

26 August 2008

Our ref: ICAEW Rep 92/08

Your ref:

Financial Services Authority
25 The North Colonnade
Canary Wharf
London
E14 5HS

By email dp08_03@fsa.gov.uk

Dear Sirs

DISCUSSION PAPER 08/3 – TRANSPARENCY AS A REGULATORY TOOL

The Institute of Chartered Accountants in England and Wales is pleased to respond to your request for comments on Transparency as a Regulatory Tool.

The ICAEW's Financial Services Faculty was established in 2007 to become a world class centre for thought leadership on issues and challenges facing the financial services industry, acting in the public interest and free from vested interests. It draws together professionals from across the financial services industry and from the 25,000 ICAEW members specialising in the sector. This includes those working for regulated firms, in professional services firms, intermediaries, and regulators.

Please contact me or Iain Coke, Head of the Financial Services Faculty, should you wish to discuss any of the points raised in the attached response.

Yours sincerely

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**THE INSTITUTE
OF CHARTERED
ACCOUNTANTS**
IN ENGLAND AND WALES

ICAEW Representation

ICAEW REP 92/08

FSA – TRANSPARENCY AS A REGULATORY TOOL

Memorandum of comment submitted in August 2008 by The Institute of Chartered Accountants in England and Wales in response to the FSA discussion paper 08/3.

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INTRODUCTION

1. The Institute of Chartered Accountants in England and Wales (the Institute) welcomes the opportunity to comment on the Discussion Paper Transparency as a Regulatory Tool.

WHO WE ARE

2. The Institute operates under a Royal Charter, working in the public interest. Its regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the Financial Reporting Council. As a world leading professional accountancy body, the Institute provides leadership and practical support to over 130,000 members in more than 140 countries, working with governments, regulators and industry in order to ensure the highest standards are maintained. The Institute is a founding member of the Global Accounting Alliance with over 700,000 members worldwide.
3. Our members provide financial knowledge and guidance based on the highest technical and ethical standards. They are trained to challenge people and organisations to think and act differently, to provide clarity and rigour, and so help create and sustain prosperity. The Institute ensures these skills are constantly developed, recognised and valued.
4. The Institute's Financial Services Faculty was established in 2007 to become a world class centre for thought leadership on issues and challenges facing the financial services industry, acting in the public interest and free from vested interests. It draws together professionals from across the financial services industry and from the 25,000 ICAEW members specialising in the sector. This includes those working for regulated firms, in professional services firms, intermediaries, and regulators.

MAJOR POINTS

5. We welcome the FSA's initiative in considering utilising transparency as a regulatory tool. In principle we believe that transparency is a legitimate regulatory tool which has the potential to assist the FSA in achieving its statutory objectives. Nonetheless, we believe it is essential that appropriate checks and balances are enshrined within the framework so as to protect all parties from unintended consequences.

We believe the Discussion Paper is a thought-provoking document which attempts to resolve the legal and practical issues that surround the concept of transparency in a constructive manner. This is useful for both consumers and firms as it enables them to appreciate what views the regulators have taken into account and the competing interests that they are required to evaluate.

We believe that a Code of Practice on Regulatory Transparency is essential as a structured approach is required to avoid any suggestion of bias. However, we also believe that there is a need to strengthen the code proposed within this Discussion Paper. Firstly it is essential that the FSA should only publish data that is "clear, fair and not misleading". Secondly, that there need to be arrangements for an independent review to be carried out of any decision by the FSA to publish data given the detrimental impact that publishing data could have on the reputation of individual member firms. We propose that such issues could be addressed by the FSA referring cases

to the Regulatory Decisions Committee whenever a firm objected to public disclosure. This approach seems appropriate given the remit of the Regulatory Decisions Committee and would be cheaper and less time consuming than establishing a new body. Thirdly, the actual test for disclosure of data needs to be strengthened. It is currently stated that information will be disclosed if the FSA “believes on balance that it, serves rather than harms, the public interest.” We believe that given the potential adverse consequences to firms a stronger test should be applied.

6. The gathering of accurate and reliable information that is helpful for consumers and which would empower them to make informed decisions must be important for the FSA to consider. Nonetheless there is a real danger that the views encompassed in this paper are too simplistic and publishing data in the proposed format could result in negative unintended consequences.

The nature of the data outlined in Table 2 on page 37 could result in consumers making ill-informed choices. This in turn, could damage the reputation of the FSA. It is very difficult to see how complaints data could be effectively utilised without a significant amount of contextual data being incorporated. Furthermore, we do not believe it is effective to consider complaints across product ranges. For example, it is likely to take considerably longer to respond to more complex issues such as those related to endowments and pensions, than it would to respond to a relatively simple complaint on say a direct debit that had been missed. Similarly, we are concerned that firms which currently take the most proactive compliance and customer service approach by effectively treating every query as a complaint will be significantly disadvantaged by the disclosure of complaints data to consumers. The proposed changes could therefore result in firms changing their overall approach in ways that are more likely to disadvantage consumers. We also note with some concern that the timescales set out in Table 2 are more stringent than the current regulations require. We believe that if the FSA wish to change their rules they should be consulting in the usual way and not risk appearing to achieve changes by stealth.

7. We believe that the publication of league tables in other areas has not necessarily helped consumers to make informed decisions on the relative performance of suppliers. A simple example to illustrate the problem would be if mortality rates were used as the sole measure to assess the performance of a cancer hospital as against another that deals with the full range of ailments, many of which are not life-threatening. In other areas of public service it is often suggested that the creation of league tables has distorted behaviour to the detriment of overall performance as attention focuses upon the measurement rather than quality of service.

The financial services sector is complex and is characterised by the diversity of products and services. Consumers of financial products and services have widely differing levels of financial capability and do not necessarily conveniently fit the pattern of consumers of other more tangible goods and less complex services.

We believe that detailed market research should be undertaken over a reasonable time period to test the effectiveness and impact of the proposed tables of complaints data prior to their publication. It cannot be sensible that individual firms should be used in effect as guinea pigs as their standing within the financial services marketplace could be irreparably harmed, with

the associated detrimental impact that this outcome would have on consumer confidence. Complaints data, is something that is likely to feed press headlines, particularly if a large firm is involved; it is unrealistic and extremely simplistic to expect a different attitude.

8. We believe that no data on complaints should be published until the FSA has at a minimum reached consensus with the appropriate industry bodies on how to contextualise the data. Until then we would propose that the FSA, if there is a need to publish information should publish trend specific data by sector.

Specific questions

9. Our answers to the specific questions raised by the FSA are set out below.

Starting from First principles

Question 1: Do you agree that transparency is a legitimate regulatory tool?

In principle we agree that transparency is a legitimate regulatory tool and that it is necessary for a structured framework to be provided. Most importantly, we believe that it is essential for all parties to ensure that data is only utilised in appropriate circumstances.

High Level Cost Benefit analysis

Question 2: Do you agree that this high level cost benefit analysis captures the main potential impacts of regulatory transparency, both positive and negative?

We do not believe that this high-level cost benefit analysis captures the main potential impacts of regulatory transparency both positive and negative. It has not been sufficiently thought through at a detailed level particularly in terms of its impact on regulated firms and the detrimental impact on the relationship between the FSA and regulated firms in terms of the potential breakdown of trust. Firms will be much more wary about the information that they provide to the regulator given that there is a very real risk that it will find its way into the public domain. The cost of the approach is also not adequately addressed. Once a firm's reputation is tarnished it is almost impossible for it to be regained other than over a long period. The other potential issue from the FSA's perspective is whether it in effect will be forced into taking action against a firm in a situation where, if the data was not published, the behaviour of that particular firm would not be treated as a priority. This would clearly be a matter of concern.

Code of Practice on Regulatory Transparency

Question 3: Do you agree a Code of Practice on Regulatory Transparency is the right approach to enable the FSA to achieve consistency of decision-making?

We believe that a Code of Practice on Regulatory Transparency is essential as a structured approach is required to avoid any suggestion of bias. The Code is the correct approach provided that it incorporates an appropriate governance structure together with the necessary checks and balances that we set out below so that a firm does not have in effect the right of appeal against the FSA's decision to disclose its own data.

Question 4: Do you agree with the three Principles:

- ***We will not publicly disclose information that we believe would infringe any statutory restrictions on us, including those set by FSMA.***

We agree.

- ***We will proactively disclose information that we believe on balance serves, rather than harms, the public interest***

As stated above we believe that a stronger test should be applied than one based on a balance of opinion given the potential impact that disclosure could have. Furthermore we believe that there should be an independent review process by the Regulatory Decisions Committee. There is no doubt that inappropriate disclosure has the potential to damage the FSA as well as member firms. It is essential that it should be recognised that publication in the media does not necessarily result in informed debate.

- ***Disclosure should meet the FSA's standards of economy, efficiency and effectiveness?***

We are comfortable with this test but believe that any disclosure should also meet the test of being "clear, fair and not misleading".

Question 5: Do you have comments on the detailed wording contained in the Code of Practice on Regulatory Transparency?

We do not have any further comments on the detailed wording in the Code other than those referred to in Question 4 above.

Complaints

Question 6: Would publication of complaints data help achieve the FSA's regulatory objectives?

The publication of complaints data has the potential to help the regulator achieve its statutory objectives but it also has the potential to be damaging to member firms, the FSA and the relationship of trust between the FSA and firms.

Question 7: Are there any reasons specific to the financial services sector which would make it inappropriate to publish firm-specific data?

We think that the overarching need to sustain trust and confidence in the financial services sector as a whole dictates that further consideration is required in relation to the desire for transparency. There is no doubt that as a result of the various financial scandals and the resultant negative publicity the sector as a whole has been tarnished in the eyes of the general public. Potentially, additional disclosure could further undermine confidence and could seriously harm individual firms and feed further confusion and distrust amongst consumers. In addition to the trust and confidence issue we also believe that financial capability is of itself a major issue, which is why we have recommended that detailed market research must be undertaken. There is no doubt that concerns exist even amongst financial services market professionals as to whether it is possible to compare complaints data and arrive at meaningful conclusions given the differences in individual products/range of products/brands and business models of the various firms. In addition, data should only be published that relates to complaints that are not frivolous otherwise a misleading picture of the state of the financial services industry is presented to consumers.

Question 8: What comments do you have on the specific data that is proposed for publication?

We believe for the reasons stated above it is entirely inappropriate to present data in the format suggested within Table 2. In addition we believe it is unreasonable to exclude the complaints received against small firms which may be of a more serious nature and potentially greater in terms of value than the absolute numbers received against the larger firms. We believe that to exclude this data would be misleading and could result in inappropriate behaviour by consumers in that it might well encourage them to go to smaller firms.

Question 9: What comments do you have about the provision of contextual data alongside the complaints data?

We believe that this is essential and must be given equal prominence to the complaints data and not just included as footnotes. Agreement must be reached with the industry bodies, as to overall size, range of products, minimum quality of complaints etc before any publication of complaints data is undertaken.

Question 10: What comments do you have about providing information on a firm or group basis?

It would be important for consumers to be able to search by group, by firm and by brand name. It is essential that a proper cost benefit analysis that addresses the potential costs to firms as well as the potential benefits to consumers is carried out. We do not have any particular views on the cost issue but would imagine that cost could be significant.

Question 11: What comments do you have on the proposed form of publication and what ideas do you have for making the data more accessible in the longer term?

We believe that it is inappropriate for data to be published in the current form.

Question 12: What comments do you have on the proposed timescale?

It appears from the timescale as if it is considered important to publish complaints data as soon as possible irrespective of its value to the end consumer. We believe that this test and learn approach is inappropriate. It would be more reasonable to determine the criteria required for meaningful complaints disclosure to be available for consumers and their advisers and subsequently to determine when publication is achievable.

Retail Themes

Question 13: Do you agree with our proposals concerning:

- **anonymous, benchmarked results; and**
- **Non-fundamental OIVoPs (Own Initiative Variations of Permission).**

We wholeheartedly support the use of anonymous benchmarked results following thematic work undertaken by the FSA in various firms. We believe that this will assist in raising regulatory standards and clarifying for firms what is expected of them.

However, in terms of the Non-fundamental OIVoPs we do have some concerns. It would seem inappropriate for the FSA to propose utilising such a tool when a firm was co-operating. Such a course of action would be likely to lead to a breakdown of trust between the firm and its regulator. In addition it is essential that the FSA by this approach is not entitled in effect to bypass the Regulatory Decisions Committee. It is essential that important governance safeguards and controls are maintained if there is to be confidence and trust in the system. As a minimum firms must be entitled to approach the Regulatory Decisions Committee if the FSA are intending to publish supervisory notices for non-fundamental OIVoPs.

Question 14: Do you agree with our comments and proposals on:

- **naming and 'faming'; and**
- **risk mitigation and redress.**

We do not believe that naming and faming would ever be an appropriate course of action for the FSA to follow. The thematic work undertaken by the FSA is limited in scope and the potential value to the firm could be far in excess of what is warranted. Furthermore, one can imagine the furore that would have occurred for example had the regulator named and famed Northern Rock. We believe that there is insufficient justification to ever consider naming and faming and the risks for the regulator are too great.

In terms of risk mitigation and redress we recommend that the FSA publishes some anonymised and aggregated information after the event in its annual report other than that we believe such matters should be kept confidential.

Question 15: Are there other measures that you believe could be useful in improving the effectiveness of our thematic work with firms?

We have not identified any other measures that could be useful in improving the effectiveness of FSA's thematic work with firms.

Financial Promotions

Question 16: Do you agree that we should take further action, over and above our existing actions, to reduce the risk of consumers making poor buying decisions because of financial promotions that are unfair, unclear or misleading?

We are particularly concerned by the proposal in paragraph 6.61 relating to a fast tracked enforcement procedure. We believe that any such change must be the subject of wide consultation

Question 17: Do you think that the package of measures described in paragraphs 6.56 to 6.68 will be effective in reducing the risk of consumer detriment?

We agree that the package of measures is likely to reduce the risk of consumer detriment. Nonetheless we have the same concerns at using non-fundamental OIVOPs as those referred to in Question 13 above.

Question 18: Do you think that the benefit of creating a financial promotions Register, as described, would outweigh the drawbacks? If so, why?

We concur with the FSA's views that there are significant downsides to creating and publishing a financial promotions register. However, we believe that the same concerns arise in relation to non-fundamental OIVOPs but these appear to have been ignored.

Treating customers Fairly

Question 19: Do you agree with our analysis of the obstacles that are impeding better progress on the TCF initiative?

We agree with your analysis of the obstacles that are impeding better progress on the TCF initiative. We believe however that there is a further issue namely that there appears at times to be differing views expressed by the central policy team at the FSA and the supervisors. Consistency in terms of the interpretation of the regulations is important. It is essential for firms to engage appropriately with the FSA and have confidence in their findings.

Question 20: Is the mix of measures outlined in paragraphs 6.79 to 6.87 appropriate for helping to achieve better progress?

We support the measures identified in paragraphs 6.79 to 6.87 save for the reference to OIVOPs for the reasons referred to earlier in Questions 13 and 17.

Question 21: Are there other measures that you would like the FSA to take?

We do not believe that there are any measures that are missing. Providing peer group information to member firms has proved especially helpful. We believe however that it is particularly important for an initiative that is seen to be a key part of the regulators retail strategy that the central policy team at the FSA and the supervisors are consistent in terms of their interpretation of the regulations. This is essential for firms to engage appropriately with the FSA and have confidence in their findings

Sector Analysis and Benchmarking

Question 22: Is there data we collect in our returns whose firm specific and/or aggregate disclosure is neither precluded by directives, nor duplicative of disclosures required by directives, and which would be useful in support of our regulatory functions and objectives?

We do not believe that anything has really been omitted The FSA utilising data gained during its Arrow visits to produce benchmarking by peer group has proved particularly useful.

Concluding on these Proposals

Question 23: Do you have comments on the various proposals set out above?

We have no further comment

Question 24: Do you have suggestions for areas of regulatory transparency not mentioned in this Discussion Paper.

We have no further suggestions in relation to regulatory transparency.

Freedom of Information

Question 25: Do you agree with our proposals to improve the accessibility and content of our Disclosure Log?

We agree

When should FSA be the publisher?

Question 26: What criteria do you think we should use in deciding whether to publish or publicise information ourselves, or rely on a third party?

Our view in general is that this issue is not critical, as the FSA would still retain underlying responsibility for the publishing of the data irrespective of who actually publishes it. We believe that it is far more appropriate to have the correct checks and balances around data disclosure in the first place.

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