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FINANCIAL MARKETS LAW COMMITTEE

ISSUE 138 – THE GAMBLING ACT 2005

*Legal assessment of the potential problems for financial markets arising from the
Gambling Act 2005*

The logo for the Financial Markets Law Committee is a light blue, three-dimensional rectangular block. The text "Financial Markets Law Committee" is embossed on the top surface of the block, arranged in four lines and slanted to match the perspective of the block.

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FINANCIAL MARKETS LAW COMMITTEE

ISSUE 138 WORKING GROUP

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1. Introduction and Executive Summary

a) Introduction

- 1.1. The role of the Financial Markets Law Committee (“FMLC”) is to identify issues of legal uncertainty, or misunderstanding, present and future, in the framework of the wholesale financial markets which might give rise to material risks and to consider how such issues should be addressed.
- 1.2. In August 2008, a possible anomaly in the drafting of the Gambling Act 2005 was brought to the attention of the FMLC, which arguably could have the unintended effect that financial market transactions which were covered by certain exemptions specified in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001,¹ would fall within the ambit of the gambling regime. The FMLC adopted this issue for further work and this paper has been produced as a result.

b) Executive Summary

- 1.3. A failure to be properly authorised under the Gambling Act 2005 could result in the commission of a criminal offence. Conceivably, the omission in the Gambling Act 2005 of a provision which operated in the Gaming Acts to exclude activities that would be regulated, *but for the existence of an exemption under the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001*, could give rise to doubt about the legal status of those same activities. To alleviate this uncertainty, the FMLC suggests that an order be made by the Treasury, pursuant to its powers under the Financial Services and Markets Act 2000, expressly excluding such activities from the scope of the Gambling Act 2005.

2. The Gambling Regime

- 2.1. The Gambling Act 2005 (“the Act”) introduced a new unified regulatory regime for all forms of gambling in the UK (other than the National Lottery

¹ SI 2001/544, as amended.

and spread betting) through a system of licensing, new offences and the creation of a single regulator – the Gambling Commission. In particular, it repealed and replaced with effect from 1 September 2007 the Betting, Gaming and Lotteries Act 1963, the Gaming Acts 1845, 1892 and 1968 and the Lotteries and Amusements Act 1976.

- 2.2. Although “bet” is not defined in the Act, section 10 (1) provides that “bet” does not include a bet the making or accepting of which is a “regulated activity” within the meaning of section 22 of the Financial Services and Markets Act 2000 (“FSMA”). As such, those activities would fall within the ambit of FSMA, and not the Act. This avoids a person having to be licensed under the Act as well as FSMA in respect of the same activity.
- 2.3. Reference should also be made to section 412 FSMA (before it was amended by the Act) which provided that:

(1) No contract to which this section applies is void or unenforceable because of—

(a) section 18 of the Gaming Act 1845...

(2) This section applies to a contract if—

(a) ...

(b) the entering into or performance of it by either party constitutes an activity of a specified kind or one which falls within a specified class of activity; and

...

(6) “Specified” means specified in an order made by the Treasury.

- 2.4. In other words, if a contract satisfied section 412 (2) (b) i.e. if it was specified as an activity in an order made by the Treasury, that contract would not be void or unenforceable because of section 18 of the Gaming Act 1845. Those activities would effectively be excluded from the gambling regime.
- 2.5. Pursuant to its powers under section 22 (1) FSMA, HM Treasury made the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001

(the “RAO”).² The RAO specifies types of regulated activities, and then goes on to set out activities which are exempt. If an activity falls within an RAO exemption, it will not be a regulated activity. Applying the logic of section 412 (b) FSMA, that activity would not be a regulated activity, in which case reliance could not be placed on section 10 (1) of the Act, and the activity would therefore fall to be regulated by the gaming legislation.

- 2.6. In order to resolve the position as regards activities falling within an RAO exemption, pursuant to its powers under section 412 (2) and (6) FSMA, the Treasury passed the Financial Services and Markets Act 2000 (Gaming Contracts) Order 2001,³ paragraph 2 (1) of which provides:

(1) Any activity of the kind -

(a) specified by article 14 or 21 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001[2] ("the Regulated Activities Order") (dealing in investments as principal or agent);

(b) specified by article 64 of that Order (agreeing to carry on specified kinds of activity), so far as relevant to either of those articles; or

(c) which would be so specified apart from any exclusion from any of those articles made by that Order;

is specified for the purposes of paragraph (b) of subsection (2) of section 412 of the Act (contracts not to be void or unenforceable because of the law relating to gaming).

(2) The class of investment consisting of securities and contractually based investments (within the meaning of the Regulated Activities Order) is specified for the purposes of paragraph (c) of subsection (2) of that section.

- 2.7. The effect of this is to ensure that activities caught by exemptions to the RAO, can still enjoy the benefit of section 412 (1), and not be void or unenforceable because of the Gaming Act 1845 i.e. despite not being regulated activities, they would still fall outside the gaming legislation.

² SI 2001/544, as amended.

³ SI 2001/2510.

Amendment by the Act

- 2.8. Section 334 (1) (c) of the Act repeals section 18 of the Gaming Act 1845. Accordingly, section 334 (1) (e) provides that in section 412 (1) (a) of FSMA, the words “section 18 of the Gaming Act 1845” cease to have effect. No reference to a subsection of the Act is proposed by way of substitution. This amendment takes effect from 1 September 2007.
- 2.9. Consequently, from that date, there is no longer an exclusion from the Act, in respect of the activities which would be regulated under FSMA, but for the exemptions in the RAO. These activities therefore will fall within the operation of the Act.
- 2.10. It is highly questionable whether the Government in fact intended this position. The consultation papers, Gambling Review Report, draft bills and Hansard reports indicate that the only type of regulated activity that the Financial Services Authority, the Department for Culture, Media and Sport and Parliament considered possible of constituting a bet were spread bets. It is therefore unlikely that Parliament intended (i) regulated activities other than spread betting to be classified as betting or (ii) that non-spread betting activities not constituting regulated activities as a result of exclusion under the RAO should fall within the new gambling regime.

Proposed Solution

- 2.11. What is required is a legislative amendment. The broad effect of section 18 of the Gaming Act was to render the relevant contract unenforceable; therefore, carve-outs for regulated activities were required but could properly be limited to those activities which would be carried on by the parties to the relevant contract (namely the activities listed under articles 14, 21 and 64 of the RAO). The 2005 Act, however, is wider in that section 5 covers any activity which amounts to providing facilities for gambling, regardless of the contractual context. “Providing facilities” could be done by someone other than the party to the contract/bet while still coming within the remaining, unspecified articles of the RAO (for example articles 25 or 37) yet it would seem that the same logic should be applied to these sorts of activities and that

they should, therefore, be carried out.

- 2.12. As such the amendment should provide that any activity specified by the RAO, or which would be a regulated activity but for an exclusion made by the RAO, shall be deemed to be a regulated activity for the purpose of section 10 (1) of the Act.
- 2.13. Section 10 (2) of the Act allows for such an order to be made by way of secondary legislation under section 22 FSMA i.e. the FMLC would suggest that the Treasury utilise this power to make the order. This would then have the effect of taking those activities outside the purview of the Act.

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⁴ Sir Terence Etherton abstained from discussions surrounding FMLC Issue 138 and involvement in the preparation of this paper in recognition of his prior official responsibilities.

⁵ David Lawton abstained from discussions surrounding FMLC Issue 138 and involvement in the preparation of this paper in recognition of his prior official responsibilities.

⁶ Clive Maxwell abstained from discussions surrounding FMLC Issue 138 and involvement in the preparation of this paper in recognition of his prior official responsibilities.