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Supervision
Financial Conduct Authority
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21 June 2018

By email: approachtosupervision@fca.org.uk

Dear Sir / Madam,

FCA Mission: Approach to Supervision

The Financial Services Consumer Panel welcomes the opportunity to respond to the FCA's *Approach to Supervision*.

Introduction

The Panel welcomes the attention paid to business models that act against the interests of consumers. The predatory business models the industry has developed create conflicts between the interests of employees and executives of firms, and the interests of their customers. Where such conflicts exist, there will always be a conduct risk. Firms largely ignore the FCA's business principles, and the Panel has cited many examples where failure to live up to these principles have resulted in consumer detriment which the FCA's supervisory resources seem unable to stop.¹ We continue to argue that a duty of care would prevent predatory business models, and we will return to this when the FCA publishes its discussion paper.

It would be helpful to consumers and industry alike for the FCA to set out what 'good' looks like" when Supervision is effective, and how it will be measured. The document answers the question "what does Supervision do?" rather than "how will we know Supervision is working?".

The Panel also believes Supervision could have greater impact. That there are insufficient resources to address all the misconduct in the industry is in no way a reflection of the FCA's willingness to supervise effectively. Rather, it is a reflection of the continuing poor behaviour by too many firms. A "prevention is better than cure" message to industry is required, and appears to be missing from this Approach document, despite the intention set out in the Mission. It would also be useful to set out the tools available to the FCA when it finds business models that operate against the consumer interest.

Supervising for All

The Approach implies that the majority of consumers buying everyday products will not be protected, as the focus is on vulnerable consumers and a high likelihood of significant misconduct. People move in and out of vulnerability, and all consumers can be vulnerable to

¹ See the Consumer Panel's Position Paper on 'A duty of care for financial services providers' which includes a list of examples of TCF failures – available at https://www.fs-cp.org.uk/sites/default/files/duty_of_care_briefing_-_jan_2017_2.pdf

predatory business models that exploit behavioural biases. Even if only small number of consumers is affected, this can rapidly become a large number if the FCA isn't alert to the risks and does not intervene early enough.

Transparency

The challenge for the FCA is to protect all consumers, yet operate efficiently. More transparency is needed. The FCA could publish more information when it undertakes supervisory activity to address a shortcoming identified by a Thematic Review, Market Study or some other activity (e.g. a 'Dear CEO' letter). This could set out the number of firms inspected on that issue (by firm visit, data request or other means) and the findings from such activity. This would help to focus FCA efforts on taking prompt and effective action. It would also enable external stakeholders to assess the effectiveness of supervisory tools, taking into account whether such activity had prompted firms to take pre-emptive action to remedy shortcomings and reduce consumer harm, or whether sub-standard behaviour had been identified which merited further intervention.

The Panel has voiced concerns previously about the secrecy that surrounds the supervision of firms. Section 348 of the Financial Services and Markets Act protects firms from being identified publicly unless enforcement action is taken against them. Hence, consumers often have no idea which firms have a track record with the regulator of breaking the rules or failing to adhere to the principles. Equally, they do not gain an understanding of what constitutes "fair" or "unfair" treatment. This can act as a barrier to complaining. It is not realistic to expect consumers to trawl through the list of FOS judgements to gain such insight. This situation also contributes to the perception that "all firms are the same", which impedes competition. More transparency from Supervision would improve firm and consumer understanding of the FCA's business principles, and how they are supposed to work. The recent letter from the Chief Executive of the FCA to the Chair of the Treasury Select Committee about the debacle at the TSB is a good example of the use of transparency. For once, the public interest has over-ridden this over-used section of FSMA, which, for too long, has put protection of the reputation of firms over and above the protection of consumers. The FCA should do this more often, not just when Parliament is taking an interest.

To increase transparency, the Panel suggests that details of the firm's last Supervision visit are made available on the FCA Register so that consumers searching for an adviser or firm can view the report in a similar fashion to the way a parent might consult an Ofsted report when looking for schools, or someone might visit the Care Quality Commission's website when choosing a care home. Information about the removal or suspension of permissions (for example pension transfer permissions) should also be made easier to find and should be added to the information held about a firm on the Register.

Further, more awareness in the industry of behaviour found by Supervision to be misconduct would encourage other firms to stop similar practices. This would be particularly powerful if accompanied by the message: "you are all on notice, and if you choose not to change your ways you will be dealt with by Enforcement rather than Supervision". The Panel has previously pointed out that shortcomings identified in Thematic Reviews usually result in only the production of FCA guidance for firms. This has only limited impact, and is frequently followed up with yet more guidance when a further Thematic Review identifies exactly the same shortcomings. Where the FCA finds poor practice, it should routinely refer firms to enforcement for follow-up action. Relying on firms do to do the right thing and take into account guidance is simply not enough. Since there is no first-mover advantage, it is only if the FCA is tough on breaches of rules or principles that it actually has an effect.

Prevention is Better than Cure

The FCA is right to highlight the importance of the SM&CR and the whistleblowing regimes. These are critical to the effectiveness of regulation and the change in industry culture that is still necessary. Pernicious attempts to undermine these regimes undermine effective regulation, particularly in an environment of limited resources. The FCA must be seen to demonstrate its commitment to improving firms' culture through the robust application of the SM&CR and whistleblowing regimes. The Panel has supported the FCA in implementing these regimes. It does not want to see them thwarted by a failure to apply the rules rigorously.

The document places emphasis on the capabilities of senior managers, but should also have included more clarity on the FCA's expectations of their behaviour and the culture they set in their firms. A reminder that Board Chairs have responsibility for firm culture would have been helpful.

Further, it is too late for the FCA to force firms to modify business models after they have identified systemic harm, as the Approach document proposes. Eliminating business models that create conduct risk in the first place would reduce harm to consumers more effectively than waiting for the harm to happen, and then requiring firms to provide redress to those consumers harmed.

Measuring effectiveness of Supervision

The Panel continues to work with the FCA to develop metrics across all areas of regulatory activity. But it is possibly most important in the area of Supervision, because, as outlined above, it is not open to public scrutiny in the way Enforcement is, for example. The National Audit Office was unable to complete a value for money report into the FCA for precisely this reason.

Consumers in the UK continue to invest, save and insure with, and borrow from the industry, trusting in the protection that our regulators provide. It is in the public interest for the FCA to demonstrate that their trust is well placed.

Yours faithfully

Sue Lewis
Chair, Financial Services Consumer Panel