

Regulatory transparency: Section 348 & 349 of FSMA

Consumer Panel Position Paper

1. Panel position

- 1.1 The Government is consulting on reforming the regulation of financial services. A Bill was introduced into Parliament in January 2012.
- 1.2 The Panel has long been an advocate of greater regulatory transparency. We therefore strongly support the Government's intention to ensure both the Financial Conduct Authority (FCA) and Prudential Regulation Authority (PRA) are transparent regulators. This will benefit consumers, and firms, by ensuring they have access to information which allows them to make informed decisions. We consider the current position, whereby consumers are left in the dark, to be unacceptable.
- 1.3 Despite the positive changes proposed through the Financial Services Bill, keeping Section 348 will significantly restrict the new regulators' ability to act openly and transparently. Section 348 restricts the publication of information about the business or other affairs of any person or firm which the regulator has received in the course of its duties. Disclosure can only be made with the consent of the person who provided the information and, if different, the person or firm to whom it relates; if the information is anonymised; or in a limited number of other circumstances identified in Section 349.
- 1.4 The Panel strongly believes the Bill should not restrict the FCA and PRA's ability to disclose information about individuals or firms they regulate, a position shared by the Joint Committee of the House of Lords and House of Commons. We believe three changes should be made to the draft Bill:
 - remove, or substantially reword, Section 348 so that it does not prevent the new regulators from publishing confidential information about the individuals or firms they regulate;
 - incorporate a clause in the Bill which enables both the FCA and PRA, where appropriate, to publish information about individuals or firms they regulate where this would help them achieve their objectives. This could be done by expanding Section 349 to allow information to be disclosed where it supports the delivery of the regulators' statutory objectives; and
 - remove the criminal punishments (set out in Section 352) imposed on any individual found to disclose information about an individual or firm.

2. Background

- 2.1 A stated aim of the Government, in reforming financial services regulation, is to ensure both the FCA and PRA are transparent regulators. The Panel strongly supports this goal and believes this can, in part, be delivered by empowering the regulators to publish the fact warning notices have been

issued; and by requiring the FCA to publish details of actions taken against firms issuing misleading financial promotions.

- 2.2 However, the Panel believes there is significant scope to increase the level of regulatory transparency by allowing the FCA and PRA to publicly disclose information in pursuit of their objectives. This will help to inform consumers and promote good behaviour among firms, thereby reducing the burden on both regulators.
- 2.3 Sections 348 and 349 of the Financial Services and Markets Act (FSMA) have restricted the ability of the current regulator, the Financial Services Authority (FSA), to become a transparent regulator. The Financial Services Bill, as currently drafted, will maintain these Sections. This stands to restrict both the FCA and PRA's ability to become the open and accountable regulators the Government envisages. Indeed, any person who contravenes Section 348 could be fined or imprisoned for up to two years.
- 2.4 Most industry representatives are opposed to changing Sections 348/9 as they feel the publication of information about an individual or firm could lead to reputational damage. The Panel does not agree with this view, as we believe greater transparency will increase consumer confidence in the industry and the effectiveness of regulation. It will reassure people that action is being taken against individuals or firms where poor practices are identified. Furthermore, this should also benefit firms by encouraging fair competition, as firms will be deterred from poor behaviour which could give them a competitive advantage.
- 2.5 The Joint Committee, when reviewing the draft Bill, expressed concern that Section 348 could *'impact on the information available to Parliament and the information available to firms and consumers'*.¹ They recommended that this Section should not be retained as currently drafted nor should regulation unnecessarily restrict the disclosure of information, a position the Panel strongly supports.
- 2.6 The Financial Secretary to the Treasury, Mark Hoban MP, has confirmed that the Treasury will undertake a review of Section 348, with the conclusions and recommendations made available through the passage of the Bill.

3. How has Section 348 restricted the FSA?

- 3.1 Section 348 has restricted the FSA's ability to publish information about individuals or firms it regulates in a number of ways. We outline four examples below:

Complaints data publication

- 3.2 To help consumers make informed choices and encourage firms to improve their products and services, the FSA wanted to publish comparative information about the complaints firms received.² Although the FSA collected this information, it was unable to publish this due to restrictions set out in

¹ Joint Committee report on the draft Financial Services Bill, December 2011

² For firms that receive 500 or more complaints in a six-month reporting period.

Section 348. Instead, the FSA had to introduce rule changes which required firms to individually publish this data, thereby allowing the FSA to also publish this information in a central location.³

- 3.3 The constraints which restricted the FSA's ability to publish complaints data by firm created unnecessary complexity and time delay. This also still restricts the FSA's ability to contextualise the data by providing market share information. Indeed, our own research found examples of complaints data published by international regulators where considerably more detail and analysis was provided, meaning there is scope to deliver greater transparency in the UK.⁴

Financial promotions

- 3.4 The FSA has been responsible for policing the promotions issued by financial firms. Like the Advertising Standards Agency (ASA), who ensure all media advertisements are truthful, the FSA can take action where it finds a promotion is misleading. However, unlike the ASA, it has been unable to publish details of action taken against firms over specific promotions. The Panel supports the intention, through the Bill, to require the FCA to publish information about action taken to tackle misleading financial promotions.⁵ However, we are concerned that Section 348 could restrict the FCA's ability to fully utilise this power.

Result of mystery shopping exercises

- 3.5 From time-to-time the FSA undertakes mystery shopping exercises to monitor firms' compliance with its rules and measure how they treat their customers. The results are used to inform policy development; issue guidance; and take forward enforcement action. However, unlike mystery shopping undertaken by media publications and other consumer groups, the FSA has been unable to publish the results for specific firms included in its exercise. This reduces the ability of mystery shopping to correct poor firm behaviours; encourage all firms to maintain high standards; and ensure consumers are aware of the shortcomings in any firms they deal with.

Retirement annuities and the Open Market Option

- 3.6 There has been considerable debate between the Government and industry stakeholders around the benefit of encouraging consumers to shop around when purchasing a retirement annuity. Much of this debate has been restricted by a poor understanding of the current market trends and annuities rates offered by firms to existing and new customers, with no accurate market information available. Although the FSA does not currently collect this data, it is in a unique position to capture and publish this intelligence. However, even if the FSA collected this evidence, it would be unable to provide this valuable

³ Section 348 allows the FSA to publish information about individuals or firms if this information is already publicly available.

⁴ John Leston on behalf of the Financial Services Consumer Panel, *Transparency as a regulatory tool: An international literature review*, September 2010

⁵ This new power will be in Section 137Q (11) of the Financial Services and Markets Act. See Section 22 of the Financial Services Bill.

insight as Section 348 would prevent them from publishing any meaningful information.

4. Conclusion

- 4.1 The Panel strongly supports the Government's intention to ensure the FCA and PRA are transparent regulators. We have long been concerned that consumers are being kept in the dark when the FSA identifies failures in a regulated firm. This disadvantages consumers by knowingly creating an asymmetry of information and the potential for further detriment to occur, undermining confidence in the regulatory system.
- 4.2 The ability of the FSA to act as a transparent regulator has been significantly restricted by Section 348. In contrast to these restrictions, the Food Standards Agency has the power to publish such information as it thinks fit under the Food Standards Act 1999, subject to a very narrow list of exceptions. This transparency helped restore consumer confidence in the industry and has supported its recovery from the reputational damage it suffered from the BSE crisis.
- 4.3 Like the Joint Committee, the Panel strongly believes the Financial Services Bill should not restrict the PRA and FCA's ability to disclose information about individuals or firms they regulate. The Panel believes Section 348 should be removed, or substantially reworded, to empower the regulators to publish information about the individuals or firms they regulate, rather than restricting their ability to disclose information which would benefit consumers.

11 May 2012

Financial Services Consumer Panel