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Consultation Response:

HM Treasury Financial Services Future Regulatory Framework Review

Response by the Money Advice Trust

Date: February 2021

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Introduction

About the Money Advice Trust

The Money Advice Trust is a charity founded in 1991 to help people across the UK tackle their debts and manage their money with confidence.

The Trust's main activities are giving advice, supporting advisers and improving the UK's money and debt environment.

In 2020, our National Debtline and Business Debtline advisers provided help to more than 161,560 people by phone and webchat, with 1.86 million visits to our advice websites.

In addition to these frontline services, our Wiseradviser service provides training to free-to-client advice organisations across the UK and in 2020 we delivered this free training to over 920 organisations.

We use the intelligence and insight gained from these activities to improve the UK's money and debt environment by contributing to policy developments and public debate around these issues.

Find out more at www.moneyadvicetrust.org

Public disclosure

Please note that we consent to public disclosure of this response.

The FCA's performance so far

We welcome the opportunity to respond to the HM Treasury consultation on the future regulatory framework for financial services.

We have limited our response to sharing our thoughts on a range of consumer-focused measures that we believe should be considered as part of the financial services regulatory structure going forward. We believe that it is vital to use the opportunity afforded by the review to retain existing consumer protections and to strengthen consumer protection where possible.

We have very much valued working with the FCA in its role as regulator of consumer credit, and in general have found the FCA to be generally helpful and responsive to consumer groups, and broadly successful in responding to current and emerging practices and markets from which consumers require protection.

The FCA has been particularly successful in advancing the vulnerability agenda in financial services – in which the Money Advice Trust continues to play a significant part as a leading provider of training and consultancy to firms looking to improve outcomes for vulnerable customers. It is notable that the FCA's work on vulnerability has also catalysed progress in other creditor sectors.

We consider that The FCA has been innovative and fast thinking in its response to Covid-19 to help people with consumer credit and mortgage difficulties.

We would also highlight the work the FCA has done on high-cost credit, in particular in relation to payday lending, and other forms of high-cost credit such as rent-to-own lending. We also recognise the work to alleviate consumer detriment in the areas of credit cards and overdrafts. This has culminated in the innovative and thoughtful recommendations to be found in the Woolard Review recommendations on change and innovation in the unsecured credit market.¹ The ability of the FCA to take on new areas such as the plans to regulate the buy-now-pay-later market should be recognised.

Despite these successes, we believe there are improvements that could make to the financial services regulatory framework in several key areas.

¹ <https://www.fca.org.uk/publication/corporate/woolard-review-report.pdf>

Areas for improvement

Financial inclusion duty

The Financial Conduct Authority (FCA) has a range of powers and tools that it uses to regulate the market. These include its statutory objectives as well as the Treating Customers Fairly outcomes and its Public Sector Equality Duty. Despite all of this, there is still no clear duty or cross-cutting ‘must have regard’ provision to tackle financial inclusion. Without this:

- ✓ there is no clear statutory requirement for the FCA to address financial inclusion issues at all;
- ✓ the FCA does not routinely have regard to issues of financial inclusion across all of its work, wherever it is appropriate.

We are signatories to the joint letter from the consumer sector that has been sent to the Minister that asks the Minister to ensure the FCA has either a duty or cross-cutting ‘must have regard’ to financial inclusion as part of the Financial Services Future Regulatory Framework Review. We hope this will be given careful consideration as part of this review.

Inclusive design

Financial and other essential services should be designed so they are as inclusive as possible. This entails markets being designed in a way that encourages this. Regulators and their sponsoring departments should embed inclusive design within their policy making processes.

The Money Advice Trust and Fair By Design are working in partnership to lead a programme exploring inclusive design in credit, insurance, energy and other essential services markets.

The Competition and Markets Authority, Financial Conduct Authority, and Ofgem have all recognised the importance of inclusive product and service design. However, there is not a well-developed, shared understanding of what inclusive design means, or how it should be incorporated into the work of regulators and businesses. Our Inclusive Design in Essential Services programme aims to fill this gap, including through new guidance published in January 2021.²

The Competition and Markets Authority, and regulators of essential services, including the FCA, should adopt inclusive design principles in regulation design.

² <https://mailchi.mp/moneyadvicetrust.org/design>

- ✓ Government and regulators must work together to bridge the policy divide – so markets work for everyone.
- ✓ There must be a single body/open process responsible for addressing issues that fall between regulators and their sponsoring departments that is public and to which organisations can easily take such issues.

The regulatory perimeter

The regulatory perimeter of the FCA needs to be reviewed and reconsidered. Many people would reasonably expect that financial products with the same lender will all be regulated by the FCA when they may not be. We believe that all financial products need to come under the same regulatory umbrella. The current perimeter causes confusion and allows for scams to proliferate and firms to develop unfair but unregulated products whilst themselves being authorised by the FCA. This may need new legislation to be put in place to achieve this aim.

We appreciate and welcome the fact that the FCA now publishes an annual report into its perimeter concerns but it has not been given the necessary powers to take action. HM Treasury and the FCA should commit to an annual perimeter review, which involves engagement with consumers and their representatives.

The FCA should also be given greater powers to act in cases of consumer detriment from firms and practices acting on the regulatory perimeter. We have raised our concerns in a number of areas before. These include:

- ✓ the activities of unauthorised private enforcement agents and debt collection agents collecting unauthorised and authorised debts;
- ✓ potential consumer detriment from search engine advertising by lead introducers masquerading as debt advice charities;
- ✓ lead introduction companies or insolvency practitioners giving unauthorised debt advice which lead to potentially unsuitable debt options such as an IVA instead of a debt relief order;
- ✓ the impact of the regulatory gap on insolvency practitioner and lead introducer authorisations regulation and supervision that lies between the FCA and the Insolvency Service.

In our response to the *FCA mission: our approach to authorisation* consultation we made the case for the FCA to look beyond its perimeter where required. We believe that the FCA should look towards its perimeter for examples of consumer detriment that it needs to tackle and dedicate further resources to doing so.

In particular, our concerns relate to firms acting as lead generators for debt management companies and insolvency practitioners. We are concerned with these perimeter activities as it is not easy to establish whether FCA authorisation is required in these cases, but there appears to us to be an increased risk of consumer harm through poor debt advice, referral into the wrong debt option, unnecessary fees and charges, and so on.

We perceive there to be a regulatory gap as insolvency practitioners giving debt advice “*in reasonable contemplation of that person’s appointment as an insolvency practitioner*” (PERG 2.9.26 G) are not required to seek FCA authorisation.

This is coupled with the government decision not to fully regulate lead generation companies that pass leads on to debt management companies for debt advice under FSMA. Instead, authorised debt management companies were given the responsibility under CONC 8.9 to ensure that lead generation companies they use are compliant with the rules.

We are now seeing a worrying growth in lead generation companies passing on leads to insolvency practitioners solely for IVAs, which neatly bypasses FCA scrutiny at the authorisation or firm supervision level.

We strongly recommend that the FCA be given the responsibility to regulate the activities of lead generation for debt advice – through the creation of a new regulated activity of “*effecting introductions to debt advice*”.

Broader links to social policy making

Issues around the definition of the FCA’s regulatory perimeter, outlined above, are one example of the need to link the FCA’s work with broader areas of social policy. A further example would be affordable credit, where the FCA’s evidence and experience of regulating consumer credit should play a key role in developing and implementing policy elsewhere. We believe the FCA engages and is engaged well with government. However, we would recommend that a formal mechanism by which the FCA can raise social policy issues with government, for formal consideration, would be a welcome addition to the ways in which its work can contribute to broader social policy making.

Early warning systems

The FCA needs to be more agile in the way in which it identifies a poorly designed financial product, major problems with affordability assessments or a lender that is not treating customers fairly.

As an example, the free debt advice sector has repeatedly raised the issues we came across relating to certain high-cost credit products such as guarantor lending, but this was not prioritised by the FCA at the time. We now see an extraordinarily high number of cases being upheld at the Financial Ombudsman Service and an investigation into such lending by the FCA. We fear that this could be another sector that is unable to fulfil its compensation obligations to its customers and the most vulnerable will lose out.

It is vital important that if consumers take the time to call regulators with concerns (as in the case of London Capital and Finance [LCF] and mini-bonds), that this lived experience gained through contact centres is captured in a data-driven environment and flagged for action. Raising these concerns should be seen as red flags and treated as an early warning system. Concerns about individual firms or practices should not be seen as just anecdotal.

We would like to see a comprehensive data infrastructure in place that allows for sound case reporting, recognition of consumer representation and a transparent system to ensure good outcomes from concerns raised. This would require the FCA to work with the data regulator and other regulators to ensure a robust structure is in place.

Transparency in consumer complaints and the role of consumer bodies

We would like the FCA to have greater powers to feedback to consumer bodies in relation to decisions on what action to take about breaches of rules. We would suggest that consideration is given to amending the restrictions under Part 9 of the Enterprise Act 2002 which prevents the FCA from identifying businesses that are subject to requirements or warnings or under investigation.

As we have pointed out in previous consultations, this means the public are not aware of the identity of “rogue” companies and cannot take their business elsewhere. It also has the effect of discouraging complaints to the FCA who can neither confirm nor deny that they are dealing with a firm or respond to the individual complaint.

It can be dispiriting for consumers to receive no feedback on the impact of any complaints or concerns raised. This is not a reporting regime that helps consumers to “do the right thing” and does not incentivise action by consumers or consumer groups.

A regulatory alternative could be to publish a public notice once an investigation is opened, following a certain threshold of concern being reached. For example, the Charity Commission, the regulator for the charity sector, operates a risk and compliance framework that summarises the circumstances under which they open an investigation into a charity, and issues a public notice accordingly.

The Financial Services Consumer Panel and a new lived experience consumer group

We support Fair By Design’s recommendation that FSMA should be amended to require the Financial Services Consumer Panel issues a formal annual consultation for consumer organisations to steer the future strategic priorities of the Panel.

We support representation and champions on the Financial Services Consumer Panel of people with protected characteristics, such as those related to race and disability, as well as lower socio-economic status which is a cross-cutting issue for all types of consumers.

We would welcome the idea of complementing the work of the Consumer Panel by the introduction of a statutory consumer lived experience panel. The FCA should fund the creation of an additional Consumer Panel of people with lived experience of poverty, financial exclusion and wider consumer vulnerability. This would help to ensure regulatory policies are designed to meet the needs of all consumers and that the regulatory system is designed with people rather than without them.

The Financial Services Consumer Panel and the “duty of best interests”

We understand that the FCA will be issuing a consultation paper on their approach to proposals for a duty of care in due course. We note with interest that the Consumer Panel has sought to address the perceived consumer harm in relation to financial services by putting forward a concept of a “*duty of best interests in financial services*”. This would entail amending the Financial Services & Markets Act (FSMA) to serve to strengthen the regulatory principle on firms to treat customers fairly.

We believe that these options on duty of care and the alternative concept of a duty of best interests deserve to be fully examined. We look forward to the FCA consultation paper which we hope will set out clear options for consideration to achieve the best consumer outcomes.

Consumer credit and the Financial Services Compensation Scheme

In our response to the FCA call for input into change and innovation in the unsecured credit market (The Woolard Review)³ we made the following points. These were not taken up in the review recommendations as they are potentially wider considerations that should come under the remit of the HMT financial services regulatory framework review.

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<http://www.moneyadvicetrust.org/SiteCollectionDocuments/Policy%20consultation%20responses/Unilateral%20responses/Money%20Advice%20Trust%20response%20to%20the%20FCA%20Call%20for%20input%20Review%20of%20the%20unsecured%20credit%20market.pdf>

When the consumer credit regime passed to the FCA in 2014, the decision was made that consumer credit would not fall under the Financial Services Compensation Scheme. This has resulted in a failure to protect or compensate consumers who have taken out financial products, particularly with payday lenders, who have then subsequently failed. These are often the most financially vulnerable groups in society, who are not eligible for any compensation beyond a few pence in the pound once the administrators for the firm have done their work. One option would be to encompass consumer credit within the Financial Services Compensation Scheme.

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