Prepared for the House of Lords Select Committee on Regulators

We submit this memorandum and appendix of recommendations on behalf of IFAs.

1. The report of the Joint Committee on Financial Services and Markets dated 29th April 1999 stated, "O*n the passing of the Financial Services and Markets Act (FSMA) the FSA will become one of the most powerful financial regulators in the world in terms of scope, powers and discretion*."

2. On 6th May 2004 the Select Committee on the Constitution, chaired by the noble Lord Norton of Louth, published its report-"The Regulatory State: Ensuring its Accountability." It stated, *"We have received a large volume of evidence concerning financial services regulation, particularly from Independent Financial Advisers (IFAs). Most submissions claimed that the FSA's bureaucracy is excessive, and state in general terms that the FSA is high-handed and insufficiently accountable. There were complaints about the retrospective application of rules, which raises concerns about inequitable treatment".* We cannot express the current situation more eloquently.

Retrospective application of rules (LAUTRO)

3. In evidence given to the Joint Committee on Financial Services and Markets on the 15th April 1999, the noble and learned Lord Hobhouse of Woodborough, Lord of Appeal in Ordinary, expressed grave concern on the enforcement procedures of the FSA; " *It purports to authorise punishment for what is lawful conduct. That is something which is just wrong in principle."* The Committee recommended in its report dated 29th April 1999, "*When the FSA or any other authority or person pursues an alleged breach of a statutory requirement, actionable rule or principle of conduct, the defendant may assert that he has complied with an underpinning non-actionable rule or code of practice. Where the regulator cannot disprove this, it should be required to prove either intent to breach the requirement, actionable rule or principle, or recklessness or possibly negligence as to whether it was breached*."

4. Despite the assertion by Mr Tiner, Managing Director of the FSA, on the 17th April 2003 that "*the rules and standards to be enforced will continue to be those in place at the time of sale and not some retrospective reconstruction"* , IFAs were compelled to pay redress to clients for endowment target shortfalls when they had complied with Rule 28.3(2) of their previous regulator, FIMBRA. This had entitled them to rely on illustrative critical yield calculations of projected returns issued by the insurance providers, an entitlement confirmed by Seymour v Ockwell and Zifa (2005) "*..Rule 28.3(2) makes clear that the assumption can only be made in respect of a projection in relation to a packaged product or product particulars produced by another authorised person."*

5. IFAs were unaware that these projections were misrepresentative, which would have absolved them under the Misrepresentation Act (1967). The projections included LAUTRO assumed expenses for charges and mortality instead of actual expenses. Thus for any given growth rate without a higher premium the actual maturity value would be lower than illustrated at the point of sale even if the illustrated growth rate was actually achieved. This breached the 'policyholders reasonable expectations' requirement under the Insurance Companies Act (1982). Section 73 of the same Act also made it an offence for a company to make misleading statements when inducing people to enter into insurance contracts. The flawed process applied to millions of endowments, pensions, savings and investments.

6. In 2001 the FSA undertook a review into LAUTRO expenses, contacting over one hundred firms in the mortgage endowment market, in respect of assumptions they had used for setting premiums during the period 1st July 1988 – 1st January 1995. The review concluded that a number of companies had been engaged in "*pre-contractual misrepresentation and in some a breach of contractual warranty."* The FSA has been the same regulator that has been in place since 1987 and changing the name from SIB, the body that supervised FIMBRA, LAUTRO and then PIA, does not absolve the FSA from the responsibilities and problems created by the imposition of the LAUTRO projection rates. The FSA failed in its statutory duty to protect consumers as policyholders have been denied their entitled compensation. A Freedom of Information request (FOI) on 1st January 2005 to name the companies was refused by the FSA. An appeal to the Information Commissioner's Office (ICO) is still under consideration.

7. The former chairman of the FSA, Sir Howard Davies, confirmed in October 2005, "*an aggressive approach by the regulator could have generated a systemic crisis. The amount of compensation would have threatened the viability of many insurance companies."* This was denied by Mr Tiner in evidence to the Treasury Select Committee (TSC) on 8th November 2005, "*The strategy… was quite explicitly not informed or made because of financial stability"…* The FSA misled the TSC.

8. On the 19th September 2005 Mr Tiner stated "*…we will consider the implications of the High Court case Seymour v Ockwell, in which it was held that a marketing company must share liability to the end consumer with an advisor. We will review the extent to which product providers can abrogate their responsibility for products…".* This was reaffirmed to the TSC on 8th November 2005, when Susan Kramer M.P challenged him. "*The strategy of the FSA in this arena has been…to provide some*

protection to the providers of these products and… to let the IFAs become the scapegoats… where the IFAs were a key part of the whole advisory chain." The implication of the Seymour v Ockwell judgement required the FSA to consider past advice as well as future advice since perceived risk within products can alter by government policies years after advice was given in good faith. It failed to do so and expected IFAs to seek redress by separate judicial process, confirmed by Mr Kenmir on 21st February 2006 "*The Seymour v Ockwell case shows that small IFAs are able to obtain a contribution from a large product provider through the courts."* This effectively denied IFAs pursuing legitimate judicial action because of the expense, since they would not have obtained the financial support of their insurance provider due to the punitive level of excess applied to their professional indemnity policy.

Double Jeopardy

9. The Select Committee on the Constitution report (2004) stated,*" We have some concerns over the accountability mechanisms of other parts of the regulatory structure in particular the ombudsman. The ombudsman service is rightly independent of the regulator and has a fair degree of discretion in judging particular cases. But this does mean that there are occasions where a firm which complies with the rule book may still be found against by the ombudsman service which only has to take account of, rather than follow, the provisions of that rule book (However, FOS is not independent of FSA)."*

10. In June 2006 Mr Tiner raised the bar further. He said he recognised concerns that for the FSA to punish a firm for breaching a principle, "*it must be possible to predict at the time it would be a breach.*" However he said "*this does not mean you must have known at the time of the conduct that you were in breach but rather that had you applied your mind to the question, you would have realised the risks you faced."* This recalls to mind the infamous quotation by the former US Secretary of Defence, Donald Rumsfeld, *"The message is that there are known knowns - there are things we know that we know. There are known unknowns - that is to say, there are things that we now know we don't know. But there are also unknown unknowns - there are things we do not know we don't know. And each year we discover a few more of those unknown unknowns."* The transition to principles based regulation is irreconcilable with the pledge to continue to judge firms based on rules at the time.

ECHR

11. In February 1998 the PIA Ombudsman (PIAOB) replied to FSA consultation paper 4, "*...by virtue of clause 19 of the Human Rights Bill… any Ombudsman service not offering a public hearing will be in breach of Article 6…"* PIAOB published its concern in their annual reports for 1998, 1999 and 2000.

12. In evidence given to the Joint Committee on Financial Services and Markets on 15th April 1999, the noble and learned Lord Lester of Herne Hill Q.C. reasserted his legal opinions, dated the 27th October 1998 and 7th April 1999. The Bill infringed Article 6 and would breach Human Rights Act (1998).

13. In evidence given to the Joint Committee on Financial Services and Markets on 15th April 1999 Mr Dean, Investment Ombudsman, accompanied by Mr Merricks, Insurance Ombudsman, stated, " *Article 6 will apply to the new scheme as it is currently envisaged because it is conceived as a compulsory scheme that will bind."* This was stated in the report of the Joint Committee on Financial Services and Markets dated 29th April 1999.

14. The Report of the Joint Committee on Financial Services and Markets dated 29th April 1999 also published a memorandum from the Financial Ombudsman Service (FOS) dated 25th March 1999 which confirmed , "*the impact of the due process requirements of Article 6 of ECHR has remained a matter of concern to us from the start... it will be necessary to offer hearings to parties who request it in any case where there is a dispute of material facts."*

15. Standing Committee A meeting on 30th November 1999 stated "*Everyone is entitled to a fair trial under Article 6 ...a fair trial normally includes a right to appeal.. respondents will have no such rights and will be stuck with the Ombudsman's determination* ." (Sir Nicholas Lyell MP)

16. The Select Committee on the Constitution report (2004) stated, "*…As a consequence of the Human Rights Act 1998, (Regulators) must exercise their powers in a manner consistent with the rights protected by the European Convention on Human Rights."*

17. For Article 6(i) to apply in a non criminal court there must be a determination of civil rights or obligations. As jurisdiction is compulsory, with decisions binding against respondents and enforceable against them, FOS determines the civil rights and obligations of respondents.

18. There is no hearing under the FOS system for cross-examination in breach of Article 6 (equality of arms).

19. The lack of an appeal process for IFAs after an Ombudsman decision, but not for the complainant who can refer to the Courts, is discriminatory under Article 14 and also Article 6 (equality of arms).

20. The FSA subverted the intent of Parliament by changing the rules in February 2003 and June 2004 governing time limits under the Limitation Act 1980. It claimed the right to do so under Section 155 (7) of FSMA which was discriminatory under Article 14.

21. The FSA has allowed FOS to ignore the 15 year longstop on complaints provided under Section 14 (b) of the Limitation Act 1980. In doing so the FSA breached Article 6 (fair hearing), Article 1 of the First Protocol (Possessions) and Article 14 (Non discrimination).

22. An FOI on 1st January 2005 to provide counsels' opinions on the compatibility of FOS with HRA was refused by the FSA. An appeal to the ICO is still under consideration.

23. FSMA was compatible under section 19(1) (a) of HRA on the 17th June 1999. An FOI on January 1st 2005 to provide counsels' opinions was refused by the FSA. An appeal to ICO is still under consideration.

24. Independence of Tribunal under Article 6 – FOS and FSA cannot be regarded as satisfying the requirements of Article 6 as they can be seen to be both prosecutor and judge and not in any way an independent tribunal.

25. The FSA and FOS have had numerous meetings with the treasury which means there is a lack of independence and a potential bias. They have also acknowledged that it is unlike a court or tribunal therefore not amounting to a fair hearing under Article 6. They are also aware of the short comings of the Ombudsman's scheme and the requirements of the normal tribunal but continue to deny the firms rights that they have, which brings into question the subject of maladministration.

26. There has to be a considerable question mark over the independence of the FSA when it publicly makes clear it is there to protect consumers but makes no reference to protecting firms or individuals.

27. Note that under the memorandum of understanding between the Financial Authority Services and the Financial Ombudsman Service it is shown that the Financial Ombudsman is not independent of the FSA as the FSA actually set out the rules of the procedure. They specifically show that there is close co-operation, the "FSA and the Financial Ombudsman Service should exercise their respective responsibilities in a complimentary fashion to address issues and problems which effect the consumers and firms." There is clearly a lack of independence, "both the FSA and the Financial Ombudsman Service will seek to act in accordance with these principles by ensuring there is an appropriate and timely flow of information between them. This exchange should take place on a regular and routine basis".

28. The lack of independence is emphasised as the two bodies are able to discuss preliminary rulings and decisions, so clearly indicating they have an opportunity to affect the final decision, "the Financial Ombudsman Service will provide the FSA with (a) briefing, as required detailed information or preliminary rulings and final decisions made by an Ombudsman (subject to the appropriate privacy considerations)".

Natural Justice

29. FSA consultation paper CP04/12 stated, "*FOS is required to proceed in line with the rules of natural justice and the HRA 1998. FOS procedures are designed accordingly."*

30. On 8th June 2004, when Norman Lamb MP of the TSC challenged him, the Chief Ombudsman, Mr Merricks, confirmed, "*We comply with rules of natural justice".*

31. We submit that unless compliance met the following criteria, the Chief Ombudsman misled the TSC.

1.to promote legislative purpose	**2**. to act intra vires	**3**.to act in good faith
4.to act reasonably	**5**.to act fairly	**6**.to apply fair process
7.to make due enquiry	**8**.to ask the right questions	**9**.to consider all relevant material
10.to consider relevant evidence	**11**.to consider evidence of probative value	**12**.to disclose documents relied on.
13.to provide opportunity for cross examination by oral hearing	**14**.to ensure legitimate expectation	**15**.to not adopt an unduly rigid policy
16.to not be irrational	**17**.to ensure procedural process does not effect an unfair conclusion.	**18**.to provide sufficient information on decision
19.to reconsider where an important error or fact is made known		

No Appeal for IFAs

32. The report of the Joint Committee on Financial Services and Markets dated 29th April 1999 stated, *"After the Ombudsman makes his decision, if somebody still wants a hearing you have some kind of review operation at the end, ring-fenced, which is done by a different Ombudsman."*

33. The Select Committee on the Constitution report (2004) stated, "*requirement for an accessible and efficient appeals mechanism based on the merits of the case rather than by judicial review, which is based on' ultra vires ' and a restricted definition of reasonableness, provided equitable regulation is not frustrated."*

34. The Government response dated 26th July 2004 stated "…*Government believes that the existing appeals arrangements are broadly proportionate and that universal adoption of review on the merits could have a significant impact on the current regulatory framework."*

35. A firm can appeal to an Ombudsman if it disagrees with an adjudicator. However the independence of the Ombudsman is questioned when the offer of appeal has the caveat "*you should be aware that unless there is any new relevant evidence or arguments, the Ombudsman decision is unlikely to differ from this adjudication"*

36. The rule of law provides: burden of proof with the accused, presumption of innocence with the defendant, evidence, cross examination, and right to appeal against a decision incorrect in law, in fact or biased.

37. To the majority of IFAs the choice of a judicial review to reverse a FOS decision is totally prohibitive. First, the estimated cost of £35000 is beyond their means. Second, within a three month timescale permission to the Court has to be made. Third, due process of egregious unreasonableness is more onerous than the customary Wednesbury principles. Fourth, the IFA would incur the punitive defence expenses of FOS if they lost unless an order was made for each party to meet their own costs. However, FOS recently claimed to the High Court that a dispute about suitability is not a legitimate action for a Judicial Review.

38. Where civil liabilities are determined through the courts, then at any subsequent time an application can be made to an appeal court for permission to appeal out of time and to adduce fresh evidence. The appellate courts have a wide discretion whether or not to allow such appeals. The principles by which they do so were first established in Ladd v Marshall (1954). Courts would admit fresh evidence where it could not have been obtained with reasonable diligence for use at the trial, would probably have an important influence on the result, although it need not be decisive, and must be such as is presumably to be believed and apparently credible.

39. Section 228 (5) of FSMA provides that if a complainant accepts a determination by the Ombudsman, it is binding and final on the firm. There is no right of appeal. The Ombudsman cannot consider new evidence even if it was subsequently proved that there had been maladministration in the methodology before the decision was reached. Thus fundamental evidence that would reverse the original decision would not be taken into account. Moreover, when new evidence presented after the Ombudsman decision proves that the original advice has been given by another firm the IFA is forced to comply as Section 229(2)(b) empowers FOS to impose on firms *"such steps as the Ombudsman considers just and appropriate (whether or not a court could order those steps to be taken)."* It is unjust when PIAOB broadly defined new evidence by the principles in Ladd v Marshall (1954).

40. In a field where the ombudsman's power is arbitrary and unappealable, this seems to be an unprecedented departure from the English Common law tradition that we are a society free from the sway of arbitrary power and governed subject to law.

41. The lack of an appeals mechanism is also prohibitive to the consumer with an expensive court action to reverse a FOS decision. In 2004 a 70-year-old pensioner did not have the resources to continue her claim for compensation in the courts when FOS did not rule in her favour since she was not entitled to legal aid.

42. Members of both Houses were so appalled in March 2004 that appeal was denied to asylum seekers by the proposed ouster clause in the Asylum and Immigration (Treatment of Benefits etc.) Bill that it was removed. FSMA imposed an equivalent ouster clause on IFAs.

43. The Legal Profession and Legal Aid (Scotland) Bill will create the Scottish Legal Complaints Commission (SLCC) for solicitor complaints. Rejecting 'frivolous and vexatious' complaints, due process will follow natural justice, comply with the ECHR, statutory law and judicial precedent. A case fee will be paid if the complaint is justified. The Bill provides right to appeal against a decision incorrect in law, in fact, or biased. If the appeal is successful the solicitor may have his legal costs paid by SLCC.

Limitation Act 1980

44. The Select Committee on the Constitution report (2004) stated, "*Regulators are bound by statute and must abide by any secondary legislation derived from it."* The FSA subverted the intent of Parliament by changing the rules in February 2003 and June 2004 governing time limits under the Limitation Act 1980. It claimed the right to do so under Section 155 (7) of FSMA. The FSA did not consult with the industry or the public as it believed that by doing so it could have been prejudicial to consumers. Any prejudice to the interests of regulated firms was not considered.

45. The FSA has allowed FOS to ignore the 15 year longstop on complaints provided under Section 14 (b) of the Limitation Act 1980. This prevented a claimant from bringing a claim, whatever their state of knowledge, once that period of time had elapsed from the date of the original advice. Paragraph 3.3 of FSA Policy Statement on Consultation Paper 158 published January 2003 stated, "*we do not consider it is in the interests of consumers to rule out the possibility of complaints being dealt with outside the 15 year period that would apply to court cases. Nor do we consider this necessary to prevent hardship to firms."* The FSA blatantly denied in the same paragraph that it was "*not changing or trying to change the time limits that would apply under ordinary law."* As Part XVI of FSMA provided for the rules governing the operation of FOS to be made by the FSA, the rules take effect as secondary legislation which must be intra vires the rule making power conferred by FSMA. The rules as drawn may well be ultra vires the primary legislation.

46. Section 228 (2) of FSMA requires that *"a complaint is to be determined by reference by what is in the opinion of the Ombudsman, fair and reasonable in all the circumstances of the case."* How can it be considered 'fair and reasonable' to override the public policy considerations for the Limitation Act 1980 by providing increased consumer protection for financial products when no such abrogation of a limitation defence was recognised for any other professional service provided to the public and increase exposure to long-term liability that is for all other purposes regarded as neither fair nor reasonable?

47. The terms of reference of FOS's predecessor, the PIA Ombudsman (PIAOB) contained a clear statement that it would abide by the rules of the Limitation Act 1980. Paragraph 6.3 (d) of PIAOB rules stated that PIAOB was not empowered to consider any complaint if it would be "*time-barred by reason of any applicable rule of law or enactment."* FOS rules made no such reference.

48. The noble and learned Lord Scott of Foscote stated in Haward v Fawcetts (2006). "*...limitation defences are creatures of statute. Parliament has had to strike a balance between the interests of claimants and the interests of defendants. It is a hardship, and in a sense, an injustice, to a claimant with a good cause of action for damages to which, let it be assumed, there is no defence on the merits to be barred from prosecuting the cause of action on account simply of the lapse of time since the occurrence of the injury for which redress is sought. But it is also a hardship to a defendant to have a cause of action hanging over him, like the sword of Damocles, for an indefinite period."*

49. The noble and learned Lord Millett stated in Cave v Robinson, Jarvis and Rolf (2002) "*…in the absence of any intentional wrong doing on his part, it is neither just nor consistent with the policy of the Limitation Act to expose a professional man to claim for negligence long after he has retired from practice and has ceased to be covered by indemnity insurance."* Rights have been expropriated without consent. It is unjust for retired IFAs who have never required FSMA authorisation, and for those retired IFAs who were authorised with no access to their former client records. They bear the expense and strain of unknown and uninsurable liabilities arbitrarily imposed to which they should not be subject.

50. The FSA's rules were based on common law when it was being set up and therefore if common law rules were applied regarding notice many complaints would be time barred. When a claim is quite clearly time barred by the Limitation Act it should be beyond the ombudsman's jurisdiction.

51. The underlying spirit of the Limitation Act is that the defendant should be spared the injustice of having to face a stale claim, that is to say one which he never expected to deal.

Supreme Court

52. Standing Committee A meeting on 30th November 1999 stated, "*The person whom we are appointing will be running the biggest ombudsman scheme in the world. He is being given huge powers and will be able to impose mandatory decisions on firms with no recourse to law*". (Mr Tyrie MP). "*He has the power not to find in accordance with the rules and regulations but in accordance with what ultimately he considers' fair and reasonable.' If he considers something that conflicts with the Bill to be 'fair and reasonable' effectively he becomes yet another regulator who creates law."* (Mr Flight MP)

53. Mr Flight was prescient. IFG Financial Services v FOS and Jenkins (2005) confirmed that the Ombudsman "*was entitled to depart from the result mandated by the law if he considered that another*

result provided the result that was fair and reasonable in the circumstance." Thus Section 228 (2) of FSMA has given FOS unlimited authority to act as a Supreme Court making body since the law, which is based on legal precedent and argument in open court, can simply be contradicted by what one person considers from time to time to be reasonable on the basis of largely written evidence alone.

54. The lack of case law precedent for FOS decisions gives wider power to the FOS principle of 'fair and reasonable'. There is criticism that FOS can apply its principles in each case in an almost arbitrary fashion secure in the knowledge that there is no external appeals mechanism by which its decision could be independently reviewed. The legal vacuum in which it operates allows it to consider, rather than follow, the law and, if challenged, it can state that it judged the case on its own merits and by its statutory remit of what it considers to be 'fair and reasonable'. At the Association of British Insurers (ABI) conference in December 2006 Halifax, Bank of Scotland (HBOS) said that FOS has " *no regulatory remit but huge 'de facto' regulatory impact"* as *"the most powerful force in the regulatory arena."*

Fraud

55. IFAs cannot protect themselves against fraudulent claims, unless they resort to civil action. After spending hours in defending cases with FOS, many from claims handling firms who have no appropriate qualifications, the complaints are not immediately dismissed by FOS on receipt as 'frivolous or vexatious'. The last annual review of FOS confirmed that only five cases out of 100,000 had been judged on this basis. It is particularly unjust when PIAOB defined 'frivolous or vexatious' in June 1995 (as) "*based on judicial interpretations… if it stands no substantial chance of success"* To compound the injustice the IFA has then to pay FOS a fee for each case for an internal review, even though the case is subsequently dismissed by FOS. Although the FSA have advised IFAs to report fraudulent claims to the police, when they do so the police state that they have insufficient resources to investigate. Some IFAs feel compelled under money laundering regulations to refer such claims to the Serious Organised Crime Agency (SOCA). Many providers automatically pay redress without justifying causation. We are seeing, whether by design or default, a quasi judicial abuse orchestrated by the regulator, executed by the provider, to the detriment of the adviser and to the benefit of the complainant, some of whom may be fraudsters. The FSA has therefore failed in its statutory duty to reduce financial crime.

56. The intense advertising by the endowment complaint firms has meant that claimants see an opportunity to try to obtain some compensation for their policy regardless of how the policy was sold to them. The Guardian article of 12 September 2003 reports that over 60% of people in England and Wales admitted in a survey that they had padded an insurance claim. This supports the need for investigations so the complaint can be thorough and to use the judicial process as its foundation.

57. A court situation would be able to separate the genuine complaints from those who see a claim as an opportunity to see if they can obtain some compensation. As a complainant giving a statement would have to do so under oath. This would be seen as more serious than writing a letter to the FOS.

58. The majority of the initial letters sent of complaint by complainants are clearly used from a standard format but are so lengthy and complex given that many years have past and brings into question that it was highly unlikely that a person could have recorded in such detail such specific complaints and given almost identical in turn would imply that they are not genuine.

59. The media attention and advertising of claim agencies regarding the selling of the endowment policies have meant that small IFA are dealing with a large amount of complaints. The outgoing chairman of the FSA stated how many of these complaints 'have little prospect for success and merely delay the resolution of other, worthier claims".

Immunity

60. The FSA has total immunity from breaches of English law by Schedule 1 paragraph 19 (1) of FSMA. In 2006, it released an IFA's private address to his client in breach of the Data Protection Act. The client had previously lost a civil action brought by the IFA in 2004 to recover unpaid professional fees. Following the court action the IFA and his family received threatening phone calls from the client, who then posted pictures of him around his home town forcing the IFA to relocate since he feared for his young family. The police considered the matter serious enough to issue the client with a written warning stating that he would be arrested for harassment if he contacted the IFA again.

Enforcement

61. In July 2005, following criticism made of the FSA's enforcement procedures by the Financial Services and Markets Tribunal in January 2005, the FSA published recommendations after a major review to remove bias and to provide greater transparency. Prior to the review, the FSA investigation team were able to discuss with the Regulatory Decisions Committee (RDC) evidence presented by the accused firm in their defence even though the RDC would subsequently judge the outcome. If the investigations team then chose to amend their case, this right was not given to the defendant. This 'court of star chamber'

would never have been allowed to operate for almost four years if more scrutiny had been given to ensure due process was compatible with natural justice by making the FSA more accountable to Parliament. It remains to be seen whether the FSA will be more willing to listen constructively in the investigation stage, before the RDC is involved, instead of following their previous culture of self protection and closed mind approach. Despite the review the FSA's enforcement team retains a greater amount of access to the RDC prior to oral hearings than that given to the accused party.

62. The changes long overdue are welcome, but the judicial process does not comply with natural justice as witness evidence is not permitted, substantive evidence is only disclosed and the FSA limit a defendant's opportunity to pursue their case with the Tribunal by informing firms that unless they concede their guilt in advance the resulting fine will be higher. Moreover, unless the Tribunal explicitly rules that the FSA acted unreasonably, there is no provision for firms to be recompensed for their legal costs even if they are wholly exonerated. A further review was announced last month under Consultation Paper 07/02.

63. An IFA wished to send your Committee correspondence between their MP and the Chairman of the RDC, to prove the inequitable process by which they had been 'tried', but was deterred by the FSA's warning *"Section 391 of the Act provides that neither the FSA nor a person to whom a warning notice or decision notice is given or copied may publish the notice or any details concerning it.*" What has happened to free speech and more important, Parliamentary privilege?

Accountability

64. The report of the Joint Committee on Financial Services and Markets dated 29th April 1999 stated, *"Given the power and discretion that the FSA will have, accountability needs to be wider than merely being held accountable for the particular decisions it makes. FSA needs to be judged and monitored for its effectiveness (whether it achieves its mandatory objectives) its efficiency (the manner in which it deploys its own internal resources) and the economy of its regulation and supervision".*

65. The Select Committee on the Constitution report (2004) stated, "*we recommend therefore that the NAO have access consistently to all regulatory bodies, including the FSA, with a view to monitoring their cost effectiveness and budgetary control."*

66. The Government response dated 26th July 2004 stated, "*the FSA is a private company limited by guarantee and is directly financed by the industry. As such it implements the audit requirements applicable under company law. The FSA has no financial relationship with Government or Parliament and is not to be regarded as acting on behalf of the Crown. This distinguishes it from other regulators to which the NAO already has access, which are either non-ministerial government departments or are partly funded by public money."*

67. The justification was questionable. In evidence given to the Joint Committee on Financial Services and Markets, the noble and learned Lord Lester of Herne Hill Q.C. expressed in his legal opinion dated the 27th October 1998, "*although a private company limited by guarantee and funded by a levy on those it regulates, the FSA will be a public authority exercising statutory and delegated powers ...."*

68. The Chairman of the Public Accounts Committee (PAC) was also in favour for a NAO review. In June 2006 the Treasury invited NAO to review the FSA. Their report to Parliament in April 2007 will then be scrutinised by either the TSC or PAC.

69. The restrictive impact of FSA and FOS on competitiveness with its ever-increasing cost to the industry will inevitably cause providers to seriously question the cost effectiveness of new products, restricting the opportunity of IFAs to provide consumer choice. London and Edinburgh deserve their reputation as centres of financial excellence, but for how much longer under this regulatory climate?

70. We believe that the Board members of the FSA and the FOS are personally liable if they persist in allowing their respective organisations to contravene Article 6 of the Human Rights Act 1998 and as there is no mechanism in place to ensure that the Board members are fully informed they place themselves at risk of direct legal action.

71. We suggest that Juvenal's quotation*, "sed quis custodiet ipsos custodes,"* is highly appropriate.

Evan Owen (Chairman)
IFA Defence Union

Appendix **Recommendations**

Section 426 of FSMA empowered the Treasury to effect secondary legislation. As Section426 (4) states that 426 cannot be limited by any other restriction in the Act, FSMA can be amended without the need for primary legislation. (Standing Committee A meeting on 9th December 1999 stated," *the clause would enable the Treasury by order… to change the Bill at will if it regards it as expedient for the general purposes or any particular purpose of the Bill."(Sir Nicholas Lyell MP)*

That the FSA

Publishes which current rules are permissive and which rules are prescriptive to provide transparency.

Promotes 'caveat emptor' for the retail market sector.

Does not apply retrospective reconstruction to rules in force at the point of sale.

Complies with statutory law and judicial precedent.

Complies with Article 6 of the Human Rights Act 1998 and the European Convention on Human Rights.

Complies with the principles of natural justice in the enforcement process.

Uses removal of Part IV 'permission to trade' as a weapon of last resort.

Applies fines proportionate to the offence.

Provides an independent appellate body for FOS, comparable with SLCC, to whom both complainants and firms appeal, comprising of personnel with proven experience and ability from IFAs, the legal profession and insurance providers.

Transfers responsibility for policing financial crime to the appropriate criminal prosecution authorities.

Reports to the police or SOCA instances of suspected attempted fraud providing false evidence to FOS and/or the appellate body.

Removes statutory immunity (far more important arms of regulation and justice have no such privilege).

Justifies statements made to the Treasury Select Committee.

Is subject to an annual audit by NAO.

That the FOS

Complies with statutory law and judicial precedent.

Complies with Article 6 of the Human Rights Act 1998 and the European Convention on Human Rights.

Complies with the principles of natural justice in the judicial process.

Does not apply retrospective reconstruction to rules in force at the point of sale.

Does not act as a supreme court by using its statutory remit of 'fair and reasonable' in an arbitrary manner.

Charges complainants a fee for a complaint, as with civil courts.

Make greater use of outside professionals when adjudicating cases.

Ensures a clear demarcation between the investigative role of the adjudicator and the judicial role of the Ombudsman.

Refunds the case fee paid by IFAs where the complaint is subsequently judged to be 'frivolous or vexatious'.

Makes a complainant liable for the IFA's legal costs in the event that either FOS or the appellate body judges that the complaint is 'frivolous or vexatious' (but not for bona fide complaints which are rejected).

Is liable for the IFA's legal costs in all cases reversed by the appellate body.

Refunds the case fee paid by IFAs in all cases reversed by the appellate body.

Publish decided complaints, as with civil courts.

Is made subject to the Freedom of Information Act 2000, to allow disclosure of information on judicial policy and decisions.

Reinsurance would guarantee retail products by using private insurance and product levies instead of public sector regulation.
The general public would be insulated from catastrophic financial loss at minimal cost without tax funded bail outs.

Summary of Paragraphs