Association of
Mortgage Intermediaries

Association of Mortgage Intermediaries' response to HMT CP 305: Financial services future regulatory framework review phase II consultation

This response is submitted on behalf of the Association of Mortgage Intermediaries (AMI) and the Association of Finance Brokers (AFB). AMI is the trade association representing over 80% of UK mortgage intermediaries. AFB sits within AMI and represents second charge (formerly secured loan) brokers.

Intermediaries active in this market act on behalf of the consumer in selecting an appropriate lender and product to meet the individual consumer's mortgage requirements. AMI members also provide access to associated protection products. AFB members also provide access to unsecured products.

Our members are authorised and regulated by the Financial Conduct Authority (FCA) to carry out mortgage, insurance mediation and consumer credit activities. Firms range from sole traders through to national firms and networks, with thousands of advisers.

Response

We welcome the opportunity to respond to this consultation. In broad terms we are supportive of the UK's current regulatory model and feel that it works well. We support of the adaptation of the current model to meet the UK's regulatory requirements now that we have left the EU.

This consultation has left us with a number of further questions which are hitherto unanswered. If it is the intention of the review and future regulatory changes to remove some of the more complex and unnecessary EU Directive led legislation, we need to understand how the financial services relationship with the EU will work in the future, in order to understand what can be removed.

Furthermore, if it is intended that the regulators will undertake more responsibilities, particularly with regards policy making, we would welcome further detail on the proposed future funding mechanism of the regulator. Currently, the costs of the regulator are funded entirely by the firms that it regulates. These proposals look set to increase the responsibility held by the regulator with regards policy making and we would welcome clarification whether HM Treasury will be providing additional funding to enable to regulator to adequately carry out these increased responsibilities following the UK's exit from the European Union. We are also concerned that in delegating more powers, the regulators both keep independence from Government who might require change and that appropriate consultation and balanced decision making is maintained.

We are concerned that the FCA's current responsibilities are too broad to allow the regulator to give sufficient focus to the markets that pose more of a financial risk for consumers. We would like to see consumer credit firms removed from the FCA's remit and placed in a ringfenced entity, in the same way as the Payment Systems Regulator, which would ensure that the regulator does not become bogged down with the smaller ticket items and will be able to focus more of its resource on the supervision and

monitoring of sectors which have already and are more likely to cause more harm and to identify and react quicker to markers of concern.

The FCA has seen a shift in culture in recent years, and rather than attributing the same weight to all its operational objectives, the focus has been skewed towards consumer protection and competition to the detriment of the good firms that it regulates and the objective of market integrity. Whilst we agree that competition is important, both for consumers and for market stability, adding competition as a standalone objective has left it open to misinterpretation and in reality, has led to consumer harm due to the dilution of focus away from supervision to a more philosophical agenda. We would like to see the FCA's competition remit removed as a standalone objective, with more clarification given to the competition remit of both the FCA and the Competition and Markets Authority in the financial services industry.

As mentioned in our response to Phase I, the supervision and enforcement teams at the FCA can appear slow to act and, in AMI's experience, are reactive rather than proactive, waiting for firms to report activity rather than taking the initiative to investigate things that seem wrong. They always appear on the back-foot in assessing market or firm activity, with a portfolio and thematic approach which needs augmenting by more general review work which would allow them to identify issues earlier in the cycle. We are concerned that the FCA's failure to act on intelligence from the industry has seen a reduction in whistleblowing because the FCA has not been seen to act upon information received and feedback loops appear limited. This must be addressed.

Incidences of individuals who, having been assessed by a firm as unfit and subject to dismissal or perhaps panel removal by a lender, set themselves up as a directly authorised firm with no references sought from the previous firm by the FCA remain too common and are a concern to AMI and our members. We would welcome the regulator taking a stronger stance to ensure that this practice ceases.

We welcome the cooperation between FCA, FOS and FSCS to tackle phoenixing and to work together to prevent individuals who have caused harm from being able to continue working within the industry. We fully support the aim of FSCS that people who phoenix into claims management companies (CMCs) and claim compensation on behalf of their former customers, would no longer be able to provide regulated financial services. This would offer protection for consumers looking for financial advice, help prevent harm and avoid further burden on levy payers. The work of the Phoenixing Working Group is vital to help reduce the incidences of harm to consumers. Whilst we understand the importance of not compromising any investigations, we are concerned that the work done by supervision and enforcement is often not published until many months or even years after the incidences occurred. Greater transparency where possible would ensure that lessons are learnt in a timely manner. Greater speed and efficiency should become a key objective, measured at FCA Board level.

In a review of the regulatory framework, consideration should also be given to the role of both the Ombudsman Service and the Compensation Scheme. The Financial Ombudsman Service was set up in order 'that certain disputes can be resolved quickly and with minimum formality by an independent person' (FSMA 2000 Part XVI). We do not feel that the organisation is currently fulfilling its brief. We understand that, for a mortgage complaint, the wait to be allocated a case handler varies from 9 to 12 months and there are over 5,000 cases with the Ombudsman, not relating to an ongoing issue with a CMC, that are over two years old.

FOS is underpinned by fairness, its website outlining that it will always try to investigate fairly and listen to both sides. The comments made by the newly appointed independent assessor, Gillian Guy, in a FOS press release that she, 'will continue to champion the fair treatment of consumers and make sure

their voices are heard[1]', were disappointing. We do not feel this is an appropriate statement for an impartial service to publish. Moreover, as this was approved by FOS executive management and passed through their PR process it raises the question of whether the service itself is impartial.

Further concerns relate to FOS' ability to consider what it denotes to be industry best practice when arbitrating a case, which can have far reaching implications for a firm and a whole sector. A decision once reached will set a precedent according to which other cases are also judged and yet firms do not have any right to appeal, except through the courts. Consideration should be given to whether the Ombudsman Service should also be subject to regulatory principles, given the potential of its decisions to set a precedent.

We are also concerned that the recent FOS consultations on its charging structure are looking to move away from the polluter pays model increasing the funding that it receives from a levy on the industry, paid for by all firms. This migration from a predominantly case fee approach to charging all firms runs against the "polluter" pays principle. Whilst it gives FOS management more certainty over its funding, it does nothing to encourage large firms to avoid complaints escalating to FOS and passes a bigger burden to well-run smaller firms.

We would welcome the consideration of the correct approach to consumer protection as part of this review. There are currently a number of required parts to this that are interrelated: a firm's capital adequacy requirements; the requirement to hold professional indemnity insurance that covers both current and past business; payment of the FOS levy and case fees where appropriate; and payment of the FSCS levy. There is merit to a discussion on whether these elements should all be required following the UK's exit from the EU, particularly whether firms should be required both to hold a certain level of capital and have professional indemnity insurance (PII). The latter has increased in price substantially over the last year, as well as insurers requiring increased excesses and additional exclusions.

Mortgage intermediary firms are also under escalating pressure due to claims from consumers of failed firms in the Life Distribution and Investment Intermediation Class of the FSCS which has reached its cap and triggered the retail pool. Firms are now paying more towards the compensation scheme than they are for the regulator and the situation is not sustainable. Good firms should not be responsible for compensating victims of criminal activity. We call on HM Treasury to urgently consider potential mitigations to ensure that the polluter pays. This might include consideration of reversing the decision for the majority of regulatory fines to be passed to the Exchequer. This was taken post financial crisis to prevent banks from benefitting financially. However, it has left many innocent firms in other sectors picking up the full FSCS costs without the reduction that would have come from fines imposed on the polluters.

The financial services regulators need to be seen to take action against individuals who, by their recklessness, cause harm to consumers. The FCA should be seen to hold individuals to account and take action against the directors of firm who cause substantial harm. These people should not be able to continue their careers within the financial services industry. Measures need to be taken to prevent this to maintain the integrity of the financial services sector. There has been recognition of the need for better communication between the FSCS and FCA, but we have yet to see tangible evidence of this working to this effect.

Finally, we have for some time, shared our growing concerns over the micro-culture we are seeing within the FCA. Over recent times there seems to have been the practice of recruiting very well-

[1] https://www.financial-ombudsman.org.uk/news-events/financial-ombudsman-services-board-appoints-new-independent-assessor

educated people with little or no industry experience, whilst at the same time, we have seen a number of employees with years of experience at the regulator and a large corporate memory who have left. The lack of diversity is potentially leading to "group-think" and even an increasing reservation to challenge internally. We do not see sufficient evidence of Board challenge to the strategy, structure, approach and prioritisation of issues and resources at the FCA.

Questions

1. How do you view the operation of the FSMA model over the last 20 years? Do you agree that the model works well and provides a reliable approach which can be adapted to the UK's position outside of the EU?

In broad terms, we are supportive of the current regulatory architecture and the operation of the FSMA model and feel that the changes introduced in the wake of the 2007-8 financial crisis work well. It would make sense to adapt this following the UK's exit from the EU, rather than changing the model.

We are pleased that the onshoring of rules is not seen to be permanent and that there will be room to adapt these where required going forwards to ensure that the regulatory framework has the flexibility to adjust and develop as markets evolve.

We agree with the suggestion that the new framework will allow the opportunity to combat the fragmented rulebook which would be welcomed by us and our members. The FCA handbook is fragmented, in parts contradictory and is in need of a full review. This would be to the benefit of both firms and consumers. We consider that its product based structure would be better served by a focus on the life stages and needs of consumers. This might lead to a more holistic approach and less risk of mis-selling and mis-buying.

In addition, we consider that moving consumer credit regulation and supervision to a distinct body would benefit all. Significantly reducing the number of firms that FCA has to embrace will allow it to focus on the significant risks in the remaining firms and will make it easier to focus on the change required to deliver oversight and supervise effectively.

2. What is your view of the proposed post-EU framework blueprint for adapting the FSMA model? In particular:

What are your views on the proposed division of responsibilities between Parliament, HM Treasury and the financial services regulators?

We agree with the proposed division of responsibilities between Parliament, HM Treasury and the financial services regulators. We welcome the suggestion that the framework provides a clear and effective way for Parliament and Government to set out what the broader public policy issues and priorities are.

We also agree with the proposals envisaging a high level of policy making responsibility for UK regulators. We hope that this will ensure that policy making is not overly influenced by the politics of the government of the time.

At their best the PRA and FCA use the Discussion Paper/Consultation Paper/Policy Statement process very effectively. This combined with an open door discursive approach will allow for the effective development of policy, for which they are rightly recognised.

What is your view of the proposal for high-level policy framework legislation for government and Parliament to set the overall policy approach in key areas of regulation?

There is currently a distinct lack of cross-party political agreement to deal with some of the pressing social issues, the government has not committed to long-term strategies on emissions, housing, welfare, long-term care, funding of retirement and intergenerational planning and wealth transfer. We hope that these proposals will bridge this gap as these issues are too complex to be dealt with by the regulator alone and will require comprehensive public debate followed by legislation from Government to enact changes. It is right that such topics should be escalated to a full policy debate by Government to incorporate other factors, such as public policy, taxation and funding of change agendas, which are intrinsically linked.

These proposals will also help the regulators provide clear focus and direction to their activity and so appear more transparent to both consumers and the firms that they regulate.

Do you have views on how the regulators should be obliged to explain how they have had regard to activity-specific regulatory principles when making policy or rule proposals?

We agree, however it is important that these requirements are honestly fulfilled and are not seen to be an exercise that needs to be undertaken just to tick a box.

It is important that the regulatory framework should apply proportionality to the intervention that is being considered. We strongly support the need for cost benefit analysis to be a core aspect on consultations. The industry must get better at outlining the costs of change and the regulator at quantifying and justifying the benefits.

3. Do you have views on whether and how the existing general regulatory principles in FSMA should be updated?

We feel that the regulatory principles are broad and would benefit from some further guidance or clarification. Without this, they are left entirely to the interpretation of regulators. The general principle that consumers should take responsibility for their decisions has become clouded within the FCA as its operational objectives of consumer protection and competition seem to have taken priority and have seen a greater focus whilst the implications of consumer responsibility has been diluted. Instead, the regulated firm is seen to have a duty of care, even in cases where a consumer has chosen a non-regulated product. Where consumers have chosen to avoid advice or acted against advice they should be liable for that decision. Where a consumer does not take advice or acquires an unregulated product when there is a regulated option available, then the industry should not be liable for that decision. Regulation must be developed to ensure that those providing products via web-based or fintech solutions are subject to the same rules as conventional firms and that consumers receive similar protections.

4. Do you have views on whether the existing statutory objectives for the regulators should be changed or added to? What do you see as the benefits and risks of changing the existing objectives? How would changing the objectives compare with the proposal for new activity-specific regulatory principles?

The FCA has, for some time, placed undue focus on its strategic objectives on competition to the detriment of its objective of market integrity and the supervision of firms. It has seemed at times, that the two parts of the organisation were not communicating openly with each other, with papers often issued in silos and with contradictory messages. In our opinion, the FCA has misunderstood its competition objective and has allowed itself to be pulled in many directions with focus on competition in markets rather than concentrating on how markets are working and the supervision of them. In recent

years, lots of FCA funding has been put into the competition side, at the expense of supervision, leaving a regulator that is out of touch with the markets it regulates, and that has not been able to share data and potential policy with the industry. We have seen examples of conventional consultations where we have benefitted from close debate and co-operation with the FCA and others under the competition agenda where we were excluded leading to sub-optimal outcomes as they deemed these to be "confidential" under this objective. This cloak and dagger approach is unhelpful, has removed the industry's ability to collaborate and has pushed the regulator to spend vast amounts of funds on things that it is largely powerless to affect, for example the Mortgages Market Study and the mortgage prisoner work.

The competition remit has led the FCA to produce more philosophical papers rather than regulatory papers. This in turn has also led the FCA to embark on the recruitment of specialists with very limited industry experience and whilst the ideas that emanate are philosophically correct, they are distanced from the practical realities of the industry and the needs of both firms and consumers.

Whilst competition is important in markets, it should not be a standalone objective. Ensuring a competitive market naturally sits as part of the objective of market integrity. The regulator should pay due regard to competition in a market place but should not feel that it is responsible for it. That competition is one of the FCA's objectives has skewed the FCA's priorities. Its role should be to prevent firms from obstructing competition, not working proactively to promote competition, unless there has been a proven market defect. Overall strategy should be decided by the FCA Board and should be considered as part of regulatory activities but should not be a standalone component and priority. We see no sight of this from the minutes of the FCA Board or evidence of challenge from the Board to influence the annual plan. The FCA's competition agenda has muddied the water and stopped the clarity of messages getting through. The results can be seen in the inquiries into the Connaught and London Capital and Finance failures.

As the Competition and Markets Authority (CMA) is also responsible for competition, there is a certain amount of duplication in the approaches of the two bodies which is not helpful for the industry. We would like clarification of the responsibilities of both organisations with regards competition in the financial services markets. The competition remit of the FCA has led in some cases to conflicts of interest with the regulator struggling to balance its supervision and competition objectives. This was seen in both the Mortgages Market Study and the work on DB transfers where the regulator didn't like what was happening in the market, but didn't take firmer action for fear of the impact on competition. We would rather the objective were removed from the FCA leaving it free to concentrate on the effective operation of the markets that it regulates. We would support the CMA having responsibility as previously.

5. Do you think there are alternative models that the government should consider? Are there international examples of alternative models that should be examined?

No comment.

6. Do you think the focus for review and adaptation of key accountability, scrutiny and public engagement mechanisms for the regulators, as set out in the consultation, is the right one? Are there other issues that should be reviewed?

We agree with the focus as set out in the review but are concerned that whilst the model is correct, the FCA has in the past not given the feedback from these mechanisms, the due concern and consideration needed. The most recent example of this is the recent FCA responses to key comments from the independent practitioner panels in which the concerns stated were rebutted and not fully addressed, with assurances given that everything was all under control. Senior industry figures, experts in their

field, give up their time to sit on these panels and it seems that whilst things are discussed, not enough focus and weight is given to the opinions that come out of these. The FCA should use the vast knowledge and experience of the members of these panels to augment its thinking. We are concerned that it is viewed by the FCA as another hurdle that needs to be overcome rather than an important consultation process and discussion with experts. They are not being allowed to perform their important role as a check or influence on the focus of the regulator or provide direction on its activity. Treasury should consider whether the panels should have more interventionist powers, or ability to refer issues to the FCA Board or TSC. FCA Board members should carry similar responsibilities to those held by the Board members of the firms they regulate.

There is a need for reform within the FCA. Too often we hear that vital markers have been missed because of the sheer number of firms that the FCA regulates and due to the amount of calls, information and data that this generates. Andrew Bailey, in a recent Treasury Select Committee interview, highlighted that that FCA call centre receives more than 200,000 calls in a year which makes it difficult to extract important data such as that relating to mis-selling at London Capital & Finance. We would support the transformation of the FCA to remove consumer credit firms from its remit to a ringfenced entity, so that the regulator's focus is not blurred by small ticket issues relating to car sales, boiler guarantees etc. In our opinion this should be a separate unit, perhaps housed in the same building, as the Payment Systems Regulator is. As with the ringfencing of banks following the financial crisis in 2007-8 and the creation of the PRA and the FCA when it was deemed that the FSA's responsibilities were too broad to allow for sufficient focus on the stability of firms, this change would allow regulator to remain more in control of the markets that pose greater financial risk to consumers and good firms. This will also allow both entities to be focussed on the core issues facing their markets.

7. How do you think the role of Parliament in scrutinising financial services policy and regulation might be adapted?

It is key that Parliament's involvement is at a strategic and macro level allowing firms the room to plan for the future. Parliament's role will be very important to ensure that the right questions are asked and to ensure true accountability from regulators but also to ensure that cross party agreement is reached on the high level policy considerations to ensure that financial services policy making decisions are not unduly affected by the political ideals of the Government of the day. Effective use of the TSC is essential in holding all the regulatory entities to account.

8. What are your views on how the policy work of HM Treasury and the regulators should be coordinated, particularly in the early stages of policy making?

It is important that the regulators are regarded as experts and are fully consulted by both HM Treasury and other governmental departments, for example the Ministry of Housing, Communities and Local Government and the Department for Business, Energy and Industrial Strategy, before consultation papers are issued to the industry, to ensure that there is consideration of impacts across the industry and to mitigate risks posed by taking a siloed approach which could lead to contradictions in policy or confusion.

For some time we have been concerned by the number of regulatory changes affecting our industry emanating from both the FCA and government departments. Mortgage intermediary firms are often very small and do not have the ability to digest the number of papers issued from the Regulator and others. Hours spent digesting and understanding extensive papers on a multitude of issues does nothing to help firms plan and develop for the betterment of their clients.

9. Do you think there are ways of further improving the regulators' policy-making processes, and in particular, ensuring that stakeholders are sufficiently involved in those processes?

We have felt that in more recent years, with the increasing prevalence of its competition objective, the FCA has become more distanced from the firms that it regulates, including during policy making processes. As previously stated, the FCA seems to use the practitioner panels as the final check for policy proposals rather than involving them early on in the process and using the panels as valuable resource for discussion during the formulation stage.

The FCA used to be more engaged with the industry and held meetings with networks and "packagers" to address any issues. These two-way flows of information promoted best practice, good communication and better market intelligence but have ceased and have not been replaced. These provided firms with conduits to provide information which cannot be replicated by an anonymous call centre. It seems that the FCA has distanced itself from communicating directly with firms in the industry and is planning to rely on data analysis to assess any issues. Its outward communication is via social media as much as direct publication and via website information, avoiding direct communication which provides more detail and clarity.