

08/3

Financial Services Authority

Transparency as a Regulatory Tool

May 2008



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The Financial Services Authority invites comments on this Discussion Paper. Please send us your comments to reach us by 29 August 2008.

Comments may be sent by electronic submission using the form on the FSA's website at (www.fsa.gov.uk/Pages/Library/Policy/DP/2008/dp08_03_response.shtml).

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1 Overview

Introduction: why transparency matters

- 1.1 From the outset, the FSA set out to be an open and transparent regulator. Ten years later we can look back and see how expectations of what it means to be transparent have changed. We are now living in a climate where parliamentary, regulatory and corporate bodies across the world are being urged to say more about things on which they have traditionally been silent. And the Freedom of Information Act 2000 (FoIA) is both a response to this new climate and a contributor to it.
- 1.2 This Discussion Paper (DP) is an invitation to look again at what we do and don't disclose. Our aim is to stimulate an informed and energetic debate: one that takes account of the real concerns and statutory barriers to some sorts of disclosures, and at the same time recognises the powerful advantages that transparency can bring about. The decisions we make as a result of this debate will shape how we use transparency as a regulatory tool to help us achieve our statutory objectives. It will affect firms, markets and consumers alike.

Who should read this?

- 1.3 We would welcome, in response to this DP, views from the widest possible range of stakeholders, from consumers of financial services and the bodies that represent them, to firms, other regulators who may have addressed similar issues, academics and others.

Summary

- 1.4 Our starting point for this DP is to ask whether transparency is a legitimate regulatory tool. We believe that where Parliament has given us the statutory powers to allow us to publish information, and if publishing that information helps us achieve our objectives, then it is legitimate for us to do so. Whether in practice we choose to disclose information will depend on a case-by-case analysis. Our high-level cost benefit analysis shows that transparency can lead to both benefits and costs, and these depend significantly on what is being disclosed. (**Section 2**)

- 1.5 Over the last few years, there has been growing interest in the relationship between regulation and transparency. Taken together, FOIA, the Better Regulation agenda and a considerable body of policy and academic work all present a profound challenge to regulators to think again about transparency. (Section 3 and Annex 1)
- 1.6 In addition to this wider context, we work within a specific environment that affects our approach to transparency. We set out in clear terms what we must, can and cannot disclose under FoIA and the Financial Services and Markets Act 2000 (FSMA). Two areas are particularly relevant here: the constraints FSMA imposes on us in relation to publishing confidential information, and those in relation to public censure. We are also conscious that consumers of financial services do not always fit the pattern of consumers of some other goods and services. On the one hand, financial sector consumers often do not have the information necessary to make good financial decisions, and on the other, they often lack the capability, confidence and appetite to use the information available. (Section 4)
- 1.7 Taking account of these strands leads us to the view that we should focus on providing information where we are legally able to do so, and where we believe that doing so will help us achieve clear regulatory objectives. We bring this together in a draft Code of Practice on Regulatory Transparency. This states that we have a presumption in favour of using transparency as a regulatory tool to help us achieve our objectives where each of the following principles are met:
- we will not 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; and
 - the disclosure meets our standards of economy, efficiency and effectiveness.
- (Section 5)
- 1.8 We have applied the draft Code to a number of concrete examples, and have said for each one whether we think regulatory transparency will or will not help us to achieve our objectives, and why. The examples include publishing firm-specific complaints data, financial promotions, the use of our supervisory powers for Variations of Permission (VoPs) and providing benchmarking data. (Section 6)
- 1.9 In looking at these examples, we have concluded that the Code provides a useful framework, but it does not remove the necessity for using judgement in our decisions. In particular, we note that where we are proposing to publish new information we do not have first-hand experience of what the actual effects will be. We propose to look at this issue again, once we have a better understanding of the effects on the behaviour of consumers, firms and markets. (Section 8).

Scope

- 1.10 Inevitably, the arguments in favour of transparency are often framed in the context of the retail markets, where information asymmetry between consumers and firms can lead to dysfunctional markets and outcomes. However, there are clear advantages to

using transparency to improve wholesale markets, and different considerations to take into account (see for example Annex 1). So while there is an emphasis on retail issues in this Discussion Paper, our expectation is that the Code of Practice on Regulatory Transparency, when agreed, will apply across all our activities.

Next Steps

- 1.11 We are inviting comments to this paper by 29 August 2008. Between now and then we hope to engage in a lively debate with stakeholders across the range of interested parties. We are seeking views on two levels:
 - We want views on the principle of using transparency as a regulatory tool, and on how we have reflected the legal and practical constraints that we are working under in our draft Code of Practice on Regulatory Transparency.
 - We will be talking to our statutory panels, consumer bodies and trade associations in particular about how we could take forward some of the specific proposals included in Section 6 of this paper. This will include our proposals on publishing complaints data, on which we have set out some further issues in Annex 2. Additionally, a separate consultation paper issued this month (CP08/10) will take forward our formal consultation on VoPs.
- 1.12 We know that views on the subject of transparency are often strongly polarised, and we will be seeking to reach areas of agreement in the middle ground.
- 1.13 We are not proposing anything that would require changes to the Handbook, other than in the area of VoPs mentioned above, but further discussion around the implementation of specific proposals may be necessary. We will issue a statement later this year confirming what we are doing and when, and publicising the final Code of Practice on Regulatory Transparency.
- 1.14 We recognise a particular concern on the part of firms that information provided to the FSA on an assumption on confidentiality may, as a result of the proposals in this DP, end up in the public domain. We are committed to ensuring that where we are considering the routine publication of confidential information (such as on complaints) we will give firms notice so that they are alerted to the possibility of publication in advance of submitting the relevant information to us. For information published by way of statutory notices our normal procedures will apply.
- 1.15 In due course, we will be reviewing what new information we have published and what effects this has had in the marketplace.

2 Introduction

Starting from first principles

- 2.1 The FSA is in a difficult position. Consumer representatives press us to disclose more than we do already, whereas practitioners generally argue for certainty around the status quo. Consumer representatives press us to ‘name and shame’ in circumstances where we believe we are legally unable to disclose that information, whereas practitioners generally claim that any disclosure of a firm-specific nature will result in a reputationally damaging environment which in turn will lead to less cooperation between firms and the FSA.
- 2.2 The very first issue this Discussion Paper needs to address is whether transparency is a legitimate regulatory tool. If it is not, and some practitioners have vigorously made that claim, then the rest of this Discussion Paper falls away. Indeed, as we shall see, we already publish a great deal of both generic and firm-specific information for regulatory purposes, so arguably we would need to turn our attention to what we should remove from publication.
- 2.3 Our view on this is simple. If we have been given statutory powers that allow us to publish specific information, and if by publishing that information we can better achieve our objectives, then it is legitimate for us to do so.
- 2.4 However, even in this short statement we start getting to the root of some of the concerns that we believe underpin the view that transparency is not a legitimate regulatory tool. Firstly, many of our stakeholders do not have a clear understanding of what, in law, we can and cannot disclose. Many of the things firms fear we might disclose we cannot, in law, do so. We hope to remove some of this uncertainty by setting out in clear terms what the legal position is.
- 2.5 We acknowledge that some uncertainty inevitably remains, because the decision on what we must disclose rests in part on the interpretation of FoIA, and this is not fully in our control. But this paper focuses on areas where we have a choice whether to disclose information, rather than where we must.
- 2.6 The second concern that we readily acknowledge is that firms are concerned about whether the information they give us on a confidential basis may, over time, turn up in the public domain because we have decided it is appropriate to publish it to

achieve our objectives. This is partly a matter of trust (see also para 1.14), and partly a reflection of the extent to which the implementation of FoIA is testing the boundary of what we must disclose. But it is also founded on a narrow interpretation of what we mean by ‘achieving our objectives’.

- 2.7 We believe it is in the interests of our objectives that there is a good flow of information readily provided to the FSA by regulated entities. Our regulatory model is based on this flow, and it is enshrined in Principle 11 of our Handbook.¹ We do not think it would serve our statutory objectives if uncertainty about what we might publish led firms to stop sharing information with us. Nor do we think those objectives would be well served if we had to replace a model where there is a voluntary flow of information with one that relies on us using our statutory tools to require firms to give us information.
- 2.8 What this suggests is that we need to be clear, on a case-by-case basis, what outcome we are hoping for and, if appropriate, how this fits with our wider objectives. In essence, this is the distinguishing feature between providing information as a result of a FoIA request and us choosing to publish information. Under FoIA there is a presumption of disclosure irrespective of the value or usefulness of that information, unless there is a reason under FoIA not to. Under the proposals in this Discussion Paper we have a more qualified presumption of transparency, by which the information being disclosed should assist our objectives and/or accountability.
- 2.9 It also suggests that we are right to propose a framework (which we call a Code of Practice on Regulatory Transparency) to give some structure and better certainty to the factors that we will be taking into account in individual cases.
- 2.10 Nothing in this detracts from our overall premise that transparency is a legitimate regulatory tool that can be used to help us achieve our objectives. Nor is it meant to suggest that we will not publish information just because firms might be unhappy that we do so. But it does, we hope, give some reassurance that we recognise that there are significant complexities to publishing information, and that we intend to adopt a disciplined and case-by-case approach that, we believe, will benefit consumers, firms and the financial sector as a whole.

Q1: Do you agree that transparency is a legitimate regulatory tool?

What we mean by ‘transparency’

- 2.11 The subject of transparency, both in the regulatory sphere and elsewhere, is one that easily elicits strong and polarised views. It does not help, in the search for common ground, that there is seldom solid agreement about what is meant by transparency.

¹ Principle 11. A *firm* must deal with its regulators in an open and cooperative way, and must disclose to the FSA appropriately anything relating to the *firm* of which the FSA would reasonably expect notice.

- 2.12 In everyday language we apply the adjective ‘transparent’ to objects of all shapes and sizes, but with the defining characteristic that light shines through them. And so it is with regulatory transparency. In this Discussion Paper we draw a clear distinction between simply making information available, which in some cases can perversely make things less clear, and presenting information which illuminates issues and so improves how markets function.
- 2.13 The shorthand often used for transparency (in our view incorrectly) is ‘name and shame’ – that is, naming firms that have or may have committed a misdemeanour. We have found that the phrase is loaded: it polarises the debate between firms and consumers. In the context of this Discussion Paper this phrase is overly narrow on two counts. Firstly, because there are many ways of providing information that are illuminating, and by no means all of them are firm specific.²
- 2.14 Secondly, not all firm-specific information is equally illuminating. When we issue press releases about firms we have fined, and the reasons for taking disciplinary action, we are making a statement not only about that firm, but about what we find unacceptable, what we are doing about it, and what consumers and firms should be alert to. If asked to name all firms visited in a particular month, that information illuminates through a much narrower lens; it gives the world a list, but not much more than that.
- 2.15 Another potential confusion is that between regulated information and regulatory transparency. In this Discussion Paper we follow the common practice of referring to information that regulators require firms to publish as regulated information. As such, regulated information can be one of many ways to achieve regulatory transparency.
- 2.16 We already publish a great deal of information, and Table 1 below classifies this and gives examples for each category.

2 For example, we believe we have a transparent approach to policy making, including as it does meaningful consultation, cost benefit analysis, advice and challenge from our consumer and practitioner panels, and our formal feedback on the views expressed and the rationale for our decisions.

Table 1

Subject	Types of Transparency	Examples
About the FSA	Corporate Plans & Performance	<ul style="list-style-type: none"> • Annual Report • Performance Account • Annual review by statutory Panels
	Policy	<ul style="list-style-type: none"> • Discussion and Consultation Papers • Policy Statements
	Process	<ul style="list-style-type: none"> • Regulatory Guides (e.g. the Enforcement Guide) • 'Doing business with the FSA' – website guides
About firms/products/markets	Firms disclose (voluntary)	<ul style="list-style-type: none"> • Various
	FSA requires firms to disclose (i.e. Regulated Information)	<ul style="list-style-type: none"> • Terms of Business
	Public information – aggregated	<ul style="list-style-type: none"> • Financial Risk Outlook
	Public information – firm-specific	<ul style="list-style-type: none"> • Type of intermediary (at proposal stage)
	Information received by the FSA – aggregated	<ul style="list-style-type: none"> • Number of firms authorised by year and sector
	Information received by the FSA – firm specific	<ul style="list-style-type: none"> • Comparative tables • Persistency tables (to 2002) • The Public Register
	Information generated by the FSA – aggregated	<ul style="list-style-type: none"> • Feedback on thematic work
	Information generated by the FSA – firm-specific	<ul style="list-style-type: none"> • Waivers granted • Disciplinary record • Undertakings under Unfair Contract Terms legislation

2.17 The classification in Table 1 has three particular features worth noting:

- Regulatory transparency is as much about being transparent about the FSA in its role as regulator as it is about regulated firms or markets. We are as open to discussion and challenge on this area as we are in relation to others.
- The distinctions made in this table between public information, information received by the FSA and information generated by the FSA (FSA actions or opinions) are particular features of the legislation under which the FSA operates (FSMA). In Section 4 below, we will see how the checks and balances built into FSMA affect what the FSA can and can't disclose.

- The classification does not distinguish between the different audiences for the information we publish, but in practice some information has a very specific audience, and some has several audiences, and this can change over time. In either case, identifying the audience and whether or how the information could change their behaviour is essential for understanding the effect a particular piece of information might have. In later sections we will see how this drives our proposed approach to transparency.
- 2.18 Looking at Table 1, the most striking feature is that we already publish a great deal of information across a wide range. That range starts at the relatively uncontroversial, though important, material we publish about whether we are achieving our stated outcomes and meeting our detailed time and quality service standards. It ends with the highly contentious area of firm-specific information, although even there we have, for a long while, published at least some information without generating much controversy.
- 2.19 Similarly, the way we put transparency into practical effect has encompassed not only the content of what we disclose but also our efforts to match the medium and form to the audience being targeted.
- 2.20 So the message, we believe, is that we need to look beyond the labels to the ‘what, why, how and when’ of specific examples. In other words, our interest in transparency should always be because of what it can achieve if the messages are properly communicated and understood, rather than transparency for its own sake.

High-level Cost Benefit Analysis

- 2.21 Transparency can lead to both benefits and costs, which depend significantly on what is being disclosed. This DP aims to identify the ways disclosures give rise to costs and benefits and draw conclusions about the broad circumstances where disclosures are likely to bring net benefits. These are some of the main potential impacts, both positive and negative:
- **Consumers.** Consumers who lack relevant information about the quality of firms or their services may be unable to differentiate accurately, and on appropriate grounds, between different firms and different products, leading to inefficient or unsuitable purchases and a loss of confidence in markets. So disclosure could help consumers (directly or through consequential analysis/publicity by others) buy better products and increase confidence; or it may have no impact if consumers do not use the disclosure; or it could lead to worse decisions if consumers misinterpret the disclosure.
 - **Firms.** Disclosure that helps consumers to identify better firms or products should stimulate competition between firms. Some firms will gain from this, but firms which expect to lose out may view the disclosure as imposing a ‘disproportionate’ cost on them. However, in pure economic terms, if the information disclosed is accurate and is correctly interpreted and acted on by consumers (or if firms think it will be), there will be net economic benefits overall. If disclosures are inaccurate or incorrectly interpreted by consumers,

there may be reputational costs for firms and a negative impact on market confidence, and the overall effect may not be beneficial. Another impact of disclosure could be to improve firms' understanding of FSA regulatory requirements by providing information that allows them to benchmark their own and peers' performance against those requirements, thereby acting both as a deterrent and encouraging behaviour that reduces their costs, or increases their quality, of compliance.

- **FSA.** Transparency is an essential component of our accountability. More transparency could give rise to more (and more informed) scrutiny, leading us to improve timeliness, quality and consistency. This may also lead to greater confidence in the FSA. On the other hand, more transparency about our own decisions could require us to devote increased resources to defending and justifying those decisions to external stakeholders. It may also lead to costs of publication and analysis, including IT costs.
- **The wider economy.** Disclosure could increase market confidence, encouraging engagement with financial services and leading to deeper and more liquid markets. This would result in benefits for the whole economy. However, badly designed or poorly timed disclosure could have costs in terms of exacerbating systemic crises and financial instability.

Q2: Do you agree that this high-level cost benefit analysis captures the main potential impacts of regulatory transparency, both positive and negative?

3 Regulation and Transparency: The Wider Context

- 3.1 Over the last few years there has been growing interest in the relationship between regulation and transparency. There have been several strands to this debate, and between them they have helped to shape the overall environment within which UK regulators operate. In Section 4 we look at the narrow FSA context, including the impact of our own statutory framework, but in this section we look at how these strands of debate have influenced thinking on best practice.

Freedom of Information

- 3.2 FoIA became law in the UK in November 2000 and has been implemented in stages. It gives the public a general right of access to all types of recorded information held by public authorities (including the FSA for this purpose), sets out exemptions from that right of access and places a number of obligations on such authorities.
- 3.3 In Section 4 we set out a closer review of the requirements that the FoIA legislation places on us. We therefore simply note in this section the far-reaching impact that FoIA has had on all types of institutions, and on the public's expectations of what information should be made available, either on request or through each organisation's 'publication scheme'. The Information Commissioner's report 'One Year On' carried survey findings which showed that some three quarters of public bodies felt they now had a culture of greater openness and were publishing more as a matter of course.³

Better Regulation

- 3.4 The government's Better Regulation Task Force set out five principles of good regulation in 1997.⁴ One is 'Accountability: regulators must be able to justify decisions and be subject to public scrutiny'. In particular:
- proposals should be published and all those affected consulted before decisions are taken;

3 Freedom of Information: One Year On. Published January 2006 by the Information Commissioner's Office.

4 <http://archive.cabinetoffice.gov.uk/brc/upload/assets/www.brc.gov.uk/principlesleaflet.pdf>

- regulators should clearly explain how and why final decisions have been reached;
 - regulators and enforcers should establish clear standards and criteria against which they can be judged; and
 - regulators and enforcers should have clear lines of accountability to ministers, parliaments and assemblies and to the public.
- 3.5 Another Better Regulation principle is ‘Transparency: that regulators should be open and keep regulations simple and user friendly’. In particular:
- policy objectives, including the need for regulation, should be clearly defined and effectively communicated to all interested parties;
 - effective consultation must take place before proposals are developed to ensure that stakeholders’ views and expertise are taken into account;
 - the regulated should be made aware of their obligations, with law and best practice clearly distinguished; and
 - the consequences of non-compliance should be made clear.
- 3.6 The principles of accountability and transparency have recently been applied to the FSA (and other regulators) on a statutory basis, through the Legislative and Regulatory Reform Act.

Transparency as a contributor to consumer protection

- 3.7 A third strand of discussion has been the sharp criticisms of regulatory effectiveness by external stakeholders, in particular consumer bodies. For example, in a recent pamphlet the National Consumer Council criticised what it describes as the limited information about business compliance which regulatory institutions make available to the public:
- Consumers might be shocked to learn that they cannot access full information about airline safety records, or clinical trials that have gone wrong. They cannot find out what our regulatory institutions already know about how broadband providers compare on performance, which financial services firms fail to respond to consumer complaints within the statutory time period, the names of the most complained about solicitor firms or details of builders formally warned by trading standards about their conduct. Regulatory practice is at odds with other aspects of consumer life.⁵*
- 3.8 From this perspective, as the NCC report notes, it is a core matter of principle that ‘consumers have a right to know when businesses act illegally or perform poorly’. Three particular functions or benefits are attributed to such regulatory transparency:
- One stresses that it is not enough for a regulator to be effective: it needs to be seen to be effective if consumer confidence is to be maintained. In particular, this view sees greater disclosure about the regulator’s activities in remedying shortcomings by firms as increasing the regulator’s accountability and removing any suspicion that, for example, the regulator is ‘too cosy’ with its regulated community.

⁵ Regulation and Reputation. Published December 2006 by the National Consumer Council.

- A second argument stresses the importance to companies of their public reputation and the potential of disclosure to affect that reputation (see Annex 1 paragraph 12 to 17). It is argued that the disclosure by a regulator of a firm's shortcomings could, through impact on its reputation, exert more leverage and influence for change on the firm's management and shareholders than, say, the finite penalty of a regulatory fine.
- The third purpose stresses the disclosure of regulatory information as helping consumers make better choices in the market place. Consumers face information asymmetries of varying degrees, knowing less about products and suppliers than those suppliers. So regulatory information could help redress that imbalance.

3.9 In sum, the 'consumerist' argument is that greater regulatory disclosure would invite and enable the public to influence the regulator through critique, and to influence firms through both critique and purchasing decisions. Consumers thereby become not passive beneficiaries of regulation but active 'co-producers' of it. From this perspective, regulatory transparency is too important to be left to the piecemeal nature of Freedom of Information requests, so regulators are urged to be proactive and systematic in disclosing more.

Research on consumer use of regulatory disclosure

- 3.10 In addition to the kinds of debate outlined earlier about the disclosure of information held by regulators, growing thought has been given to the role of information which governments or regulators have mandated that firms disclose to the public. In the UK, USA and elsewhere, such mandated disclosure has been increasingly used to tackle perceived market failures or other regulatory issues, such as energy efficiency, nutritional content, polluting emissions and (by the FSA and EU directives) disclosures about financial products and services at the time they are sold.
- 3.11 However, success has been mixed, and the lessons this has thrown up concerning the actual use and effect of the disclosed information are ones that can be applied to regulatory disclosure more broadly.
- 3.12 Reviewing the UK's experience, a recent report by the Better Regulation Executive and National Consumer Council concluded that while such 'regulated information' can help empower consumers and can be an effective and proportionate way to make markets work better, it doesn't always.⁶ Moreover, the proliferation of such information, among growing information in general, is fast exceeding the capacity of consumers to process it. Hence, regulated information cannot be seen as a panacea for all market failures. So the review called for regulators to give more thought and caution as to whether requiring such disclosure is in fact helpful and proportionate.
- 3.13 The government has responded positively to this report, and in particular agreed with its first recommendation, namely that government departments and regulators commit to applying five tests when considering the use of regulated information requirements:

6 www.berr.gov.uk/files/file44588.pdf

- Have you defined the behavioural outcomes that you wish to achieve? (what do you want to achieve?)
 - Will information provide a sufficient incentive for consumers to change their behaviour? (is the information likely to be of value to consumers?)
 - To what extent does the information fit with the wider system and simplify choices for consumers? (will the information help consumers make choices?)
 - Is the information aligned with business incentives, where this is possible? (will businesses support or oppose what you are trying to achieve?)
 - Have you considered the fit with existing information requirements? (what information is already there?).⁷
- 3.14 These kinds of consideration are set out in more detail in recent public policy research. Weil et al examined US experiences.⁸ He notes that whereas standards-based regulatory systems send unambiguous signals to regulated parties concerning whether, when and how to change their practices, transparency systems do not. Instead, they rely on users responding to new information in a way that means that their actions create market or political incentives for the disclosers.
- 3.15 However, for these responses to emerge in practice, it must be the case that the information is ‘embedded’ into the decision making processes of the users or disclosers, and preferably of both.
- 3.16 Experience suggests that to be embedded in users’ (ie consumers’) decision making, the data has to be:
- relevant to users’ decisions; moreover, users need to believe these are things they need to know and they have genuine choice in the decisions they then make;
 - compatible with user decision-making processes, in terms of useful format, level/detail of data, findable location, and timely availability at the time and place when people actually make decisions;
 - comprehensible to users, compatible with their ability and with the way in which they actually make decisions; and
 - not too costly to collect – users may be more willing to invest time and effort in integrating new information into their choices when they perceive significant gain from it.
- 3.17 In summary, Weil et al suggest regulators must ask themselves:
- Is it the case that information users systematically make sub-optimal choices (from a social perspective) because they lack certain relevant information?

⁷ Warning! Regulated information: a guide for policy-makers.

⁸ The Effectiveness of Regulatory Disclosure Policies, *Journal of Policy Analysis and Management* Vol 25 No 1 155-181. 2006.

- If they had this information would users have the will and capacity to change their behaviour accordingly?
 - Would their new choices cause information disclosers to alter their behaviour in ways that make it more compatible with the regulator’s policy intentions?
- 3.18 In Section 4 we talk specifically about consumers of financial products and services, and how this affects our view of what information is useful to, and will be used by, them.

Regulatory transparency and reputational sanctions: another view

- 3.19 In all of this, it is the potential for disproportionate use of reputational sanctions that industry bodies and firms are particularly concerned about. Firms argue, in particular, that when public bodies name individual firms the impact on the firm’s reputation – once the media and other commentators have added their commentary – can have a significantly disproportionate effect. The concern, from this point of view, is not that transparency is ineffective, but that it can be too effective, and therefore unfair.
- 3.20 The Macrory review of enforcement certainly argued for the importance of reputational sanctions to motivate firms to change their behaviour, and recommended mechanisms such as publicity orders as an effective means of deterring regulatory non-compliance.⁹ But he specifically distanced himself from a regulatory strategy for ‘naming and shaming’. Instead, conscious of the civil rights implications, he stressed that his own recommended publicity orders were to be imposed by the courts as an independent third party, and not by regulators themselves.
- 3.21 Meanwhile, David Arculus, in the Better Regulation Task Force report on ‘Avoiding Regulatory Creep’ has also expressed doubts about the aggregate benefits of ‘naming and shaming’ as a matter of course.¹⁰ While agreeing it may be an appropriate enforcement strategy for those who fail to comply with regulations, he stresses it needs care. Some regulators, he comments, issue press releases naming and shaming firms but failing to tell the full story, for example omitting mitigating circumstances. And absent any right of prior appeal, damage can be done to the firm even if the ‘charge’ later turns out to be invalid. Nor, he says, is such an approach – particularly in respect of minor breaches or even just shortcomings against best practice guidelines – likely to help form constructive relationships with the regulated. So it is, in fact, unlikely to lead to better protection for those whom the regulations are designed to help.
- 3.22 The concerns that David Arculus raises suggest some important themes to which we will return, namely the extent to which fairness to firms, and preserving cooperation between regulator and regulated, are factors to be taken into account in our decision-making processes.
- 3.23 It is also useful to consider the experience of the Food Standards Agency. Established in the wake of public concerns over the handling of the BSE crisis with a statutory function to protect the interests of consumers in relation to food and drink, it enjoys an essentially permissive legislative basis, which leaves disclosure to the Agency’s

9 Macrory Review (November 2006) – ‘Regulatory Justice: Making sanctions effective’

10 <http://archive.cabinetoffice.gov.uk/brc/upload/assets/www.brc.gov.uk/hiddenmenace.pdf>

discretion (subject to other general legislation). As a result, it is the UK regulator that has perhaps gone furthest in the direction of transparency.

- 3.24 This approach has not been without its difficulties. Its own research, and the conclusions of an independent reviewer, suggest particular problems associated with ‘naming and shaming’:
- Naming and shaming featured in many of its staff survey responses as being a reason for stakeholders’ reluctance to share information or work cooperatively with it, leading to difficulties in the Agency’s ability to collect the information required to protect the consumer (and the potentially disproportionate impact on the economic viability of small businesses which also had responsibilities towards consumers).
 - More generally, survey responses indicated that the commitment to publishing all evidence and data was leading even non-firm stakeholders, such as scientists and other agencies, to be reluctant to engage with the Agency or share information with it. This extended the time required to do things because of protracted negotiations with industry and scientists around issues relating to the release of information, and prevented some research products and surveys from taking place at all. The report concluded that overall, this has reduced the Agency’s access to information it needs to carry out its duties.¹¹
- 3.25 The Food Standards Agency has set up a Task Force to consider what information it should publish in future. This demonstrates that even very transparent organisations have to keep their policies under review. The Task Force’s findings will report to the Agency’s Board at their June open meeting.

In conclusion

- 3.26 Taken together, the various strands of thinking highlighted in this section, and in our literature review at Annex 1, have presented a profound challenge to regulators to consider their views and practices concerning the balance between disclosure and confidentiality. It is obliging us all to think, freshly and self-consciously, about the true extent of our constraints and discretion, when and how we balance the competing calls of transparency and non-disclosure, and whether that line could be differently and more usefully drawn.
- 3.27 So this Discussion Paper reflects our effort to take forward such challenge in a rounded and thoughtful way. It aims to rise to the challenge of the calls for greater transparency where we think we can usefully do more; and to explain, openly and in detail, those areas where we believe we are constrained from disclosing more, or where we think greater disclosure would be counter-productive or unfair.

11 Review of openness in the Food Standards Agency – An independent review carried out by Dr J.A Bailey Feb 2007

4 Transparency and the FSA

- 4.1 Having looked in Section 3 at the external context for regulatory transparency, in Section 4 we look at how the specific features of our environment affect our response to the arguments both for and against greater transparency. There are two particular aspects of this. The first is the set of obligations imposed on us through FSMA and other legislation. The second is the particular nature of retail consumers of financial services and their appetite for, and ability to use, additional information.

Legal requirements

- 4.2 There are two areas of FSMA which are particularly relevant when looking at what we must, can and cannot disclose: the constraints imposed on us in relation to publishing confidential information, and those regarding public censure. Running alongside these are the obligations on us to disclose information arising out of the Freedom of Information Act. As we will see, we cannot understand our FoIA obligations without first having an appreciation of our FSMA ones.

Confidential Information

- 4.3 FSMA restricts our ability to disclose publicly ‘confidential information’ (section 348); in summary, that is information which:
- is not already lawfully publicly available
 - relates to the business or affairs of any person, and
 - is received by the FSA for the purposes of its functions under FSMA.
- 4.4 So in the absence of consent to its public disclosure from the person who provided the information (and, if different, the person to whom the information relates), we can only disclose such information if there is a ‘gateway’ permitting this disclosure.¹² A gateway is a formal exception to our duty of confidentiality, allowing the disclosure of confidential information to third parties in certain circumstances.

12 These gateways are set out in the Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001 (SI 2001/2188) which were made under s349 of FSMA.

Among these gateways is the ‘self-help’ gateway whereby we can disclose confidential information to third parties to enable or assist us to perform our own functions.¹³

- 4.5 FSMA does not define ‘functions’, but the generally accepted public law definition is something that a public body either has to do or may do. So we generally take it to mean those duties, powers or rights assigned to us under, or made pursuant to, FSMA or subordinate legislation. These functions include giving information or advice in order to meet our objectives or if it appears to be otherwise desirable (s157).
- 4.6 However, the mere fact that a disclosure is relevant to or in line with our functions will not, of itself, be sufficient to satisfy the requirement that disclosure of such information by us is made for the purpose of *enabling or assisting* the FSA to discharge its public functions. That is, the disclosure must be able to be reasonably presumed to make a material contribution to the discharge of that function.
- 4.7 So for example, we use the self-help gateway to enable us to publish the record we are required to keep, and may publish, of firms (the FSA register) including details of each firm’s permitted regulated activities and details (we are required to publish) of any rule modifications or waivers granted to particular firms. We can also publish information in pursuance of our function to provide guidance (including information or advice) in order to meet the regulatory objectives or if it appears to be otherwise desirable.
- 4.8 The constraints imposed on us in relation to publishing confidential information also prevent a breach of Article 8 of the European Convention on Human Rights (incorporated into English law by the Human Rights Act 1998). Article 8 establishes a person’s right to respect for private and family life and requires that that right is not interfered with by public authorities such as the FSA except in line with the law and as necessary in a democratic society in the interests of, among other things, the economic well-being of the country and the protection of the rights and freedoms of others. Hence (in part) the confidentiality regime under FSMA.
- 4.9 Note that the self help gateway is explicitly stated to be ‘subject to [European] Directive restrictions’. Consequently, our ability to disclose ‘directive information’ (that is information obtained by us as part of our function as the competent authority under a directive) will be determined by the restrictions on disclosure set out in the relevant directive.¹⁴

13 See Regulation 3.

14 Most recently, Article 54(1) of MiFID imposes a strict obligation of professional secrecy on the further transmission of confidential information which the FSA has received in carrying out its obligations under MiFID. However, Article 54 does go on to provide for exceptions to this requirement, one of which (Article 54(5)) states that: ‘This Article shall not prevent the competent authorities from exchanging or transmitting in accordance with national law, confidential information that has not been received from a competent authority of another Member State’. Essentially the effect of this provision is to dis-apply the prohibition on disclosing confidential information set out in Article 54(1) where the source of the information is not a competent authority of another Member State (MS). This means that for confidential information received by the FSA direct from (MiFID investment) firms, there are no Directive restrictions on us disclosing this information further.

- 4.10 So UK and European legislation has built in careful safeguards against the casual or unwarranted public disclosure of confidential information provided by firms and individuals.
- 4.11 One option open to us is to make Rules requiring firms to publish information themselves. This would enable us to publish the information published by firms in response to such Rules. But such Rules must appear to us to be necessary or expedient for the purpose of protecting the interests of consumers (FSMA s138) and would be subject to the usual disciplines of cost benefit analysis and consultation (FSMA s155).

Public censure

- 4.12 Sections 207 and 208 of FSMA require us to follow due process before we can publish a statement which amounts to a ‘public censure’ of a firm ie where we consider that firm to have contravened a requirement imposed on it by or under FSMA (FSMA s205). Typically, such requirements will be contained in the principles for businesses and Rules set out in our Handbook.
- 4.13 Such due process involves us issuing a notice warning the firm of the action we propose to take and giving it time to make representations. If, despite any representations made to us, we decide to proceed with the public censure, we must then issue a decision notice advising the firm of our decision to go ahead with the action proposed and advising it of its right to refer the matter to the Financial Services and Markets Tribunal and, if it does not do so or is unsuccessful, a final notice.¹⁵ Section 391(1) of FSMA contains a clear prohibition on the publication of the contents of warning notices and decisions notices.
- 4.14 In short, significant procedural safeguards were specifically built into FSMA in order to prevent the casual, rash or unchallenged use by the regulator of public statements that could damage a financial services firm’s reputation and commercial standing. This in turn reflected the lengthy discussion and debate in Parliament during the drafting and passage of FSMA on the balance between the regulator’s enforcement and other powers and the rights of the regulated.¹⁶

Practical implications of these legal constraints

- 4.15 It follows that calls by some for us to ‘name and shame’ firms as a matter of course is not the approach envisioned by Parliament and is not one we can readily meet under FSMA. If we were to accede to these calls we would have to commit to a far greater number of enforcement cases in order to satisfy the due process required by FSMA.
- 4.16 Greater commitment to a number of enforcement cases would require a significant re-balancing of our current position where enforcement is one of an armoury of

15 Our decision-making process for regulatory enforcement cases generally gives an opportunity for both written and oral representations to be made. We have stressed the importance of the separation between those who investigate a case and those who decide, the transparency for those subject to enforcement action about the case they have to answer and the evidence on which it is based, and the importance of having sufficient checks and controls during the investigation phase to help deliver balance and fairness.

16 The due process requirements are also designed to prevent breach of Article 6 (right to a fair trial) and Article 8 (right to respect for private and family life) of the European Convention on Human Rights.

regulatory tools which include supervision and risk mitigation. We do not believe this would be an efficient or effective approach. For in a world where every element of supervisory discussion or fact finding became from the outset a potential element in a formal enforcement action, there would inevitably be more caution in firms' disclosures to us, and more legal representation on their side and ours.

- 4.17 Moreover, as well as dissuading firms from being so open with us, such an approach may reduce the effectiveness of our supervisory system. Supervisory actions may be founded on a deliberately risk-based and proportionate approach (unless there is already evidence to suggest more is required) which may involve limited file sampling, short inspections or moderate numbers of mystery shops. While this kind of activity gives us confidence to challenge firms privately and require improvement from them, it doesn't necessarily in every case give us sufficient grounds to expose the firm to public censure.
- 4.18 In other words, a commitment to a significant rebalancing of our regulatory tools towards enforcement would soon make our whole supervisory approach hopelessly unwieldy. It would radically reduce the number and range of firms over whom we could sustain such scrutiny.
- 4.19 Some commentators dismiss this concern as 'cosiness' with the industry and argue that we should not have to rely on voluntary provision of information to do our job effectively. But we would then become reliant on the formal information-seeking powers provided to us under FSMA, rather than on the more informal requests we mainly use now or indeed the many spontaneous submissions and notifications we receive from firms. Again, such formalising could become legalistic and increase the time and effort involved in all our monitoring and discovery activity, thus radically reducing the number of firms it would be possible to scrutinise.
- 4.20 These kinds of considerations are not excuses or evasions but, as we saw in Section 3, have been fully recognised within the context of the Better Regulation initiative.

Freedom of Information

- 4.21 FoIA imposes a wide general duty on public authorities (including the FSA) to disclose information on request, although it also provides a wide range of exemptions to that duty. FoIA is fully retrospective: it applies to information whenever it was created and not only to information created after FoIA came into force.
- 4.22 Where a person makes a request for information to a public authority, the authority has a duty to:
- inform the applicant, in writing, whether it holds information of the description specified in the request
 - communicate the information (if it does hold information of the requested description) to the applicant
- 4.23 Thus the duties placed upon public authorities arise when 'any person' makes a request for information to that body. And unless the information in question is

covered by an exemption, that information must be disclosed. There are two types of exemption under FoIA – ‘absolute’ or ‘qualified’.

- 4.24 In addition to this a public authority is not obliged to comply with a request for information if the authority estimates that the cost of compliance would exceed the ‘appropriate limit’ (FoIA s12) or where the request is vexatious or repeated (FoIA s14).
- 4.25 ‘Absolute’ exemptions relieve the public authority from the duty to inform the applicant whether it has the information requested and the duty to disclose that information. There are a number of absolute exemptions, but perhaps the most important in the context of this paper is the provision that excludes from the right of public access any information that is subject to a statutory restriction on disclosure.¹⁷
- 4.26 Importantly, this is where our obligations under FoIA and FSMA cross refer, for both FSMA s348 concerning confidential information and FSMA s205 concerning public censure (as described above) are statutory restrictions. In other words, where the information is covered by either the confidential information or public censure restrictions, the FSA is prohibited from disclosing the information by both FSMA and FoIA.
- 4.27 ‘Qualified’ exemptions are, as their name implies, exemptions which may or may not restrict the disclosure of information, depending on relevant circumstances. Examples of circumstances where qualified exemptions may apply include:
- information held for the purposes of certain investigations or criminal proceedings;
 - information which, if disclosed, would be likely to prejudice relations between the UK and any international organisation;
 - where legal professional privilege applies;
 - where disclosure would, or would be likely to, prejudice the commercial interests of any person;
 - where disclosure could prejudice the carrying out of regulatory functions under FSMA; and
 - where disclosure would, or is likely to, prejudice the economy.

The last three of these are likely to be most relevant to most regulatory information held by us.

- 4.28 Where requested information falls within the scope of a ‘qualified exemption’, a public authority must inform the applicant whether it has the information requested and disclose that information unless, in all the circumstances of the case, *the public interest in non-disclosure outweighs the public interest in disclosure*. We consider this for each request on a case-by-case basis and consider the factors in favour of disclosure balanced against those against.

17 FOIA s 44. Another absolute exemption applies where the information requested is personal data of which the applicant is the data subject (in which case application should be made under the DPA) or disclosure would otherwise involve contravention of the Data Protection Act (FoIA s 40). Publicly available information (eg via a publication scheme) also benefits from an absolute exemption (FoIA s 21).

- 4.29 Factors in favour of disclosure that we take into account in the public interest test include:
- the presumption that runs throughout FoIA that openness is, in itself, to be regarded as something which is in the public interest;
 - whether such disclosure is in the interests of consumers, in particular whether disclosure will assist consumers to make informed decisions (the age of the requested information may be relevant here); and
 - promoting the accountability and transparency of the regulator, thereby engendering confidence that the regulator is doing a good job.
- 4.30 Factors against disclosure that we take into account in the public interest test include:
- in relation to harm that may be caused to a firm's commercial interests, whether the disclosure could cause a loss of confidence in the market for that firm and result in it being unable to get new business;
 - in relation to the carrying out of regulatory functions, whether the disclosure might deter firms from providing information to us informally rather than in response to an invocation of our formal powers to acquire information thereby adversely affecting our supervisory approach and ability to respond rapidly to market failure or consumer detriment; and
 - in relation to the economy, whether disclosure could pose risks to financial stability.
- 4.31 The balance of public interest test in FoIA is, as noted above, phrased in such a way as to lean towards disclosure where the arguments are finely balanced (ie if it is not clear that the public interest favours protecting the information, it should be disclosed).
- 4.32 Similar tests of balance have been enacted and applied in similar jurisdictions in Ireland and the Commonwealth, and Meredith Cook reviews a number of decisions and explores the broad themes they revealed.¹⁸
- 4.33 Cook concludes that the public interest is not the same as that which may be of interest to the public. And importantly, the balance of the public interest in disclosure cannot always be decided solely on the basis of the effect of a specific disclosure; there may, for example, be a need to consider whether specific disclosure would in the longer term harm the particular interests on which the exemption is based. However, she notes, embarrassment to a government or other public body, or loss of confidence in them, is not a factor weighing against disclosure. And nor is the technical nature of the information or the fact an applicant or the public may misinterpret or misunderstand it.
- 4.34 There is, in addition, one factor that is particularly relevant to the financial services sector in general, and regulators and central banks in particular. This is where disclosure of information may be effective in achieving one objective, but is

18 Balancing the Public Interest: Applying the public interest test to exemptions in the UK Freedom of Information Act 2000 (August 2003)

potentially in conflict with another. One example of this would be where too much information about a firm's financial position could destabilise markets in mid-crisis.

- 4.35 In light of these various considerations and experiences, while we are committed in this Discussion Paper to reviewing whether we can disclose more regulatory information, we are not proposing options which necessitate a radical remodelling of our current approach and resources, or which would create risks to our aim of financial stability.

Financial services consumers and transparency

- 4.36 For our purposes, the considerations from research and good regulatory practice have to be applied and interpreted in the particular context of the financial services market and its consumers. As is well known, this is a market where there are often particularly significant asymmetries in what suppliers and consumers know about products, and significant gaps between many consumers' need for these important products, and what they actually understand about them (see for example paras 3-11 of the review of literature at Annex 1).
- 4.37 Accordingly, one of our four statutory objectives under FSMA is to promote a better public awareness of the financial system, and we believe that this involves improved financial capability, around:
- managing money;
 - keeping track of finances;
 - planning ahead;
 - choosing products; and
 - staying informed of financial matters.¹⁹
- 4.38 Our vision for financial capability is for better informed, educated and more confident citizens, able to take greater responsibility for their financial affairs and play a more active role in the market for financial services. We publish a range of consumer information in the form of booklets, guides and factsheets (ranging from financial advice for new parents through to managing in retirement), and also product information and financial tools (such as budget calculators and products tables on our consumer website: www.moneymadeclear.fsa.gov.uk). This information is produced specifically for consumers.
- 4.39 So in considering whether and how to disclose more, one important test will be whether it helps consumers become more financially capable.
- 4.40 Consumers are most likely to benefit from further disclosure which helps them in choosing products and staying informed of financial matters. Consumers may also gain confidence through greater regulatory disclosure by acquiring a better understanding of our role in consumer protection.

19 Financial Services Authority – Financial Capability in the UK: Establishing a Baseline (Mar 2006)

20 National Consumer Council & Better Regulation Executive – Too Much Information Can Harm (Nov 2007)

21 www.fool.co.uk/news/your-money/2008/01/18/are-holidays-more-important-than-your-finances.aspx

- 4.41 Set against these benefits is the potential harm of too much information or information taken out of context.²⁰ The financial services industry is vulnerable to these risks because of the perceived complexity of many financial products, and low levels of financial capability. Partly because of this, customers may be under-engaged in financial decision making. In our Financial Capability Baseline Survey, only 21% of customers said they conducted an active search for products they purchased. A recent survey for a financial website²¹ showed that customers spent almost twice as long researching the purchase of a holiday than they did for their mortgage.
- 4.42 Some information may even inhibit financial capability. This problem may arise where the information is a low priority for consumers, where the white noise of less relevant information may crowd out the more significant information. Poor data quality, information which is difficult to compare across the market, or highly relevant information that is hard to understand, can all inhibit financially sound decision making.
- 4.43 In short, blanket disclosure of all the information that we hold may not be desirable as a tool for improving financial capability. But disclosure can improve financial capability in some cases and, in these cases, it may also be a driver for improved compliance with regulatory standards by firms. This is particularly true if the information we provide coincides with those factors which are key to consumers' purchasing decisions and therefore influence consumer demand. These factors could be summarised as price, value or return on investment and customer service. In some cases, better supply of relevant information may also increase the demand for it by consumers.
- 4.44 While some disclosures may be targeted directly at consumers (for example the disclosure of banned firms), other regulatory disclosures are likely to be most effective when intermediated in some way by the market. Key intermediaries – such as consumer bodies, independent financial advisers (IFAs), brokers, trade bodies, trade unions, journalists and financial analysts – might play a vital role in delivering the benefit of regulatory information to consumers. This is because consumers have diverse needs and, even where we publish information ourselves, others will have a role in interpreting and prioritising it for particular segments of consumers. Using intermediaries effectively can limit the risk of providing too much information.
- 4.45 So we may decide that some of our regulatory information needs to be interpreted before it can be released, to avoid it being given undue (or too little) weight. How material is presented should therefore be decided on a case-by-case basis. However, we think it is appropriate for us to assume minimal interpretation to achieve our regulatory objectives. This will allow intermediaries the maximum leeway to present data in a way that most effectively meets the needs of their target audience.
- 4.46 In summary, proponents of greater disclosure argue that regulatory information has a key role in improving financial capability. But while we believe the case can be made for some categories of information, the effectiveness of this information, and the mechanisms for reaching the audience, remain to be explored.

5 Transparency as a regulatory tool

Both ends of the spectrum

- 5.1 As noted, views on transparency are often polarised. At their (commonly expressed) extremes:
- we should disclose all information unless there is a compelling reason not to; or
 - we should only disclose information if there is a statutory requirement or other compelling reason to do so.
- 5.2 Proponents of the ‘disclose all’ approach have told us they base their views on some or all of the following opinions and assumptions:
- transparency is a good thing in itself;
 - consumers have a right to know if firms do not treat them fairly;
 - consumers are better able to sift information appropriately and act rationally than we give them credit for;
 - the FSA’s starting point should be FoIA – we could go beyond the disclosure requirements set by FoIA but should not set a lower standard;
 - firm-specific information is more valuable to consumers than other types;
 - the adverse effect on firms of firm-specific information is over-played – over time it would become the norm in the same way as school ratings have; and
 - ‘naming and shaming’ is a key lever in influencing firms’ behaviour.
- 5.3 Whereas proponents of the ‘only disclose if’ approach cite the following:
- firm-specific information will result in press commentary which has a disproportionately adverse impact on larger firms;
 - the media would take advantage of any new information and this will result in half truths;
 - there is a danger of ‘unintended consequences’ where information is published for the first time;

- transparency is in conflict with more principles-based regulation, because it will result in a proliferation of detailed material that firms have to attend to; and
- ‘naming and shaming’ could be viewed as ‘back-door enforcement’ or ‘regulatory creep’.

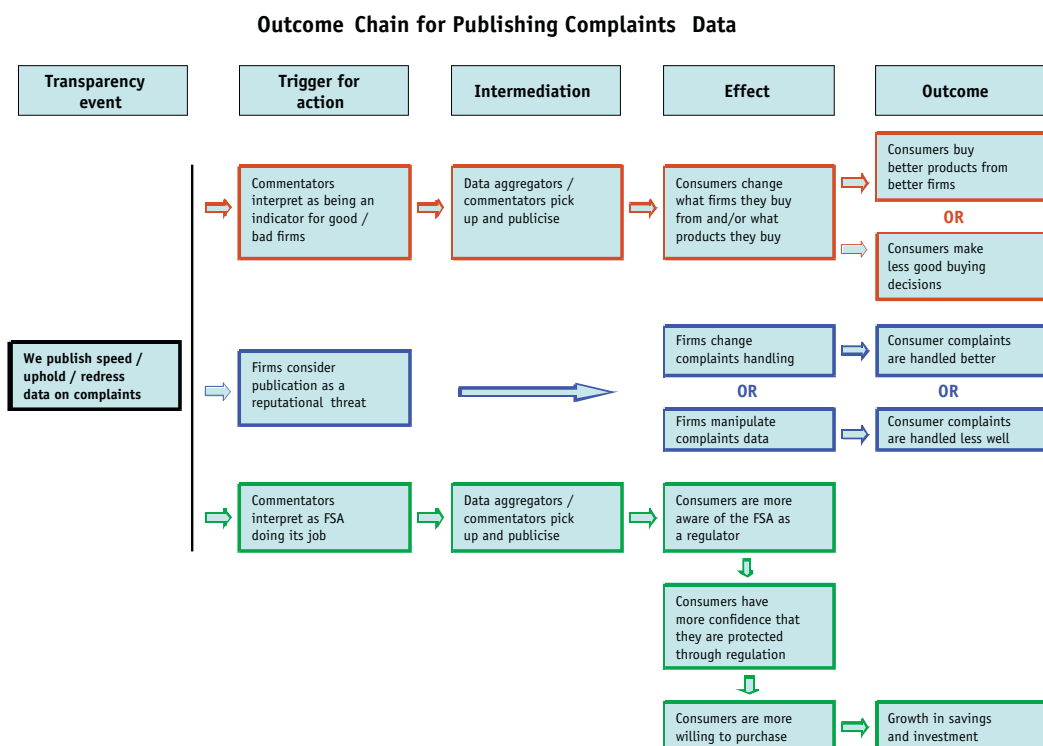
5.4 This is more than a philosophical argument. There are significant implications for us, for consumers and for firms in deciding where we should be on the spectrum.

5.5 In Figure 1 we take a practical example – in this case the much-discussed publication of firm-specific complaints information – to illustrate how the different approaches set out above would affect our approach to decision making.

5.6 The ‘disclose all’ approach would require us to assess whether there was a compelling reason why not to publish. Figure 1 suggests there might be two possible negative outcomes: that consumers make worse buying decisions and/or that firms handle complaints less well. The assumption underlying the ‘disclose all’ approach – that consumers can sift information appropriately – would suggest that the first of these negative outcomes has low probability. So the main issue would be whether the possibility that firms manipulate complaints is a sufficiently compelling reason to outweigh the potential benefits.

5.7 The ‘only disclose if’ approach would require us to assess whether there is a statutory requirement to disclose this information (there isn’t) or a compelling reason to do so. Under this approach, that ‘compelling reason’ is a high hurdle (as it is in the ‘disclose all’ approach). It requires strong evidence that the positive outcomes will be achieved, and at the same time gives due weight to the possibility of negative outcomes. In practice, it might be hard to demonstrate that the positive effects are sufficiently probable (given the difficulty of predicting changes in behaviour) to meet this test.

Figure1



- 5.8 This leaves us in the position where we agree with some but not all of the arguments at both ends of the spectrum, and need to find both some common ground and to create the necessary understanding of our judgements.
- 5.9 Our approach, set out in the following sections, has been to create – for discussion – a draft Code of Practice on Regulatory Transparency that provides:
- a Statement of Intent about our directional movement on this issue;
 - some Principles that we will use in our decision-making; and
 - the Applications, or types of communication, to which regulatory transparency will apply.

Code of Practice on Regulatory Transparency

- 5.10 The Code starts with a Statement of Intent, which reaffirms our long-standing commitment to be an open and transparent regulator. The Statement of Intent also refers to transparency as a regulatory tool: we believe that transparency should be viewed and assessed, alongside our other regulatory tools, on the extent to which it helps us to achieve our objectives either in isolation or, more often, alongside other tools.
- 5.11 This approach demands a very clear and specific understanding of our regulatory objectives, as later examples will demonstrate. And it requires us to start our decision-making process by looking at what the problem is, rather than looking at what information we have in order to see whether there is a problem it can fix.
- 5.12 Why is this so important? For three reasons:
- We have huge quantities of information which we could potentially disclose, some of it at negligible cost to publish, but which would serve no purpose at all. We do not see advantage in publishing such material, and indeed see the potential for disadvantage if key communications are drowned out amid the volume of information of little interest. For example, the more information there is on our website the more difficult it becomes to structure the results of search engine requests to give meaningful and targeted information.
 - It requires us to look at transparency alongside our other regulatory tools and make decisions based on the right package of regulatory tools.
 - Approaching the decision by looking at the problem encourages us to define that purpose in much more specific terms. For example, taking this approach with the example of complaints at Figure 1, we can define our purpose very simply as:
 - a) consumers' complaints are dealt with promptly;
 - b) consumers' complaints are dealt with fairly; and
 - c) firms take appropriate action to rectify the causes of complaints.

These outcomes are more specific than the ones in Figure 1, and it is much easier to see what data could contribute to which outcomes, through which audience and by what mechanisms. Our conclusions on this particular issue are set out in paragraphs 6.9 to 6.22.

- 5.13 The Principles take as their starting point the assumption that we have targeted a particular purpose, and set out three key 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; and
 - disclosure should meet the FSA's standards of economy, efficiency and effectiveness.
- 5.14 Each of the principles is absolute: we will not publish information that would breach any one of the principles.
- 5.15 The third element of the Code sets out at a high level the practical Applications through which our commitment to be open and transparent is experienced. Some of these applications are statutory requirements, such as our duty to consult on changes to our Handbook of Rules. We have set out elsewhere how we will ensure that this consultation is meaningful, such as making sure that audiences have appropriate time to consider proposals by setting a standard three-month consultation period. Some of the applications are voluntary, and in particular those areas where we publish information on our own performance which extends well beyond the statutory requirements.
- 5.16 Taken together, the three elements of the Code of Practice on Regulatory Transparency will, we hope, provide the basis for consistent decision making across our wide-ranging activities. The proposed Code is set out in the panel below.

FSA Code of Practice on Regulatory Transparency

Statement of Intent

The FSA is committed to being an open and transparent regulator. We have a presumption in favour of using transparency as a regulatory tool to help us achieve our objectives where each of the following principles are met:

- 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; and
- the disclosure meets our standards of economy, efficiency and effectiveness.

Principles

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

*We will not disclose information which:
would amount to public censure, without prior due process*

We are permitted under FSMA to publish a statement where we consider a firm is in breach of a requirement under that act, but in doing so we must first follow due process. This includes issuing the firm with a warning notice and decision notice and engaging with any representations, including at the Financial Services and Markets Tribunal.

*And/or
is confidential information, unless there is a relevant gateway or other exception under FSMA;*

Information that we receive in relation to our functions under FSMA may only be published if any of the following conditions is met:

- we have the consent of the person who provided the information and (if different) about whom the information relates; or
- the information is already publicly available; or
- the information is not attributable to a particular firm eg it is anonymised or aggregated; or
- there is a 'gateway' under FSMA. In the context of publishing information to a wide audience, the gateway most likely to give us discretion to publish information is if disclosure would enable or assist us carry out our public functions under FSMA (not applicable to information where publication is prohibited under a Directive).

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

By serving of the public interest we mean:

facilitating the delivery of our statutory objectives and strategic aims, including:

- a) consumers are able to make informed judgements about firms and products, so reducing inefficient or unsuitable purchases;
- b) competition between firms is stimulated; and
- c) firms improve their understanding of FSA regulatory requirements and so reduce costs of compliance and/or improve quality of compliance.

and/or

facilitating the scrutiny and accountability of our performance, including:

- a) publication promotes the accountability of, and/or confidence in, the regulator leading to greater public confidence in the financial system; and
- b) there is greater scrutiny of FSA decisions and actions, leading to improved timeliness, quality and consistency.

By harming of the public interest we mean:

hindering the delivery of our statutory objectives and strategic aims, including:

- a) consumers may misunderstand information, and so make less efficient or less suitable decisions;
- b) enforcement actions may be prejudiced including, for example, a risk of evidence being destroyed;
- c) negotiating positions may be prejudiced;
- d) adverse effects on our ability to deal promptly with market failure or consumer detriment;
- e) risk to the FSA's supervisory approach;
- f) risk to market integrity or stability; and
- g) relations between UK and international organisations may be prejudiced.

3 Disclosure should meet the FSA's standards of economy, efficiency and effectiveness.

We are committed to making information available in ways that maximise our ability to achieve our statutory objectives and the principles of good regulation set out in FSMA. We will not make the disclosure unless the means and medium of doing so are likely to be effective, and their costs proportionate.

Where the cost relates to making Rules in support of collecting and publishing data the test is cost benefit analysis; where the cost is to us the test is whether we are using our resources in the most efficient and economic way.

Information should be presented in such a way as to be:

- relevant to the intended audience;
- sufficiently timely to affect the behavioural changes being targeted;
- targeted through media appropriate for reaching the prime audience(s) at the right time;
- presented in a way designed to maximise audience understanding; and minimise the potential for misunderstanding.

The information being disclosed must be sufficiently robust to support the intended outcome. Information should be sufficiently comprehensive, substantiated, timely and accurate so as not to be generally misleading.

Application

Our commitment to transparency, combined with our statutory obligations, is visible through the following practical applications.

The facilitation of our delivery of our statutory objectives and strategic aims

1. Guidance and supporting materials to firms.

We will be clear to firms about what we expect from them and we will help them to understand the outcomes we want to achieve.

2. Guidance and supporting materials to consumers

We will provide consumers – directly, through firms, or working with other organisations – with clear information in order to improve their confidence, knowledge and understanding of personal finance.

3. Development of FSA policy

We will consult publicly on material changes in regulatory requirements, policy or procedure.

4. Effectiveness and accuracy of our communications

We will regularly review this in our communications through all media.

The facilitation of the scrutiny and accountability of our performance

5. FSA performance

We will publish a regular account of how the FSA performs against its strategic aims and against its statutory objectives.

6. FSA activity

We will publish annually a forward view of our main areas of activity and budget and will provide updates on any material changes.

7. Requests for information

We will use requests for information under the Freedom of Information Act as an opportunity to enhance our existing accountability by disclosing more information.

Q3: Do you agree a Code of Practice on Regulatory Transparency is the right approach to enable the FSA to achieve consistency of decision-making?

Q4: 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 our standards of economy, efficiency and effectiveness.

Q5: Do you have comments on the detailed wording contained in the Code of Practice on Regulatory Transparency?

6 Applying the Code in practice

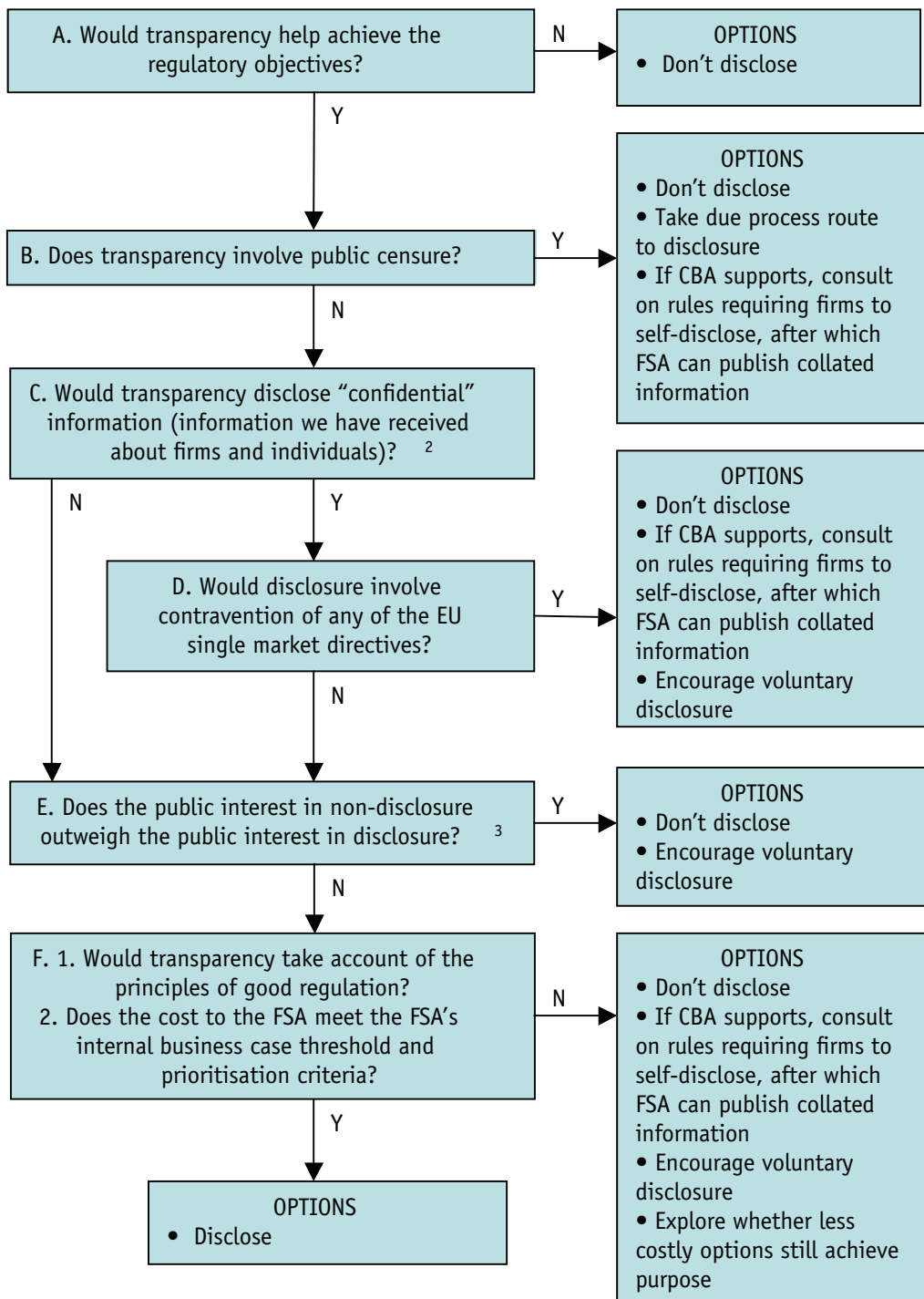
6.1 In this section we look at a number of concrete examples where, taking into account the Code, we have firstly articulated what our regulatory purpose is, and then considered whether or not transparency, as a regulatory tool, can help us achieve that purpose at reasonable cost. The examples cover:

- complaints;
- retail themes;
- financial promotions;
- Treating Customers Fairly (TCF);
- enforcement;
- sector analysis/benchmarking; and
- capital requirements.

6.2 In putting the Code into practice, we have started by identifying what we are trying to achieve, so that we can then answer the question, ‘Would regulatory transparency help achieve our regulatory objectives?’. This is the starting point of a practical flowchart which helps to create the consistency of decision making that we are hoping to achieve, as set out in Figure 2 below.

Figure 2

Decision Tree for Regulatory Transparency ¹



¹This decision tree does not address data protection issues which will need to be considered separately.

² If transparency satisfies the requirements set out in Box A and 1 of Box F, the requirement for applying the 'self help' gateway (see regulation 3 of the Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001) will be satisfied.

³ In order to ensure consistency with its response to FOIA information requests, FSA will apply the FOIA public interest test when considering candidates for regulatory transparency.

Complaints

What outcomes are we trying to achieve?

- 6.3 Our complaints-handling Rules and our associated supervisory work are designed to achieve three key outcomes:
- consumers' complaints are dealt with promptly;
 - consumers' complaints are dealt with fairly; and
 - firms take appropriate action to rectify the causes of complaints.

What tools do we currently use?

- 6.4 Effective complaints handling is a key element of our Treating Customers Fairly (TCF) initiative, and we have issued several case studies and cluster reports illustrating good and bad practice.
- 6.5 To support our work on complaints handling, we require firms to report every six months on the number of complaints they have received, the speed of handling those complaints, the outcomes of the complaints and the redress paid. For the second half of 2007, almost 18,500 firms submitted a complaints return. Of these, around 4,000 firms reported that they had received complaints, and around 14,500 firms submitted nil returns (although some of these would have had their complaints reported in joint returns with other companies in their group).
- 6.6 We use the detailed information provided by firms for supervisory purposes, including providing background information for TCF assessments and thematic projects. In addition, where our analysis of the returns suggests that there may be issues with a firm's complaint handling, we also explore with the firm why this is the case and, if necessary, what needs to be done to rectify the position.

What do other organisations do?

- 6.7 Publication of complaints data is already undertaken by other regulators in the UK and abroad:
- Ofcom publishes figures on the number and type of complaints it receives from consumers about broadcasters and telecommunication providers²² based on complaints it receives about firms and customer tracking surveys. Ofcom also requires the largest fixed-line providers to participate in a co-regulatory group called Topcomm, which publishes firm-specific data covering various service delivery and complaint handling standards.²³
 - Energywatch and the Consumer Council for Water also publish data on the number of complaints received in respect of each firm.²⁴ The energy regulator, Ofgem, has recently announced new complaint handling standards under which

22 www.ofcom.org.uk/research/tce/ce07/research07.pdf

23 www.topcomm.co.uk Covers service provision, reported faults, service restoration, complaints and billing accuracy.

24 See www.energywatch.org.uk/help_and_advice/supplier_performance/index.asp and www.ccwater.org.uk/server.php?show=nav.118

energy companies will have to publish information on the number of complaints they receive. This will replace the energywatch arrangements.²⁵

- In the financial services sector, the Pensions Ombudsman has published details of all its determinations since April 2001.²⁶
- The FSA publishes each year in its Annual Report the number of complaints we receive about the FSA, and the outcome of those complaints.²⁷

6.8 Complaints information is also published overseas:

- In the US, the National Association of Insurance Commissioners publishes information received from state insurance departments on a website which allows consumers to look up the numbers of complaints investigated for a specific firm.²⁸
- The Swedish Financial Supervisory Authority publishes the number of consumer complaints received by each regulated firm.²⁹

What are we minded to do?

- 6.9 We propose publishing information from the returns that firms provide to us. This would include information about overall trends in complaints handling on an industry-wide level and, more importantly, we propose publishing information about the performance of individual firms.
- 6.10 The differences in performance between firms can be significant. Looking at the data for the 28 firms or groups with the largest number of complaints, the results range from 1% to 66% of complaints closed after eight weeks, and between 3% and 76% of customer complaints upheld by the firm. There may of course be justifiable reasons for these variations, but the analysis and discussion cannot begin until the figures are available.
- 6.11 We believe that making this information available will enable us to achieve our regulatory objectives by encouraging firms to improve their own performance, particularly in response to pressure from consumers (either directly or through consumer representatives, media commentators and the intermediary sector).
- 6.12 We recognise that the effectiveness of providing more information will depend on the extent to which the information provided is accessible to users, relevant to their needs and easily and meaningfully comparable between firms. The main issues we foresee in ensuring publication is both effective and fair, and which we address in the following paragraphs, are:
- the form of publication;
 - being clear about what the limitations are of what the information can and cannot tell consumers about firms' performance, and in the following paragraphs we identify five particular issues to consider; and

25 www.ofgem.gov.uk/media/pressrel/documents1/ofgem13.pdf

26 See www.pensions-ombudsman.org.uk/determinations/index.asp

27 www.fsa.gov.uk/pages/Library/corporate/Annual/ar06_07_appendices.shtml

28 See www.naic.org/cis/complaintReportMenu.do

29 See www.fi.se/Templates/ListPage____3164.aspx

- enabling firms, consumers and commentators to make useful comparisons between firms of different sizes, reporting complaints against different definitions, and dealing with different types of business.

6.13 **Form of publication.** We propose publishing this data in a simple table on our website. An example is set out at Table 2. We did consider requiring firms to publish their own data on complaints handling, but although this would make firms more closely accountable for their own data, it might also make it harder for consumers to draw comparisons between different firms. Media outlets and industry analysts may bring this information together, but they may not do it comprehensively.

Table 2: Proposed publication of complaints data

Firm	Part of Group (Name)	No. complaints received by firm	Percentage of complaints dealt with by firm...			% of complaints upheld by firm	£ redress paid by firm
			Within 4 weeks	Between 4 and 8 weeks	Over 8 weeks		
Sort ▲▼	Sort ▲▼	Sort ▲▼	Sort ▲▼	Sort ▲▼	Sort ▲▼	Sort ▲▼	Sort ▲▼
Firm A	Group 1						
Firm B	Group 2						

Notes

- Where groups include a number of firms, it may be helpful to provide information about the group to which each individual firm belongs, to enable comparisons to be made within and between groups. We would need to discuss with firms how complaints information should be consolidated for publication, in order to allow useful comparisons.
- Data would be presented alphabetically by firm name, rather than by any of the specific indicators. If the information was provided in a downloadable spreadsheet, users would be able to sort the data by any of the columns.
- The information on the speed of complaints handling could be simplified to show only the percentage of complaints handled within eight weeks (by adding together the first two columns). But showing the complaints dealt with within four weeks and between four and eight weeks makes the tables more useful to firms and consumers by showing how quickly different firms address complaints within the eight-week period.
- We would need to consider how any contextual information or information provided by the Financial Ombudsman Service should be shown alongside the information in this table.

6.14 We propose publishing details only for those firms handling the largest numbers of complaints. This would greatly reduce the number of firms whose details would be published, without having a significant impact on the total coverage. For example, publishing data for about 125 firms would cover less than 1% of the firms who submit a complaints return but account for 95% of all the complaints reported in each six-month period. Publishing data for around 400 firms would account for 99% of the reported complaints.³⁰

6.15 Limiting the number of firms in this way would reduce costs for us, and for those firms whose data were not being published – and it would make the data more manageable for users. Information in relation to firms that handle only a small number of complaints could also be misleading and could fluctuate widely from one period to the next. We will of course continue to analyse this information as part of our supervisory work, and would include the information as part of the group data, but we do not propose to list all these firms individually.

³⁰ Many firms are, of course, part of larger groups and so the exact number of firms for whom data will be published will only become clear over the next few months.

- 6.16 In due course, subject to experience and reactions from consumers and firms, we may be able to publish data for larger numbers of firms and make it accessible in different ways – for example through a search facility on the website. We would welcome views on the best methods of publication in the longer term, but propose initially to start with a relatively simple form of publication.
- 6.17 **Interpreting a firm’s data.** Complaints data can give us a valuable insight into how firms handle complaints, but we must also recognise the limitations of the data. We have particularly considered five issues in relation to our proposal:
- Not all complaints will be captured in what we propose publishing. The data that firms give us do not include complaints that they have dealt with by the close of the next working day. By definition, these are complaints that they can handle quickly and informally – often in person or over the telephone – and are often far more numerous than the complex complaints that require a formal response.
 - It can be difficult to interpret the reasons for trends in a firm’s total volume of complaints. Firms get complaints for different reasons – because of problems with products or services, or because of how they were described or sold. The number of complaints received may also reflect media attention in a particular product and may relate either to current activity or to sales made many years previously. All these points need to be borne in mind when considering complaint volume data.
 - A single set of data cannot tell the full story. A firm that handles complaints quickly may be able to do so because it gives them a cursory review, and this may (or may not) show in its uphold rate. A firm with a high uphold rate may be giving its customers more benefit of the doubt than other firms. It is important to look at the data in the round – and in many cases only the firm itself will be able to explain the reason for a particular pattern of data.
 - We are also aware that publication of complaints data may affect how some firms report their complaints to us. We intend to monitor the complaints data reported to look out for unexpected changes and will explore the reasons for them with the firms involved.
 - Evidence suggests that different ‘measures’ of complaints handling quality, such as volume, speed of resolution and uphold rates, are not clearly correlated with each other. This suggests that it is not possible to infer from them some underlying ‘quality of service’ factor, although individually they do provide information about different aspects of quality.
- 6.18 These are important factors in considering the costs and benefits of publishing complaints data, but we believe that the risks of publication can be managed and the benefits would be worth it.
- 6.19 **Supporting comparisons between firms.** Just as we have seen that there are difficulties interpreting an individual firm’s data, so there are difficulties in comparing firms. Information on the speed of complaints handling and the proportion of complaints upheld should be readily comparable between firms, but the figures on the number of complaints received and the redress paid are likely to need more background information to put them into context. For example:

- The figures for the number of complaints received by each firm might appear to demonstrate which firms offered a more or less satisfactory service, but they may also reflect sales made several years earlier or a firm's accessibility in receiving complaints.
- More significantly, the number of complaints will often reflect the overall size of the firm – broadly, if a firm has more customers, it will be expected to have more complaints. It should be possible to set this data in context by comparing the numbers of complaints received against the total number of customers or policies in force, but the data required to do this is variable and particularly complex where a firm – such as a high-street bank – offers a wide range of different products and services. Annex 2 sets out our initial thinking about the information that could be used to help set the number of complaints in context, and how this might be done. We wish to discuss with trade associations, consumer groups and others, what information could be used to help contextualise the complaints data that we publish.
- A related issue on making comparisons between firms is the definition of the firms for which the complaints are reported. Many financial services firms are part of larger groups. Sometimes there are several firms using similar brands and sometimes there are different brands within the same group. Firms are allowed to report complaints on a group basis, if it is logical to do so, for example, where the firms have a common central complaints handling team and the same accounting reference date. In terms of publishing complaints data, we think that it would be valuable to indicate where firms have reported on a joint basis, and where firms are part of a larger group. More generally, we believe it would be helpful to gain agreement from the industry and some consensus about how this should be done in order to make the results most useful – so that firms can benchmark themselves against others in comparable sectors, and so that consumers can make comparisons between firms.

6.20 We have looked at the costs and benefits of this proposal. The main benefit of publishing complaints data would be to give consumers (and intermediaries including consumer groups and the media) additional information relating to the underlying quality of firms, helping them to make better product and provider choices. If the information becomes embedded in consumers' decisions, even if only for a minority of consumers, this will incentivise firms to improve their products and services, including their standard of complaints handling. These benefits depend on the information provided being used and correctly interpreted by consumers, which depends on how the information is presented.

6.21 As described in the CBA at paragraph 2.21 above, while some firms lose from the increased competition, as long as the information is accurate, correctly interpreted and acted upon by consumers then there will be net benefits overall.

6.22 In the preferred option, there will be additional staff costs – at least initially – to check the data and prepare tables and reports for publication twice a year. The other option considered, to require firms to publish the information, would involve substantial costs for firms and may constrain the consumer impact of the information, as described above. An indirect cost of the proposals would be if firms

under-report or mis-report complaints in order to reduce reputational risk. We will aim to mitigate risk by monitoring the figures when they are submitted and making further enquiries as necessary.

Information from the Financial Ombudsman Service

- 6.23 It would help us achieve our regulatory objectives if we were also able to publish some of the complaints data gathered by the Financial Ombudsman Service (FOS) on cases where consumers have taken their complaint beyond the firm for independent adjudication. The FOS currently uses the data it holds on the outcome of cases to help improve standards of complaint handling, in particular by providing detailed feedback for those firms that provide the largest number of cases.
- 6.24 The independent review of the FOS's accessibility and transparency led by Lord Hunt has recently reported. Its recommendations included that the FOS 'should work with the FSA, industry and consumer stakeholders to define a common complaints dataset to enable joint publication of performance data on a firm-specific basis in the medium-term'. The FOS Board is minded to accept this recommendation in principle – although there are a number of complex practical issues that would first need to be discussed with stakeholders and resolved.

What are the next steps?

- 6.25 We do not envisage that these proposals will require any changes to our Handbook, and so we do not propose to issue a formal Consultation Paper.
- 6.26 However, we would welcome comments on the proposals for publishing complaints data set out in this section of the Discussion Paper and in Annex 2. We will arrange discussions with industry bodies, consumer groups and others to discuss how we might take these proposals forward in practice. The specific questions on which we would welcome comments are set out below.
- 6.27 Subject to the comments made during these discussions, and in response to this Discussion Paper, we would then intend by the end of this year to publish the first report showing aggregated data on complaints trends across the industry. This will cover the data received from firms in the first half of 2008. This publication will help to raise the profile of complaints handling and supply a context for the detailed data from firms that we will publish subsequently.
- 6.28 We then intend to publish the first firm-specific data in early 2009, covering the returns received from firms in the second half of 2008. We would then provide a complete update every six months, to match the requirement on firms to produce a return twice a year.
- 6.29 We have developed a new complaints return, which firms will be required to use for periods ending on and after 1 August 2009. There will be some variations in the data available in the new return, and it will allow more detailed information to be provided, so there is an argument for delaying publication until data from the new return is available – which would not be until the early part of 2010. Our initial view is that there is no reason to wait until then to start publishing firm-specific data, but we would welcome comments on this.

- Q6: Would publication of complaints data help achieve the FSA's regulatory objectives?
- Q7: Are there any reasons specific to the financial services sector which would make it inappropriate to publish firm-specific data?
- Q8: What comments do you have on the specific data that is proposed for publication?
- Q9: What comments do you have about the provision of contextual data alongside the complaints data?
- Q10: What comments do you have about providing information on a firm or group basis?
- Q11: 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?
- Q12: What comments do you have on the proposed timescale?

Retail themes

What outcomes are we trying to achieve?

- 6.30 Thematic work in the FSA aims to identify, assess and mitigate emergent risks to our objectives that are common to a number of firms across the market.³¹ In the retail arena the desired outcomes are that we promptly identify mis-selling or other unfair or inadequate behaviours by firms towards consumers, correct these (where they are significant) and, on occasion, ensure that the effects of such behaviours are methodically redressed.

What tools do we currently use?

- 6.31 Each year we publish a plan that sets out the major retail thematic issues we are pursuing, setting out what we are seeking to achieve through our work on them and the particular tools we will deploy in the period to do this. In gathering and assessing evidence concerning a risk and potential problem, our approach is focused on outcomes. It will typically involve a combination of file reviews, discussions with firms' managements concerning systems and controls, consumer surveys and research, mystery or shadow shopping.
- 6.32 In addition to providing direct feedback to firms, we disclose our findings from these announced thematic investigations, typically through the publication of a report covering the relevant good and poor practice we have seen. In appropriate circumstances, we will follow up thematic work with enforcement action.³²

³¹ Because of this spread of interest, such work is also referred to as 'horizontal supervision', in contrast to the 'vertical supervision' involved in the relationship management of a single firm and its risks. Participation in both forms of supervision are non-optional for firms.

³² For example, we have taken enforcement action against ten firms for failings concerning mortgage endowment complaints, and a record fine has just been levied concerning mis-sales of Payment Protection Insurance.

What are we minded to do, and why?

- 6.33 Public interest in the findings of our thematic work is growing, including in details about the nature and extent of problems, the pace of improvement, and the consequences for firms who do not meet our standards. In the face of this challenge, we have concluded that there are several aspects of retail thematic work where further disclosure has the potential to drive better outcomes, and/or enhance public confidence. The following paragraphs set out our thoughts in four areas:
- anonymous, benchmarked results;
 - non-fundamental OIVoPs (Own Initiative Variations of Permission);
 - naming and ‘faming’;
 - risk mitigation and redress.
- 6.34 **Anonymous, benchmarked results.** Many firms have asked us to give them more detailed feedback following thematic work, to enable them to get a better sense of where they stand in relation to their peers, and to learn from this and improve.
- 6.35 We have already made some use of this type of disclosure. For example, concerning mortgage endowment complaint handling, the data we collected from firms was shared, including their position against an average of their (anonymous) peers. Also, we provided information on their position in the ‘league table’ we had assembled from the data (again, without naming the other firms around them). These disclosures, supported by supervisory engagement, were a positive factor which influenced firms to improve complaint handling practices.
- 6.36 We will look to build on this experience, using this kind of tool where appropriate, and we will consider enhancing the granularity so as, for example, to give a firm a better sense of the spread of performance.
- 6.37 We will also consider whether we should disclose (entirely anonymously) aspects of this data to the public at large, so they too could gain a better sense of the scale and contours of the thematic issue we were pursuing. And insofar as major thematic work often extends across several cycles of work, successive publication of such data might potentially allow the public to assess whether there is improvement among firms, and thus help our accountability.
- 6.38 **Non-fundamental OIVoPs.** We are conscious that when we conduct thematic work the rigour often required means that improved outcomes may not be visible to the public for some time – progress by firms on addressing thematic issues can sometimes be slower than we would like. During this period, customers may be treated less than fairly, which in turn increases the size of the problem and, if relevant, redress that the firm will have to make.
- 6.39 Therefore, we will consider whether to make more use of non-fundamental OIVoPs (own initiative variations of permission). Under s45 of FSMA, we have power to vary or cancel a Part IV permission on our own initiative, rather than on request of the firm concerned. We can use this power, in particular, to require any action that appears to us to be desirable to protect the interests of consumers or potential customers.

- 6.40 In the context of thematic work, non-fundamental OIVoPs could allow us to require that a firm carry out, or desist from, certain actions, for example requiring a firm to:
- alert its customers to risks they face e.g. because they were not adequately described at an earlier stage;
 - submit regular reports on certain aspects of its business; and/or
 - make changes to its management or risk management structures or procedures.
- 6.41 Our use of OIVoPs for supervisory purposes, as set out above and later in this DP, is predicated on changes being proposed in a Consultation Paper on our Enforcement Guide (EG) and Decision Procedure and Penalties Manual (DEPP) (CP08/10), which has asked for responses in the same timeframe as for this DP. The CP on EG & DEPP makes the case for the increased use of this tool, and the publication of supervisory notices for non-fundamental OIVoPs, on grounds of improved flexibility, greater consumer awareness and effective deterrence. Where our aim in imposing an OIVoP is to inform consumers other than customers of the firm concerned, or to deter the wider industry, then it is the effect of transparency that brings about the desired changes in market behaviour.
- 6.42 Greater use of non-fundamental OIVoPs, as a supplement rather than replacement for enforcement action, provides a means to impose conditions on a firm's activity that will help reduce the risk that consumers are treated unfairly. It may also enable us to secure improvements from firms more quickly and create more momentum in addressing thematic risks.
- 6.43 **Naming and 'faming'.** We have an open mind about whether it might on occasion be helpful to consider the selective use of the naming of firms who showed up well in thematic work.
- 6.44 Since the underlying data provided by firms is confidential, we would need to either secure the firm's consent to the disclosure, or else be satisfied that we could make the disclosure under our self-help gateway. But we acknowledge the potential for such disclosure to reward firms that perform well because of the positive effect on their reputations.
- 6.45 On the other hand, we would need to be careful about the nature and extent of the good results obtained (and our limited evidence for them), in order to avoid an unwarranted 'halo effect' spreading to all aspects of that firm which could mislead consumers. So it is not obvious whether the resulting disclosure would provide clarity or benefit to either firm or consumer.
- 6.46 More broadly, we will consider whether there is more we could do to address some firms' complaint that what would help would be for us to tell them which other firms have good practice, so they can learn from them. We could, perhaps, facilitate this by approaching firms we consider good in the relevant sphere and asking them to approach and share their knowledge with others, so helping to raise industry standards overall. Of course such a solution would rely entirely on the cooperation of firms.

- 6.47 **Risk mitigation and redress.** Our thematic work can be successful in securing remedial actions and redress from firms for consumers who have suffered detriment, but this is not always visible to the public.
- 6.48 This is not an easy matter to address. It would be counter-productive for example to insist on disclosure to such a degree that it led a firm to refuse to redress matters informally (thereby forcing us into more formal and resource intensive actions). On the other hand, while the need for redress implies some shortcoming in the firm's behaviour, its willingness to redress is a potential good news story for the firm, which it might agree to make public.
- 6.49 Where firms have agreed to take mitigating action without admitting liability and on the understanding that the action will remain confidential, we could publish this as anonymised and aggregated information some time after the event. For example, we might say in our Annual Report that 'In the course of the year, as a result of thematic work we undertook, X firms reviewed their business and agreed to pay consumers a total of £Y million compensation.'

What are we not currently minded to do, and why?

- 6.50 The results of thematic work have been a particular focus for those consumer bodies who have called on us to 'name and shame' individual firms (as discussed earlier in this DP). In particular, we have been called upon to disclose the firm-specific results of mystery shopping (and have received a formal FoI request on this).
- 6.51 However, as we have explained, FSMA constrains our ability to name firms for having breached requirements without prior due process. In addition, the results of the mystery shops are themselves confidential information, and their disclosure is constrained by FSMA even where censure may not be an issue.
- 6.52 So we do not intend to 'name and shame' firms in the context of thematic work without due process, and we do not intend to publish firm-specific results of mystery shops, file reviews or other evidence gathering without the consent of the firm.
- 6.53 There is interest from stakeholders in the methods we use in discovery work, such as how we assess files or mystery shops. We consult privately on our methods with suitable experts, to ensure challenge and the quality and fairness of our approach. But we do not propose to publish such details during the thematic work, not least to avoid the direction or pace of our work being obscured in methodological disputes. However, we will continue our practice of, from time to time, disclosing and discussing our current methods to foster confidence in and understanding of them.

Q13: Do you agree with our proposals concerning:

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

Q14: Do you agree with our comments and proposals on:

- Naming and 'faming'; and
- Risk mitigation and redress.

Q15: Are there other measures that you believe could be useful in improving the effectiveness of our thematic work with firms?

Financial promotions

What outcomes are we trying to achieve?

- 6.54 The overall outcome we are aiming for with our work on financial promotions is to reduce the risk that consumers will make poor buying decisions based on information in financial promotions that is unclear, unfair or misleading. To achieve this outcome we target both the overall number of financial promotions that present such a risk, and the size of risk presented by individual promotions.
- 6.55 In analysing why firms issue non-compliant financial promotions, we concluded that a small minority of firms lack either the resource or culture to conform to our requirements. However, most promotions that we take action on are the result of firms having a poor understanding of our requirements. This understanding of the problem has shaped our objectives in a very direct way:
- **Education.** It follows from our analysis that we believe that we can achieve the greatest reduction in risks to consumers by helping firms to understand our expectations. This education objective is also important for consumers; it is important for us to have the tools to communicate clear, timely and explicit warnings when necessary.
 - **Deterrence.** To tackle the smaller minority of firms that lack the resource or culture to be compliant, we need tools that create a penalty for firms that either repeatedly commit minor breaches of the spirit or letter of the financial promotions requirements, or commit a fundamental breach of the requirements
 - **Prevention.** Whether a risk of future non-compliance arises from educational or cultural shortfalls, we need to be able to put procedures in place that reduce risks to consumers.
 - **Confidence.** Finally, we believe that facilitating the scrutiny and accountability of our activities in this area will lead to greater confidence in the financial system on the part of both firms and consumers.

What tools do we currently use?

- 6.56 We have a programme of proactive communication with firms and consumers, as well as advertising agencies. In addition to our direct communications with individual firms, we communicate our concerns to the wider industry through dedicated web pages, presentations at conferences and events, bespoke training, press releases and the publication of the outcomes of our thematic work. We also produce anonymised case studies of good and bad practice to help firms better

understand our expectations. And we publish aggregated statistics as a measure of the effectiveness of our actions over time.

- 6.57 We supervise financial promotions in a proportionate way. If we decide that a promotion is deficient, we ask the firm to explain why it believes the promotion is 'clear, fair and not misleading', and what process it went through in issuing the promotion. If we remain concerned about the promotion, we ask that it be amended or withdrawn. Where the risk of consumer detriment is significant, we may pursue the matter through our enforcement process.
- 6.58 In summer 2007, we launched an informal consultation with consumer and practitioner representatives to get their input into how we could improve transparency in the area of financial promotions. The clear message we received was that the current tools were of limited relevance for firms and that we should be doing more to clarify our expectations and to educate firms on what we expect to see (and what we don't) in compliant financial promotions. Stakeholders also told us that we should take further steps to deter firms from non-compliance with the regime, by using the enforcement process.

What are we minded to do, and why?

- 6.59 **Education.** During the informal consultation, firms advised us that the case studies we publish of good and bad practice do not resemble 'real life' so are of limited use. We agree that we could do more to ensure the relevance of the examples we use. Therefore, in addition to these case studies, we have also launched a new series of 'real life cases', which give firms examples of actual cases we have considered. These 'real life cases' contain the high-level details of the financial promotion and our concerns, and the action the firm took because of our intervention. Our intention is that these cases will give firms a better sense of our expectations, without naming the firm concerned.
- 6.60 **Deterrence.** Since December 2004, we have finalised 12 enforcement cases, which resulted in public censure and fines of £1.5m. However, the enforcement process can be expensive from the point of view of both us and firms, and we tend to use it only in the more serious cases.
- 6.61 We are therefore considering whether to develop a fast-track enforcement procedure for cases where public censure, rather than a fine, is the most likely and appropriate outcome. This procedure would follow due process and would not differ from the current process for public censure. However, it would allow for a more limited, streamlined and faster investigation. We would use this in cases where the evidence of a breach of, say, the financial promotions rules is clear and we could establish this without an extensive investigation. Streamlined enforcement will also clearly communicate our expectations of what firms should be doing to ensure their promotions are compliant, and will explicitly detail the circumstances that led to the action. The streamlined nature of these tools will also help to ensure that we can communicate messages quickly and efficiently to consumers and other firms.

- 6.62 **Prevention.** In order to raise standards we feel that, in addition to the traditional use of the enforcement process for the most serious cases, we need other tools that will prevent possible future risks to consumers.
- 6.63 One such tool that will assist us to meet this objective is non-fundamental OIVoPs (see paras 6.38 to 6.42 above). We are considering using these where we have significant concerns about either a particular financial promotion or the systems and controls that led to the publication of the promotion, which warrants immediate action.
- 6.64 An example of this is where we are concerned that a firm has failed to meet our expectations, either because we have seen instances over time where the firm has failed to produce compliant financial promotions, or where a particular financial promotion raises concerns. In addition, publicising a non-fundamental OIVoP would provide clarity to the firm and wider industry on the standards we require by using real examples of where our concerns lie.
- 6.65 The nature of non-fundamental OIVoPs means that the scope for action under this mechanism is extremely broad. However, actions taken might include:
- Requiring a firm to withdraw a specific financial promotion. Please note, we are not intending to use OIVoPs in all instances where we require a firm to withdraw a promotion.
 - Requiring a firm to use an external person/firm to confirm the compliance of financial promotions for a period.
 - Requiring a firm to provide specific training to the team that approves financial promotions.
- 6.66 The use of this tool, in addition to the deterrence tools described above, will also further our education objective, by ensuring that our position and expectations are clear.
- 6.67 **Confidence.** We have enhanced the metrics that we publish to include details of our monitoring activities, complaints received and case or thematic work. The monitoring and complaints section includes details of the number of promotions we have monitored, the number and source of complaints received, and the number of advertisements we considered in more detail. We also publish details of the number of financial promotions that firms have withdrawn or amended because of our intervention. Both the real-life cases and enhanced metrics are on our website.
- 6.68 Improved transparency may lead to an increase in consumer confidence that we are actively monitoring promotions and addressing non-compliance. However, we also recognise the possibility that consumers may mistakenly interpret action on our part as being reflective of our view about financial services in general, the underlying product or the issuing firm.

What are we not currently minded to do, and why?

- 6.69 During the informal consultation in 2007, we requested views on the use of a public register, which would disclose the details of firms that have amended or withdrawn a financial promotion at our request. The Register would contain, in addition to the

name of the firm, the steps the firm has taken in amending or withdrawing a promotion, and would also include an explanation of the reasons why we were concerned and what prompted the amendment. Finally, we would also provide a copy of the promotion that prompted our intervention. Having taken views from a wide range of stakeholders we were left with a finely balanced test of the public interest.

- 6.70 In favour of publishing the Register is the possibility that it would raise industry standards by clarifying our expectations and that consumers would have better information on which to make their buying decisions. A Register would also make much more visible what the FSA does to reduce risk in the area of financial promotion, and so could contribute to our confidence objective.
- 6.71 Against publication is the possibility that the Register would result in reputational damage to firms that was disproportionate and so unfair. If this were the case, or if firms thought it might be, a significant potential downside would be that firms would be less willing to make changes to their promotions for fear of appearing on the Register. We are, in practice, very dependent on the cooperation of firms to make changes or withdrawals quickly to minimise risks to consumers, and this was a significant factor in our thinking. We were also conscious that a Register that accumulated some 400 entries every year (based on current levels of FSA activity), and where we were constrained in what we could say, would be less useful to consumers as an educational tool than a smaller number that focused on the worst cases.³³ The existence of the Register could also be a disincentive to innovation in financial promotions if firms became more cautious about their interpretation of FSA requirements.
- 6.72 For the reasons outlined above, and given the benefits that are achievable by using the alternative tools, we do not consider that the additional benefits of a public Register are sufficient to justify the significant downsides. We are of the opinion that we should implement these alternative tools in the first instance, and the implementation of the Register should be re-considered if the alternatives fail to achieve their objectives.

What are the next steps?

- 6.73 We have already implemented the educational objective, and will continue to revise and enhance this based on comments received on the Discussion Paper.
- 6.74 For the reasons outlined above, we are currently not minded to implement a public Register. However, we will continue to review the situation in light of comments received from the DP and the progress made in successfully using the alternative tools considered in this section.

Q16: Do you agree 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?

33 As noted elsewhere in this Discussion Paper, sections 207 and 208 of FSMA require us to follow due process before it can publish a statement that amounts to 'public censure' of an authorised person. This suggests we would be circumscribed in what we could say about a promotion, to avoid the implication that the firm was in breach of an FSA requirement.

Q17: 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?

Q18: Do you think that the benefit of creating a financial promotions Register, as described, would outweigh the drawbacks? If so, why?

Treating Customers Fairly (TCF)

What outcomes are we trying to achieve?

- 6.75 In the Treating Customers Fairly (TCF) initiative we are aiming to change firms' behaviour in order consistently to deliver fairer outcomes for consumers.³⁴ What firms need to do varies: we are not presuming that every firm has to make widespread changes to how they treat their customers. However, recognising the scale of cultural change that we are looking for in many firms, and to maintain momentum in firms which are moving ahead, we have set out a timetable for firms to achieve demonstrable progress.
- 6.76 Looking forwards, we have set two deadlines. By December 2008 we expect all firms to be able to demonstrate to themselves and to us that they are consistently treating their customers fairly. To do this, we expect firms to have the right management information in place to test whether they are treating their customers fairly. We have said that we expect this to be in place by the end of March 2008.
- 6.77 When we reported on progress six months ago we welcomed the commitment to TCF that we had seen on the part of senior management and the improvements we had seen in, for example, product design processes and progress on the clarity of information in financial promotions and in mortgage and general insurance disclosure. But we also noted that the findings from some of our thematic work and from some of our firm-specific supervision showed that there was still some way to go before the fair treatment of customers is embedded across the industry. Examples of the areas we had looked at, and where we found shortcomings, included the quality of the advice process, equity release and payment protection insurance.

34 We have categorised these outcomes as follows:

Outcome 1: Consumers can be confident that they are dealing with firms where the fair treatment of customers is central to the corporate culture

Outcome 2: Products and services marketed and sold in the retail market are designed to meet the needs of identified consumer groups and are targeted accordingly

Outcome 3: Consumers are provided with clear information and are kept appropriately informed, before, during and after the point of sale

Outcome 4: Where consumers receive advice the advice is suitable and takes account of their circumstances

Outcome 5: Consumers are provided with products that perform as firms have led them to expect, and the associated service is both of an acceptable standard and as they have been led to expect

Outcome 6: Consumers do not face unreasonable post-sale barriers imposed by firms to change product, switch provider, submit a claim or make a complaint.

- 6.78 It is too early for us to assess the extent to which firms have met the March 2008 deadline. Overall in TCF, we have seen two particular obstacles:
- some firms have expressed confusion about what the FSA wants; and
 - senior management in firms have found it hard to turn commitment for change into coalface improvements.

What tools do we currently use?

- 6.79 On the first of these obstacles, considerable work has been done to illustrate what we are looking for in terms of demonstrable progress from firms.
- 6.80 We publish anonymised case studies and examples of good and poor practice; we use thematic work to illustrate what problems exist; and we have increased the level of personal, direct contact with small firms using interactive roadshows to provide firms with more detail on the assessment process and our expectations regarding TCF. Through all of this we have tried to create an environment for firms where understanding of compliance and good practice standards is widespread and firms are fully engaged in meeting those standards.
- 6.81 Turning to the second obstacle, converting commitment into changed behaviours, the fact that we set clear milestones was in itself a means of incentivising firms to make progress over sensible timescales. We are committed to publishing our assessment of how the industry has performed against our deadlines to promote collective responsibility for raising industry standards.
- 6.82 One difficulty that we observed through our programme of firm visits is that some firms had addressed the TCF challenge by setting up a stand-alone project. Whilst there is nothing intrinsically wrong with this, for some firms the result is that TCF was seen as an add-on, rather than requiring the necessary root and branch cultural change that is necessary to firms' success in this area. We addressed this by publishing a document setting out the cultural challenge that TCF requires. This has been positively received as practical assistance to firms (to self assess their own culture and improve) as well as a basis for us to challenge firms.
- 6.83 For individual firms who have failed to take the TCF initiative seriously, or who have failed in their duty to treat customers fairly, we have used our supervisory powers (such as requiring a s166 skilled persons review) or enforcement powers.³⁵
- 6.84 We are also using enforcement cases to highlight the visible application of our standards and as a deterrent to other firms in similar situations. Since January 2007, we have published over 30 enforcement cases which have involved TCF issues. Our thematic work enables us to highlight areas where we believe the industry needs to take action, for example on unfair practices in sale of Payment Protection Insurance (PPI). This has led to fines of £2.6m so far. Other examples of regulatory failings

35 Skilled persons reports are carried out under s166 of FSMA. This allows us to require a firm to give us a report by a person that we have either nominated or approved.

relevant to TCF and highlighted in recent enforcement cases include: networks not doing enough to ensure that their Appointed Representatives (ARs) are treating customers fairly; misleading ‘saving claims’ in general insurance adverts; unsuitable advice; and inadequate systems and controls, including firms having insufficient management information and failing to act on management information.

What are we minded to do, and why?

- 6.85 In our view the two obstacles outlined in 6.78 above are still the areas that we particularly need to target. As we move through this calendar year and beyond, the emphasis of our response inevitably shifts from educational activity towards providing a harder edged incentive structure for firms to achieve demonstrable results. Indeed, while we will continue providing firms with opportunities for them to clarify what it is we are expecting them to do, we have no plans at present to make any substantial expansion to the material already readily available on our website pages dedicated to TCF.
- 6.86 In terms of creating an incentive structure for firms, we have already noted the existence of deadlines and the use of supervisory and enforcement tools. Looking ahead, we intend increasingly to publish information that informs the public about the progress being made and what action we are taking. Some of this information will be at an aggregated level, and some firm-specific:
- We will publish aggregate data on the proportion of firms that have met our deadlines and the number and type of regulatory actions we have taken. This will include: the number of skilled persons reports we have required firms to undertake; the types of actions we have required firms to do (for example in their Risk Mitigation Plans); and the number of referrals we make to Enforcement.
 - Subject to the consultation on EG & DEPP (CP08/10), we will publicise instances where we require individual firms to take action through the formal use of an OIVoP (see above).
 - We will publicise any use of our Enforcement powers (prohibitions, cancellations, fines or public censure) in the normal way.
- 6.87 We have also considered whether it would provide a useful incentive to firms if we were to require them to self-certify that they had met our deadlines and to publish their own performance against our six outcomes. A public articulation by firms about what their customers can expect from them could spur firms to comply with our requirements. And this articulation would provide consumers themselves with a visible illustration of what they can expect from those firms. On the other hand, we recognise that there may be a risk of giving consumers unwarranted comfort if the firm overstates its compliance with the TCF outcomes.

What we are minded not to do

- 6.88 A further proposal that we actively considered was whether we should publish lists naming those firms that we judge have or have not met the March or December deadlines. We can certainly see that publishing this information would act as a strong incentive for firms to meet the deadlines.
- 6.89 However, firms that fail to meet the deadlines could be in breach of their regulatory requirements.³⁶ This means that disclosing the names of firms that have not met the deadlines could amount to public censure, and without going through the prior due process of enforcement action, we would be in danger of breaching the statutory restrictions set on us by FSMA (s205). We are not proposing to take this proposal further forward.
- Q19: Do you agree with our analysis of the obstacles that are impeding better progress on the TCF initiative?
- Q20: Is the mix of measures outlined in paragraphs 6.79 to 6.87 appropriate for helping to achieve better progress?
- Q21: Are there other measures that you would like us to take?

Enforcement

What outcomes are we trying to achieve?

- 6.90 Our priority in our enforcement strategy is to achieve credible deterrence. We focus on those cases where we think we can make a real difference to consumers and markets, using enforcement strategically as a tool to change behaviour in the industry. An important part of our strategy is appropriate publicity of concluded enforcement action and we are mandated by section 391 of FSMA to publish appropriate information about certain enforcement outcomes.
- 6.91 The publication of this information can be a robust and effective way of raising consumer awareness, maintaining market confidence and deterring future contraventions of regulatory rules and requirements. It can also contribute to the transparency and accountability of the regulatory process as a whole.

What tools do we currently use?

- 6.92 We have a wide range of civil, criminal and disciplinary powers at our disposal. These include financial penalties, public censures, the removal or variation of a person's authorisation or approval, criminal prosecutions and applications in the civil courts for injunctions or restitution orders.

36 In particular Principle 6: A firm must pay due regard to the interests of its customers and treat them fairly. Also, other Principles could be relevant: Principle 2 (due skill, care and diligence), Principle 3 (systems and controls); Principle 7 (information that is clear fair and not misleading), Principle 9 (suitable advice)

- 6.93 Our approach to publicising the facts and/or details of our investigations and concluded enforcement action is, to a large extent, prescribed or influenced by the framework within which we operate. That framework principally comprises: (a) the express statutory and other legal requirements to which we are subject (including those discussed in Section 4); (b) the need to balance our statutory objectives; and (c) the rules of the civil and criminal justice systems.
- 6.94 Our policy on enforcement publicity is set out in chapter 6 of our Enforcement Guide³⁷. Reference should be made to its detailed provisions but, in summary, the essence of our approach is not generally to make public the fact that we are investigating a particular matter. However, we will do this in exceptional circumstances where an announcement is necessary, amongst other things, to maintain confidence in the financial system or protect consumers or investors. We will ordinarily publicise the outcome of concluded enforcement action, based on the facts of a given case and our statutory objectives, where this has led to a supervisory notice that has taken effect or a final notice or a judgment in the civil or criminal courts.
- 6.95 We believe there are several significant issues and competing priorities regarding the use of publicity in the enforcement context, particularly where investigations or proceedings are ongoing and there has been no determination of culpability. A balance needs to be struck between various factors, including:
- the relevant statutory limits on what we can say;
 - the potential benefits that could flow from greater publicity of enforcement investigations by demonstrating to the market our concerns about certain areas or conduct, better informing consumers and deterring bad practice;
 - the scope for publicity to hamper or prejudice investigations and enforcement action or, alternatively, to assist in bringing forward witnesses; and
 - concerns about the fairness of publicity by us – and, potentially, consequential media attention – potentially prejudicing those who are the subject of an investigation where the case is ongoing.

What other tools/options do we have, including transparency?

- 6.96 Generally, we do not see publicity of enforcement action and/or outcomes as discrete enforcement processes in their own right. Such publicity is ancillary to a range of enforcement processes and measures. For the reasons set out above, it can be a very effective facet of them and an important way of maximising the impact of a relatively limited number of enforcement cases.

37 Our enforcement guide is made and published pursuant to s 157 of FSMA

What are we minded to do, and why?

- 6.97 To achieve credible deterrence, wrongdoers must not only realise that they face a real and tangible risk of being held to account, but must also expect a significant penalty. Where we see evidence that standards are not improving despite clear messages to industry, we will seek to increase penalties in order to achieve our goal.
- 6.98 We are also keen to ensure that our messages regarding particular cases are better targeted towards the consumer so that, for example, where relevant, consumers will be told who they should contact if remediation is available. And we work with others, such as the Financial Ombudsman Service and OFT, to ensure the linking of thematic work to produce a coordinated public communication strategy.

What are we minded not to do, and why?

- 6.99 Our policy on enforcement publicity was consolidated and clarified as part of the consultation we conducted in 2007 on our revised enforcement guide and decision procedure and penalties manual.³⁸
- 6.100 We do not believe that a departure from our current policy is presently justified and we do not propose changes to it. We recognise that striking the right balance between competing priorities can be difficult but having reassessed our policy, we believe that it correctly identifies and requires consideration of the right factors and is appropriately underpinned by strong public interest considerations.

What are the next steps?

- 6.101 In summary, we propose to keep our current policy on enforcement publicity and the implementation of it under review, and to seek to develop our communications strategy to help achieve credible deterrence. We are also examining the potential to publish greater detail regarding the number of cases referred to enforcement, and how they break down by subject and industry sector. We intend to give consumers and other interested stakeholders a better understanding of how many cases we are pushing forward and where our main areas of focus lie.

Sector analysis/benchmarking

What outcomes are we trying to achieve?

- 6.102 We make considerable use of peer-group and sectoral information in our risk-assessment work. It enables us to benchmark firms against their peers, determine a more proportionate and cost-effective approach where a peer-group-wide response is more suitable, and provide a key input into our overall priorities.
- 6.103 Our intention would be to provide significant further disclosure based on this peer-group and sectoral information so that firms will be better able to benchmark themselves – putting them in the position of being able to change their behaviours in

38 Reference: CP07/2

order to avoid over-compliance where not necessary and emphasising priority areas for improvement. This would support our strategy on market-based solutions and more principles-based regulation.

6.104 In this section we look at two areas:

- the assessment generated through our ARROW process (Advanced Risk Responsive Operating frameWork); and
- the data gathered as part of the Integrated Regulatory Returns (IRR) that firms submit to us.

ARROW: What tools do we currently use?

6.105 At the moment, we routinely disclose peer-group assessment data to firms who have just undergone their ARROW assessment – indeed it is part of the formal communication with the firm. In addition, at occasional sectoral public events (usually organised through trade bodies or similar), we will provide some high-level sectoral information, such as average risk-assessment scores and common issues arising from our assessment work.

6.106 Feedback we receive from such events is very positive and contributes significantly to the greater understanding of our regulatory approach and priorities amongst the regulated population.

ARROW: What are we minded to do, and why?

6.107 We intend to place such disclosure on a more formal and regular footing. Our proposal is to have a dedicated part of our website showing regularly updated sectoral assessment and financial data. This would include the average risk profile for the sector, key statistical ratios, common issues emerging from risk assessments and a commentary on the current risk profile. We do not intend to disclose information that could be identified as relating to a specific firm – such disclosure we do not view as appropriate at the present time.

6.108 As the purpose of our further disclosure is to help firms determine their priorities and overall risk position, we are keen to hear what information firms would like to see disclosed (remembering that such information must be consistent with our intended approach to anonymity). We will therefore be seeking feedback on a number of proposed disclosure formats. An example is set out in Annex 3.

IRR: What tools do we currently use?

6.109 A good example of where we have published information to change behaviours is with regard to the timely submission of returns. Here compliance rates were low (at 75%) but some 18 months later stand at over 95%. Whilst the ‘stick’ of a £250 administrative charge has provided firms with an ‘incentive’ to report on time, publicity of compliance rates has also helped to embed this change.

6.110 The Annual Financial Return for insurers is already available to the public, due to a Handbook requirement³⁹. Commercial companies (A M Best and Standard & Poor's) can make data available electronically (for a charge). The reason for publishing this data was to help potential/current policy holders on their choice of insurance company.

IRR: What are we minded to do?

- Publication of mortgage information (Q2/3 2008) – this will enable firms to benchmark themselves against the market and to review their own lending profile against trends in the market as a whole.
- Publication of depolarisation status information collected through the Retail Mediation Activities Return (on which we consulted in July 2007).
- Publication of other data – no timetable for this agreed yet, but our aim is to start discussions with trade associations in late 2008.

6.111 We will continue to work with stakeholders to ensure we are clear on what they perceive as the benefits and to address any confidentiality issues. There is a far-ranging debate to be had in this area.⁴⁰

Q22: 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?

Capital requirements

What outcomes are we trying to achieve?

6.112 The overall outcome we aim for is that firms maintain adequate financial resources that are more closely aligned with the risks associated with their business, which in turn means that consumers enjoy greater protection as firms make better assessments of the capital they need to meet their liabilities.

39 IPRU (Ins) section 9.7 requires an insurer to provide any person with a copy of their return within 30 days of the request ie someone has to request the information. The provision is limited to the latest annual return and the two previous returns. The provisions in IPRU (Ins) came into effect from 2001/02 when responsibility transferred from the Department of Trade & Industry to us and at that point there was no longer a requirement to send the accounts to Companies House. Historical accounts may therefore be available through Companies House.

40 Some of the data we collect from firms via our regulatory returns is data which we collect in our capacity as the regulator pursuant to certain single market Directives – and it is thus known as 'Directive Information'. Our ability to disclose this Directive Information via our domestic 'gateways' is constrained by the nature and provisions of the particular Directive. Other Directives, meanwhile, are placing increasing obligations of disclosure on firms themselves. In particular, those Directives taking their approach from Basle accords on the capital requirements of banks, investments firms, and insurers, are now requiring firms to disclose to the market key aspects of their capital, balance sheet and market and operational risks.

Current position

- 6.113 The International Accounting Standard (IAS) Presentation of Financial Statements Capital Disclosures, does not require firms to disclose their capital requirements. This is because of the risks associated with the disclosure as listed below.⁴¹
- 6.114 A firm is only required to disclose whether it complied with any externally imposed capital requirements and if not the consequences of such non-compliance. We currently achieve our desired outcome by establishing capital requirements, through our supervisory processes, which are communicated privately to firms. For many firms, including almost all the larger ones, these capital figures reflect both minimum levels calculated as described in our Handbook (Pillar 1) and a process in which supervisors discuss with firms what additional capital they should hold to reflect factors such as risks not covered in the Pillar 1 approach (Pillar 2).

Arguments for and against disclosure

- 6.115 There are several arguments why we might want to give firms scope to disclose more supervisory information, including capital requirements:
- It would improve the overall market discipline on firms by giving consumers and other stakeholders a more complete picture of the financial position and other aspects of regulated firms. Disclosure would in particular reward the strong, leading to a potential regulatory dividend, and penalise the weak and those posing greater risks to our objectives. On the other hand, consumers may benefit simply from the assurance that a regulatory capital regime exists and regulatory action is taken by us – i.e. they do not need to be aware of the results, which may (absent clear analysis or advice) mislead.
 - It would help to ensure that we do not inadvertently encourage listed firms not to comply with their obligations under the listing regime. The risk of this is arguably low if supervisors, when consulted by firms, adhere to FSA policy and do not discourage firms from disclosing what they judge to be insider information. But there remains the danger that we are influencing issuers to take a line contrary to their legal obligations under the listing regime and running counter to our general stance on the disclosure of price sensitive information.
 - Overall capital requirements for certain firms are likely to be disclosed in the future anyway, and it is better that we control the process. The pressure here may be more from wider stakeholders (investors and analysts) than directly from firms.
 - For insurance companies, disclosure of the overall capital requirements would be consistent with a regulatory regime traditionally focused on high transparency. We acknowledged this in an early CP on the new regime (CP195) where we outlined the arguments for us not requiring disclosure of overall capital requirements, but equally not prohibiting firms from disclosing.
- 6.116 However, there are risks in moving to greater disclosure:
- It would risk misleading users of the information. Supervisory judgements are complex, reflecting our wide range of experience and information and the process which we use to assess each firm in context. ARROW risk scores and

⁴¹ This issue has been much discussed, particularly in the US, and is the subject of a great deal of academic literature, some of which is referred to in the literature review in Annex 1 paragraphs 27 to 33.

overall capital requirements distil all this and do not convey a single, simple message or imply a precise regulatory response. In the case of overall capital requirements, we continue to feel that the still developing approaches at firms and at the FSA make it hard to compare ICG information across firms without extensive explanatory information. There may also be misconstruction of the significance of the overall capital requirements, relative to the firm's own internal measure of solvency, in driving actual capital management by the firm.

- In practice, disclosure would probably lead to much more drawn out discussions of overall capital requirements and/or ARROW letters. It could affect the content of our supervisory communications, tending to constrain us in what we say to firms. Such a discipline on supervisors could also be positive of course. It would reinforce the pressures to be certain of our facts and judgements and would help enforce consistency; it could promote a more risk-based and more principles-based focus. Equally, it seems likely that at least at the margins, disclosure would be anticipated by supervisors in their work through over-cautious judgements, particularly where there was a risk of damaging a wider relationship or precipitating adverse wider confidence effects. These are most likely to be issues with the larger firms.
- By the same token, more disclosure could also constrain our scope to deal with crises or emergencies where we would prefer to take action that would not be disclosed. We may not want to raise or lower the overall capital requirements of a particular firm when the disclosure by the firm that we had done so could make the circumstances more difficult to manage.

What are we minded to do, and why?

- 6.117 We do not favour disclosure of further information on capital requirements because, on balance, we consider the arguments against disclosure to be more compelling than those in favour of it. We are particularly concerned that in isolation regulatory capital ratios can be misleading. For example, a firm which we require to hold a 'high' level of capital may not have deficiencies in management or systems – it may simply be that their business is focused on higher risk activities.

Concluding on these proposals

- 6.118 In this section we have set out a number of areas where we have given serious thought to the possibility of publishing further information. For some areas we have concluded that transparency would help us achieve our objectives, in others we have concluded that it would not. These conclusions are provisional, and subject to the views put forward in response to this paper and/or in response to the further discussions we will have with stakeholders after publication.

Q23: Do you have comments on the various proposals set out above?

Q24: Do you have suggestions for areas of regulatory transparency not mentioned in this Discussion Paper?

7 Our Role in Transparency

- 7.1 This section looks at two areas which are specific to our own role as regulator: the information we publicise in the course of responding to FoIA requests, and our role as publisher (or not) of information.

Freedom of Information Act (FoIA)

What outcomes are we trying to achieve?

- 7.2 As outlined in Section 3, the Freedom of Information Act (FoIA) became law in the UK on 30 November 2000. It gives the public a general right of access to all types of recorded information held by public authorities, sets out exemptions from that right of access and places a number of obligations on such authorities. The government has designated us as a public authority for these purposes.
- 7.3 Our stated approach to implementing FoIA is to use this opportunity to enhance our existing accountability by disclosing more information. It follows that the outcome we are trying to achieve is that we publish and make accessible as much information as possible that the public is or may be interested in. We know that there are real legal constraints on this, as set out in Section 4, but our internal challenge is to ensure that we do not hide behind those constraints when it is inappropriate to do so. In addition, the wider oversight of FoIA by the Information Commissioner and Information Tribunal provides external challenge.

What tools do we currently use?

- 7.4 We have a well-documented and comprehensive procedure for handling requests for information. That procedure includes a senior and robust internal challenge to assess the case for disclosure. We also have a publication scheme, as we are required to under FoIA, which we review three times a year to see what more we should add. Our Publication Scheme includes a Disclosure Log which sets out some of the requests we have received and our response to those requests. The Disclosure Log includes, among many other examples, our reply to requests for external reviews of our IS Division, a letter sent from our chairman, Callum McCarthy, to the then Prime Minister, and the volume and nature of complaints received by firms by product type.

What are we minded to do?

- 7.5 The Disclosure Log contains a lot of information. We believe it could be improved in two ways. Firstly, the Log could be more prominent on our website where some small changes would improve its accessibility. Secondly, at present it only contains reference to requests which we think may be of wider public interest. There is a danger that adding more cases to the Log will make it less, rather than more, useful. But on balance we think greater openness and accountability for us will be served by increasing the number of cases referenced on the Log.
- 7.6 Inevitably, the legal constraints under which we operate mean that we cannot accede to all requests for information. Nevertheless, we would be particularly interested to hear from individuals who have made FoIA requests to us on whether there are other improvements we could make.

Q25: Do you agree with our proposals to improve the accessibility and content of our Disclosure Log?

When should FSA be the publisher?

- 7.7 In the previous section, we have referred to proposals where information may or may not be published. We have also sometimes referred to information being ‘publicised’, to draw a distinction between, for example, a change to the public register (which we consider to be publishing) and a more visible type of published information such as a press release or table on our website (which we consider to be publicising).
- 7.8 Where we are satisfied that we are not constrained by FSMA from disclosing some set of information, and that such disclosure would serve our regulatory objectives, then further decisions need to be taken about *how* the information should be put in the public domain, and this includes the distinction between publicising and publishing. We also have decisions to make on *who* is best placed to do this. Inevitably, these latter details of format and medium need to reflect, and may potentially somewhat alter, the anticipated purpose of the disclosure.
- 7.9 So, for example, at one end of the spectrum of possibilities, the FSA itself could take on the role of presenting the particular information set to the public. Well-known examples of this include the Register, which carries key information about firms’ locations and permissions, and the Comparative Tables, which set out comparative information for consumers concerning firms’ offerings of some key retail products.
- 7.10 At the other extreme, firms might have the role of disclosing the relevant information about themselves (perhaps voluntarily or, more likely, because we had made rules requiring this). So for example, we have rules requiring (relevant) firms to publicise their membership of the Financial Ombudsman Service and Financial Services Compensation Scheme, and rules requiring insurers to provide to members of the public (on request) copies of regulatory returns concerning their premiums and exposures.

- 7.11 In the middle ground, meanwhile, are various possibilities of third party intermediation. This could be the result of the media and other commentators using their own analysis of information we publish. Or it could be a more formal process where, by agreement with us, an external company packages and presents the relevant information. For example, the insurance return data described in para 6.110 above is consolidated by Standard and Poor's, which then makes the full data set available for a licence fee to subscribers.
- 7.12 In the paragraphs below we suggest some broad criteria for when each approach may be more suitable.
- 7.13 Where the information concerned is directly related to FSA decisions or judgements, as it is with matters of authorisation and permission (and as it would be were we to go down the route of disclosing information related to ARROW metrics), then it may well be appropriate for us to be the 'publisher'. For it is reasonable that this data be closely associated with the FSA brand, and its readership expect us to ensure the accuracy and quality of the data disclosed. Moreover, the data in these cases is only a sub-set of a wider (and sensitive) body of information we are unable, or disinclined to disclose, so it would be prudent for the redaction and packaging to be done by us in-house, notwithstanding any burden on our own IT resource.
- 7.14 FSA publication may also be appropriate where the intended readership is a mass retail one, and the intended purpose requires a standardised format and presentation. Thus, though the information in the comparative tables concerns 'commercial' rather than regulatory matters, we felt it appropriate to directly brand and house those tables, in order to: make them readily available to consumers (and for free); give consumers confidence in the data; and ensure the information and its presentation is standardised and genuinely comparable.
- 7.15 We could imagine a different approach also being workable, where we ensure (for example through rules) this standardisation of the data's content and format, but where an external company did the branding and consolidation. However, such third-party hosting would tend to raise the question, at least in the mass retail context, of whether the 'host' would be sufficiently well known and accessible to consumers in general, or sufficiently trusted by them.
- 7.16 One might anticipate such intermediation being more appropriate and effective where the anticipated readership is not consumers themselves, but analysts, commentators, or other firms, who are used to sourcing information from intermediaries and to paying for it. Hosting may also be especially suited to data where the 'host' could annotate and enrich it with their own expert comment and analysis.
- 7.17 From our perspective, such hosting will tend to be more appropriate where the data is not a redacted sub-set of a wider set, and where we are not keen to take on the implicit obligation (through FSA branding) of verifying or vouchsafing the data. For experience suggests that a reputable host will invest itself in checking the data, to safeguard its own service and brand, whilst for their part, firms will tend to take extra pains to provide coherent data where this is being passed on to the market.

7.18 Lastly, there may be data sets where the intended purpose of the disclosure does not mainly rely on comparison between numerous firms, such that a consolidated publication (by the FSA or others), to reduce search costs, is not warranted. Data of this kind might tend to concern matters for which firms should be accountable to the public, but whose details are peculiar to the circumstances of individual firms. A hypothetical example might be had we required firms to disclose their preparations and readiness for Year 2000.

Q26: What criteria do you think we should use in deciding whether to publish or publicise information ourselves, or rely on a third party?

8 Conclusion – Adopting a learning approach

- 8.1 In looking at these examples of where we are – or are not – inclined to use transparency as a regulatory tool, it is clear that following the Code does not remove the necessity for judgement, nor all controversy from the decisions we make. The need for judgement is acute because of the difficulty of assessing whether the expected benefits and disbenefits will materialise, and whether the extent of these will change over time.
- 8.2 In particular, we note that the immediate impact is not the end story. For example, it is possible that the initial media response to publishing firm-specific information, for example about complaints, may be disproportionate to the subject. But over time, it would be reasonable to expect a more measured, and more informed, response. It is also possible that while transparency in the short term may create friction around our supervisory relationships and impede the achievement of our objectives, in the longer term the educational effects of transparency could have an offsetting effect that more than compensates for this by improving standards of compliance overall.
- 8.3 So the approach we intend to take is to do some things that bring about greater transparency, and to watch carefully what the market effects of these are over time. The more we learn about these effects, through testing, the more we can rely on evidence and the less we need rely on judgement.
- 8.4 This approach fits neatly into our risk, outcome- and evidence-based approaches. It allows us to evaluate whether we have successfully achieved our intended outcomes, and whether the benefits have indeed outweighed the costs as we predicted.
- 8.5 This means that we are not, in this Discussion Paper, setting out a vision of the FSA's exact destination as an open and transparent regulator (beyond saying, as we do in the Code, that we have a presumption in favour of using transparency as a regulatory tool to help us achieve our objectives where the Code's principles are met). But we are starting down the path of greater transparency and will adjust our direction and speed of travel to reflect what we learn about the landscape along the way.
- 8.6 As we have seen in this paper, this is not an easy subject. It requires careful analysis of what we can and cannot disclose under legislation, understanding of whether and how audiences will engage with information, and good evidential grounding on what

the actual impacts of disclosure will be. So we are very keen to stimulate a debate with the widest possible constituency, including other regulators or public sector bodies that have first hand experience of addressing similar issues.

- 8.7 We have set out a list of questions included in this paper in the following section, and would also welcome views on aspects we have not covered.

List of questions

Sub-heading	No.	Questions
Starting from First Principles	1.	Do you agree that transparency is a legitimate regulatory tool?
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?
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?
	4.	Do you agree with the three Principles: <ul style="list-style-type: none"> • 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?
	5.	Do you have comments on the detailed wording contained in the Code of Practice on Regulatory Transparency?
Complaints	6.	Would publication of complaints data help achieve the FSA's regulatory objectives?
	7.	Are there any reasons specific to the financial services sector which would make it inappropriate to publish firm-specific data?
	8.	What comments do you have on the specific data that is proposed for publication?
	9.	What comments do you have about the provision of contextual data alongside the complaints data?
	10.	What comments do you have about providing information on a firm or group basis?
	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?
	12.	What comments do you have on the proposed timescale?

Sub-heading	No.	Questions
Retail Themes	13.	Do you agree with our proposals concerning: <ul style="list-style-type: none"> • anonymous, benchmarked results; and • Non-fundamental OIVoPs (Own Initiative Variations of Permission).
	14.	Do you agree with our comments and proposals on: <ul style="list-style-type: none"> • naming and ‘faming’; and • risk mitigation and redress.
	15.	Are there other measures that you believe could be useful in improving the effectiveness of our thematic work with firms?
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?
	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?
	18.	Do you think that the benefit of creating a financial promotions Register, as described, would outweigh the drawbacks? If so, why?
Treating Customers Fairly	19.	Do you agree with our analysis of the obstacles that are impeding better progress on the TCF initiative?
	20.	Is the mix of measures outlined in paragraphs 6.79 to 6.87 appropriate for helping to achieve better progress?
	21.	Are there other measures that you would like the FSA to take?
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?
Concluding on these proposals	23.	Do you have comments on the various proposals set out above?
	24.	Do you have suggestions for areas of regulatory transparency not mentioned in this Discussion Paper.
Freedom of Information	25.	Do you agree with our proposals to improve the accessibility and content of our Disclosure Log?
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?

Brief review of literature on regulatory disclosure

(Matthew Osborne – a member of the FSA’s Economics of Financial Regulation Department, Strategy & Risk Division)

1. Disclosing information on regulatory and firm activities to be used by market participants is a tool commonly used in this and other countries in pursuit of regulatory objectives. The asymmetry of information that exists over the features and underlying quality of a product and provider is a concern for the regulator in both wholesale and retail markets, since it leads to unsuitable purchases by consumers and a lack of confidence in markets where participants cannot observe key characteristics of counterparties. The use of regulatory disclosure to address these problems is the subject of a burgeoning academic literature examining the impact of such information on the behaviour of firms and consumers.
2. In this Discussion Paper we propose to adopt a set of principles to govern whether disclosure of any particular set of data should take place. In this review we provide a quick summary of literature which may be relevant to the decision making process. It is organised around a set of questions, broadly organised into retail and consumer areas.

How would we expect regulatory disclosure to affect consumer behaviour?

3. In a market characterised by asymmetric information, theory tells us that the disclosure of economically relevant information should change the decisions made by market participants, increasing market confidence and making the market more competitive as consumers are better able to differentiate between different products and make suitable purchases. This in turn will increase the incentives for firms to improve their products and service in order to attract business from better informed consumers.
4. A growing body of work looks at the effectiveness of point of sale disclosure in changing consumers’ behaviour, and suggests that we should be sceptical about the likelihood that ordinary retail consumers will use information, even where that information clearly tells something about the price or quality of the services they are purchasing. In one experiment participants chose between index-linked funds, with real financial incentives (Choi, Laibson and Madrian 2006). Some were given

disclosure documentation on charges, some were not. The results showed that consumers overwhelmingly did not use charges information to choose the best fund, even though the design of the experiment meant that fees were the only factor important in determining relative performance. This result held even where investors were made aware of the importance of fees. It seems that they either did not understand this or were unable to find/use this information correctly.

5. We have commissioned further work on the effectiveness of point of sale disclosure:
 - **CR55, Investment Disclosure Research**⁴² found that there was no significant difference in the knowledge and understanding of investment products between consumers who received disclosure documents (which contained relevant information) and a control group who did not, and in general product knowledge was low.
 - A study carried out for the ICOB review by **de Meza, Irlenbusch and Reyniers (2007)**⁴³ shows that disclosure of information such as value for money (the claims ratio) and commissions by sellers of insurance (PPI) had a negligible effect on consumers' decisions, and actually made consumers less confident in their decisions.
6. However, the Choi et al paper tells us that disclosure can have some effect, even if this is small, and it is clear that there is some scope for regulatory disclosure to benefit consumers, for example by increasing accountability of vendors and advisors or by increasing overall market confidence. This suggests we should look at ways in which disclosure of information to consumers can be effective. A review of the literature by **Weil et al (2006)** suggests several conditions which regulatory disclosures should fulfil if they are to achieve their aim of becoming embedded in consumers' decision-making process, and thus affecting consumers' decisions.
 - a) Consumers must be able to see that they can gain from the information; they think it will help them achieve their own goals.
 - b) Information must be delivered in a useful format, in a timely manner, and in a location where users can find it, so that it fits into their existing decision-making process.
 - c) The information must be easily understood.
 - d) Information must be readily available or easy to collect.
 - e) Failing the above, the existence of intermediaries can overcome some of the other conditions.
7. The authors go on to review a number of disclosure policies in the US which they argue are consistent with their criteria for success. If disclosure affects consumers' decisions then this may have knock-on effects on firms' actions e.g. by incentivising firms to avoid behaviour which might cause consumers to take their business

42 www.fsa.gov.uk/pubs/consumer-research/crpr55.pdf

43 www.fsa.gov.uk/pubs/other/DeMeza_Report.pdf ; similar analysis has been undertaken in the US on mortgage broker compensation disclosure, with similar results (Lacko & Pappalardo 2004).

elsewhere. Weil et al argue that for this to occur firms must be able to observe that disclosure affects consumers' behaviour, and changes in behaviour are relevant to the firms' goals.

8. We can get some idea about what types of disclosed information are likely to change behaviour from surveys which ask consumers what sources of information they use when they are making decisions about financial products.

Table 1: Financial Capability Baseline Survey, 2006

How respondent chose product	Percentage
Well-informed personal choice, using an IFA	12
Influenced by an IFA but did not collect best buy	1
Relied on independent advice	9
Relied on product information and/or non-independent advice	79
Total	100

9. This table shows that 79% of consumers rely on product information (i.e. from the provider) or non-independent advice. This might suggest that one way of influencing choices is to require firms to provide information to their customers, although the evidence above may suggest this is unlikely to change their behaviour. The proportion conducting their own search using independent advice (9%) does not lend much support to the idea that individual consumers will pick up on regulatory disclosed information, regardless of how it is conveyed. The Consumer Purchasing Outcomes Survey goes into more detail about what sources of information were used and we present the results in table 2 below.

Table 2: Purchasing Outcomes Survey: Information sources used by respondents in product purchase

	Use this source (%)
Personal information	
IFA/broker	36
Friends & family	22
Estate agents/accountants/solicitors	6
Information from companies providing the product	
Requested and sent in the post	9
Unsolicited mail	4
Picked up in branch	13
Internet	20
Sales staff e.g. bank/building society	15
Provided by IFA/broker	6
Looking at best-buy tables	
On the internet	18
Financial pages of newspapers/magazines	9
Financial articles	
Financial press/financial pages of newspapers etc	6
Specialist magazines/publications	2
Adverts	
Newspapers/press	4
On TV/radio	3
TV/radio	2
Employer	4

Source: Consumer Purchasing Outcomes Survey (CPOS) Q8

Product purchases include mortgage, pension, investment, general insurance

- The table indicates some scope for disclosed information to influence consumers via intermediaries such as IFAs (36%), best-buy websites (18%) and the press (best buy tables 9%, general press coverage 6%). This suggests that a key effect of putting information in the public domain is that it will be picked up and publicised by intermediaries, which would be indirectly beneficial for consumers. For example, particularly important or newsworthy information about companies could result

publicity or advice which changes consumers' decisions. Alternatively, the potential for intermediaries to use the information could give firms a strong incentive to avoid 'bad news' reaching consumers, and this could result in improvements to product quality and customer service. We consider this in more detail in the next section.

11. Overall, the evidence reviewed above suggests that it is unlikely that disclosed information would have a significant impact on consumers' decisions unless it is likely to become firmly embedded in their decision-making processes. We saw above that consumers take into account information about firms from the media and from advisors, which could provide a mechanism for disclosure to affect consumer behaviour. However, behavioural economics studies give us cause to doubt whether, consumers who use relevant information actually use it to make the best decision.

Could disclosure of information influence firms' behaviour?

12. A separate but related question is what kind of information changes firms' behaviour. In order to change firms' behaviour it is not necessary that the information is important to a large proportion of consumers; it may be sufficient either that a sizeable minority of active consumers use the information, or simply that the firm expects consumers to use the information, or for other market participants such as investors or counterparties to attach some value to the information so that it affects the firm's cost of capital.
13. Two studies look directly at the role of corporate reputation on consumers in retail banking. **Bloemer et al (1998)** conduct a large scale survey of customers of a Dutch bank and find that the image of the bank, as perceived by customers, is directly related to the level of customer loyalty. This is true even when controlling for levels of satisfaction, which the authors interpret as evidence that consumers use 'external cues' to evaluate the bank in terms of its position in the marketplace. **Martensen et al (2000)** use the results of a large scale survey of the customers of Danish banks to find that image is directly related to both customer satisfaction and loyalty, with the former relationship serving to reinforce the latter. Interestingly, they find that image is more important than either products or service in determining customer satisfaction and loyalty, and this is true across different size banks.
14. **Helm (2007)** reviews literature covering the role of corporate reputation in financial services in general, and reports that firms with relatively good reputation are better able to sustain superior profit outcomes over time (**Roberts and Dowling 2002**), are generally able to attain higher ratings (**Fombrun 1996**), and tend to be perceived as less risky by investors, who thus expect lower returns (**Larsen 2002, Srivastava et al 1997**).
15. A review by **Sabate & Puente (2003)** finds a consistent and positive link from corporate reputation to financial performance⁴⁴ amongst firms in all industries, with performance measured by share price. The results use a variety of methodologies and data sources so the results appear to stand up to scrutiny⁴⁵ Some studies use rankings

44 The authors identify the possibility that the causation could be reversed, i.e. financial performance causes good reputation. The studies which lead to the conclusion above identify the direction of causation as being from reputation to performance.

45 Research conducted by Qamar Zaman and Kai Kohlberger in EFR as part of the market abuse programme has also established a link between rumours about firms circulating in the press and abnormal returns.

published in periodicals such as Fortune, while one study finds that the relationship remains even when financial aspects of this measure (e.g. past performance) are stripped out. Another looks at the impact of media reporting, finding a positive relationship between press analysis in local newspapers and financial performance (Deephouse 1997). One interesting finding is that in the event of a sudden and unexpected decline across a market, firms with a good reputation tend to suffer a lower decrease in their share price than their competitors.

16. Kim (1997) looks at the relationship between reputation and firm revenues and finds this to be highly significant. His method involves modelling first the relationship between public relations expenditure on reputation and then the impact of reputation on revenue, clearly demonstrating that firms' incentive structure will tend to make them averse to bad news stories.
17. In conclusion, there does appear to be a strong link between corporate reputation and financial performance, which confirms the common view that firms may be concerned to protect their reputations in the face of the disclosure of information by the regulator. This may be independent of the potential for consumers to act on the information, since firms may take action to improve their performance in anticipation a consumer reaction.

Wholesale markets: When is regulatory intervention necessary to supply information on firms to the market?

18. Regulators commonly get involved in mandating firms to disclose information to the market, whether this is the standard financial reporting or more specific requirements concerned with raising capital on equity markets or prudential standards such as the disclosure requirements in Basel Pillar 3. In addition regulators also collect a great deal of information of firms as part of the supervisory process, which raises the question of whether any of this information should be disclosed to the market by the regulator. This section reviews the rationale for disclosing or requiring disclosure into wholesale markets and provides some evidence on the likely impact.
19. The first criterion which should be met for regulators to disclose or require disclosure of firm level information is that the information is of value to the market, which for the purposes of research is interpreted as whether making it public would affect the value of the firm. This is similar to the requirement common under listing regimes for listed firms to announce any information which would be seen as relevant by investors ('regular users' in the UK). The tractability of such a test has made it a popular subject for academic research, which tends to ask whether changes in disclosure requirements or regulatory policies result in changes in the value of a firm of listed firms, as captured through share prices or bond spreads.
20. The 'value relevance' literature is reviewed by Healy and Palepu (2001), who conclude that financial reporting by firms provides new and relevant information to investors. This value varies with country and firm-level characteristics, and may have deteriorated in the US over recent years. The authors also review different reasons why managers may voluntarily disclose information. These include providing managers with

information to resist shareholder criticism or litigation, and maximising compensation by improving stock liquidity and signalling good performance.

21. **Weil et al (2006)** review the literature on financial reporting (pp. 168-9) and find that it has been effective in reducing investor risks and improving corporate governance. Some key findings they mention are:
 - Reporting reduces information asymmetries between more and less sophisticated investors (**Bushman & Smith 2001; Greenstone et al. 2004; Ferrell 2003**), and limits investors' risks by reducing errors and costs of identifying opportunities (**Simon 1989; Botosan 1997**).
 - Reporting reduces information asymmetries between shareholders and managers, reducing monitoring costs and agency problems, improving managerial discipline and supporting enforceable contracts (**Bushman & Smith 2001; Healy & Palepu 2001; Ball 2001**).
 - Improve firms' stock liquidity and access to capital as well as reduce cost of capital (**Leuz & Verrechia 2000**).
 - In periods of financial crisis investors are more likely to buy shares in companies with relatively high transparency than in those with relatively low transparency (**Gelos & Wei 2002**).
22. A study by **Baumann and Nier (2004)** seeks to show whether higher levels of disclosure bring benefits to firms and markets by reducing the volatility of the share price. Using a large, international, dataset of banks from 1993-2000, they find that higher scores on a measure of disclosure are negatively correlated with volatility of the share price, after controlling for a number of relevant variables including bank size. This is likely to yield benefits for the firm by reducing the cost of capital and increasing the effectiveness and reducing cost of stock-based executive compensation. It may also bring benefits to financial markets by reducing uncertainty, which may lead to an increase in the depth of such markets.
23. As these studies show, firms themselves stand to benefit a great deal from disclosure of financial information, and this suggests that in many cases there may not be a role for the regulator. Thus the second criterion for regulatory involvement is that there are market failures which mean that the market fails to provide the socially efficient level of disclosure (**Healy and Palepu 2001**). Then there may be opportunities for improvements in social welfare.⁴⁶
24. One relevant market failure often cited for mandating disclosure relates to information asymmetries between sophisticated and unsophisticated investors. The consequences may be to narrow the market in, for example, publicly-traded shares, leading to less efficient allocation of resources overall. Thus, requiring greater disclosure may lead to deeper capital markets and more efficient resource allocation. A second market failure is that disclosure is a public good; it is paid for by the shareholders of the firm, but they are unable to charge future users of the

46 This assumes that the costs associated with mandated disclosures would not exceed the expected benefits and, therefore, that society would realize a net benefit.

information (e.g. future investors), so disclosure is inefficiently low. The diffuse nature of potential users means that it is difficult for them to organise so as to purchase the information; and if the information is provided, then it may be difficult to prevent others from using it. The role of intermediaries may be crucial in overcoming the public good problem in relation to value relevant information. Credit-rating agencies, for example, provide a cost effective distillation of relevant information for market participants.

25. Both of the major reviews described above (Healy and Palepu 2001; Weil et al 2002) cite the importance of the role of intermediaries in the effectiveness of disclosure. These include auditors and financial analysts. Auditors enhance the credibility of disclosed information and, as such, they may be required by capital providers if not by regulators (Leftwich 1983). Financial analysts have been shown to add value in stock markets, increasing efficiency and potentially increasing the value of voluntary disclosure of information (although this is ambiguous since voluntary disclosure may make analysts' services less valuable). This may be seen as a market response to an information market failure, similar to the development of ratings agencies.
26. The third criterion is that regulatory interventions designed to address these market failures do not impose costs out of proportion to the benefits. Increased levels of disclosure by firms have direct costs if that information needs to be prepared or published. This in turn may lead to unintended consequences, such as distortion of companies' business planning. A large amount of literature has focused on costs associated with the disclosure requirements of the Sarbanes-Oxley legislation in the US. One example is Ghose and Rajan (2006). They analyse financial information disclosure from the perspective of firms' costs and find that requirements such as those in the Sarbanes-Oxley Act may have a number of unintended consequences, including a reduction in production quantities, a decline in market competition, and an overall reduction in social welfare caused by an inefficient distortion of spending towards compliance activities. These costs may be particularly burdensome for small firms and may result in companies choosing to de-list from stock exchanges.

Should regulators disclose supervisory information on firms?

27. The activities of regulators in collecting information on regulated firms and analysing it to form a view on the risk exposure of regulated firms can be compared to the role of intermediaries such as ratings agencies providing information to markets. In the US, the processes that supervisors go through to set their ratings have been compared to market participants' procedures for understanding risk exposure (Hoenig 2003). Information held by supervisors could be a valuable source of information on financial positions, risk concentrations and asset profiles, and supervisors' assessment could assist in identifying deficiencies in firms' own disclosures.
28. However, Hoenig also argues that since supervisory ratings have not been designed for use by market participants, public disclosure without explanation or dialogue with the bank could have unintended and harmful consequences. It could lead to overreaction by market participants who fail to interpret the ratings correctly. It might also be difficult to make ratings consistent (or, for that matter, for market

participants to compare and evaluate ratings) across banks of different sizes, engaging in different activities, and monitored by different supervisors. The information could replace, reduce, or be confounded with private market sources of information and analysis, which could weaken the market's role. Hoenig argues rather than disclosing ratings, regulators should require banks to disclose any significant weakness or material findings identified by supervisors. In this way, the information could be suitably contextualised and accompanied by a detailed explanation which would avoid most of the adverse effects mentioned above.

29. In deciding whether supervisory information should be disclosed, it is critical to understand whether the information in supervisory ratings is value relevant. That is, would such information provide insights about firms' condition and fundamental value beyond that already embedded in other market disclosures? This question is addressed by a large amount of literature in the US. Given that supervisory information is usually private, research often looks at whether the private supervisory information in some way precedes the market getting hold of the information. For example, supervisors might find out about problems in a firm before the market does, in which case there will be a lag between the change in supervisory ratings and market measures of value. **Berger and Davies (1998)** find strong evidence that US supervisory rating (called 'CAMEL' ratings) downgrades are followed by reductions in the share price of a firm's parent company. **Hirschhorn (1987)** finds that the CAMEL rating is correlated with share returns, but that only one component, capital adequacy, was correlated with future share returns, suggesting that much of the information in supervisory ratings was already known to the market. **Berger, Davies and Flannery (2000)** found that ratings of bank holding companies were more important for bond investors than for equity investors, while **DeYoung et al. (2001)** find that bank examinations produce information that affects bond spreads, with the response largely dependent on the anticipated regulatory response.
30. A few studies take advantage of isolated events which allow the market to infer supervisory ratings to test whether the disclosure of supervisory information does affect value. **Allen, Jagtiani & Moser (2001)** take advantage of a regulatory change in the US which allowed bank holding companies (BHCs) to become financial holding companies (FHCs), so they could operate merchant banking and offer insurance and securities products. In order to qualify for the new status, BHCs had to hold high supervisory (CAMEL) ratings. Since these ratings were not publicly available information, the market may have been able to infer a poor rating from a BHC apparently likely to convert that did not apply to convert. However, their findings do not constitute strong evidence in favour of this hypothesis. There were in fact positive abnormal returns for these banks, which appears to contradict the hypothesis. It could be explained by investors reacting positively to the news that regulators were effectively limiting risk taking, or it could be that investors were aware of information not captured in the model. An older paper by **Johnson and Weber (1977)** makes use of the accidental disclosure of the names of 35 banks on a Federal Reserve 'problem bank' list. They find that this information had little effect on market perceptions of these banks.

31. A second critical issue (also raised by Hoenig) in considering supervisory disclosures concerns is they may distort the market, or cause confusion amongst market participants. **Jordan, Peek and Rosengren (1999)** present findings which are not consistent with this argument. They consider the hypothesis that disclosure of problems at one bank may be interpreted by the market as indicating widespread problems, leading to bank runs and collapsing share prices. Of concern here is that disclosure could lead to a systemic crisis, which would affect strong banks as well as weak ones, and which would have an adverse effect on social welfare. However, their empirical findings do not support such a scenario. They look at the experience in the US of a legislative change requiring bank regulators to disclose to the public all formal enforcement actions imposed on banks, in the midst of a banking crisis in 1989-90. Their findings indicate that enhanced disclosure assisted the market in identifying financial problems at specific banks, rather than leading to systemic crisis. They find no evidence of bank runs and no spillover effect on dissimilar banks or banks in other states. Other studies have shown that disclosure of regulatory information may have a limited effect on perceptions of banks. **Gilbert and Vaughan (2001)** looked at enforcement actions in the US from 1990-1997 and find that depositors do not react to the new information⁴⁷.
32. Another possible reason for thinking that supervisory information might be misleading is that while it might be relevant at the time it is released, it loses this value as time goes on. This has been recognised as a problem in the US, where bank examinations occur every 12-18 months, so it is likely to be even more of a problem in the UK, where ARROW scores are only updated every 3 years. **Cole and Gunther (1998)** found that supervisory ratings less than six months old were better predictors of financial distress than older ratings, while **Hirtle and Lopez (1999)** estimate that ratings no longer contain private information after 18-36 months, and this occurs the most quickly for banks in financial distress.
33. A specific cost often noted in relation to disclosure of supervisory information on firms by the regulator is that it will make it harder for supervisors to monitor firms and take action when they perceive there are problems.⁴⁸ Disclosure could make firms less willing to hand over information to the regulator, or it could make it harder for supervisors to downgrade problem banks. To our knowledge the only empirical study of this issue is **Feldman, Jagtiani and Schmidt (2003)**. They look at a change in the information disclosed by the regulator to bank management, and their analysis may not apply in the same extent to public disclosure. They find that, comparing pre-disclosure (1992-1996) to post-disclosure (1997-2001) years, supervisors were just as likely to downgrade banks in the latter period as in the former.

47 To our knowledge, a full and formal analysis of this type has not been done for the UK and would be a useful addition to the literature.

48 Regulators may be less willing to downgrade a marginal institution if disclosure might perpetuate existing problems or lead to further problems (e.g., liquidity could dry up) that could ultimately cause an institution to fail. This issue could be especially pronounced if the marginal institution were of systemic importance.

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Contextualising complaints data

1. This Annex discusses how it might be possible to use firm-specific business volume information to set complaints data in context and make the resulting figures more meaningful to the end user. This could be done relatively simply, for example by using turnover figures to provide an indication of the relative size of different firms, or it could be more tailored to different types of business. For example, the number of complaints a bank receives could be set against the number of banking accounts it has in force to provide a better indicator of the standards of service at the firm.
2. We currently collect several sets of firm-specific business volume data that could be used to contextualise complaints data. These include Fee Tariff Data; the Insurance Returns, the Retail Mediation Activities Return (RMAR), the Mortgage Lending and Administration Return (MLAR) and Product Sales Data (PSD). The table below shows how the current business volume data we collect from firms could be used.

Complaints product and service groups	Source of business information	Examples of possible metrics
Product Provision		
Banking	Fee Tariff Data	Number of accounts
Home Finance	MLAR	Number of mortgage contracts
General insurance & pure protection	Insurance Returns	Number of policies £ of premia
Decumulation, life & pensions		Number of vehicle years
Investments	Fee Tariff Data	Value of funds under management
Other	This is an aggregated mixture of complaints about 'Other product and service groups'. As the information is not granular we cannot use business volume data to contextualise it.	
Distribution		
All	Product Sales Data	Number of sales
	RMAR	Number of advisers
	Fee Tariff Data	
	ARROW	

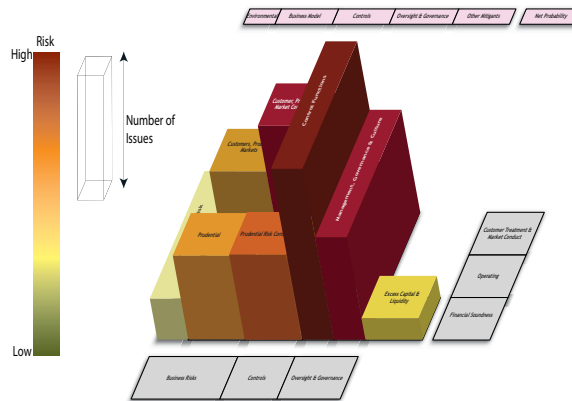
3. However, the following should be noted:
 - The business volume data we would use to contextualise complaints data is not collected for this purpose. This means that business volume data and complaints data are not collected on uniform product categories and uniform reporting periods. As a result of these disparities, business volume data does not always easily ‘map’ across to complaints data.
 - Some firms may report their complaints data jointly (DISP 1.10.1CR). So, for example, a firm might report complaints at a group level but report business volume data (such as Product Sales Data) at an individual firm level. We would therefore need to set complaints data in context at a group level where relevant.
 - We do not collect business volume data for all products. This means the amount of complaints data we could set in context is limited.
4. In light of the issues listed above we believe there are three potential options for taking this forward:
 - we use the business volume data we collect currently to set some complaints data in context and publish this information, albeit recognising and highlighting the inherent limitations of this approach;
 - we investigate whether firms, trade associations, consumer groups and other industry bodies would be willing to make available the relevant firm-specific business volume data so that all complaints data could be set in context; or
 - we recognise the limitations of using the business volume data we collect to contextualise complaints data and therefore publish complaints data without business volumes. Individuals and/or expert commentators could then use the complaints data as they see fit.

Example Arrow sub-sector report

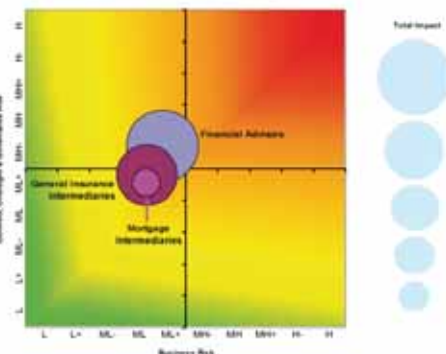
Sub-Sector Profiles: Independent Financial Advisers As at October 2007

Independent Financial Advisers

This peer-group consists of XXXX firms, with an average impact of Low. The peer-group consistently performs poorly in respect of oversight and governance. This has been coupled with increasing business risks provided by substantial strategic uncertainty.



Top 10 Issues	ARROW Risk Group(s)	ARROW Risk Element(s)
Treating Customers Fairly	Customers, Products & Markets Controls Management, Governance & Culture	All customer related risk elements Culture & management
Corporate Governance	Management, Governance & Culture	Culture & management Corporate Governance
Compliance	Control Functions	Compliance monitoring and guidance
Capital Management	Prudential Risk Controls Excess Capital and Liquidity	Most risk elements under Prudential Risk Controls may be relevant Adopting of Capital
Business Continuity Planning	Financial and Operating Controls	Business continuity planning
Financial Crime	Customers, Products & Markets Controls Financial and Operating Controls Control Functions	Most risk elements under these groups may be relevant
Internal Audit	Control Functions	Internal audit monitoring and guidance
Risk Management	Prudential Risk Controls Control Functions	Most risk elements under Prudential Risk Controls may be relevant Enterprise-wide risk management
Strategy	Management, Governance & Culture	Strategic planning
Conflicts of Interest	Customers, Products & Markets Customers, Products & Markets Controls	Conflicts of Interest Conflicts of Interest management



Sub-sector	Business Model	Controls	Oversight and Governance	Risk Mitigants	Net Probability
Sub-segment: Retail	Customers, Products and Markets	Customers, Products and Markets Controls	Control Functions	Management	Customer Treatment and Market Cr.
Sub-segment: Wholesale	Business Process	Financial and Operating Controls	Financial and Operating Controls	Capital and Liquidity	Operating
Sub-segment: Prudential	Prudential	Prudential Risk Controls	Prudential Risk Controls	Prudential Risk Controls	Prudential Controls
Sub-segment: Business Risk	Business Risk	Business Risk	Business Risk	Business Risk	Business Risk
Sub-segment: Controls	Controls	Controls	Controls	Controls	Controls
Sub-segment: Oversight and Governance	Oversight and Governance	Oversight and Governance	Oversight and Governance	Oversight and Governance	Oversight and Governance

Commentary

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