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By email: cp21-28@fca.org.uk

Dear Sir/Madam,

Financial Services Consumer Panel response to CP21/28: New cancellation and variation power: Changes to the Handbook and Enforcement Guide

The Panel welcomes the opportunity to comment on the FCA's proposed guidance on the use of its new cancellation and variation power under Schedule 6A to the Financial Services and Markets Act 2000. We strongly support the FCA's ambition to make its decision making processes faster, more effective and more efficient. We believe this will reduce overall harm to consumers in financial services. The new power, which allows the FCA to more quickly vary or cancel the permissions of firms which are not carrying out any regulated activity is a welcome step in achieving this. The proposed guidance to firms on how the FCA will use the new power should help set clear expectations.

In previous consultation responses, we have set out our vision for financial services markets¹. The cornerstone of this vision is that firms should act in the best interests of consumers and firms which do not, or are unlikely to, act in this way should not be admitted to the market. Those that are already in the market should be robustly sanctioned or barred. The new Schedule 6A power will help the FCA deliver this more easily.

We agree with the FCA's assessment of the risks posed to consumers by firms which appear as authorised and regulated on the FCA's Register but do not actually conduct any regulated activities. In particular, firms which hold permissions for regulated activities may use this to create false assurances about the safety and security of their non-regulated activities – known as the 'halo effect'. To do so is clearly not in the best interests of consumers, who may be – and have been – misled as to the protections that apply. For consumers to be able to understand what protections apply it is vital that the FCA Register is immediately accurate. The FCA should make it clear that firms must update their permissions on the Register and/or Directory as soon as possible after being informed of the FCA's decision to vary or cancel. This should be done irrespective of whether a firm intends to apply for annulment.

Broadly we support the FCA's proposed changes to its existing guidance and sourcebooks setting out how it will use its new Schedule 6A power. However, we would encourage the FCA to be more proactive in identifying firms which are not using any of their part 4A permissions. This will help to prevent harm before it occurs, which should be the starting point for all regulatory activity.

¹ For the full vision, see p1 of our response to HM Treasury's consultation on its Future Regulatory Framework review: https://www.fs-cp.org.uk/sites/default/files/final_fscp_response_hmt_frf_review_phase_ii_20210219_v2.pdf

The FCA should also more explicitly set out how it will use its new power in respect of individuals. This will help to drive home the sense of personal accountability delivered via the SM&CR and prevent the same individuals from repeatedly causing harm to consumers.

We note reference in the consultation to parallel work being done as part of the FCA's 'use it or lose it' exercise. This exercise means that firms that have not used their permissions for 12 months or more are, as a result, at risk of having those permissions cancelled. We would encourage the FCA to shorten this period to 6 months, similar to the slot rules in the airline industry, in order to minimise harm caused from the 'halo effect' outlined above.

Finally, it will be important that the FCA can demonstrate how its use of the new power (and 'use it or lose it' exercise) has made a difference to how it regulates and, ultimately, to consumer outcomes. We therefore encourage the FCA to set clear outcomes and monitor and publish key metrics, including the amount of times it has invoked its new power, to track progress against these outcomes.

We set out our response to the questions asked in the consultation in Annex A below.

Yours sincerely,

Wanda Goldwag
Chair, Financial Services Consumer Panel

Annex A – Answers to consultation questions

Q1: Do you have any comments on our proposed changes to the Glossary?

No.

Q2: Do you have any comments on our proposed changes to the Supervision Guidance (SUP)?

The proposed changes to SUP set out the circumstances in which the FCA may conclude a firm is carrying on no regulated activities and so may use the new Schedule 6A power. Many of these circumstances rely on the firm telling the FCA it is not using any of its permissions (either by act in the form of notification, or by omission in the form of not submitting required returns or responding to post). Senior Managers should be required to inform the FCA if their firm becomes dormant and be held individually accountable if they fail to do so. We would encourage the FCA to also be proactive in identifying these dormant firms. This will help prevent harm before it occurs, which should be the starting point for all regulatory decision making. The improvements in the FCA's data and intelligence capabilities planned under its Transformation programme should help the FCA to deliver this.

The proposed changes to SUP also set out the factors the FCA will consider when deciding whether it is just and reasonable to annul the decision to vary or cancel a firm's permissions. We support the high threshold for annulment set out in para 4.9 of the consultation. This will ensure that any firms looking to re-enter the market following a cancellation or variation of permissions will need to meet the high standards expected, and needed, to adequately protect consumers.

It is important that consumers are able to find out the regulated status of firms they transact with, or are considering transacting with, so that they know what protections and redress routes apply. They must be able to rely on the accuracy of the Register to do so. The FCA should therefore make it clear that firms should update their permissions on the Register and/or Directory as soon as possible after being informed of the FCA's decision to vary or cancel. This should be done irrespective of whether a firm intends to apply for annulment.

Q3: Do you have any views on our proposed approach, described in paragraphs 2.26 to 2.32 above, to dealing with obligations on firms and individuals on annulment?

No.

Q4: Do you have any comments on our proposed changes to the Enforcement Guidance (EG)?

We support the proposed changes to EG, in line with our comments on SUP above.

We have previously raised concerns about the time it can take for the FCA to reach enforcement decisions². This new Schedule 6A power allows the FCA to act more quickly and so the FCA should ensure that its internal governance processes do not slow down use of it. The FCA will need to demonstrate a greater risk appetite when using the new power if the full benefits of the quicker process are to be realised.

² https://www.fs-cp.org.uk/sites/default/files/final_fscp_response_cp21-25_changes_to_fca_decision_making_20210917.pdf p2

Q5: Do you have any comments on our proposed changes to the Compensation Sourcebook (COMP)?

AND

Q6: Do you have any comments on our proposed changes to the Dispute resolution: Complaints sourcebook (DISP)?

We support the proposed changes to COMP and DISP. One of the aspects of our vision for financial services mentioned above is that consumers have access to prompt and commensurate redress. The proposed changes to these sourcebooks preserve access to the FSCS and FOS in the event of an annulment.

We also support proposed changes to DISP that will encourage firms to continue to resolve complaints and take action to address any consumer harm during the process of variation, cancellation or annulment. Firms' willingness and ability to effectively handle complaints in line with the requirements of DISP should be a key consideration for the FCA in deciding whether or not to annul (or apply conditions to an annulment). The removal of permissions – whether later annulled or not – should not remove firms' liability and responsibility for any business done under those permissions.

We believe firms should write to all consumers impacted by the removal of permissions to inform them of the impact on future business and complaints handling. This will help prevent delays and disruption for consumers when the FCA exercises its new Schedule 6A power.

Q7: Do you agree that firms should have up to 30 business days from the date of annulment to submit a complaints return when the deadline for doing so passed before annulment?

Yes.