

Financial Conduct Authority



# FCA transparency framework

August 2013





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# 1

## Getting started: setting out our approach

We are committed to being a transparent regulator, to be clear in how we communicate and in the way we work. We have a responsibility to:

exercise our functions as transparently as possible; and

consider publishing information about regulated firms/individuals, or requiring such persons to publish information.<sup>1</sup>

### 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 the FSA did; it may also mean disclosing a smaller amount of more meaningful and relevant information that can be used more effectively.

We have reviewed when and how we balance the competing calls of transparency and sound regulation, and the extent of our constraints. The 2012 Act makes several changes that support the view that greater transparency and disclosure should be essential components of our regulatory regime. But there are still legal constraints on what information we can disclose. We need to strike the right balance.

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.

We intend to use and promote 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 statutory objective, or
- external stakeholders hold us to account.

### Sparking the debate on transparency

In March 2013, we published our Transparency Discussion Paper (DP13/1). We set out our proposals in three categories and invited our stakeholders to share their views.

<sup>1</sup> The Financial Services Act 2012 (the 2012 Act) made changes to the Financial Services and Markets Act 2000 (FSMA) and introduced a requirement for the FCA to have regard to two new regulatory principles about transparency.

**Three categories of transparency:**

- **How the FCA could be more transparent (transparency of the regulator):** how we can be more transparent about our work so that the external world can hold us to account.
- **Information we could release about firms, individuals, markets (disclosure as a regulatory tool):** information we can release to inform consumers and to provide an incentive for firms to change their behaviour in beneficial ways.
- **Information we could require firms to release about their products and about other aspects their performance and behaviour:** we make new rules so firms disclose information about their behaviour and product performance, to allow market participants to make informed decisions and to better judge, either directly or via intermediaries, which product is most appropriate for their needs.

Greater firm disclosure may offer an incentive to change behaviour through peer analysis or the fear of reputational damage from negative reporting in the media.

In August 2013, we published our Feedback Statement.<sup>2</sup> As well as giving an overview of the feedback on our ideas in the D, it sets out our response, including how we will take the proposals forward.

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<sup>2</sup> The Feedback Statement gives an overview of the feedback we received to the Transparency Discussion Paper DP13/01 and our response to it: [www.fca.org.uk/about/governance/transparency](http://www.fca.org.uk/about/governance/transparency).

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# Moving forward: a framework to support ongoing work

The DP and the Feedback Statement represent only the initial stages of our work. We will continue to identify ways to improve and promote greater transparency.

Our approach to transparency sets the context. To be an effective tool in regulation, we should consider how transparency affects our statutory objectives, our existing legal constraints (see our legal framework in appendix 1), and our other work.

To support us in this, and to help industry and others understand our approach, we have established a framework to help us to decide, on an ongoing basis, whether and how to pursue any new transparency initiatives and in a way that takes account of other factors e.g. other regulatory priorities, EU directives etc. We will use it to identify those transparency initiatives that will best help us achieve our objectives, or where it will help external stakeholders hold us to account.

It should also help:

- ensure relevant information is disclosed and in a way that is clearly understood
- maximise the benefits and minimise the risks of disclosure
- evaluate whether initiatives have been successful, and
- ensure our approach is economic, efficient and effective.

We want the framework to encourage a proportionate, flexible and judgement-based approach and to help, not hinder, our work.

### **New ideas on transparency**

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We may think of new transparency initiatives as we carry out our regulatory activities; our stakeholders may also make proposals.

These proposals may involve new work or extensions of existing work by us, or by those we regulate. They may be simple or very complex; for example releasing data we already capture on an aggregated basis will differ from making new rules to mandate firms to release data. Sometimes we may need to act quickly and disclose information to warn consumers and equally, on other occasions we, or our stakeholders, may identify information that would be useful for us or firms to disclose which might require significant changes to the way we or firms work.

For this reason, we will look at each proposal on a case-by-case basis and the depth of any appraisal will be proportionate to the proposal. In all cases, we would consider the same key

questions but depending on what is involved, who might be affected, the complexity and the potential impact, our exact approach may vary in terms of scale, depth and time taken. For example, where changes to policy are required we would carry out a full market failure analysis, cost benefit analysis and consultation, in line with our policy framework. But it would be unnecessary and poor value for money to do this for all ideas, particularly those relating to transparency of the regulator and might involve publishing information about our organisation that we already have available.

### **Making decisions**

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When we carry out an appraisal, we will present the evidence in the form of a business case for a decision. The level at which a decision is made will vary depending on the nature of the proposal. For example, where a proposal involves changes to the rules, the FCA Board would make the decision about whether and how to proceed.

### **Evaluating success**

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Where we implement new initiatives, we will evaluate their impact in line with our overall approach to post-implementation reviews. This is particularly important, as apart from complaints data publication and the literature review we have conducted to inform the DP, we have little baseline evidence to indicate what works well and what does not work well.

There will be challenges, particularly in relation to attributing impact, and in knowing when the right time is to examine whether our initiatives achieve their outcomes. In drawing conclusions we are also likely to rely on qualitative data, e.g. feedback from stakeholders, which may be subjective.

The framework, set out on the next page, introduces the factors we will look at and the key questions we will ask when appraising and evaluating transparency initiatives.

## Approach

*The presumption should be towards transparency unless there are compelling regulatory, legal or other reasons to the contrary*

<b>Appraise</b>		<b>Evaluate</b>
<i>We would look at four main factors and seek to answer a number of key questions (this list is not exhaustive)</i>		<i>We would follow our standard approach for post-implementation reviews. Questions we may seek to answer include:</i>
<b>Contribution to FCA statutory objectives*</b>	<ul style="list-style-type: none"> <li>• Does the proposal have the potential to contribute to our statutory objectives?</li> <li>• To what extent does the proposal align with, or have potential to enhance, our other work e.g. behavioural economics, competition, supervisory activity including thematic reviews, enforcement?</li> </ul>	Has the initiative been successful overall in achieving its intended outcomes?
<b>Legal feasibility</b>	<ul style="list-style-type: none"> <li>• Are there any legal constraints to disclosing this information?</li> </ul>	Has the initiative resulted in behavioural change of the relevant target audience e.g. firms, consumers.
<b>Value, impact &amp; success</b>	<ul style="list-style-type: none"> <li>• What is the potential value to market participants and how will it lead to beneficial behavioural change?</li> <li>• What impact might be achieved by implementing this proposal?</li> <li>• What would success look like?</li> <li>• When might we see evidence of impact?</li> <li>• What evidence would we need to assess impact?</li> </ul>	Have there been any unintended consequences?  Did any of the risks identified crystallise?
<b>Risks, consequences &amp; complexities</b>	<ul style="list-style-type: none"> <li>• What are the potential risks to the FCA/firms/ consumers/others associated with this disclosure? What is the probability and impact of these?</li> <li>• Are there any potential unintended consequences of disclosing this information?</li> <li>• How complex might this proposal be to implement?</li> <li>• What are the practical considerations for the FCA/for firms e.g. how long would it take, would new systems be required?</li> </ul>	What have the actual costs and benefits been?

\*FCA statutory objectives: Our strategic objective is to ensure that the relevant markets function well. We have three operational objectives: to secure and appropriate degree of protection for consumers; to protect and enhance the integrity of the UK financial system; to promote effective competition in the interests of consumers.

# Appendix 1

## The legal framework

The legal context affects how transparent we can be.

This section sets out the legal context and summarises the main legal requirements we need to take into account when considering the disclosure of information. It also explains legal changes that may allow the FCA to disclose more information.

### Current legal requirements

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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 (DP08/3).

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.

As the legal position has changed little since DP08/3, rather than repeat the detailed explanation given in that DP, here is a brief summary of the legal constraints in FSMA on publishing confidential information and the due process requirements on public censure.

### Confidential information

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The restrictions in section 348 of FSMA on the FSA's ability to disclose publicly 'confidential information' 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.

In summary, the FCA will not be able to disclose information that relates to the business or affairs of any person, and information that 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. Among the gateways is the 'self-help' gateway whereby the FCA will be able to disclose confidential information to third parties to enable or help it to perform its public functions. Those receiving information disclosed under the gateway are still bound by the section 348 confidentiality regime.

### Public censure

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Sections 207 and 208 of FSMA 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

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#### Publicity of enforcement action

Section 391 of FSMA sets out the extent to which the FSA can publicise its enforcement action. It 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.

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.

The FCA's policy will continue – to not 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

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.

**Financial Conduct Authority**



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