THE FCA PRACTITIONER PANEL:

RESPONSE TO FSA CONSULTATION PAPER CP 13/7

'HIGH LEVEL PROPOSALS FOR AN FCA REGIME FOR CONSUMER CREDIT'

MAY 2013

Introduction

The FCA Practitioner Panel welcomes the FSA consultation entitled 'High-level proposals for an FCA regime for consumer credit'. We support the Government's view that a well-functioning consumer credit market is essential. The Panel considers that a critical element of this is a regulatory regime that fulfils two criteria:

1) It operates in a proportionate, efficient and cost-effective manner (as illustrated by positive outcomes for consumers, lenders and the wider economy); and
2) Has minimal downside for lenders and consumers

We have provided our comments on the initial high-level framework as outlined in the consultation paper below, and look forward to seeing the more detailed rules in the autumn.

Executive Summary:

- Overall, we are positive about the approach taken by the FCA. We support the intention to be proportionate and to differentiate firms from a regulatory perspective on the basis of risk
- It is vital that the transfer of OFT guidance into the FCA is done in a thoughtful manner. There should not be automatic read-across of OFT guidance into FCA rules, but significant changes of policy should be considered individually and consulted on as per the normal FCA process
- The transfer also provides both the FCA and HMT with an opportunity to re-consider certain existing pieces of legislation and rules. We would support a re-consideration of the unenforceability provisions, and of section 75 in relation to overseas transactions
- The Panel remains concerned regarding the planned short timeline of transition from the OFT to the FCA, as well as the short transition period for firms to get up to speed with FCA rules

Detailed response:

Proportionality

The Panel welcomes the intention to make the regime proportionate, and in this respect supports the introduction of a two-tier authorisations process and adjusted capital requirements for relevant firms. It is important that the regulatory regime is tailored as proposed, especially given that most of those involved are only lenders rather than deposit takers (and so have a different risk profile). We would welcome further detail around how the classification into higher and lower risk activities was determined, as well as detail around how the FCA proposes to carry out the 'further differentiation within these groups based on firm and sector specific risks'.

Whilst supportive of a tailored approach, the FCA should be sensitive to the overall impact of a more burdensome regulatory regime for smaller firms. Should the future regime become too costly, existing retail lenders may withdraw from the market. This could have a severe impact on the smaller retail firms who use financing schemes to increase sales of their products. (Such as furniture retailers offering longer term financing of a sofa). We would therefore urge the FCA to be aware of the possible unintended consequences to smaller retailers and general economic activity of a more intrusive regulatory regime.

However, we would also suggest the regulator be sensitive to attempts by firms who would rightly be categorised as higher risk to seek to 'game' the tiered approach by changing the way in which products and services are supplied to fit the less onerous regime.

Transferring CCA to FCA rules

OFT guidance to FCA rules

OFT guidance should not automatically be made into FCA rules. Where it is believed that existing guidance would benefit from being converted into rules, this should be done in a thoughtful manner and should follow the normal FCA consultation process. This will potentially affect a number of areas including forbearance, affordability assessments, product governance and enhanced disclosure and financial promotions approvals.

Review of existing provisions

The transfer of the consumer credit regulation powers to the FCA means that certain of the existing provisions in the CCA will become superfluous or unnecessary. Two aspects of the existing regime that we would suggest should be re-assessed as fit for purpose would be the unenforceability provisions of the CCA, as well as section 75 in relation to overseas transactions.

We believe the unenforceability provisions currently in the Act will be superfluous under the FCA regime. Under the current arrangement, any mistake (even very minor ones) by the lender can lead to the credit agreement becoming unenforceable in court. As the OFT has had limited powers to sanction in the past, it has relied on this provision to ensure greater

compliance across the market. However, the FCA has much greater enforcement powers available and the power to grant redress. As such, we believe the FCA should work with HMT to consider whether there is a case for removing this provision when responsibility is transferred to the FCA.

Another provision that could be re-considered as part of the setting up of the new regime is aspects of section 75 of the current Act, which provides credit card providers with joint liability with the retailer for services not rendered. Our concern in relation to this section relates to its use in overseas transactions. Whereas in the UK, firms can enforce the statutory indemnity against the retailer, this option is not always available overseas. For instance, the contract law in jurisdictions such as the United States can make pursuance of the merchant for compensation very challenging. We would encourage the FCA to work with HMT to consider limiting the use of this power to the UK or at least within the European Union.

Logistics of transfer

The Panel notes with some concern the short timeline for implementation into the FCA of this significant new area of regulation. Although we are sympathetic to the Government's desire to enhance consumer protection quickly, we retain concerns regarding resource requirements and the logistical challenges involved in taking over on such a large new area of responsibility. As a Panel, we remain concerned that the transfer of these powers to the FCA in such a short space of time could cause difficulties.

The transfer is likely to be made more challenging for the regulator due to its decision to require firms with which it has an existing relationship to re-apply for authorisation. We are unclear why this decision has been made, and are worried this could cause unnecessary additional burdens for the FCA during this short transfer period.

Further, while we welcome the establishment of a 'grace period', where firms do not face formal action as long as they can demonstrate that they have acted in compliance with the relevant CCA requirement or OFT guidance, we think six months is too short. Given that there will be significant regulatory changes for firms to contend with as the FCA adopts a new regulatory approach to consumer credit, we would encourage the regulator to extend this grace period to eighteen months.

Next steps – publishing detailed rules

Overall view

We would urge the FCA not to deviate materially from its suggested approach outlined in the high level consultation when it comes to publishing detailed rules in the autumn. Given the short timing of publication prior to implementation, there will not be time for industry to comply with any significant changes by the deadline of full authorisation. This would affect new entrants to the market and existing regulated firms alike, given the short grace period.

As stated above, we believe it is also key for the regulator to take a considered approach to how to implement the detail for the regulatory regime. For instance, areas such as data

reporting are likely to require quite different approaches for new firms (especially those who have been categorised as low risk). The FCA will also have to take its time to consider how best to communicate proposed changes and requirements to new entrants in time for full authorisation.

Specific comments

We note that during the two year transitional period, holders of an interim permission or variation of permission will not be able to act as a principal to an appointed representative. As a consequence, a firm's ability to act as a principal will be dependent upon when it is able to achieve full authorisation.

The Panel is concerned that this could therefore place potential principals at a commercial advantage/disadvantage vis-à-vis others and would welcome greater detail on this topic in the next consultation paper.

In addition:

- The Panel supports the Government's intention to maintain the exemptions for High Net Worth individuals and business lending where credit exceeds 25k
- The Panel supports the Government's aim of ensuring that consumers who are lending and borrowing via peer-to-peer platforms enjoy the same regulatory protections as customers of more traditional lenders. We seek clarity from the FCA for what the proposals for peer-to-peer lenders will be in the interim permission period
- Regarding designated professional bodies, we would welcome greater clarity regarding what credit activity is deemed to be 'incidental' and therefore exempt from the regime
- We would welcome greater detail around the regulation of liquidators and receivers/insolvency practitioners, noting that the approach as proposed seems very complex
- We would welcome greater clarity on the scope of the simple definition of credit brokerage which includes credit intermediation

The Panel looks forward to continuing to engage with the FCA on this topic over the next year.