

Financial Services Consumer Panel
response to

The Financial Conduct Authority
Approach Document

September 2011

Introduction

A good regulatory regime will deliver better and fairer outcomes for consumers. There is still a long way to go before we can be sure the Financial Conduct Authority (FCA) will deliver these outcomes, but the FCA Regulatory Approach document takes a step in the right direction by setting out how the new regulator intends to meet the objectives set for it by Parliament. We are pleased that the Financial Services Authority/FCA is already starting to put consumers at the centre of its thinking.

In recent times the Financial Services Authority (FSA) has undergone a change in behaviour in areas such as enforcement, where it has begun to adopt a tougher stance than we have seen before. We were encouraged by Hector Sants' speech¹ at the FCA Conference in June this year when he spoke frankly of the FCA's "more interventionist regulatory stance" and recognised the need for the FCA to have "more resources" and "more powers" than its predecessor organisation. The FCA must be equipped with the right legal tools for the job as the debate on the Financial Services Bill moves forward.

It is important the FCA learns from the experiences of the current regulator. We have been here before. On 11 December 2000, Howard Davis said² on publication of the FSA's Progress Report on Building the New Regulator, published earlier that year: "And most of all, consumers supported the idea of a proactive regulator, one which tried to anticipate and head off consumer problems in advance, rather than has been sadly the case too often in the ancient regime, coming along afterwards to clear up the mess. Being cast permanently as the man who followed the Lord Mayor's show with a shovel and a bucket is not an attractive role." It seems, then, that some of the challenges for the new FCA are exactly the same as the FSA faced over ten years ago. We are looking forward to working with the FSA and FCA to ensure that protecting consumer interests remains at the heart of regulation and that this time, it really works.

A great deal needs to be done between now and when the FCA formally takes over regulatory responsibility from the FSA. The bold ambition in the approach document will have to be carried forward in the powers, culture and ethos of the new organisation, as well as in its day-to-day operations. It is often the less tangible and less measurable changes that present the greatest challenge to an organisation, but without such transformative change consumers will still not have the assertive and committed regulator they need.

¹ 28 June 2011 speech by Hector Sants, Chief Executive of the FSA, at www.fsa.gov.uk

² 11 December 2000, speech by Howard Davis (then Chairman of the FSA) to the FSA Conference "A Radical Approach to Regulation" at www.fsa.gov.uk

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Executive summary

This document sets out the Consumer Panel's views on the Financial Conduct Authority Approach to Regulation published by the Financial Services Authority (FSA) in June this year ("the approach document"). We are pleased to have had the opportunity to discuss the approach as it was developed by the FSA executive and we believe it provides a platform on which further strategic thinking and ultimately detailed plans, can be built.

We approve of a number of the proposals, in particular:

- The document outlining what the FCA will not do, as well as what it will.
- A firm commitment to identifying the root causes of problems, rather than the symptoms and consequences.
- The articulation of transparency as one of the FCA's regulatory principles, and the clear statement that the FCA's culture will be based on a presumption of transparency, both of regulatory processes and of information publication.
- The view that the FCA will need a sound economic understanding of the way relevant markets operate, and we support the approach set out on the question of pricing in particular.
- A drive towards frequent information sharing between the FCA, the Financial Ombudsman Service (FOS), the Financial Services Compensation Scheme (FSCS) and the Money Advice Service (MAS).
- The commitment to greater and more effective engagement with consumers and to a better understanding of consumer behaviour.
- The acknowledgement that the FCA has a mandate to address financial inclusion under its efficiency and choice objective.

There are, however, areas where we believe the proposals need to go further, such as:

- Although we appreciate this is an approach document, we would like to see more of a forward programme developed with sensible timelines, milestones and objectives, for the implementation of the new regime.
- A clearer explanation of how the FCA's aspirations on root cause analysis will be delivered. The FSA has been discussing this area for some time.
- Specific actions under the transparency objective, such as more detail in complaints reporting and publishing statements on misleading financial promotions at the same time action has been taken.
- More detail on how the new ethos of 'openness' will be implemented – the approach document goes little further than building on the existing consultation process, which is a disappointingly timid start.
- We support strong competition powers for the FCA, and look forward to further discussion of this as a matter of urgency, particularly the potential tension between its obligation to promote competition, and the need to address access for all sectors of the public.

- The approach document gives little information on the risk appetite/tolerance of the new regime, and we would like to see clearer statements of intent.
- We would like to see more information about how the FCA will ensure it has sufficient and appropriate expertise not only in the financial sector but also economic, consumer and policy areas.
- The approach to coordination between the FCA, PRA, HM Treasury, and FPC seems logical in principle but overly complex in practice. We urge the FCA to focus on designing a streamlined, pragmatic method of ensuring effective communication without being overwhelmed by process.
- The document lacks sufficient detail about the FCA's input to the two European Supervisory Authorities of which it is not a member, given that both EIOPA and the EBA will have conduct of business responsibilities.
- We would like to see the FSA taking action now to develop an improved programme of direct engagement with consumers, and to see much more information about how the FCA strategy for financial inclusion will be developed.

Those areas where we have active concerns are:

- In the current economic climate, and taking into account the loss of at least some staff and other resources to the PRA, the Panel is concerned that the FCA may not have adequate resources to deliver its regulatory obligations, and urges the Government to ensure that sufficient resources are made available.
- We disagree with the restriction of the FCA's regulatory toolkit at this stage, by stating that it will not provide product kitemarking, approval and authorisation (other than for those products authorised by the FSA under the current regime). Setting limitations at this point seems contrary to the desire to take full advantage of the opportunity to develop a new approach to conduct regulation.
- We believe the requirement for the FCA to consult those involved before publishing warning notices to firms could lead to a significant level of consumer detriment.
- There are several references to the need for effective communication with consumers, but examples given, such as the approach to clarifying the distinction between registration and regulation, do not match the aspirations. This strategy needs to be much more clearly thought out.
- We are concerned the FSA has identified that an important way to promote good outcomes for retail consumers is by equipping them with information to avoid risks and protect themselves. This suggests an underlying reliance on disclosure as a means of consumer protection which presupposes a level of numeracy and literacy simply not present among many consumer groups. The existence of programmes to address financial capability does not mean that the responsibility for making decisions can be passed on to consumers. The FSA has in the past recognised that disclosure is not a panacea for consumer protection³ and the FCA must not backtrack on this.

³ 7 April 2005, speech by John Tiner to the FSA Insurance Sector Conference, at www.fsa.gov.uk

Regulation and regulatory culture

Product intervention

In our response to the FSA's Discussion Paper on product intervention⁴, we identified a number of good consumer outcomes that the FSA/FCA's approach should deliver. We called, amongst other things, for consumers to have access to products that deliver what they promise, including value for money, through all distribution channels including execution only. These products would meet a diverse set of needs and aspirations, and would have been subject to appropriate internal and regulatory scrutiny both at the design stage and during subsequent product development, such that regrets and complaints to FOS are minimal. We have referred to these as "straightforward outcome" products and we went on to commission research⁵ that set out likely criteria for product types that might deliver these straightforward outcome products, and also analysed existing products against those criteria.

On the issue of product intervention more widely, we called for a broad, flexible intervention toolkit for the FCA, including product pre-approval and product banning as and when necessary; and for the entire intervention regime to be underpinned by the active application of the principle of Treating Customers Fairly (TCF). We also favour the development of a regulatory benefit in the form of a process of 'self certification' for firms that have demonstrated high levels of compliance in product design and development with mandatory pre-approval for 'persistent offenders'. We are disappointed therefore that the approach document states categorically⁶ that the FCA will not provide:

- Product 'kite marking'
- Product approval
- Product authorisation other than for those products authorised by the FSA under the current regime⁷.

At this stage we do not wish to see the FCA restricting its toolkit in this way, although we recognise that there are as yet unresolved EU issues to be addressed before final decisions can be taken. Nevertheless, setting limitations at this point seems contrary to the desire to take full advantage of the opportunity to develop a new approach to conduct regulation "addressing the problems which have beset UK retail financial services for 20 years".⁸

In the course of our earlier discussions with the FSA about the development of the approach document we specifically asked that it be made clear what

⁴ DP11/1 product intervention at www.fsa.gov.uk. Panel response at www.fs-cp.ork.uk

⁵ Research carried out by independent consultant Nick Hurman, at www.fs-cp.org.uk: "Defining straightforward outcome products"

⁶ Page 21 of the approach document

⁷ Some open ended investment companies (OEICS), where the collective scheme itself is authorised, and the regulator's role in UCITS (Undertakings for Collective Investments in Transferable Securities) authorisation

⁸ Paragraph 1.9 of the approach document

the FCA would *not* do, so we are grateful that the FSA took this on board. In the case of product intervention, however, it is a pity that the FSA seems to be more bold and definitive about what the FCA won't do, rather than what it will do.

Root cause analysis

The Turner Review⁹ recognised that the relative growth of financial services in recent years, associated with extensive innovation, has had both beneficial and harmful consequences. Innovation as a source of instability has received extensive consideration, in the context of developing the new prudential regulatory regime. Another possible harmful effect is rent extraction, arising from a variety of sources of market failure, which adds to transaction costs and is detrimental to consumers and pensioners. The FCA will need to develop an analysis of the root causes of such market failure and identify appropriate interventions to mitigate the detrimental consequences, in particular by promoting competition.

We are pleased to see therefore a firm FCA commitment¹⁰ to identifying and addressing the root causes of problems, rather than only the symptoms or consequences of those problems. We are encouraged too by the acknowledgement of the possibility of intervening in the wholesale markets in order to address issues within the retail market¹¹. We see this as a key shift in approach from the FSA and we welcome it.

The type of analysis described in the approach document will require a significant amount of support and data from the FCA's new market and business model analysis teams and reference is made to this in the document. But the FCA will need to take full account too of its own and other available research on consumer behaviour and decision-making, such as the European Commission's 2010 Report Consumer Decision-Making in Retail Investment Services: A Behavioural Economics Perspective¹². Production and review of research of this magnitude seems likely to place a significant burden on FCA resources, an issue which we have covered in more detail later in this response. The FSA has been speaking about its aspirations in this area for some time and we have been encouraged by this, but we would now like to see the FSA developing a clearer approach on how this will be delivered.

Transparency

One of the FCA's six regulatory principles relates to transparency¹³. We support the use of transparency as a tool¹⁴. Used effectively, it can be a significant factor in improving compliance, without necessarily requiring the

⁹ The Turner Review: A regulatory response to the global banking crisis, March 2009 at www.fsa.gov.uk

¹⁰ Page 24 of the approach document

¹¹ Paragraph 4.7 of the approach document

¹² Published November 2010 at http://ec.europa.eu/consumers/strategy/docs/final_report_en.pdf

¹³ Page 15 of the approach document, "the FCA should exercise its functions as transparently as possible, which recognises the importance of ensuring that appropriate information is provided on regulatory decisions and also that the FCA should be more open and accessible, both to the regulated community and the general public."

¹⁴ Consumer Panel position statement Transparency: The Consumer Panel's View, September 2010 at www.fs-cp.org.uk

alternative of expensive and protracted enforcement action. Greater levels of compliance should, in turn, play a part in helping industry and the regulator to earn the trust of consumers.

In September 2010 we published an international literature review¹⁵ we had commissioned from John Leston. While the FSA's arrangements to require firms to provide and publish their own complaints data placed them at the more transparent end of the international spectrum, we would like to see improvements under the new regime such as reporting by brand. This would, in our view, be more meaningful for consumers and would help them to make effective use of the information. We would also like to see data relating to smaller¹⁶, local or niche providers published as well as information relating to 'household names'.

The Panel would like to see the publication of warning notices issued to firms, so we strongly support the expected new legal power to do so. The approach document goes on to say however that there is likely to be a requirement for the FCA to consult the individual concerned in advance and to take account of, for example, any reputational damage that could arise from publication. Of course, any delay or failure to publish could lead to a significant level of consumer detriment. It has been reported to Panel members that some insiders believe that these restrictions may in reality undermine the presumption in favour of transparency.

We understand that there is a balance to be struck between the rights and interests of individuals subject to enforcement proceedings and the rights and interests of consumers and potential consumers. The clear statement in the approach document that the FCA's culture will be based on a presumption of transparency¹⁷ is therefore particularly significant. We expect the FCA to take decisions on publication within that context.

The provisions in the Financial Services Bill for the FCA to take action against misleading financial promotions and to have a duty to publish the fact that it has done so is an important feature of the FCA's work for consumers, but is not developed in the approach document. The presumption of transparency is a key point here too. The FCA should in our view be committed to publishing statements on misleading financial promotions at the same time that action has been taken – for consumers to hear about misleading advertising after the event is of little use unless the individual responded to the particular promotion, in which case damage will already have been done. While anonymised case studies might be a useful learning tool for firms, they mean almost nothing to consumers, so FCA notifications of action must be firm and product specific.

On the issue of transparency more generally, more is promised in future publications on how the new ethos of "openness"¹⁸ will be implemented.

¹⁵ Transparency as a Regulatory Tool (An international literature review) by John Leston, at www.fs-cp.org.uk

¹⁶ Currently complaints data is only published for firms that receive 500 or more complaints in the relevant reporting period

¹⁷ Pages 15 and 26 of the approach document

¹⁸ Paragraph 4.16 of the approach document

Even so we were concerned to see that initial thinking goes little further than building on the FSA's approach to consultation as part of the rule-making process; seeking to develop more effective ways of getting feedback on proposals; engaging actively with the statutory Panels; and publishing information about its views on markets and the comparative performance of a firm¹⁹. This is a disappointingly timid start. We had expected to see the presumption of transparency reflected in a far more dynamic base on which future strategy could be built.

We would encourage the FSA/FCA to learn from the experience and approach of other sectors, such as food and farming, where public trust plummeted after industry and regulatory failings and yet, anecdotally, it appears to have been significantly restored.

Competition

The Panel supports strong competition powers for the FCA. In our response to the Financial Services Bill²⁰, we have said that the FCA should have concurrent powers in line with other industry regulators, allowing it to use its expertise to carry out market investigations, and refer to the Competition Commission (or its successor) only if structural change needs to be considered. As the Bill currently stands however, the FCA will be required, so far as is compatible with its objectives, to discharge its functions in a way which promotes competition²¹. The FCA's main functions will include rule making, guidance and general policies. The approach document reports that in this way the FCA will have a formal and wide-ranging mandate to place competition "at the heart of the new conduct regime. [The Government] sees the new duty, combined with the new efficiency and choice objective, as giving the FCA a significant role in promoting competition in financial services."²²

The FCA's approach to this fundamental aspect of its work requires a great deal of debate and development and we look forward to further discussion/consultation papers on this issue as a matter of some urgency. It has been suggested to us that there is a possible tension between the FCA's obligation to promote competition, and the need to address access to financial services for all sectors of society, under its efficiency and choice objective. We would like the FCA to explore this issue further in future papers.

We agree with the view expressed in the approach document that the FCA will need a sound economic understanding of the way relevant markets operate and that the required approach is significantly different to that of the FCA, both analytically and culturally. Clearly, 'economic understanding' of this depth and magnitude will be a significant aspect of the FCA's work, underlying almost everything that it will do. We are disappointed therefore that there is so little in the approach document about how the FCA intends to

¹⁹ Page 26 of the approach document

²⁰ The Financial Services Bill is at www.official-documents.gov.uk and the Panel's response is at www.fs-cp.org.uk

²¹ Page 15 of the approach document

²² Box 2, page 18 of the approach document

tackle this aspect of its remit. We urge the FSA to publish further, specific proposals or ideas soon.

On the question of pricing in particular, we support the approach set out in the paper²³. Value for money is one of the most important considerations for consumers thinking of buying a financial product and we see this concept as an integral part of the principle of TCF, as well as an important feature of the FCA's competition duty.

Risk appetite

Apart from confirmation that the FCA will not be operating a zero-failure regime²⁴, the approach document gives no real indication or impression of the risk appetite/tolerance of the new regime. In the context of "credible deterrence²⁵" there is reference to the FCA's more interventionist stance and lower tolerance for consumer detriment, implying perhaps a low tolerance level for non-compliance in every aspect of its remit. But there is no explicit confirmation of that in the document and we would like to see the FCA making clear statements of intent. Our earlier discussions with the FSA executive and impressions of the approach document as a whole have raised expectations that the FCA will be a new, proactive regulator acting decisively and on a pre-emptive basis to address failings in the financial services markets. If that is not the case, consumer trust and confidence in the new regulator may well fall away very quickly.

FCA resources

The approach document contains a clear statement²⁶ that "a considerable investment in resources will be needed to deal with these significant supervisory responsibilities." What the document does not say is where these resources will come from or when they will be made available to the FCA.

But it is not just a question of the amount of resources, but also the balance. As well as people with knowledge of the financial services sector and regulation the FCA will need economists and those with consumer and policy expertise. Getting the balance right matters both at FCA Board level and also throughout the entire organisation. It is essential not just to the work of the organisation, but to addressing the potential problem of regulatory capture which, it could be argued by some, might have contributed to a past lack of incisiveness at the FSA.

In the current economic climate and taking into account the loss of at least some staff and other resources to the Prudential Regulation Authority (PRA), we are concerned that the approach document might be setting out more of an aspirational than a practical framework on which the FCA will deliver its regulatory obligations. It would be detrimental to consumer interests if this proved to be the case, or if the FCA was developed piecemeal over a number

²³ Box 2 on page 19 of the approach document

²⁴ Page 21 of the approach document

²⁵ Pages 25 and 26 of the approach document

²⁶ Paragraph 1.10 of the approach document

of years, with the particularly specialist and resource-intensive work such as business plan and market analysis and direct engagement with consumers put back many months while the FCA awaits the funding or staff it needs in order to meet its obligations. We hope the FSA is taking action now to retain good people and to recruit those with the particular skills and expertise to deliver what the FCA has promised and what consumers are entitled to expect.

It is important that the FSA/FCA is open and realistic about the future. We would like to see a forward programme developed, with sensible timelines, milestones and objectives, for the implementation of the new regime.

Co-ordination

The approach document sets out²⁷ how the FCA will co-ordinate with firms, HM Treasury and other regulatory bodies including the PRA and Financial Policy Committee (FPC). Given the division of regulatory responsibility, the approach seems logical in principle - but it looks overly complex in practice.

For example, the FCA and PRA will put in place arrangements that will include, but not be limited to, supervisory colleges; working together in areas such as authorisation; notification of intended enforcement action; discussions about putting in place common standards and rules for risks which are directly relevant to both authorities' responsibilities; and co-ordination in setting policy and rules. All this seems likely to take up a considerable amount of time and staff resources and will be a significant factor when the FCA is intending to take regulatory action of almost any kind. We urge the FCA to focus on designing a streamlined, pragmatic method of ensuring effective communication, without being overwhelmed by process.

The Panel has particular concerns about the regulation of with-profits business, responsibility for which is split between the PRA and the FCA. All those involved seem to recognise the complexities of with-profits business itself as well as of the arrangements that will be required if regulation is to be effective. As a reflection of the importance of with-profits issues the PRA will have a policyholder protection responsibility²⁸. The Panel has sought separately²⁹ a mechanism for direct access to the PRA, in order to advise on prudential matters in general and the interests of with-profits policyholders in particular. If that request is unsuccessful, the Panel's communications with the PRA will have to be through the FCA, and then by the FCA through whatever specific arrangements are put in place to address with-profits issues. This seems both unnecessarily complicated and burdensome on the FCA and runs the risk of the Panel's consumer concerns being overwhelmed by other with-profits issues being discussed by the two regulators. This is an area of co-ordination that will require further detailed proposals and debate.

²⁷ Chapter 6, from page 41 of the approach document

²⁸ "The PRA's role will be to ensure there is a reasonably high probability that an insurer is able to meet claims from, and material obligations to, policyholders as they fall due." From The Bank of England, Prudential Regulation Authority: Our approach to insurance supervision, June 2011 at www.fsa.gov.uk

²⁹ The Consumer Panel's response to the Financial Services Bill, at www.fs-cp.org.uk. The Panel has also sought an amendment to the Bill requiring the FPC to consider representations made by the Panel

A further key area will be the operational and strategic relationship between the FCA, the Financial Ombudsman Service, The Financial Services Compensation Scheme and the Money Advice Service. We strongly support ease and frequency of information sharing between the FCA and these three independent organisations, both in terms of consumer and market awareness and co-ordinating approaches to emerging or crystallised risk, unintended consequences of regulatory action and wider implications issues³⁰. As we have already indicated, we would not wish to see rapid and effective engagement hindered by complex process. We hope that the new Coordination Committee will facilitate the necessary level of debate and decision-making.

From the important European perspective the document lacks sufficient detail about how the FCA will input to the European Supervisory Authorities of which it is not a member, although the approach document states that a Memorandum of Understanding will be put in place to provide the basic framework for co-ordination between HM Treasury, the Bank of England, the PRA and the FCA. In our view it is not sufficient to say that, for example, the FCA “will support the PRA in representing UK interests in European Insurance and Occupational Pensions Authority and the European Banking Authority³¹”. We would like to see far more detail being made available about the FCA’s involvement in the critical area of EU policy-making.

Finally on this question, no decision has yet been made on the possible transfer of regulatory responsibility for consumer credit to the FCA. The FSA/FCA needs to be thinking now about how it would deal with both a transfer and consequent operational issues, given the potential scale and scope of an extended remit. Additionally we look forward to learning more about how the FCA intends to approach its new powers to refer matters formally to the Office of Fair Trading, which has not been explored within the approach document.

³⁰ The FSA, Financial Ombudsman Service and Office of Fair Trading published a feedback statement in March 2011 (FS11/2) setting out their approach to dealing with emerging risks and mass claims, including the establishment of a Coordination Committee at www.fsa.gov.uk

³¹ Page 44 of the approach document

Consumers

Engagement with consumers

We welcome the regulator's commitment to greater and more effective engagement with consumers and to a better understanding of consumer behaviour, consumer needs and consumer experiences³². We look forward to seeing early progress in this area in the form of, for example, the development of the FSA's Consumer Affairs team and an extensive programme of market research. These teams will need to be placed at the right level within the organisation, with the appropriate level of seniority and influence. But consumer engagement of the depth alluded to in the approach document cannot be achieved by individual teams alone. The commitment must be embedded within the ethos of the organisation and form an intrinsic part of policy debate and development, alongside considerations around equality and diversity.

We understand that there is to be a Strategic Research and Intelligence Unit within the FSA. This Unit must be a centre of excellence for research across primary and secondary data. Research should be used to help to shape the future strategy of the FCA. Of particular importance will be research focused on the individual consumer's experience of financial services, whether in the form of mystery shopping or post-purchase review. Together with information received through the Consumer Contact Centre, this research would provide an invaluable source of qualitative data on specific firms, products and services that cannot be obtained through regulatory tools such as direct firm supervision or thematic reviews.

The FCA also aims to engage with consumers more directly and to ensure face-to-face contact. No doubt this is something that many consumers and consumer groups would support and, as we have already said, we would view post purchase review and to a degree, mystery shopping as valuable forms of direct engagement. But the question remains of how the FSA/FCA expects direct engagement to work in practice. Financial Services consumers are a diverse group and, even using social media and focus groups³³ it is difficult to envisage at this stage how the FCA could find and put in place the right resources to ensure that direct engagement could be achieved in a way that encompassed a sufficiently representative range of consumer interests and concerns. This is an area where we would like to see the FSA taking action now.

The Panel of course remains committed to fulfilling its role of advising and challenging the regulator as it develops its policies and we will be happy to work with the FSA and the FCA on the regulator's consumer engagement strategy.

³² Pages 24 and 25 of The FCA approach to regulation, June 2011, at www.fsa.gov.uk (the approach document)

³³ Page 25 of the approach document

Communications

There are several references in the approach document to the need for effective communication with consumers³⁴. On page 25 there is a statement that “the FCA will ensure that its own communications to consumers are clear and readily accessible.” Yet in the context of the risk of consumers not understanding the distinction between registration and regulation, the proposed mitigation is communication through the Register of firms and through other channels³⁵. We are rather puzzled by this comment. First, this approach does not seem to match the unequivocal commitment made later in the document; second, information is already provided on the FSA Register about registration versus regulation, yet based on the FSA’s own experience, this has already failed to deliver key messages on this question³⁶; and third, there is no indication of what the “other channels” might be. The FCA must be clear about what it actually intends to do and to match rhetoric with action.

“Consumer responsibility”

The regulatory principle that consumers should take responsibility for their financial services decisions³⁷ is to be carried over we understand from the Financial Services & Markets Act 2000 (FSMA), together with the operational objective of securing an appropriate degree of protection for consumers. The FCA will also take into account its obligations under the Equality Act 2010. In addition the FCA proposes to recognise the differences across the spectrum of consumers falling within the definition of “consumer”. This means the FCA will have to perform a skilful balancing act in carrying out its regulatory functions when considering what it describes as “consumer responsibility”.

The Panel’s position on the issue of consumer responsibility remains unchanged from the approach taken at the time of the FSA’s most recent discussion paper on the subject³⁸. When the FSA published its feedback statement in September 2009³⁹ the Panel Chairman said⁴⁰ in response:

“The FSA’s original idea that consumers should have regulatory responsibilities was at best naïve, and at worst irresponsible. The Panel has always argued that the concept of ‘consumer responsibility’ is flawed. We are pleased that the FSA has listened to our advice: the decision announced today that the FSA will promote sensible actions for consumers as part of its consumer capability work is much more realistic.”

We were concerned to see from the approach document that, while in high-level terms acknowledging the diverse nature of consumers of all kinds, the FSA has identified an important way to promote good outcomes for retail consumers as equipping them with information so that they can avoid risks

³⁴ For example, on pages 7, 12 and 25 of the approach document

³⁵ Page 12 of the approach document

³⁶ The FSA register page already has a link to a page setting out “some differences between authorised and registered firms at www.fsa.gov.uk

³⁷ Page 15 of the Approach document. The FCA must have regard to six regulatory principles, including the general principle that consumers should take responsibility for their decisions

³⁸ DP08/5 Consumer responsibility at www.fsa.gov.uk. Consumer Panel response at www.fs-cp.org.uk

³⁹ FS09/2 at 111.fsa.gov.uk

⁴⁰ Press release 23 September 2009 at www.fs-cp.org.uk

and protect themselves⁴¹. The document goes on to say that the FCA will seek to ensure that firms provide appropriate information to consumers, at the right time, so that they can consider the implications for their personal situation and make an informed decision. Decision-making is a complex process and the FCA will have to take careful account of this in its policy-making. We have referred earlier in this response to the Commission's 2010 report on consumer decision-making. This FSA conducted its own work in this area in 2008⁴². Research such as this provides important information about the reality of decision-making and the exercise of choice that the FCA will need to take into careful account as it develops its policies.

Effective communication on the basis implied in the approach document presupposes a level of numeracy and literacy that is simply not present amongst many consumer groups⁴³ and suggests to the Panel an underlying reliance on disclosure as a means of consumer protection. Raising levels of financial capability is vitally important for consumers, but it cannot be achieved overnight. The existence of programmes designed to address financial capability needs does not mean that the entire responsibility for making decisions can be passed onto all consumers. The position is far more complex and the FCA will have to ensure that it does not fall back on disclosure as a panacea for consumer protection.

In our response to the Financial Services Bill we have called for authorised persons to have a fiduciary duty towards the consumers who are their clients⁴⁴. Fiduciary duty implies a stricter standard of behaviour than the comparable duty of care at common law. Amongst other things, a fiduciary cannot have a conflict of interest. If this amendment is adopted it should help consumers who are expected to take responsibility for their financial decisions and provide a level of protection that currently does not exist. But even with the benefit of a fiduciary obligation, the industry still has a long way to go in terms of compliance, quality versus quantity and plain language before greater reliance can be placed on communications between firms and consumers and so-called "consumer responsibility" can be reassessed. In the meantime, we would like the regulator and the industry to bear in mind that the more that firms treat their customers fairly, the more able consumers will be in the longer term to take greater levels of responsibility for their financial services decisions.

Financial inclusion

The approach document acknowledges that the FCA has a mandate to address financial inclusion under its efficiency and choice objective⁴⁵ and we are pleased to see this on the agenda. In our response to HM Treasury's second consultation on the reform of the regulatory system⁴⁶ we called for the

⁴¹ Page 17 of the approach document

⁴² Financial capability: a behavioural economics perspective, at www.fsa.gov.uk

⁴³ Financial Capability in the UK: Establishing a Baseline, March 2006 and Consumer Research 47, both at www.fsa.gov.uk; In Brief: financial capability, Resolution Foundation and transact at www.resolutionfoundation.org/media

⁴⁴ The Financial Services Bill is at www.official-documents.gov.uk and the Panel's response is at www.fs-cp.org.uk

⁴⁵ Page 21 of the approach document

⁴⁶ HM Treasury paper A new approach to financial regulation: Building a stronger system, April 2011 at www.hm-treasury.gov.uk. Panel response at www.fs-cp.org.uk

FCA's consumer protection objective to be extended to include access specifically. Access to financial services is a precondition to functioning in today's society and needs to be intermediated. We believe the FCA is well-placed to drive real progress in this area.

The document goes on to refer to the authorisation of Sharia-complaint banks as an example of financial inclusion, but stops short of exploring further how the FCA proposes to deal with this particular 'mandate'. The question links back of course to the financial capability and competition issues we have already raised, and the FCA's equality obligations. We would like to see much more information soon about how FCA strategy in this area is to be developed and how the regulator's important role will dovetail effectively with the work of bodies such as the Money Advice Service; The Financial Inclusion Task Force; Transact; and the Resolution Foundation. The financial inclusion mandate has to be incorporated into the FCA's core thinking, rather than considered as a separate issue.

Success and success measures

For many years the FSA has been working to address the problematic issue of measuring how successful it has been in achieving its objectives. The Annual Report, supported by performance evaluation such as service standards, progress against milestones and the enforcement performance account, goes some way towards doing this. But in the financial services sector more widely there are particular difficulties in, for example, linking cause and effect in the form of direct consequences of FSA action as distinct from environmental change and the less tangible impact that regulation can have, such as changes in the willingness of consumers to engage in particular sectors of the financial services market.

It will be important for the FCA to be able to assess not only its own performance, but also the impact of its new regulatory approach, and to be able to demonstrate that impact objectively. In particular we would like the main focus of FCA success measures to be better consumer outcomes, rather than for example indicators that are activity and not achievement-based – although we accept of course that the FCA will also need to monitor operational issues such as performance against service standards. We realise that there could be quite complex questions to be answered before this can be done – the impact of FCA action on competition and indirectly on consumers for example – but we urge the FSA/FCA to develop performance measures including objectives, timelines and milestones alongside or preferably as an integral part of the regulatory and operational approach, rather than address them at the end of the process. Success measurement cannot work effectively if it is a bolt-on or afterthought to the work of the organisation.

Particular attention will need to be paid to the success of the FCA's consumer engagement strategy: how successful it has been, what it has achieved, and how it could be improved. We see this is an area which is likely to be subject to continuing development and refinement and the FCA will need to be

sensitive to shifting demands on its resources. We would also like the FCA to give early thought to the defining the consumer outcomes it is seeking from its work on financial inclusion, as well as its own internal objectives and success criteria in this area. As we have said, the FCA will be working alongside many others on this issue, but as a financial regulator it has a special part to play in helping financially excluded consumers and it should be feasible to develop specific, FCA-focused outcomes.