

Financial Services Consumer Panel

AN INDEPENDENT VOICE FOR CONSUMERS OF FINANCIAL SERVICES

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Financial Conduct Authority
12 Endeavour Square
London
E20 1JN

7 February 2023

By email: CP22-27@fca.org.uk

Dear Sir/Madam,

Financial Services Consumer Panel response to the FCA's consultation on introducing a gateway for firms who approve financial promotions

The Panel welcomes the FCA's proposals that builds on new rules and guidance to strengthen the financial promotion rules for high-risk investments with this additional guidance and regulation for firms who approve or intend to approve financial promotions.

The Panel welcomes the strengthening of the requirements for Section 21. We hope that the FCA's proposed approach will better align the rules to the needs of consumers, rather than focusing on what works for products.

The Panel has previously provided feedback to both HMT and the FCA in relation to the Future Regulatory Framework (FRF) implementation. You can find the Panel's response to HMT in Annex 2 and the FCA in Annex 3.

We welcome and appreciate the opportunity for engagement with the FCA on this subject. However, as stated in our feedback responses and specifically to the FCA: in our view, the rule review framework must include a dedicated framework and processes for the FCA to actively capture, incorporate and reflect consumers' views, experiences and needs, as well as the outcomes delivered to consumers. In delivering this, the FCA needs to go above and beyond engagement with the Consumer Panel. The FCA needs to explore and explain how this will be achieved in relation to this subject.

Within our feedback to the FCA, the Panel has also emphasised that the international competitiveness objective will be a secondary objective, and as mentioned within our feedback, the Panel would like to see the FCA publish further detail on how it will analyse specific policy options against its revised objectives. The Panel would be keen to see this explored and explained in the approach to this subject.

Please find response to questions posed in Annex 1 below.

Yours faithfully

Helen Charlton

Chair, Financial Services Consumer Panel

Annex 1 - Consultation Question Responses

Q1: Do you agree with our proposed approach to assessing applications?

The Panel agrees with the FCA's assessment approach. The Panel believe that where granting firms' permission to approve financial promotions for unauthorised firms, this must be determined by reference and alignment to the Regulators operational objectives. Additionally, the firm seeking authorisation must have the adequate experience, systems, controls, and processes in place to satisfy threshold conditions. Additionally, the firm applying needs to demonstrate all required in point 4.5 of the consultation paper.

Q2: Do you agree with our proposed approach to determining whether to refuse an application or to grant permission on terms which are different from those for which application has been made?

The Panel agrees with the FCA's approach, subject to the detailed explanation and requirements clearly being communicated.

Q3: Do you agree with our proposal not to make changes to the Financial Ombudsman Service's CJ for complaints about the approval of a financial promotion?

The FCA acknowledge that there have been too many non-compliant promotions being approved which then are communicated to consumers by unauthorised firms and consumer harm has resulted. The FCA state that approving a financial promotion is not a 'regulated activity; and 'not otherwise specified' in the DISP rules and, as a result, complaints about the approval of a financial promotion are 'generally' not covered by the FOS. The Panel believe this language in itself signals a lack of clarity around the access consumers have to redress for a failure in the approval process and that lack of clarity needs to be addressed. What is absolutely essential is for consumers to have clarity and confidence not only about their rights but also the redress options available to them. Currently they do not.

The FCA is proposing to make authorisation a 'permitted activity' for those firms who successfully go through the gateway. That permission to approve and authorise something as important as financial promotion activity by others must bring with it clear responsibility to the consumer for any harm that results from the inappropriate granting of that permission.

The Panel strongly believes that where a financial promotion was found not to meet the FCA's rules there should be a responsibility on the permitted approver for the losses the consumer suffers where the promotion was communicated by an unauthorised firm.

Consumers should feel that financial promotions have been approved by someone competent and permitted to do so, and that these promotions should be clear, fair and not misleading and align with the principles of the new consumer duty.

Where there are cases where harm results to the consumer as a direct result of the failure of the authorised firm to approve appropriately, even if any ultimate liability may be split between the authorised firm (the 'approver') and the unauthorised firm, the consumer should ultimately have access to the FOS to complain and seek redress (the FOS can decide on the extent of the liability of the authorised firm).

This should, along with the FCA's ongoing supervisory activities, drive better behaviour by authorised firms in carrying out their services and therefore drive better outcomes for consumers.

Even if, in reality, it seems unlikely that many cases would find their way to the FOS, especially if the firm deals quickly, transparently and fairly with the complaint in the first place, we do not want to see any consumer denied the opportunity to seek redress through the FOS for a valid complaint where responsibility for some of all of the consumers loss sits with the FCA authorised firm.

The Panel recommend that these complaints should be covered by the FOS as they are about the activities of an authorised firm approving an unauthorised firm to publish financial promotions. The Panel acknowledge that in practice, much of the harm consumers experience will likely be suffered because the consumer acted upon the promotion communicated by the unauthorised firm so it would in practice be a challenge (but not impossible) for the consumer to hold the permitted (i.e., FCA authorised) approver responsible. The Panel suggest the authorised firm have some joint responsibility for their failure in the process of approving and the impact that failure has ultimately had on the consumer who acts on the promotion.

Q4: Do you agree with our proposal for Section 21 approvers to submit a notification to us within 1 week of every approval, withdrawal or amendment of a financial promotion?

The Panel strongly agree with this notification requirement, more so where the promotion is being directed at retail consumers and/or likely to be so. It is also important for the FCA to ensure they have the resources available to accurately consider these notifications and take action if any financial promotions breach rules or guidance.

Q5: Do you agree with our proposal for Section 21 approvers to submit regular reports to us on financial promotions approved for unauthorised firms?

The Panel agree with the FCA's proposal for Section 21 approvers to submit regular reports to the FCA on financial promotions approved for unauthorised firms. As mentioned in our response to question 4, the Panel believe it is important for the FCA to ensure they have the resources available to accurately consider these reports and intervene should any financial promotions breach rules or guidance.

Q6: Do you agree with the proposed metrics and bi-annual report frequency?

The FCA has detailed the harm it is seeking to address is "too many non-compliant promotions being approved and then communicated by unauthorised firms to retail consumers. Harm has occurred when these promotions have been relied on by consumers for whom the product or service being marketed is inappropriate" (paragraph 1.4 of the published consultation).

The Panel believe that the corresponding metrics would be a reduction in non-compliant promotions being approved and communicated by unauthorised firms, and a reduction in consumer harm arising from non-complaint promotions.

It is unclear from the metrics specified within the consultation whether/how this, specifically, will be captured and reflected. The Panel would like further information on this and would like to further understand what the FCA will continue to do, beyond checking firms' returns and how this might help to gauge reduction in consumer harms.

Q7: Do you intend to apply for permission to approve financial promotions?

N/A

Q8: Do you agree with our proposed changes to the non-Handbook guidance for

the approval of financial promotions for unauthorised firms?

The Panel agree with the FCA's proposed changes to the non-Handbook guidance for the approval of financial promotions for unauthorised firms. The Panel would like to emphasise paragraph 34 re Social Media and Digital Communication and paragraph 44 re Preliminary Suitability Assessment for non-mass market investments as roughly twice as many consumers self-certify as high net worth or sophisticated as would objectively qualify as such.

Annex 2 – Financial Services Consumer Panel response to FCA's approach to Future Regulatory Framework (FRF) implementation

Financial Services Consumer Panel

AN INDEPENDENT VOICE FOR CONSUMERS OF FINANCIAL SERVICES

Telephone: 020 7066 9346
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20 December 2022

By email: forregulatoryframeworkpolicy@fca.org.uk

Dear Sir / Madam,

Financial Services Consumer Panel response to FCA's approach to Future Regulatory Framework (FRF) implementation

The Panel welcomes the opportunity to provide feedback on the FCA's proposed approach to the implementation of the FRF. At a time when consumers are facing challenges of a cost of living crisis and confidence in the FCA is likely to have diminished following consumer losses associated with high-profile regulatory shortcomings, the FCA's approach to implementing FRF provides an opportunity to reset and refocus the regulatory framework.

We have set out our comments below on different aspects of the FCA's proposed approach. Paramount, however, is our over-riding concern about the lack of explicit consumer direction in the paper. We believe it is crucial that the FCA put first and foremost the consumer voice in implementing these changes, to ensure that it remains focused on regulating the financial services market and protecting consumers. The implementation of the FRF should not distract from or dilute the FCA's attention to this most important task.

We also wish to make clear from the outset that throughout this letter, when we refer to consumers, we are including SMEs.

The international competitiveness objective

One of the key parts of the FRF is that the FCA will have a secondary objective on the international competitiveness of the UK economy and its growth in the medium to long term. We wish to note and welcome HM Treasury's assurance that this 'will not require or authorise the FCA to take any action inconsistent with [its] general, strategic and operational objectives'¹, which of course include the consumer protection objective. We

¹https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1122734/Building_a_smarter_financial_services_framework_for_the_UK_.pdf
para 2.13

often hear of a 'balance to be struck' between the international competitiveness and consumer protection objectives but we wish to be clear that this should not be an equal balance: when implementing reform, the consumer protection objective, as a primary objective, takes precedence over the international competitiveness objective and there must not be a 'trade off' here nor a cost benefit analysis pitting benefits to businesses against benefits or harms to consumers. We would like to see the FCA publish further detail on how the FCA will analyse specific policy options against its revised objectives.

The FCA must ensure and deliver the appropriate level of protection for consumers. We believe it should hold itself to the wording of the consumer principle as part of the new Consumer Duty: that is to say it should act to deliver good outcomes for retail consumers (which includes SMEs).

Finally, we note that, as initially drafted, the competitiveness objective did not include specific reference to the competitiveness of *the financial services sector*. Whilst we had reservations about the original wording, we are especially concerned by the addition of this reference to financial services as we feel it shifts the focus of the objective away from the overall economic health of the UK towards the interests of one sector, and specifically the sector the FCA exists to regulate².

Rule review framework

In our view the rule review framework must include a dedicated framework and processes for the FCA to actively capture, incorporate and reflect consumers' views, experiences and needs, as well as the outcomes delivered to consumers.

In delivering this the FCA needs to go above and beyond engagement with the Consumer Panel. We recognise that we have an important role to play within our statutory remit to represent the interests of consumers, and we will continue to provide insight derived from our wide-ranging experience and expertise. That said, engaging with the Panel is not a substitute for engaging with consumers directly and the advocates and organisations that represent them. As we have said in our responses to HM Treasury on the FRF³, this could be done via research, focus groups, forums and ad hoc advisory panels. The FCA could also consider making use of behavioural research to identify what really works in practice to help consumers make effective choices.

With this in mind, we believe the FCA should publicly set out a plan and process for engaging effectively with consumers and consumer representatives. It should set out how the FCA will gather evidence - including deploying a range of research techniques - to garner and incorporate consumer views, needs, behaviour and experiences in relation to the various FRF measures that are in train or will follow. This should be from the full spectrum of the consumer voice: from individual consumers, to small local or niche consumer groups that represent a subset of consumers, to national consumer organisations.

The FCA's plan should ensure the methods it outlines allow for *meaningful* consumer engagement. For example, although the FCA's Consumer Network is a welcome initiative, we note it tends to function more as a means to share information rather than as a vehicle for two-way engagement. Finally, the plan will also need to show how all such consumer engagement will happen where timelines are shortened in urgent situations (such as the shorter consultation periods on guidance issued during the Covid-19 pandemic).

Accountability and scrutiny

²https://www.fscf.org.uk/sites/default/files/final_fscf_response_to_pbc_fsm_bill_call_for_evidence_20221024.pdf p4

³https://www.fscf.org.uk/sites/default/files/final_fscf_response_hmt_frf_proposals_for_form_20220209.pdf p6

We welcome the FRF measures on increased transparency around Panel processes and engagement with the FCA. This includes the FCA's commitment to build on its existing arrangements for providing information about how it has engaged with the Panels and the requirement to publish a statement of policy for the appointment processes of the Panels. We fully agree on the need to ensure diverse representation on the Panel to make sure a broad range of consumer perspectives is heard.

We stand ready to respond and work constructively with the FCA on the implementation of the FRF, mindful of the resource challenges for both the FCA and us as a Panel. We would welcome discussions with the FCA on these challenges to make sure we are able to fulfil our role in relation to the FRF in addition to our existing roles and responsibilities.

As the FCA's proposed implementation approach and HM Treasury's Policy Statement acknowledge, close cooperation between the FCA and HM Treasury will be needed to implement the FRF. For this reason, we have copied this feedback letter to John Owen, Director of Financial Services at HM Treasury. We have also enclosed our letter to HM Treasury regarding their Policy Statement.

Yours sincerely,

Helen Charlton
Chair, Financial Services Consumer Panel

Annex 3 – Financial Services Consumer Panel response to HM Treasury’s Policy Statement on building a smarter Financial Services Framework for the UK

Financial Services Consumer Panel

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22 December 2022

By email: john.owen@hmtreasury.gov.uk

Dear Mr Owen,

Financial Services Consumer Panel response to HM Treasury’s Policy Statement on building a smarter financial services framework for the UK

I am sending this letter on behalf of the Financial Services Consumer Panel in response to HM Treasury’s recent Policy Statement on building a smarter financial services framework for the UK.

The Financial Services Consumer Panel is an independent statutory body. We represent the interests of individual and small business consumers in the development of policy and regulation of financial services in the UK. Our focus is predominately on the work of the FCA and so we are commenting on the Policy Statement as it and future regulatory framework (FRF) more broadly are directly relevant to the FCA’s objectives and functions.

There are two key areas we wish to comment on: the urgent need for the consumer voice to be hardwired into implementation of the FRF, and concerns about how the competitiveness objective will be implemented, to ensure that the interests of consumers remain paramount.

1. Hard wiring the consumer voice into the system

In our previous responses to HM Treasury’s consultations on the FRF we have expressed concern about the lack of consumer voice and input into the system⁴. We would like to see consumers’ views, experiences and needs embedded throughout the regulatory policy making process, including any rule reviews conducted in the future. The impact of regulatory change on consumer outcomes must be considered and therefore policy makers (and regulators) must effectively engage with consumers and their representatives. We are disappointed that neither HM Treasury’s policy statement nor the FCA’s approach to FRF implementation set out how this will be achieved.

⁴ See [here](#) for February 2021 response and [here](#) for February 2022 response. See also our [letter to the Treasury Select Committee](#) (February 2021)

In Chapter 4 of the Policy Statement, it says that there will be 'opportunities for the full range of stakeholders to engage and to feed in views as the programme is delivered'⁵. It goes on to say that 'consultation will need to be proportionate to the nature of the area of regulation as well as the work involved to avoid unnecessary delays to the commencement of the new rules and, on occasion, long enough to allow sufficient opportunity for stakeholders to respond in a meaningful way'⁶.

Whilst this is encouraging, we believe the 'opportunity' for engagement with or on behalf of consumers needs to be supplemented with formal, transparent and structured processes for engagement with consumers and their representatives in order to consider, address and incorporate consumer views, experiences and needs. Where there is need for more informal engagement, this should still be appropriately structured. Engagement with consumer representatives should include the full spectrum from national organisations to smaller niche or local ones that represent subsets of consumers.

The kind of consumer input we are proposing is especially important because of the current imbalance in consumer and industry voices. As we have pointed out in responses to previous consultations⁷, industry stakeholders have much more resource available to make their voice heard – both as individual firms and when they come together via trade bodies (especially in the current economic circumstances). This imbalance is illustrated and emphasised by the fact that the Policy Statement describes at Annex 1 a dedicated 'Industry Engagement Group', comprising associations and bodies representing the financial sector, and law firms with expertise in financial services⁸. Yet there is no equivalent engagement group to incorporate consumers' views, experiences and needs. Ultimately, it is consumers paying for financial products and services whose custom helps to finance the sector. Consumers should have equivalent treatment in terms of input as industry stakeholders.

2. International competitiveness objective

We have previously expressed our concerns about the international competitiveness objective and how it would work alongside the FCA's primary consumer protection objective. We therefore welcome HM Treasury's assurance that the international competitiveness objective 'will not require or authorise the FCA to take any action inconsistent with [its] general, strategic and operational objectives'⁹, which of course include the consumer protection objective. However, we note this is a broad assurance and await further details from the FCA about how it will analyse specific policy options against its revised set of objectives.

We often hear of a 'balance to be struck' between the secondary international competitiveness and primary consumer protection objectives but we wish to be clear that this should not be an equal balance: the consumer protection objective, as a

⁵https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1122734/Building_a_smarter_financial_services_framework_for_the_UK_.pdf

para 4.12

⁶ Ibid para 4.13

⁷https://www.fscf.org.uk/sites/default/files/final_fscf_response_hmt_frf_proposals_for_reform_20220209.pdf p5

⁸https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1122734/Building_a_smarter_financial_services_framework_for_the_UK_.pdf

p33

⁹https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1122734/Building_a_smarter_financial_services_framework_for_the_UK_.pdf

para 2.13

primary objective, takes precedence.

As HM Treasury's Policy Statement and the FCA's approach to FRF implementation acknowledge, close cooperation between HM Treasury and the FCA will be needed. For this reason, we have copied this feedback response to the FCA. We have also enclosed our letter to FCA on their FRF implementation below.

Yours sincerely,

Helen Charlton
Chair, Financial Services Consumer Panel