

Discussion Paper

DP13/1☆☆

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Transparency



The Financial Services Authority invites comments on this Discussion Paper. Comments should reach us by 26 April 2013.

Comments may be sent by electronic submission using the form on the FSA's website at: www.fsa.gov.uk/Pages/Library/Policy/DP/2013/dp13-01-response.shtml.

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Setting the scene

- 1.1 The firms and individuals that we (the FCA) regulate have a huge impact on people's daily lives and on our economy, so we know that, like other public bodies, we should carry out our work in a way that is as open and accountable as possible.^{1,2} Being a transparent regulator is at the heart of our approach; we are committed to being clear in the way we communicate and in the way we work, and to be open to scrutiny from consumers, firms and Parliament.
- 1.2 As a result of changes made to the Financial Services and Markets Act 2000 (FSMA) by the Financial Services Act 2012 (the 2012 Act), we will be required to have regard to two new regulatory principles³ relating to transparency:
- The desirability of publishing information about regulated firms/individuals, or requiring such persons to publish information.
 - The FCA should exercise its functions as transparently as possible.
- 1.3 In light of these new principles, we are reviewing the extent of our constraints and when and how we balance the competing calls of transparency and sound regulation.

Our approach

- 1.4 Our approach is informed by the guiding principle that the presumption should be towards transparency unless there are compelling regulatory, legal or other reasons to the contrary.

What do we mean by transparency?

Being transparent is about disclosing relevant information in a way that can be clearly understood. For the FCA, this might mean disclosing more information than has been disclosed by the FSA; it may also mean disclosing a smaller amount of more meaningful and relevant information that can be used more effectively.

We will seek to use transparency where we believe it will help consumers make more informed choices or change consumer or firm behaviour in ways that help us achieve our objectives, or where it will help external stakeholders hold us to account.

1 *Journey to the FCA*, October 2012: www.fsa.gov.uk/static/pubs/other/journey-to-the-fca-standard.pdf

2 The transparency agenda for the public sector is a pledge by the Coalition Government; the Cabinet office is playing a lead role. Cross-government review: Implementing Transparency, National Audit Office 2012.

3 The regulatory principles are what we must 'have regard to' when we carry out our work. They are set out in section 3B of FSMA, as amended by section 6(1) of the 2012 Act.

- 1.5 Transparency does not take precedence over other relevant considerations. We are required to take account of other regulatory principles including: efficiency and economy, proportionality and the responsibilities of senior management.⁴ While the 2012 Act makes several changes that support the view that greater transparency and disclosure should be essential components of our regulatory regime, there remain a number of legal constraints about what information we are legally permitted to disclose. Further, our ability to change our approach to disclosure is limited in various ways including by European directives. More information about the legal framework is provided in Appendix One.
- 1.6 We have to strike the right balance between disclosing information (where we are legally able to do so) where the public has a legitimate interest in knowing about a particular matter, and refraining from disclosing information where it would be unfair to a particular firm or individual or where it could harm the public interest.
- 1.7 Our ideas build on what the FSA has already done. In particular, we have taken account of work in Discussion Paper DP08/3, *Transparency as a Regulatory Tool*⁵, and drawn lessons from follow-up actions. We have also taken account of research that has looked at the approaches of other regulators and public bodies.

About this paper

- 1.8 This paper provides an opportunity to look at what we could and could not disclose about our regulatory activities and about our organisation, and what we should require firms to disclose. Its purpose is to share our ideas and to stimulate a discussion about how we can be more transparent against a backdrop of stakeholders' expectations and legal constraints.
- 1.9 Firstly, it considers the background to the debate on transparency, including lessons learned from the FSA's approach, and lessons from wider research on transparency and disclosure. It then explores a small number of ideas about how we could be a more transparent regulator and provides an overview of our legal framework.
- 1.10 These ideas, generated through internal discussions and in consultation with trade bodies, consumer bodies and Panels⁶, are set out in three main categories:
- how the FCA could be more transparent (transparency of the regulator);
 - information that we could release about firms, individuals and markets (disclosure as a regulatory tool); and
 - information that we could require firms to release:
 - about their products; and
 - about other aspects of firms' performance or behaviour.

⁴ Ibid

⁵ www.fsa.gov.uk/pubs/discussion/dp08_03.pdf

⁶ Under FSMA, the FCA, like the FSA before it, has established Panels with which the FCA must consult when undertaking its regulatory activities, to understand the impact on different actors. There are three panels: the Consumer Panel, the Practitioners Panel, and the Smaller Business Practitioners Panel. The FCA will also have to consult a fourth panel, the Market Practitioner Panel.

- 1.11 We believe the ideas in this paper have the potential to advance our operational objectives and increase our accountability. However, they are not intended to be exhaustive. As we shape the FCA, we will continue to identify additional ways to increase transparency.

Contributing to the discussion

- 1.12 We have not determined which ideas will be taken forward. We would like you to give us your views and to provide us with your ideas. There are a number of questions included as a guide, but responses should not necessarily be limited to these and we welcome all constructive suggestions.
- 1.13 We will welcome responses until 26th April 2013. We will publish all responses on our website after this date where we have been given permission to do so. If you do not wish your response to be published please tell us.

Next steps

- 1.14 We will consider all suggestions and will assess and prioritise those that may be taken forward by looking at:
- whether it is legally possible;
 - the extent to which it will be compatible with the FCA's strategic objective and advance one or more of the FCA's operational objectives;
 - the extent of desired impact;
 - risks; and
 - practicalities of implementation.
- 1.15 We will seek to establish a transparency framework that we will use to identify transparency initiatives. To maximise the net benefits of transparency we will need to measure and monitor the costs and benefits of our transparency initiatives on an ongoing basis, so that we can assess whether they are successful, and whether we are being economic, efficient and effective.⁷
- 1.16 Some suggestions may require us to change the way we work or to change how firms provide information; it may take some time to do this. If, for example, we want to change firm disclosure requirements, we would have to make rules. This would involve carrying out a consultation exercise, completing a cost benefit analysis, and explaining how the rules would advance one or more of our operational objectives.

⁷ *Cross-government review: Implementing Transparency*, National Audit Office, 2012.

2

Background

- 2.1 We recognise that our work on transparency has not occurred in a vacuum; it builds on previous work carried out by the FSA and acknowledges the move towards greater transparency in public life. In this section we set out:
- lessons from the FSA approach to transparency;
 - lessons from wider research on transparency; and
 - legal considerations.

Lessons from the FSA approach to transparency and recent initiatives by other regulators and Government

- 2.2 When it was established, the FSA was expected to be transparent about how it spent its money, its decision-making and its performance. There were two main requirements: to publish Annual Reports and Business Plans⁸, and to consult on any rule change and provide the related arguments, evidence and a cost benefit analysis. In addition, from 2004, the FSA started to publish summary minutes of its Board meetings.
- 2.3 Like other public bodies, the FSA became subject to the Freedom of Information Act 2000 (FOIA), which required it to respond to information requests. And in 2005, like all regulators, it had to align its behaviour to five Principles of Good Regulation, one of which was transparency.⁹

Better firm disclosure

- 2.4 From its inception, disclosure has been an important focus of the FSA's approach to regulation. It was reflected in its principles of business with specific disclosure rules for each product regulated. The FSA's approach prioritised firms having the right principles and processes. If they provided consumers with full information in product documents, then consumers would be capable of freely choosing the best products for them. With hindsight, this approach did not adequately consider the types of information that consumers would be able to engage with, interpret and act upon to seek out the best deal.

⁸ Before 2004 we called this our Plan and Budget.

⁹ http://webarchive.nationalarchives.gov.uk/20100807034701/http://archive.cabinetoffice.gov.uk/brc/about_us.html

- 2.5 Under the 2012 Act, the FCA will have a new objective of promoting effective competition in the interests of consumers, as well as a duty to do so when discharging its general functions (insofar as is compatible with its other objectives). As part of this new competition mandate, there may be an enhanced role for the FCA to review firms' disclosures to ensure they enable consumers to understand and engage with the market. In doing so, we will seek to learn from wider work undertaken on disclosure.
- 2.6 In recent years, public bodies have sought to harness technological developments and insights from behavioural economics to make disclosure more effective in changing behaviour. Some regulators, including Ofgem and Ofcom, have applied behavioural insights to empower consumers by seeking to simplify tariffs, or by making information clearer, comparable or personalised on the price or underlying quality of products.^{10,11} Ofcom has also endorsed price comparison websites and published its own comparative information.
- 2.7 In its recent consumer empowerment strategy, the Government set out what could be done to 'increase consumer power in a rapidly changing and demanding economy'.¹² As part of this initiative, the Behavioural Insights Team (Cabinet Office) has led the 'midata' project which, 'aims to put consumers in charge so that they are better able to get the best deals'. Their work has also looked at consumers' interaction with disclosure and how to make messages more effective at changing behaviour including how technology can play a role.
- 2.8 As the *midata* project suggests, online aggregator websites have transformed how consumers engage with, compare and purchase financial services products, particularly where the underlying product is complex. The *midata* project has also considered whether aggregator sites can play an even greater role in helping consumers if firms' disclosure was to take into account an individual's circumstances. More broadly, in its recommendations, the Independent Commission on Banking proposed empowering consumers in the current account market through linking price comparison websites to personal account usage.¹³
- 2.9 At the same time, concerns have been expressed about the independence or quality of intermediaries in wholesale or retail markets.¹⁴ Online aggregator sites may lack the data to provide a full cross-market picture; they may promote those firms that provide the biggest commissions or they may be unable to deal with complex products. Many products are compared solely on price which, on its own, may not be an adequate indicator of value. Consequently, firms may design products to top the comparison table on price by stripping away product features.
- 2.10 With the new competition objective in place, there may be a greater role for the FCA to ensure that firms disclose the appropriate information in order to enable third parties, such as consumer websites or aggregator sites, to do a better job at enhancing transparency. We are exploring how to harness technological development and a better understanding of

10 *Ofgem, Retail Market Review: Updated domestic proposals*, October 2012; *Ofcom, Simplifying non-geographic numbers: details proposals on the unbundled tariff and Freephone*, April 2012.

11 OFCOM, *2010 Voluntary Code of Practice: Broadband Speeds*

<http://stakeholders.ofcom.org.uk/telecoms/codes-of-practice/broadband-speeds-cop-2010/code-of-practice/>

12 BIS, *Consumer Empowerment Strategy; Better Choices: Better Deals. Consumers Powering Growth*, April 2011

<http://www.bis.gov.uk/betterchoices>

13 For example, p4 https://update.cabinetoffice.gov.uk/sites/default/files/resources/BIT_fraud_error_debt_web.pdf

14 Consumer Focus, *Market comparison websites – not just for meerkats*

www.consumerfocus.org.uk/blog/market-comparison-websites-not-just-for-meerkats

consumer behaviour. This will help us to design firm disclosures that are more likely to lead directly to improved consumer engagement and behaviour change, either for retail or wholesale consumers.

Disclosure as a regulatory tool

- 2.11 The FSA was keen to send appropriate messages to industry and other stakeholders about its concerns and has communicated these in several ways, for example:
- Annual *Financial Risk Outlook* and its successors;
 - Letters to firms, such as Dear CEO letters;
 - Speeches;
 - Guidance or technical notes; and
 - Feedback on thematic reviews.
- 2.12 The enforcement process has also been used to send messages about where the FSA has thought firms' or individuals' behaviour posed an unacceptable risk to its objectives. In accordance with FSMA requirements, the FSA usually published final notices it gave to firms and individuals, which set out details of the enforcement action it had taken. Since October 2010, it has also been able to publish decision notices. These statutory notices include details of the failings of the firm or individual in question, so that other firms and individuals can learn lessons and amend their own approach if necessary.
- 2.13 In each of these examples, the focus was on how the FSA could let its stakeholders and the general public know its strategic concerns. More recently, the debate has shifted to also include a broader set of aggregated and firm-specific data that could be disclosed where, in doing so, it would contribute to achieving its objectives.

Approach in light of the financial crisis

- 2.14 The FSA was pro-active about learning the lessons from the crisis, including being more transparent about its performance. In October 2012, Lord Turner said the FSA had been 'brutally honest about its own failures'.¹⁵ For example, it set out the failures in its supervisory approach to Northern Rock. These experiences will help inform the FCA's approach to accountability. Amendments to FSMA to require the FCA to produce a report in a case of a serious regulatory failure support this approach (see page 10 for more information).

Discussion Paper DP08/3 Transparency as a Regulatory Tool

- 2.15 In 2008, the FSA published DP08/3, which was the result of the growing interest in the relationship between regulation and transparency.¹⁶ It suggested disclosure could be a tool for regulation and acknowledged that in each case, there were potential downsides,

¹⁵ Lord Turner, speech to Mansion House, October 2012.

¹⁶ www.fsa.gov.uk/pubs/discussion/dp08_03.pdf

unintended consequences or costs that should be considered. It concluded that disclosure was most likely to be effective where it was directed at altering firms' behaviour, by exposing their or their peers', relative performance, in ways aligned with the FSA's objectives.

- 2.16** DP08/3 reaffirmed the view that many consumers might not change their behaviour as a result of changes in firms' disclosure. Nonetheless, such disclosure could still deliver benefits to consumers through better firm behaviour if the information was used by a minority of active consumers or other market participants.
- 2.17** Following DP08/03, the FSA produced a Code of Practice on Regulatory Transparency to support its approach to transparency. The guiding principle was a presumption in favour of being transparent where the following principles were met:
- any disclosure would not infringe any statutory restrictions, including those under FSMA;
 - information that is believed on balance to serve, rather than harm, the public interest would be disclosed pro-actively; and
 - standards of economy, efficiency and effectiveness were met.

Lessons learnt from the DP

- 2.18** The Code of Practice remains a valuable tool for analysing the possible ways in which transparency can help with regulation as well as the possible pitfalls. However, while DP08/3 largely succeeded in providing a framework for transparency, the FSA was not able to provide the impetus required to drive systematic reform. The DP suggested a number of reforms but the Code was not prioritised or translated into a change programme, which meant that most of these reforms were not taken forward.
- 2.19** One major initiative introduced following DP08/3 was for firms to publish their complaints data and for the FSA to aggregate their submissions. According to our research (see case study over), this programme has been largely successful in delivering the outcomes intended – exposing firms' complaint figures has focused their senior management's minds on improving the quality of complaint handling. We can learn from this case study in future proposals to use transparency as a regulatory tool.
- 2.20** Nevertheless, this example cannot blind us to the caution expressed in DP08/3 and elsewhere, about the limitations of disclosure to change consumer behaviour because of consumers' abilities to engage with financial information.^{17,18}

¹⁷ FSA (2009) Financial Capability and Wellbeing: Evidence from the BHPS www.fsa.gov.uk/pubs/occpapers/op34.pdf

¹⁸ Better Regulation Executive and Consumer Council (2007) Warning: Too much information can harm consumers and www.bis.gov.uk/files/file44588.pdf

Case study on complaints data

Following DP08/3 and the subsequent Consultation Paper, the FSA decided to require firms with over 500 'recordable complaints' to publish their complaints figures twice a year. This process started in the second half of 2010. In early 2012, the FSA conducted a review of this initiative against its original objectives of increasing firms' focus on complaint handling and against the risks identified.

In the analysis for the proposal, the FSA identified the following possible unintended consequences:

- That the wrong firms would be targeted for example: sensationalist stories targeting the largest firms which inevitably may have a higher number of complaints.
- That publication may incentivise firms to under report.

The FSA surveyed 183 firms, trade associations, consumer groups and direct consumer research to ascertain how far they were aware of the publication. Findings suggest that publication has broadly achieved the intended outcomes. The fears about the lack of impact, or the unintended consequences have largely not materialised.

Highlights from the research included:

- Trade associations agreed that firms are more focused on complaints.
- Firms taking actions to address the causes of complaints.
- 76% of firms used complaints data to compare against peers and 59% to review their own complaints performance.
- Consumer groups say firms used complaints data to demonstrate performance and what they are doing to improve.
- 42% of firms thought the coverage was fair, only one firm considered it unwarranted.
- Only 6% of firms think consumers are more likely to complain due to this but consumer groups think it does encourage those to complain who have cause to complain, as it proves that complaints will be dealt with.
- While increasing consumer awareness was not a direct objective of the initiative, consumer research suggested the publication of complaints data had begun to make an impact amongst the general public. 22% of consumers claimed to be aware of the complaints data, 38% of whom said they used it when choosing a new financial services provider.

The FSA and industry were both concerned about a lack of contextualisation with the media focusing simply on the volume of complaints, mostly on the big banks. The research concluded there would be added benefits if media attention focused on the worst offenders rather than just those with the largest volume of complaints. We consider that lesson further in the section on firm disclosure.

The FSA has focused on the quality of complaint handling through a number of initiatives in recent years, so establishing a direct causal link between this initiative and the quality of complaint handling is not possible. However, the sentiment from all stakeholders and perhaps unexpectedly, from direct consumer research, suggests that the initiative has helped our objectives and is worth emulating.

Lessons from wider research on transparency

- 2.21 Proposals in DP08/3 were supported by a literature review. In preparing this DP we have carried out a review of the earlier evidence and of new literature in related areas, including the approaches taken by other regulators and the subsequent impact.
- 2.22 A number of key messages were identified, that:
- Disclosure is not sufficient to provide transparency; information needs to be able to be processed by consumers for it to result in clear messages that make products, firms or markets more transparent.
 - There are limitations to the complexity of information that can be processed by all consumers, and that excessive information provision undermines the benefits of providing the information at all.
 - There are examples of where consumers did not understand or act on apparently simple information. This was attributed to ‘biases’ where consumers have certain preferences that cause them to act in a way inconsistent with efficient market theory that suggests consumers will seek to maximise the value they obtain from products.
 - Behavioural economics may be able to support the design of disclosure in the context of such biases, but there is not yet sufficient evidence to support any specific approach, and testing will be critical.
 - Regardless of the design of disclosure, if the underlying services are too complex, then consumers will not be able to process the information. Therefore transparency will remain limited regardless of the form of disclosure, unless intermediaries are able to support end-consumers in understanding the information available.
- 2.23 The review also looked at how regulators sought to assess the impact of their regulation, supervision and enforcement, and found that there is a precedent of using inputs, outputs and outcomes to measure the impact of regulation. Unsurprisingly, this was largely about accountability rather than having a positive impact on the market itself. The full report, *Review of literature on regulatory transparency* is available on our website.

Legal considerations

- 2.24 There is a need to balance the desire for greater transparency with sufficient legal safeguards to protect sensitive information relating to both individuals and market participants.
- 2.25 The same broad legal considerations that applied to the FSA will continue to apply to the FCA. We explore these more fully in Appendix One but, in summary, they relate to:
- restrictions in FSMA on publishing confidential information;
 - due process requirements in FSMA regarding public censure; and
 - requirements under other legislation, including the Freedom of Information Act, the Data Protection Act and Article 8 of the European Convention on Human Rights.

3

How the FCA could be more transparent

- 3.1 This section discusses our accountability and changes we are making, either as a result of the 2012 Act or on our own initiative, so that we are more accessible. It also sets out ideas for how we could be more transparent about the work we do.

Our accountability

- 3.2 We are committed to being transparent about our work, the decisions we make and the actions we take.¹⁹ Explaining to the public, firms and Parliament our thinking, the way we work, how we manage our costs and that we are open to scrutiny, is important to our own legitimacy as an effective regulator.
- 3.3 The FSA voluntarily published summary minutes of its Board meetings. The 2012 Act amends FSMA to require that the FCA publish a record of Board meetings, either within six weeks of a Board meeting taking place or, if no meeting is held during that period, within two weeks of the next meeting.²⁰ Confidential information will continue to be redacted before publication. These requirements will enable our external stakeholders to read information about discussions and decisions taken within a reasonable timescale.

External scrutiny

- 3.4 There are new formal mechanisms to scrutinise our work. As well as the Treasury Select Committee (TSC), the FCA will also be held to account by the Public Accounts Committee (PAC). These committees can ask us to appear before them to answer questions about particular aspects of our work and our expenditure, in line with their individual remits.

¹⁹ *Journey to the FCA*, October 2012: www.fsa.gov.uk/static/pubs/other/journey-to-the-fca-standard.pdf

²⁰ Para.10 of Sch1ZA to FSMA, as amended by the 2012 Act.

- 3.5 The 2012 Act amends FSMA to give the National Audit Office (NAO) greater powers to hold us to account for how we manage our costs and spending, and to examine our performance and service delivery. The NAO will audit our financial statements and report results to Parliament; it may also choose to carry out a value-for-money study to look at how economic, efficient and effective we are being in delivering our services.
- 3.6 As part of our work to shape the FCA, we are developing a value-for-money strategy that we will publish. It will establish a framework that over time will enable us to examine our different activities to ensure we are making the most efficient use of our resources. As part of our value-for-money strategy, we will aim to publish more information about particular areas of direct expenditure such as IT and indirect expenditure such as s166 reports.

Regulatory failures

- 3.7 As part of our ongoing accountability, we will need to carry out an investigation and subsequently report to the Treasury if there has been a significant regulatory failure. This will be where it appears to us that two conditions have been met:
- a significant failure to either secure an appropriate degree of protection for consumers; or a failure that had or could have had a significant adverse effect on the integrity of the UK financial system or on effective competition in the interests of consumers; and
 - the events occurred, or were made worse, because of a serious failure on our part or a failure of the system itself.
- 3.8 The Treasury may require us to carry out an investigation and report to them where they consider the conditions have been met, or if they think an investigation is in the public interest.²¹ We will be publishing our statement of policy on regulatory failures some time after April and it will cover what we will take into account when deciding whether the above conditions are met.

Changing our approach as a regulator

- 3.9 As part of our new approach, we are looking into how we can improve the accessibility and transparency of information that we produce. The FSA published information but feedback from consumer groups and industry tells us that it was often too difficult to find the information and to understand it.
- 3.10 To enable the public and others to hold us to account effectively, we will therefore aim to be more open in the way we communicate. We will aim to ensure our publications are easier to understand and written clearly using plain language, where possible. As part of our work to establish the FCA, we are developing a new website that will be easier to navigate to find information and key documents.

²¹ Section 76 of the 2012 Act.

Making more of what we already publish

3.11 Table One below shows the categories and examples of some of the information published by the FSA and that the FCA will continue to publish.

Category of information	Examples
Planning and performance	Annual Report Business Plan Service standards Enforcement performance account
Policy	Discussion and consultation papers including cost benefit analysis Policy statements
Research	Occasional papers Research findings
Regulatory processes	Handbook Speeches
Freedom of information	Disclosure log of FOIA requests Publications scheme
Regulatory data	The Public Register Complaints data Product sales data Aggregate mortgage lending and administration return data
Regulatory decisions	Statutory notices

3.12 We are keen to explore how we could go further and publish a greater amount of information in these categories. For example, rather than publishing a selection of consultation responses, we could publish all responses except where the respondent has specifically asked us not to publish their response, rather than disclosing only those considered to be of continuing public interest²²; we could publish all FOIA requests and our responses; and we could publish more information about our performance framework e.g. our performance outcomes and indicators, and how we will report our performance to our executive and Board.²³ We could also publish more about our research programme and research findings.

Publishing more about our processes and the actions we take

3.13 We generate and hold a large amount of information to help us run the organisation and to carry out our regulatory activities. We wish to be transparent in a meaningful way, which means identifying information that is useful and relevant to our stakeholders, to aid their understanding about what we do and to hold us to account.

²² Current FSA disclosure log and examples of what may be included: www.fsa.gov.uk/information/disclosure_12.shtml

²³ In June 2013, we will be publishing a paper setting out the FCA Performance Framework and our approach to outcomes-based performance measurement.

- 3.14 We are considering the following three ideas for increasing the transparency of our processes:
- whistleblowing: saying more about what we've been told and the action we may have taken;
 - publishing more about our enforcement activities; and
 - publishing more about our supervisory activities and supervisory outcomes.
- 3.15 These ideas represent a step-change. We believe they will help our stakeholders and the public judge our actions and hold us to account. Like the other ideas in this paper, these are not exhaustive and you may have other suggestions that you would like us to consider.

Whistleblowing: saying more about what we've been told and the action we may have taken

- 3.16 After they share information with us, we currently say very little to whistleblowers. We are constrained by law²⁴ from providing specific information about action we have taken; however, we think we could say more about what we do with information received.
- 3.17 Without compromising confidentiality, we could provide a written response to the whistleblower to let them know whether we are acting on the information and to provide a general overview of the next steps we will take. We could update the individual whistleblower where firms give us their permission to do so, or where we have taken action that has resulted in a statutory notice being issued. Some whistleblowers are happy to contact us, but do not want us to follow up with them by email or letter (in case, for example, they are reporting a partner or someone they live with). So we need to take that into account in deciding what feedback to give.
- 3.18 We could also report about whistleblowing on an aggregate basis for example: the number of whistleblowing incidents, the type of cases and an overview of the type of action taken.
- 3.19 Saying more about our activities in response to whistleblowing could serve to assure whistleblowers and other stakeholders that we take information received in this way seriously. It could help to demonstrate that we are engaged, we listen and we are determined to act where we can on this information as part of our intelligence-gathering across the market.
- 3.20 In pursuing this suggestion, we will also need to consider how best to communicate our decisions not to take action and to mitigate the risk that this may act as a barrier to other whistleblowers coming forward. There will be occasions where we consider intelligence received from a whistleblower and decide, based on that and other evidence, that no further action is needed.

²⁴ Section 348 of FSMA restricts what information we can provide.

We are considering saying more about what we've been told and any action we may have taken as a result of whistleblowing.

- What information do you think would be helpful?
- What do you think would be the potential benefits?
- What do you think are the potential drawbacks?

Publishing more about our enforcement activities

3.21 We publish an annual performance account about our enforcement activities. It includes information about our approach, and the number and type of cases we have been working on. We could expand this to provide a more detailed picture of our activities, for example by:

- saying more about what we are seeking to achieve through our enforcement activities;
- bringing together themes and explaining why we have focused on particular topics in our work;
- highlighting the achievements and any lessons learned;
- enhancing the brief summaries of the feedback meetings we have with firms at the end of cases, by providing more information about the issues covered; and
- including more information about our work such as the average length and cost of investigations, our allocation of resource by sector, and some of the challenges we face in carrying it out.

3.22 In pursuing enforcement action, we take a number of factors into consideration. These are often challenging decisions that require us to make judgements based on whether we consider that pursuing action will have an impact on the individual or firm, and act as an incentive to others to amend their approach. All cases are different and cannot be compared easily, meaning that we may pursue them in different ways. We believe that by expanding the performance account in the way suggested, consumers and other stakeholders would be better informed about our enforcement work, and better placed to understand what we do, how we do it and why we do it, based on contextual information.

We could publish more about our enforcement activities in our annual performance account.

- To what extent do you think this would be helpful?
- What additional information about enforcement activities should be published?
- What do you think are the potential benefits?
- What do you think are the potential drawbacks?

Publishing more about our supervisory activity

- 3.23** We already publish information about supervisory activity and outcomes, for example, we publish supervisory notices. We think we can go further. Disclosing more about our supervisory activity should help inform our stakeholders about the trade-offs that we often have to make. It should help them to judge our approach and performance; it could help to explain where we believe there are risks and how we are mitigating those risks. Evidence of supervisory activity targeted at certain issues or sectors could act as an incentive to change firm behaviour if they understand how we work and how we might tackle certain issues.
- 3.24** We propose publishing anonymous aggregated information on the following:
- how many planned and unannounced supervisory visits have taken place across different sectors and mapped to the firm classification, and the total cost of these;
 - how many variations in permissions (OIVOPS²⁵ and VVOPS²⁶) have occurred and in which sectors; and
 - how permissions have been varied or the type of requirements imposed.
- 3.25** There are potential unintended consequences if some firms use this information to identify areas we are not focusing on and to lower their standards. Our initial view is that the benefits may outweigh potential unintended consequences. When taking this proposal forward we will need to consider carefully how information is presented and contextualised, (for example, providing a non-exhaustive list of key issues), to ensure there is a net beneficial effect on behaviour.

We could publish more supervisory activities and outcomes.

- To what extent do you think this would be helpful?
- What additional information about supervisory activities should be published?
- What do you think are the potential benefits?
- What do you think are the potential drawbacks?

²⁵ Own Initiative Variation of Permission (OIVOP)

²⁶ Voluntary Variation of Permission (VVOP)

4

Information we could release about firms, individuals and markets

- 4.1 This section sets out ideas about the information we could release about firms, individuals and markets.
- 4.2 We hold a considerable volume of information. Much of it is about the firms and individuals we regulate and includes objective data about firms and individuals such as the number of complaints made against a firm and the products it sells.
- 4.3 The FSA currently collects data through returns made by firms including complaints data, product sales data, and the mortgage lending and administration returns (MLAR) data, publishing this in aggregate. The FCA will continue to publish all of this data and will be looking at other aggregate data we can publish, where feasible. The MLAR data will be published jointly by the FCA and the Bank of England.
- 4.4 We also generate subjective data such as the opinions we form about firms or individuals through undertaking thematic work or taking disciplinary proceedings. In pursuit of our new competition objective, we will also be generating more subjective views on markets. We will create a Markets Map which tracks concerns we have around possible competition weaknesses in the markets that we regulate. Elements of this will be published through future versions of the *Conduct Risk Outlook*, highlighting our biggest concerns around competitiveness in the financial services industry.
- 4.5 In addition to thinking about *what* may be disclosed, we are also considering whether *the way* in which we disclose could be improved. For example, whether we should disclose information:
- in more (or less) detail so as to communicate our messages more effectively; and
 - earlier in the process.

How could we be more transparent?

- 4.6 We carry out three main regulatory activities. We approve firms and individuals to conduct financial services. We then supervise to ensure compliance with our rules. We also take enforcement action when misconduct occurs.
- 4.7 We are considering in particular, the following three ideas for increasing the transparency of the information we collect and the judgements we make in the pursuit of our regulatory objectives:
- transparency of our authorisations process;
 - transparency of our thematic work and early interventions; and
 - transparency of the redress process.
- 4.8 You may have other suggestions you would like us to consider. It would be helpful to us in deciding how to proceed to know what further information you would like us to disclose, how you would like us to disclose it, and how this would be helpful to you.

Transparency of our authorisations process

- 4.9 When making decisions about who is fit and proper to undertake regulatory activity, among other activities, we gather a considerable amount of information and data. We are exploring whether we could be more transparent about the work we do in our Authorisations Division.
- 4.10 We already disclose information about the authorisations process. For example, we publish information on refusals in the form of a decision notice or final notice, but more information could be made available. We are therefore proposing to publish in anonymous aggregated form the following:
- the average length of time it takes to authorise firms in the context of the statutory time limit for dealing with applications; this would be split by sector and regulatory activity;
 - the broad reasons why firms withdraw from an authorisations process; and
 - the broad reasons why applications are refused.
- 4.11 If we publish common reasons for refusals we would make firms more aware of our requirements and expectations. We believe this could help new entrants understand our authorisations process, what we are asking and our requirements as they attempt to enter the market. As such, this would fit with our wider barriers to entry work, to facilitate fresh competition into the market. We should consider what information we publish and in what format, in order to minimise the risk that some firms may use the information to better hide potential problems in applications.
- 4.12 We already publish details of our performance against voluntary and statutory timescales (service standards) for processing applications; however, there is little narrative or contextual information published alongside this. If we publish further information about

performance against timescales this would help external stakeholders to hold us to account. If we publish common reasons for delays in the application process, it may act as a tool to highlight areas for improvement for both the FCA and those who make applications.

We are proposing to publish the average length of time it takes to authorise firms and the reasons why applications are refused.

- To what extent do you think this would be helpful?
- Is there any other information you would like us to publish in relation to the authorisations process? Why?

Transparency of our thematic reviews and early intervention

4.13 The FCA will use three supervisory pillars in supervising firms:

- the Firm Systematic Framework;
- Event driven work; and
- Issues and Product work.

4.14 Thematic work is therefore a core element of our supervisory approach. The FSA already publishes information about its thematic reviews but we believe that by improving the content, clarity and accessibility of this information, we could be more transparent about thematic work we carry out.

4.15 There have been requests from consumer representatives that we should disclose the firm-specific results of thematic work. But the FCA is constrained by law from disclosing the firm-specific results of thematic work.²⁷ Failure to name poorly performing firms can mean consumers are kept in the dark. Consumers who lack relevant information about the quality of firms or their services may be unable to choose between, on appropriate grounds, different firms and different products. This can lead to inefficient or unsuitable purchases and a loss of confidence in markets. Disclosure that helps consumers to identify better firms or products should stimulate competition between firms.

4.16 The FCA is tasked with the responsibility to be appropriately proactive and interventionist to nip mis-selling problems in the bud. There have been occasions when the FSA has taken early intervention action and, often as the result of thematic reviews, has requested that firms make urgent changes to selling practices or training. If firms, in response to FSA pressure, do this voluntarily, then the FSA action is not normally made public as it could be seen as a breach of confidentiality or censure without due process. This means that FSA supervision action remains hidden from public view.

4.17 The FCA is in a difficult position. In the interests of fairness, we are legally obliged to follow a process that provides a firm with an opportunity to make representations to us, which we must consider, before it is publicly censured. We also cannot issue general guidance on rules until we have gone through a formal consultation exercise.

²⁷ For further information please refer to Appendix One – The Legal Framework.

- 4.18 Publishing thematic work on an anonymous aggregated basis would, however, put the industry ‘on notice’ that we are constantly reviewing and exploring sectors. This may act as an incentive for firms to act without the need for more robust supervisory or enforcement action. It also signals to our stakeholders and the general public, where evidence suggests there are concerns or good practice; this could provide reassurance around market cleanliness.

We are proposing to develop a consistent approach for publishing the results of thematic work on an anonymised/aggregated basis.

- Do you think this would be helpful?
- What sort of information would you expect to see?
- How would you like this information to be made available?
- What are the potential benefits?
- What are the potential drawbacks?

Transparency of the redress process

- 4.19 There has been an impetus to release more information around redress, to enable the external world to understand our parameters and decision-making process in achieving appropriate compensation for consumers. This may influence other firms to change their behaviour if they have better knowledge of the redress payments being made. Redress can arise as the result of either supervision or enforcement activity. An overriding objective of the regulator in redress settlements is to get the best deal for the majority of consumers as quickly as possible in a fair way. On a case-by-case basis this may mean some consumers would be better off with a different option. But we are looking at the total package in judging its overall appropriateness.
- 4.20 We do not consistently publish the amount of redress firms pay nor the formula or criteria applied. If we were to consider publishing how much a firm pays out, we would only receive this information from the firm itself. We could use s.165 to require firms to provide us with this information e.g. the total amount of redress obtained in a year. This would be considered confidential information under s.348 of FSMA and the usual confidentiality constraints would apply. We would need the consent of firms to publish this data.
- 4.21 When there is redress as the result of a settlement of an enforcement case, the details of the redress scheme are usually set out in the confidential settlement agreement but not in the public notice. We are intending to disclose more details about the redress scheme in the public notice. It should be noted that seeking agreement from firms in settlements for greater transparency on redress could delay settlement negotiations if firms oppose this. We will expect full openness on redress as part of any future agreements.

We are proposing to publish, with the firm's consent, how much it has paid out in redress and disclose more details about the redress scheme in the public notice. Do you think this would be helpful?

- What sort of information would you expect to see?
- How would you like this information to be made available?
- What do you think are the benefits?
- What do you think are the drawbacks?

5

Information that we could require firms to release

- 5.1 This section discusses how we could change what firms disclose to improve the transparency of their activity and their performance, and sets out ideas for this.
- 5.2 In particular, there are two principles that we have in mind:
- adjusting disclosure rules to help make products or markets more transparent (the price or value of the products firms offer); and
 - mandating firms to release more or different data/information on other aspects of their performance that could be used to compare firms.

Product disclosure

- 5.3 We wish to consider whether there are markets where firms could be more transparent about the underlying value or performance of their products. This could allow consumers (retail or wholesale) to better judge, either directly or via intermediaries, which product is appropriate for their needs. We believe there is a particular need to consider this in retail financial services. Retail financial services products are increasingly bought via online aggregator sites judged primarily on price. We are seeking additional information that will enable consumers to compare prices *and* quality.
- 5.4 This fits into the FCA's broader remit which now includes a competition operational objective. The aim of these proposals is to improve consumers' understanding of the value of products. This could improve consumers' decisions in the market and may drive effective competition over the longer term.

5.5 We are exploring in particular two ideas that could result in greater firm disclosure of product performance:

- improved transparency in the annuity market; and
- publication of claims data for insurance products.

Improved transparency in the annuity market

5.6 For a number of years, there has been a focus on how well consumers understand the annuity offer from their pension provider and the importance of considering the Open Market Option. The product has a long-term impact on the consumers purchasing it that makes effective decision-making particularly important. Issues include:

- the one-off nature of the purchase;
- the inability for consumers to change their mind;
- the tendency for consumers to accept the offer from their pension provider and not to shop around;
- the difficulties for consumers in understanding whether they are reviewing annuity offers from the whole market; and
- the difficulties for consumers in knowing what alternative offers are available for them personally.

5.7 We recognise that the Association of British Insurers (ABI) have issued a new Code of Conduct that seeks to improve communications to customers, and have consulted on making annuity rates more transparent.

5.8 We believe that the regulator may also have a role in making the annuity market more transparent, comprehensible and comparable. We could explore how to improve the ease of accessing and meaningfully comparing alternative options as part of the annuity buying process. This may make it easier for consumers to know if they are getting a good value annuity and, if not, how to seek the best deal available across the market. That in turn should stimulate effective competition and enable consumers to get a better deal for their annuity.

5.9 The FSA has been undertaking thematic work on the financial losses that might arise from consumers not shopping around and any barriers to shopping around that might exist on the supply side; the FCA will continue to do this.

5.10 We recognise that there are features of this market that make comparisons particularly difficult and badly designed disclosure that does not confront these issues can lead to additional confusion and unintended consequences. When considering whether intervention is required, we intend to work with industry, the Money Advice Service and consumer bodies, and ensure that the ABI and other stakeholders' work is taken into account.

We think the annuity market could be more transparent and easier to understand.

- Do you believe the FCA has a role to play in increasing transparency in the annuity market?
- What is the best way the FCA can improve transparency in the annuity market?
- Are there any downsides or potential unintended consequences to greater transparency that the FCA should be mindful of?

Publication of claims data on insurance products

- 5.11** Consumer groups have raised concerns that some insurance products do not pay out as consumers may expect. That can either be a problem from specific firms or more broadly across a whole sub-sector of the market, as was the case with payment protection insurance (PPI). Publishing information about which firms pay out on insurance products could help to address concerns that insurers seek to avoid paying out. It would send a signal to the market about the relative performance of both firms and sub-sectors of the insurance market.
- 5.12** Publishing this data in a way that consumers would understand and pay attention to, could improve their choices of insurance providers and help them to avoid low-value products. As with complaints data, intermediaries could help consumers aggregate and compare firms' disclosures on claims. Greater focus by buyers on product value, not just price, could in turn stimulate improvements in quality from firms that rarely pay out and could make competition more effective. Done well, this work could deliver real transparency about the genuine value or otherwise of products, which would tell a really compelling story for consumers.
- 5.13** The possibility for negative publicity around poor performance in particular may become an incentive for better firm behaviour, which in turn could impact on brand reputation, share price, or even the cost of borrowing. Firms may seek to prevent bad behaviour happening if they know it will be exposed, or may try to resolve problems more quickly following exposure. Consequently, we believe it is possible that, through better disclosure, we may be able to make the market work better for consumers. Specific ways to provide and disseminate the information will need to be considered and tested carefully.
- 5.14** Transparency may be an effective tool in certain insurance markets but not work well in others. Our initial thinking suggests this could work particularly well for add-on and non-core products such as warranty, home emergency, identity theft, and mobile phone insurance.
- 5.15** In pursuing this option we would need to agree the level of detail and the methodology required to deliver the most accurate information and to create an appropriate impact. The following examples have been suggested:
- Claims per customer;
 - Successful claims percentage following an initial contact;
 - Premiums vs. payout ratios; and
 - Reducing/refusing claims due to non-disclosure.

- 5.16 Regardless of the methodology we use, there are limitations to what can be interpreted from the release of such data. There may also be valid reasons as to why some lines of insurance have low claims per customer, for example when covering a very rare but extremely costly event. Consequently, we are mindful that we would only wish to present data that was sufficiently rigorous and where it would not cause unreasonable conclusions to be drawn.
- 5.17 What may be useful data for the market to view are outlier products or firms compared to the market norm and assessing trends over time. However, any change in these trends could also be due to a variety of reasons and it may be difficult to ascertain whether a trend indicates a firm declining to pay claims.

Publication of claims data for insurance products is one idea that we think could help improve the outcome for consumers and change firm behaviour.

- To what extent do you think this would be helpful?
- What information about claims data would be useful to publish?
- What do you consider are the benefits of this idea?
- What do you consider are the drawbacks?

Other forms of firm disclosure

- 5.18 The second principle underpinning greater firm disclosure is whether firms can release any new (or amended) information that provides an incentive for them to change their behaviour in beneficial ways. Firms may amend behaviour through peer analysis or a fear of the reputational damage that negative stories may have for their business. Disclosure of information may support all of our operational objectives and has recently been proposed as part of the *Wheatley Review*.

The Wheatley Review into LIBOR

In its discussion paper, the Wheatley Review identified a number of failings with the current administration of LIBOR, which included limited transparency and accountability of the governing structures and the systems and controls within contributing banks.²⁸ The Wheatley Review proposed to pass responsibility to an independent administrator who should have regard to transparency and fair and non-discriminatory access to the benchmark. As a result, transparency is a tool to further our integrity objective, as part of the package of measures used to provide confidence in the LIBOR-setting practice. European regulators are also looking to use transparency as part of wider reforms to the way EURIBOR rates are overseen.

28 The Wheatley Review of LIBOR http://cdn.hm-treasury.gov.uk/wheatley_review_libor_finalreport_280912.pdf

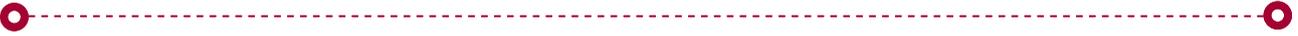
Contextualisation of complaints data

- 5.19** The major proposal we have regarding firm disclosure, is to build on the success of publishing complaints data (see Background section). We think more could be done to improve the key messages from the publication. This could be achieved by mandated contextualisation so that media, consumers, intermediaries (or other market actors) gain a more accurate understanding of what the data tells us. The objective is to further improve the signals sent to the market which in turn should enhance the behavioural benefits from firms.
- 5.20** The FSA published a voluntary contextualisation matrix for firms within its complaints handbook DISP.²⁹ For example, for banking and loans we propose complaints per 1,000 accounts. We could either consult on mandating this or look again at what criteria we should use.
- 5.21** We are aware that the FSA has not been able to identify a matrix that satisfies all parties. There may continue to be resistance for any standard measure as some will feel it frames the data in ways that send inaccurate messages to consumers. We are also aware that there may be diminishing returns from any extra work we put into this in terms of improving firms' focus on complaint handling, as the research already suggests firms are paying more attention to complaint handling. There may also be diminishing returns in getting more consumers to be aware of the complaints data. These effects will need to be weighed against likely costs to firms when we consider what further disclosure is needed, if any.

We think that mandating contextualisation of complaints data would improve understanding of the key messages.

- To what extent do you think this would be helpful?
- Do you have any suggestions about what matrix we should mandate?
- Do you have any other suggestions about where firms releasing information about their own behaviour may lead to beneficial outcomes?

²⁹ <http://fsahandbook.info/FSA/html/handbook/DISP/1/Annex1A>



6

Conclusions

- 6.1 Our approach to transparency will be guided by our new approach to regulation and by the principles set out in this paper. There are legal constraints, as set out in Appendix One, and a number of other criteria that we will need to consider when taking ideas forward including: the contribution to our objectives, desired outcomes, risks, costs and benefits.
- 6.2 We are a new organisation that will learn from its past; there are lessons set out in this paper drawn from the work following DP08/3 and from research. One success has been the publication of complaints data and we wish to build on this.
- 6.3 The ideas set out in this paper are intended to open a debate about how we can be more transparent, about information we could disclose and information we could mandate firms to disclose. We believe these ideas have the potential to have a material impact on our accountability and on the markets we regulate.
- 6.4 Nonetheless, not all disclosure aids transparency – the more information that is disclosed, the more difficult it may be to draw the appropriate lessons or send the appropriate signals. We must be clear about the net impact of changes, including unintended consequences, to us as the regulator, and to firms.
- 6.5 We are keen to understand our stakeholders' views about transparency and to gather more ideas about how we can be transparent in each of the areas set out. We have a list of questions included throughout the paper to aid respondents, and we would also welcome views on any aspects that have not been covered.

Appendix 1

The Legal Framework

1. This sets out the legal context and summarises the main legal requirements we need to take into account when giving consideration to the disclosure of information. It also explains legal changes that may allow the FCA to disclose more information.
2. This legal context will affect how transparent we can be and how we may take forward ideas set out in this paper.

Current legal requirements

3. Aside from the amendments to section 391(1) of FSMA regarding what can be published about enforcement action (described below), no material changes have been made to the legal requirements regarding disclosure that were explained in the earlier FSA discussion paper on transparency.
4. Therefore, the main legal constraints in FSMA that will apply to the FCA are the restrictions in relation to publishing confidential information and the due process requirements regarding public censure. In addition, the FCA will have to have regard to the restrictions and obligations in the Freedom of Information Act (FOIA), the Data Protection Act and Article 8 of the European Convention of Human Rights in deciding what it must, can and cannot disclose.
5. As the legal position has changed little since DP08/3, rather than repeat the detailed explanation given in that DP, we provide here just a brief summary of the legal constraints in FSMA concerning the publication of confidential information and the due process requirements regarding public censure.

Confidential information

6. The restrictions in section 348 of FSMA on the FSA's ability to disclose publicly 'confidential information' remain unchanged since DP08/03 and will continue to apply to the FCA. However, while section 348 limits the information that the FCA will be able to disclose, it does not prevent it from being a more transparent regulator.

7. In summary, like the FSA, the FCA will not be able to disclose information that relates to the business or affairs of any person, and which it receives for the purposes of its functions under FSMA, unless:
- the information is already lawfully publicly available;
 - the FCA has the consent of the person who provided the information and, if different, the person to whom it relates;
 - the information is published in such a way that it is not attributable to a particular person (for example, if it is anonymised or aggregated); or
 - there is a ‘gateway’ permitting this disclosure.¹ Among the gateways is the ‘self-help’ gateway whereby the FCA will be able to disclose confidential information to third parties to enable or assist it to perform its public functions.² The recipients of information disclosed under the gateway are still bound by the section 348 confidentiality regime.

Public censure

8. Sections 207 and 208 of FSMA will require the FCA to follow due process before it can publish a statement which amounts to a ‘public censure’ of a firm, i.e. where the FCA considers that firm has contravened a requirement imposed on it by or under FSMA (s.205 FSMA). Such due process involves issuing a notice warning the firm of the action we propose to take and giving it time to make representations. Although the amendments made by the 2012 Act to s.391 of FSMA will allow the FCA to publicise warning notices it has issued, these due process requirements effectively constrain the FCA from making public statements that criticise a firm’s conduct before it has issued a warning notice.

Amendments made by the 2012 Act relating to publicity

Publicity of enforcement action

9. Section 391 of FSMA sets out the extent to which the FSA can publicise its enforcement action. Section 391 has been amended by the 2012 Act, having previously been amended by the Financial Services Act 2010, with the result that the FCA will be able to publicise its enforcement action at a much earlier stage than the FSA was able to when DP08/3 was published.
10. Until October 2010, section 391(1) of FSMA prohibited the FSA from publishing the contents of warning notices and decision notices. The Financial Services Act 2010 amended section 391(1) to allow the FSA to publish the contents of decision notices. The 2012 Act goes a step further and amends section 391(1) to allow the FCA to publish details of certain disciplinary warning notices, providing the FCA has first consulted the persons to whom the warning notice is given or copied.

1 These gateways are set out in the Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001 (SI 2001/2188).

2 See Regulation 3.

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11. The FCA's policy will continue to be not to normally make public the fact that we are, or are not investigating any firm or individual. The investigation would remain private until the Warning Notice stage is reached.

Financial promotions

12. Under section 137Q of FSMA, the FCA will be able to give an authorised person a direction to withdraw, or refrain from making, a financial promotion, where it considers that there has been, or is likely to be, a contravention of financial promotion rules in respect of the promotion. In terms of transparency, the FCA may require the authorised person to publish details of the direction, and the FCA itself may publish such information about the direction as it considers appropriate.

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