Financial Services Consumer Panel
AN INDEPENDENT VOICE FOR CONSUMERS OF FINANCIAL SERVICES

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Dear Katharine

DP 08/3: Transparency as a Regulatory Tool

This is the Financial Services Consumer Panel's response to DP08/3: Transparency as a Regulatory Tool. The Panel very much welcomes the FSA's decision to address this emotive subject and we regard this paper as a well-considered discussion of the most salient issues. Our answers follow to the questions posed in the paper:

Starting from First Principles
1. Do you agree that transparency is a legitimate regulatory tool?

We firmly believe that transparency is a legitimate regulatory tool and, used effectively, can be a significant factor in improving compliance, without necessarily requiring the alternative of 'expensive' enforcement action. In addition it can only help consumers better understand the work of the FSA and financial services firms better understand what is expected of them. Accordingly, we think now is an appropriate time for the FSA to determine its policy on greater transparency. The FSA has been given statutory powers that allow it to publish specific information which will help it better achieve its objectives so we believe it is legitimate for it to do so and to a greater degree than it does at present.

We do, however, have concerns about the emphasis given to the voluntary flow of information in the paper as indicated by the last two sentences of paragraph 2.7. This is the archetypal refrain of all British regulatory bodies. It may be relevant where authorities rely on the flow of information which they have no power to compel, or where the use of legal powers is so slow and cumbersome as to be impractical, but not elsewhere. It gives weight to firms' objections (or anticipated objections) to disclosure, even where these are based on unrealistic fears. It also assumes that firms will refuse to provide information when asked informally, even where they know that any refusal will provoke a legally enforceable demand for it.

The proper basis for withholding information should be that disclosure would unjustifiably harm the business interests of firms or unjustifiably impede the regulatory functions of the authority. It should not take account of the fact that

businesses might not like the prospect of disclosure, if no identifiable harm to them will occur. The introduction of the Freedom of Information Act (FOIA) has changed the basic assumptions about disclosure, but the sentiments in paragraph 2.7 do not fully reflect this change. We wonder to what extent such concerns lead the FSA to believe that the prohibition in s348 of the Financial Services and Markets Act 2000 (FSMA) – which we come to under q3 below – is necessary in the wide terms in which it is stated.

High Level Cost Benefit Analysis

2. Do you agree that this high level cost benefit analysis captures the main potential impacts of regulatory transparency, both positive and negative?

We have concerns that the high-level cost benefit analysis puts undue emphasis on the possibility or likelihood of consumers misunderstanding information published by the FSA and the potential detrimental impact this could have on firms. It is far too easy to treat consumers as one homogenous group when making considerations in this regard, giving justification to an approach which argues against openness.

We are of the opinion that the FSA should recognise the diversity of the consumer population and tailor its approach to disclosure accordingly. Information which helps consumers better identify the most appropriate firms or products for them should stimulate rather than impede the market.

Code of Practice on Regulatory Transparency

3. Do you agree a Code of Practice on Regulatory Transparency is the right approach to enable the FSA to achieve consistency of decision-making?

In our view such a Code could be an appropriate means of providing for consistent decision making across the FSA's wide-ranging activities but only if it is rigorous and carefully enforced. There have been examples of codes of practice in the past that were set up with the best of intentions but which meant little in practice. We believe that greater clarity needs to be given to the Code before it is finalised. If a Code were to be introduced the most appropriate starting point ought to be the FOIA as this sets the legislative minimum for what is publishable.

4. Do you agree with the three Principles:

- We will not publicly disclose information that we believe would infringe any statutory restrictions on us, including those set by FSMA.

- We will proactively disclose information that we believe on balance serves, rather than harms, the public interest.

- Disclosure should meet the FSA's standards of economy, efficiency and effectiveness?

In our opinion these principles, and particularly the first one, send out the wrong messages to stakeholders. The first principle, by highlighting what will not rather than what will be disclosed, immediately gives the impression of being obstructive rather than transparent and open.

We also think that there are issues to be explored with regards to the statutory prohibition in FSMA. This prohibition, in S348 of the Act, prevents the FSA from disclosing confidential information. However, S349 of FSMA allows regulations to be made by the Treasury to modify the effect of S348 for the purposes of facilitating a public function. By making such modifications Treasury provides the FSA with a number of 'gateways' to disclose information to certain third parties. Disclosing information to other UK or EEA regulators is one example of such a gateway.

Where the discussion paper is deficient is in its lack of consideration of the scope to amend further S349 and add additional gateways, for instance a gateway that would permit disclosure of the undertakings required for a Financial Promotions Register.

A model for such a Register already exists with regards to the FSA's approach to the Consumer Protection from Unfair Trading Regulations 2008 (CPRs). Under the CPRs consumers and consumer bodies can make a complaint against a firm that trades unfairly. The FSA has a duty to inform the OFT, as lead regulator of the CPRs, of those undertakings it has received. As the OFT has a duty to publish these the FSA also does so which means there is a public register on the FSA's website of undertakings given by firms. The FSA by telling other firms to be aware of these examples shows that undertakings can be published with no actual detriment to firms. A Register of Financial Promotions could feasibly operate in a similar way.

We also have concerns about the paper's second principle. This principle, and the paper in general, in our opinion give excessive weight to the potential disadvantage of publishing too much information (as in paragraph 5.12 for instance). The reference to 'harming' the public interest again draws on the presumption that consumers may misunderstand information. Consumers have a wide range of capabilities and there are no reasonable grounds, in our view, for depriving knowledgeable consumers of useful information because of a risk that the less knowledgeable may be misled. Moreover, there are many commentators and journalists who can and do use information to help consumers make better decisions.

The Information Commissioner's guidance (http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/awareness_guidance_3_public_interest_test.pdf) on FOIA's public interest test states the following helpful guidance in this regard:

> It may sometimes be argued that information is too complicated for the applicant to understand or that disclosure might misinform the public because it is incomplete (for instance because the information consists of a policy recommendation that was not followed). Neither of these are good grounds for refusal of a request. If an authority fears that information disclosed may be misleading, the solution is to give some explanation or to put the information into a proper context rather than to withhold it.

The third of the principles: "Disclosure should meet the FSA's standards of economy, efficiency and effectiveness" is vague and could theoretically encompass a number of different scenarios, therefore giving the FSA a very wide 'get-out clause'. We believe that the potential interpretations of such a principle are so broad as to render it potentially meaningless.

5. Do you have comments on the detailed wording contained in the Code of Practice on Regulatory Transparency?

We have already commented in our answer to Q4 on our concern with the FSA's proposed principles on transparency. It follows that we have similar concerns about the expression of those principles in the Code. We have also commented at Q2 above on the misleading emphasis in the paper on the potential for consumers to misunderstand information and make less efficient decisions. This is encapsulated in point 2 a) of the Code of Practice and to our mind is unhelpful.

Complaints

6. Would publication of complaints data help achieve the FSA's regulatory objectives?

We support the proposals in the paper on the publication of complaints data. As the paper points out the differences in performance between firms in this area can be significant and publishing this information will enable the FSA to better achieve its regulatory objectives by encouraging firms to improve their own performance, particularly in response to pressure from consumers. It is, however, imperative that the data enables firms, consumers and financial services commentators to make useful comparisons between firms of different sizes or business types. Clear examples of where firms may have gone wrong become important in defining the boundaries of acceptable practice and maintaining effective regulation. Similar examples of where firms have performed well can be equally valuable.

It is also our belief that publishing data about the existence of complaints – for example, that 40 may have been received of the same nature – would be helpful to other consumers who could be eligible to make the same complaint. The FSA's comparative tables work well in this regard, making consumers more aware of actual price disparities between firms. The same could feasibly be implemented relatively easily with complaints. Thus, firms who consistently break the rules will be brought into the public domain where this could otherwise lead to consumer detriment.

7. Are there any reasons specific to the financial services sector which would make it inappropriate to publish firm-specific data?

We do not believe there are any reasons why firm-specific data should not be published. The firms in question are already subject to broadcast advertising regulations, for example, the same as firms in other industries. If anything we consider the importance of the financial services sector to consumers to be such that it warrants a more rather than less transparent approach to firm-specific data.

8. What comments do you have on the specific data that is proposed for publication?

As we mention above the comparative feature of the complaints data is key so a simple table with the main elements, as the FSA proposes, would appear to offer the most appropriate solution. This would offer consumers a straightforward comparative vehicle with good and bad examples.

9. What comments do you have about the provision of contextual data alongside the complaints data?

We recognise that contextual data is important to position the complaints data vis-à-vis different firms more accurately. The most obvious method of doing this would be to use business volumes. We understand from the discussion paper that because complaints and business volume data are not necessarily collected from uniform reporting periods and uniform product categories then this may be problematic. However, none of the other options appear to be entirely satisfactory. Therefore, it would make more sense to align the reporting of complaints and business volume data where necessary.

10. What comments do you have about providing information on a firm or group basis?

We consider that all data should be provided on the basis that consumers would be most able to interpret, and that this is actually at brand level. Consumers cannot be expected to know the exact make-up of particular Banking or Insurance Groups so for comparative purposes data needs to be made available according to brand rather that firm or Group. If this is not possible with the way data is currently collected we consider that firms should be required to submit data in this manner. The release of data would be rendered meaningless if two similar sized Banking Groups, for example, reported their figures in two different ways. We have already made representations to the FSA about the confusion this breeds among consumers with compensation limits. We would hope that the FSA take heed of that confusion when deciding on their approach in this area.

11. What comments do you have on the proposed form of publication and what ideas do you have for making the data more accessible in the longer term?

We agree that initially it makes most sense to publish data about those firms handling the largest number of complaints. Information from smaller firms may indeed fluctuate more over short periods of time. However, we would hope that, subject to the success of the initial roll-out, that it may be possible to publish data for larger numbers of firms and make it accessible in different ways given time. A search facility along with trend data would seem to be helpful elements in this regard.

12. What comments do you have on the proposed timescale?

We support the timetable for full implementation. However, we would also like to see the publication of at least some complaints data before the end of this year if at all possible.

Retail Themes

13. Do you agree with our proposals concerning:

- anonymous, benchmarked results; and
- Non-fundamental OIVoPs (Own Initiative Variations of Permission).

We are pleased that the FSA is proposing steps to address the level of public interest in the findings of its thematic work and we support the principle, if not the title, of non-fundamental OIVoPs. The latter would certainly benefit from a name which is more consumer-friendly and bears a closer resemblance to what they aim to do.

We also do not think that the proposals in this regard go far enough. The idea of anonymous benchmarked results may help firms assess their own performance against their competitors but non-fundamental OIVoPS on their own, whilst the principle behind them is sound, are unlikely to assist consumers in making more knowledgeable decisions and improve firms' performance.

The Panel is firmly of the opinion that competitive influences can put heavy pressure on firms so that the result can be compliance tending towards the 'lowest common denominator', where firms will copy the policy of their major competitors who may be stretching the rules and are assumed to be 'getting away with it'. Only by identifying specific areas of non-compliance and putting this information, along with the name of the firm, in the public domain will all sectors of the industry have clear, specific and timely guidance over what is and is not acceptable.

14. Do you agree with our comments and proposals on:

- naming and 'faming'; and
- risk mitigation and redress.

We agree that it would be helpful to reputable firms to consider naming firms who show up well in thematic work. However, equally we believe it is important to name those firms who show up poorly in this work.

In our opinion the FSA generally has a good understanding of what is happening in the market, but lacks the necessary tools to influence behaviour. What has been often crudely called 'naming and shaming' but which we prefer to refer to as a policy of non-concealment could be a key lever in this regard. We believe the FSA will lose credibility if it continues to do mystery shopping, for example, without achieving better outcomes for consumers. Other initiatives could even overtake the FSA in terms of realising successful outcomes – for example, the case of HSBC's policy being influenced as a result of student Facebook action, and the campaign by 'monyesavingexpert.com' in respect of mis-sold PPI policies. The risk of the FSA seeming ineffectual is great, and the need for greater transparency pressing.

With regards to risk mitigation and redress we have doubts about how successful from a consumer perspective the process of firms anonymously taking mitigating action without admitting liability can be. We have seen that even in instances where liability is acknowledged and the process is not anonymous the level of take-up of past business reviews is low. Therefore, in instances where there is no admission of liability we believe it is important that the FSA mandates the means and level of mitigating action.

15. Are there other measures that you believe could be useful in improving the effectiveness of our thematic work with firms?

We have mentioned the value we give to 'naming and shaming' firms. We also believe that at the same time as adopting a more transparent approach there is potential to take more enforcement action. The current processes involve a significant time-lag between discovery of a breach and full resolution of enforcement action. We believe that there has to be a way of flagging a problem immediately and of achieving better outcomes more quickly.

Financial Promotions

16. Do you agree that we should take further action, over and above our existing actions, to reduce the risk of consumers making poor buying decisions because of financial promotions that are unfair, unclear or misleading?

We do have concerns that not enough is being done to reduce this risk. This is an area we have taken a keen interest in for some time and the results of our own research show that the level of compliance among firms is still not satisfactory. In particular, mortgage and investment promotions still show numerous medium and low risk breaches which receive no public criticism, or warning to consumers to beware, from the FSA.

Advertising has to compete for consumers' attention. In a situation where specific ads that fail to meet the necessary standard are not publicly held up as examples of poor practice there is a danger that companies will copy them thinking that they are acceptable. Given that the FSA is applying a more principles based approach to the regulation of financial promotions clear examples become very important to defining the boundaries of acceptable practice and maintaining effective regulation. Without identifying specific advertisements there will be no concrete examples for advertising agencies to rely on when deciding what is acceptable, unlike the situation in other market sectors which are regulated by the Advertising Standards Authority (ASA). The ASA already regulates most other industries aside from financial services so the motivation to treat financial services firms differently is not justifiable.

17. Do you think that the package of measures described in paragraphs 6.56 to 6.68 will be effective in reducing the risk of consumer detriment?

Whilst we support the potential introduction of a fast-track enforcement procedure we do not believe that this package of measures goes far enough in addressing the issues in hand, and in particular to encourage firms to vary their advertising methods. Aside from the issue of a financial promotions register, which we address below, we also believe that there are issues to be addressed with past performance tables and the way in which particular types of promotion are targeted. Although risk warnings are mandated on past performance tables it is still common for consumers to over-estimate their importance.

18. Do you think that the benefit of creating a financial promotions Register, as described, would outweigh the drawbacks? If so, why?

The Panel has been a keen supporter of a financial promotions Register for some time. In our view the primary purpose of the register – to help firms and their advertising agencies better understand the standards expected of financial

promotions and so improve their quality and compliance levels – would outweigh any potential disadvantages, while facilitating competitive innovation in the advertising and promotion of retail financial services.

The Panel views the register as a very important development, and we fail to see what arguments the FSA can have against its introduction especially when something very similar already exists for broadcast media. We cannot see any firm evidence that this is not a good idea, or that it will be disproportionately costly to operate. Any proposal of this nature where publicity is given to a failing of one kind or another will inevitably be received with some opposition. Unless the affected firms can provide hard evidence that this will prove to be a costly move in relation to the likely benefits for fair competition and consumer confidence, we would urge the FSA to rethink the approach in this regard.

Treating Customers Fairly

19. Do you agree with our analysis of the obstacles that are impeding better progress on the TCF initiative?

We remain strong supporters of the FSA's work in this vitally important area, which has been both consistent and pragmatic. However, we agree with the FSA's analysis of the obstacles that continue to impede improvement in this regard. Nevertheless, although some firms may still be confused about what the FSA wants TCF cannot be described as a new concept or a radical regulatory approach. It is not enough, in our opinion, for firms to say they do not understand and leave it at that. The emphasis should be on them to be proactive on TCF, with help from the FSA. Firms that continue to lag behind must surely face the sanction of regulatory intervention.

Most worryingly, there is still scant evidence of any improvement in outcomes for consumers. Firms need to focus much more urgently on meeting the December 2008 deadline and in particular to demonstrate to themselves through their management information that they are delivering fair outcomes for their customers. It is about time that consumers started seeing some tangible results.

20. Is the mix of measures outlined in paragraphs 6.79 to 6.87 appropriate for helping to achieve better progress?

We can see from this mix of measures that the FSA is keen to work with firms to raise standards, but we are beginning to think that the FSA's approach to what are in reality regulatory failings in the area of TCF is overly tolerant and unhelpful for consumers.

21. Are there other measures that you would like the FSA to take?

We would like to see the FSA taking more supervisory and enforcement action in the coming months, both to deal with individual cases and also to provide a clear warning to all firms that continued failure to meet TCF requirements will be dealt with robustly.

Sector Analysis and Benchmarking

22. Is there data we collect in our returns whose firm specific and/or aggregate disclosure is neither precluded by directives, nor duplicative of disclosures required by directives, and which would be useful in support of our regulatory functions and objectives?

We are unaware of any such data.

Concluding on these proposals
23. Do you have comments on the various proposals set out above?

Our levels of concern or support for the proposals outlined in the Paper can be broadly summarised as follows:

- Concern at the extent to which the document provides evidence of the FSA's contention that it is an open and transparent regulator.
- Support for the proposals on complaints data and own initiative variations of permission.
- Concern that the financial promotions register is still being overlooked as it is our belief that it would add great value for consumers.
- Concern at some of the assumptions made in the draft document about consumer understanding.

24. Do you have suggestions for areas of regulatory transparency not mentioned in this Discussion Paper.

We do not have any additional suggestions to those already put forward.

Freedom of Information
25. Do you agree with our proposals to improve the accessibility and content of our Disclosure Log?

We agree with the recommendations in the Paper both to make more information available via the Disclosure Log and to make it more accessible on the FSA's website.

We do have some concerns, however, about the FSA's overall interpretation of the FOIA's provisions as indicated in paragraph 4.25. This is only true of some of the Act's absolute exemptions but not of all. It is not true of the absolute exemptions most relevant to the FSA's own functions, namely section 40 (personal information), section 41 (information supplied in confidence) and section 44 (statutory prohibitions).

Thus, under S40 an authority is required to confirm whether or not it holds personal data about an identifiable individual unless to do so would itself involve a disclosure which breaches one of the data protection principles [FOIA s. 40(5)(b)]. There will be cases where it will be unfair in DP terms to release personal data, but not unfair to confirm that such personal data is held (eg where the data subject has himself already publicly confirmed that fact).

Under S41 an authority is permitted to confirm or deny whether it holds confidential information supplied to it by another person subject to an obligation of confidence, unless to give that confirmation or denial would itself be a breach of confidence. The Act does not rule out giving that confirmation, if it can be done without committing a breach of confidence [see s.41(2)].

Similarly, an authority is not relieved of the duty to confirm or deny the existence of information whose disclosure is prohibited by statute, unless to do so would itself involve the release of information which is prohibited by law [s 44(2)].

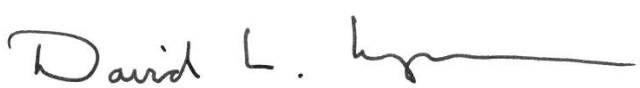
It is possible that paragraph 4.25 is just a drafting error, but it is also possible that it represents a misunderstanding by the FSA of the legal position, which is causing it to refuse to confirm/deny whether it holds information in circumstances where it should be doing so.

When should FSA be the publisher?
26. What criteria do you think we should use in deciding whether to publish or publicise information ourselves, or rely on a third party?

The Panel appreciates the efforts of the FSA to commit to a more structured approach to disclosure rather than have its regulatory policy decided piecemeal on the basis of individual cases. However, we also believe that policy should be more open and therefore think that the FSA itself should take on the role of presenting the relevant information to the public in those instances where the potential readership is a mass market one. This would include making improvements to existing vehicles - the current Register for one needs to be made more consumer-friendly – and also the introduction of new vehicles – a Register for financial promotions, in particular.

We are also aware of the potential implications of the FSA's approach in this regard on its use of mystery shopping. The Panel has some sympathy with the view that disclosing the results of mystery shopping could be unjustifiably damaging for individual firms. However, where there is any evidence of mis-selling by firms then consumers could reasonably expect the FSA to make public any information it has to that effect. Where evidence is shown to be an isolated case then this would minimise the potential reputational impact of disclosure. The Panel has fully supported the FSA in its use of mystery shopping in the past and would be concerned if the FSA's approach to publishing information were to limit the FSA's ability to use this important regulatory tool in the future.

Yours sincerely



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