

THE FCA PRACTITIONER PANEL:

RESPONSE TO FCA CONSULTATION PAPER 13/10

**on DETAILED PROPOSALS FOR THE FCA REGIME FOR CONSUMER
CREDIT**

4 December 2013

Introduction

The FCA Practitioner Panel ('Panel') has welcomed the decision to bring consumer credit regulation within the scope of the FCA's activities, to ensure a proportionate framework for this important market. Several members of the Panel currently hold OFT consumer credit licences as part of their businesses, and are therefore interested to see an orderly transfer of responsibilities from the OFT to the FCA. The regime the FCA creates must be proportionate, efficient and cost-effective, considering all of consequences of the policy options for consumers, the regulator and regulated firms.

We address in this consultation response some of the Panel's concerns and thoughts about the FCA implementation of the regime and on certain specific issues regarding consumer credit policy.

Executive Summary:

- Overall, the Panel continues to be supportive of the transfer of consumer credit responsibilities from the OFT to the FCA, but is concerned about the consequences for FCA resource and senior management time;
- The greatest concern for firms is the short time given to implement the regime after the final rules are published;
- We continue to believe a 12- or 18-months grace-period from 1 April 2014 would be more appropriate given the unworkably short implementation time available;
- The FCA should work with industry and the government to address certain elements of the CCA regime, which do not fit comfortably with FCA policies (e.g., in relation to s.75 and unenforceability provisions);
- Current lack of clarity about FCA expectations on firms, arising from the piecemeal transfer of OFT guidance to the FCA rulebook, should be addressed to avoid firm and consumer confusion;
- The FCA should seek to ensure clear expectations and application of consumer credit rules, codifying requirements from guidance, FCA rules, the Act and legal judgements.
- The Panel would welcome early guidance for industry on how the FCA will approach regulation of consumer credit activities beyond high-cost short-term credit and debt management;
- A further change to status disclosures this year is disproportionate, and the FCA should consider provide a 12-month grace-period for firms to make necessary changes to documentation and websites;
- The FCA must be alive to the risk that extending its regime may result in gold-plating of the EU Consumer Credit Directive;
- The FCA should be clear that the regime does not apply to 'payment of insurance by instalment' arrangements.

Detailed response:

FCA resources

The Panel is supportive of the FCA taking over responsibility for regulation of consumer credit activities from the OFT, but on several occasions has expressed to the FCA its concern about the significant burden this will place on the FCA's resources. Moving from regulating 27,000 firms to regulating at least twice that number of firms will place burdens on all aspects of FCA regulation, including senior management time. We are first concerned that the FCA approaches this area proportionately, and that other aspects of FCA regulation do not suffer as a result. We would welcome it if consumer credit activity supervision were incorporated into existing supervisory arrangements to minimise duplication with existing supervision activities and maximise FCA use of resources.

Burden on firms and timing concerns

The regime will also place new burden on regulated firms, both for those who have never been regulated by the FCA before and for those who will undertake certain consumer credit activities as an additional permission. We support the proportionate application of the FCA regime, and feel the FCA should be focusing its resources on areas where currently there is potential consumer detriment (e.g., in the pay day loans sector).

However, for all firms we feel the biggest burden is the extremely short timescale given for firms and the FCA to implement the regime. With this consultation closing in December, we are now not expecting final rules and guidance until February or March. This will leave firms with, potentially, less than a month in which to review the new rules and guidance before they become subject to the regime. For large banking institutions, with extensive consumer credit business (e.g., unsecured loans, overdrafts and credit cards), this is an unworkably short amount of time. The result is likely to be firms struggling to organise themselves by the April deadline, and failing to full comply with all requirements at this date.

The timing is also of concern in light of the lack of clarity about how the FCA will approach its responsibilities under the Consumer Credit Act and how it will bring across OFT guidance. We would encourage the FCA to promptly consider these topics and provide clarity on changes to the FCA handbook as early as possible in 2014.

While the timing is unfortunate, we support the FCA being willing to give firms a grace period where if firms meet the CCA and OFT guidance, the FCA will take no enforcement action for compliance breaches. However, we continue to feel that six-months is insufficient time and that 12- or 18-months may be more appropriate. This is especially important given the number of new firms in the regime, and lack of experience of certain smaller low-risk firms, plus the complexity of certain large firms.

We would encourage the FCA to work with industry to provide as much early guidance on the regime and expectations as possible, and to fully exercise forbearance during the grace period to those who are making best efforts to comply with the new regime.

CCA and OFT guidance

Many of the legislative provisions of the regime may require consideration along with HM Treasury to ensure the statutory underpinnings of the regime are appropriate and align with what the FCA is trying to achieve. The Panel has previously expressed reservations about the appropriateness of the unenforceability provisions of the Act, where firms are unable to claim interest (or must return interest) if there are any mistakes in consumer credit documentation (even minor ones). This seems to compensate consumers beyond any detriment they may have suffered, and ignores key regulatory principals such as the responsibilities of consumers for making their financial decisions. In addition, we highlighted that the section 75 provision which gives credit card providers equal and joint liability with the retailer for services not rendered, should be reconsidered in relation to overseas transactions. The provision provides much greater protection than is necessary for the vast majority of consumers, and places an unnecessarily large burden on firms to try to enforce on retailers outside of the EU, which is disproportionate.

In most areas, the OFT guidance has been moved from being guidance to being rules added to the CONC sourcebook. However, the change from guidance to rules, with reference to FCA definitions, may lead to changes in the meaning of some parts of the guidance. In addition, not all guidance has been made into rules, and certain parts of the BIS guidance or the Lending code remain guidance. We feel that the arrangements create a confused picture, where firms and consumers are unclear what has become rules and what remains guidance (and is thus not enforceable). It would be useful if the FCA could provide some clear guidance on what has changed and what this means in terms of a change in the FCA's expectations on firms.

We also believe that the FCA may need to consider further guidance that currently exists going forward. Particularly, we note that a lot of the understanding of the application of the Consumer Credit Act under the OFT has come from court judgements. This further complicates the picture for firms and consumers. The FCA should attempt, where possible, to consider how it can ensure all requirements and protections under the Act are clear by codifying them in one place and ensuring the regime is proportionate, coherent and consistent.

Other FCA policy

An issue to note is that the FCA has given little indication so far of its intentions for the regime beyond high-cost, short-term credit, debt management and peer-to-peer lending. While these are important areas, not subject to FCA regulation at the moment and thus need to be addressed, those undertaking other consumer credit activities are not yet clear what the FCA considers to be other problem areas. We note that the FCA's Risk Outlook and Business Plan for 2014/15 will only be published after firms will have obtained their new interim permissions from the FCA. Further policy changes will of course be needed in due course to ensure the regime for consumer credit is consistent between the different types of activity. We would welcome early guidance on the FCA's thinking about how other important areas of consumer credit will be addressed by the FCA.

Status disclosures

The Panel is supportive of the changes proposed in the consultation that firms no longer need to notify consumers via a status disclosure that their permission in relation to consumer credit is on an interim basis. Rightly, the FCA has recognised that this may confuse consumers and is an additional unnecessary cost.

However, we are concerned that this year firms already had to make a significant change to documentation and websites to include the regulatory disclosure that a firm is now regulated by the FCA only, or by the FCA and PRA. This involved a significant amount of work for IT and compliance staff in ensuring all disclosure requirements are met. We would like the FCA to consider providing a further grace period for the new regulatory disclosure requirements in relation to consumer credit activities. In line with the previous change of disclosure status, we feel a maximum period of 12-months from 1 April 2014 would provide adequate time for all firms to provide the new disclosures.

EU Consumer Credit Directive

We appreciate that the Consumer Credit Act 2010 which sets much of the statutory framework for the OFT regime and future FCA regime derives from the EU Consumer Credit Directive. Several respondents to the first FCA consumer credit consultation noted the potential for the new regime to “gold-plate” some provisions of the Directive by carrying over OFT guidance into FCA rules, where these go further than the maximum harmonisation provision of the Directive. We urge the FCA to be alive to this criticism and ensure that it is not extending its regime into product areas or creating new requirements which are not permitted in the UK’s implementation of its EU commitments.

Application to insurers

The Panel is concerned about how the FCA consumer credit regime may mistakenly impact on certain activities of insurers. A very smaller number of insurance firms provide activities that fall within the range of regulated activities of the Consumer Credit Act, such as ‘Premium Financing’, where an unsecured loan is provided to a customer to meet their insurance premium. These activities genuinely fall within the scope of activities, and should be subject to the FCA’s new regime. However, other insurance arrangements in the past have been mistakenly assumed to be consumer credit activities, for example ‘payment of insurance by instalment’. Many annual insurance policies (e.g., motor insurance policies) offer customers the option of either payment in full or monthly premium insurance policies. Monthly payment of insurance premiums does not involve a loan to the customer, and cover ceases to apply if a monthly payment is not met. The EU Consumer Credit Directive specifically excludes these activities from the EU regime¹, and therefore we believe the FCA should make a clear statement for consumers and firms that these activities are not included within the regulatory regime. To include it is likely to add unnecessary cost and complexity, and hamper a service that is widely used and which consumers value (e.g., being able to stagger premium payments for car insurance).

¹ Article 3(c)