

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

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Dear Howard

The Financial Services & Markets Act 2000 (“FSMA”)

When we met recently, I mentioned the Panel’s concerns about certain operational aspects of FSMA. I am writing to you now to set out these concerns on a formal basis.

Disclosure of Information – Financial promotions

The Panel strongly supports the use of publicity as a tool for achieving the FSA’s statutory objectives, particularly in the areas of consumer protection and consumer education. Unfortunately it seems that the FSA’s use of publicity in certain circumstances is severely hampered – if not prevented – by the restrictive disclosure provisions of FSMA. From the Panel’s perspective, the most striking example of this has been in the area of financial promotions, where the Panel continues to press the FSA to go as far as it can within the bounds of the law to inform the public and to promulgate standards to the industry by publicising key cases.

Our understanding of the position regarding complaints about advertisements and other promotional material is that the disclosure of information about action taken by the FSA to anyone – including the complainant – is impossible unless formal disciplinary procedures have been invoked and completed (I comment on the enforcement process separately below). This means that in cases where the FSA deals with complaints by persuading firms to withdraw the financial promotion without formal enforcement action, no information about an advertisement or the manner in which it was dealt with can ever be made public. This means that people can potentially have been mis-sold while an advertisement was in the public domain, without ever knowing that this was the case. In cases where the FSA does take action against an advertisement, it will be months or even years before the enforcement action can be made public.

This is really quite extraordinary and leaves promotions which are against the rules in the public domain for long periods, without any warnings. It is in stark contrast to the type of information put into the public domain by the Advertising Standards Authority and the Financial Ombudsman Service.

In this context the Panel welcomes and supports the financial promotions initiative launched by the FSA earlier this month. We are delighted that the FSA is raising consumer awareness of its powers in this area, but this initiative does not address the concerns the Panel has about the inability of the FSA to publicise any action it takes in respect of specific complaints. The FSA's website encourages consumers to report misleading advertisements, yet the complainants (and the public at large) can be told nothing about the progress or outcome of the complaint unless or until enforcement action has been completed. The Panel's concern is that, in order to fulfil its objective of protecting consumers, the FSA needs to have the ability to publicise its views on and any action it takes in respect of misleading promotional material. Moreover, it needs to be able to do this quickly if consumer detriment is to be minimised. If necessary, we would like to see FSMA amended to enable the FSA to do this.

Enforcement

The Panel understands that, because of the time it takes to pursue a case through the enforcement process, the FSA's policy has been to resolve most instances of misleading financial promotions by taking them up direct with the firms concerned and getting them to withdraw or amend the offending promotion. While the Panel understands that some time needs to be built into enforcement procedures to allow for representations to be made, we feel it is entirely unsatisfactory that the FSA's approach to dealing with misleading financial promotions is driven by the delays it experiences in pursuing enforcement cases. Recent announcements regarding the conclusion of enforcement action against some firms for other reasons also seem indicative of an overly long enforcement process. We think that this needs examining with a view to accelerating the whole enforcement process.

The Panel is mindful of the Treasury's commitment to review the operation of FSMA two years after N2, which will be November 2003. We are therefore setting out our concerns now as an input to FSA forward thinking about the review.

Yours sincerely



Colin Brown
Chairman

cc. John Tiner, Anna Bradley

FS Consumer Panel can be contacted c/o Consumer
Panel Secretariat at the FSA
Tel: 020 7676 0720 Fax: 0207 676 9711
Email: enquiries@fs-cp.org.uk
Website: <http://www.fs-cp.org.uk>