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Our ref: Responses

22 December 2006

Dear Ms Roberts

Discussion Paper DP 06/05 FSA Confirmation of Industry Guidance

This is the Financial Services Consumer Panel's response to DP 06/05 Confirmation of Industry Guidance.

The Panel is pleased to see the question of industry guidance being tackled in a pragmatic way. It is important to consumers that the FSA works creatively with industry to raise standards and to ensure that markets work better as a result. We have however expressed concern on other occasions, such as in our letter to the Chief Executive of the FSA regarding the move to more principles-based regulation¹, about FSA confirmation or other 'endorsement' of industry codes and guidance.

Under the current regulatory regime there is a transparent and structured consultation process which provides an opportunity for all interested parties, including consumer groups and consumer advocates, to participate in the debate that generally surrounds new rules and guidance from the FSA. We believe that the move to more principles-based regulation is likely to spawn a number of industry codes and guidance as firms understandably look for a level of consistency and certainty in what is likely to be a radically different regulatory landscape than at present. Currently the FSA is required by law to establish Practitioner and Consumer Panels to advise the regulator from their particular perspectives. There are no such legal obligations on trade bodies proposing to issue guidance. Consequently there is no statutory structure in place to ensure that consumer views are taken into account when industry guidance is drawn up. In our view this is a gap that must be filled either by long-term committed industry involvement with consumer groups or, more likely, by regulatory intervention.

In the overview to DP06/05 the FSA states that the proposals in the paper "may be of interest to consumers ... we do not consider our proposals will have a significant impact on consumers." We think in making this statement the FSA has taken an unrealistically narrow view. It is true to say that the technical process for seeking

¹ Letter dated 2 August 2006 published on the Panel's website www.fs-cp.org.uk, together with the FSA's response

FSA confirmation of industry guidance will be of little interest to most consumers, but the potential impact of the outcome of that process could be as significant for consumers as it is for firms themselves. We accept that there may well be areas in the wholesale markets or particular technical issues where the effect of any guidance will be limited to the industry or the markets. Nevertheless we consider it vital that the broader consumer interest does not become side-lined.

The FSA recognises in paragraph 3.17 of the Paper that the interests of consumers must not be undermined, but does not then set out specific, realistic proposals for ensuring that this does not happen. The FSA proposes to invite the Panel to provide views on significant pieces of industry guidance where possible and will encourage those developing guidance to consider consulting the Panel directly. Other methods of gauging the views of consumers will be considered. While we welcome this as a statement of good intention, the Panel would expect to see far more formal mechanisms in place for ensuring that the consumer perspective will be covered as part of the FSA confirmation process.

We have no objection to the high-level parameters for confirmation of guidance set out in the paper. We are pleased to see that FSA-confirmed industry guidance must be publicly available and free. The Panel does have concerns however about the detail of the process for dealing with cases where the FSA perceives that consumers will be directly affected.

The Paper states that the FSA proposes to look for evidence that the provider of the guidance has considered carefully the impact that the guidance would have on consumers, and accounted for consumer interests, before giving formal confirmation. What is the appropriate and proportionate level of involvement by consumer groups is to be assessed on a case-by-case basis. Although we can see that there is merit in having a process which is sufficiently flexible to deal with each case as it arises, there are a number of basic standards which we would like to see built in to the confirmation process as minimum criteria. This would include, but not be limited to:

- The FSA seeking evidence that consumer representatives have been consulted, their views correctly recorded and actively considered, with a public statement of the reasons for not taking these views on board if appropriate;
- Acceptable standards of governance;
- Open consultation;
- Regular review; and
- Transparency.

While the Panel has some concerns about certain aspects of the Banking Code, it is a good example of how and open and transparent consultation can be made to work effectively.

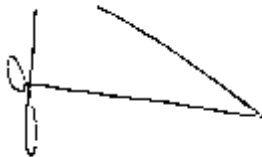
So far as its limited resources allow, the Panel will be pleased to advise the FSA and others drawing up industry guidance from a consumer perspective. No doubt other

consumer bodies might wish to be involved, but again there are likely to be resource issues to be addressed.

The FSA has already decided not to put in place a similar process to that run by the Office of Fair Trading for its Consumer Codes Approval Scheme. However there are other policy and practice papers which we believe should be considered by the FSA. The National Consumer Council's paper "Three Steps to Credible Self-Regulation" (available at www.ncc.org.uk) provides a checklist of good practice for self-regulatory schemes. We are aware that the use of industry guidance would not necessarily constitute a self-regulation scheme as such, but nevertheless areas such as governance and compliance that are covered in the paper can be usefully read across into the guidance 'confirmation' process currently under discussion. Similarly Ofcom's Statement on Co-regulation (available at www.ofcom.org.uk) also provides helpful information on criteria for promoting co and self regulation that is relevant to the current debate.

Finally, we were pleased to see that the Financial Ombudsman Service has confirmed that the proposals for FSA confirmation of industry guidance will not present an inherent conflict with its role. This is an area that would need to be monitored closely as the production and use of industry guidance develops.

Yours sincerely

A handwritten signature in black ink, consisting of a vertical line on the left, a horizontal line extending to the right, and a diagonal line crossing the horizontal one from the top right towards the middle of the horizontal line.

John Howard
Chairman
Financial Services Consumer Panel