



House of Commons
Treasury Committee

**The work of the
Financial Conduct
Authority: the
perimeter of regulation:
FCA response to the
Committee's Thirty-
Fifth Report of Session
2017–19**

**First Special Report of
Session 2019–20**

*Ordered by the House of Commons
to be printed 15 October 2019*

The Treasury Committee

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First Special Report

On 2 August 2019, the Treasury Committee published its Thirty-Fifth Report of Session 2017–19, [*The work of the Financial Conduct Authority: the perimeter of regulation*](#) (HC 2594). On 14 October 2019 we received the FCA Response to the Report, which is appended below.

Appendix: FCA Response

Dear Catherine,

RE: The FCA’s response to the Treasury Select Committee’s ‘The work of the Financial Conduct Authority: the perimeter of regulation’ report

I am writing to you in response to the Committee’s report on the FCA’s regulatory perimeter published on 24 July 2019. As you know we are undertaking work in this area, as discussed in our evidence and in our own report published earlier this year. This work includes HMT’s review of policy on non-transferable debt securities.

We welcome the Committee’s report as a useful contribution to the debate and have responded to its recommendations below.

Warnings where regulated financial institutions undertake unregulated activities

The Committee recommends that where regulated financial institutions undertake unregulated activity, the regulatory system should ensure that clear and explicit warnings are provided at that point, with the potential consequences of the lack of regulatory cover clearly explained, with sanctions for firms that fail to do so.

We agree with the Committee that it should be clear to consumers when an activity undertaken by a regulated firm is regulated or not.

There are already rules in place requiring that firms do not imply an activity is regulated when it is unregulated. Our rules related to statements about authorisation and regulation¹ state that “a firm must not indicate or imply that it is regulated or otherwise supervised by the FCA in respect of business for which it is not regulated by the FCA”.

Our rules also require that a financial promotion communicated or approved by an authorised firm must be fair, clear and not misleading.² For these purposes, it is relevant to note that marketing may constitute a financial promotion even if the subject matter does not constitute a regulated activity (e.g. promotions relating to mini-bonds). Further, guidance clarifies that firms should ensure a financial promotion that names the FCA, Prudential Regulation Authority (PRA) or both as regulator, and refers to unregulated matters, makes clear that those matters are not regulated by the FCA or the PRA. However, the rules do not require, in all cases, a proactive explanation or warning to consumers when a product or service is not regulated or the consequences of this.

1 GEN 4.5.4R

2 Principle 7, COBS 4.2.5 R and COBS 4.2.4G (4)

We are exploring what more we can do to ensure firms are clearer and more actively disclosing where their activities are unregulated, and considering how best to further raise consumer awareness of regulated and unregulated activities. As part of this work we are also working with the Financial Ombudsman Service (FOS) and the Financial Services Compensation Scheme (FSCS) to identify options to raise consumer awareness about the scope of regulatory, FOS and FSCS cover. We will keep the Committee updated on this work.

In the meantime, we have been clear that we will take action against firms that don't meet our requirements. In January we issued a 'Dear CEO'³ letter which set out our expectations to firms regarding clarity in their promotions about regulated and unregulated business, and we will continue to be active on this by pursuing cases with firms to ensure that they amend or withdraw their communication or approval of a promotion in order to mitigate instances of unfair, unclear or misleading promotions. When we suspect serious misconduct has occurred within our jurisdiction, we will investigate, and where appropriate we can consider using our powers under section 137S of the Financial Services and Markets Act (FSMA) to ban financial promotions.

Formal powers to recommend changes to perimeter

The Committee recommends that the FCA be given the formal power, and necessary remit to be able to formally recommend to the Treasury changes to the perimeter of regulation, where that would enhance its ability to meet its objectives, in particular to prevent consumer harm. It should set out any costs, both to firms and consumers, from such a move at the same time. It would then be for the Treasury to consider such a recommendation promptly. All such recommendations and Treasury replies should be publicly disclosed. This would formalise the relationship described by the Minister, and in so doing provide greater transparency and focus to the process.

We engage actively with HMT on the scope of the perimeter, and there have been a number of recent cases where HMT and the FCA have worked closely together to address perimeter issues, for example on proxy advisers and peer-to-peer lending.

However, we share the Committee's view that there could be a more structured and transparent approach for identifying and engaging with HMT on perimeter changes. This could allow for a regular opportunity to consider what activities are covered by regulation, and enhance transparency surrounding changes to the FCA regulatory perimeter.

It is also the case that there will be occasions when a perimeter issue is particularly sensitive or complex where direct engagement is important to avoid uncertainty in the market.

If there is a legislative opportunity to bring forward a power for the FCA to act in this area, we are ready to work with HMT to put this into place. In the meantime, we will work to enhance the current process around these issues. Our inaugural perimeter report has helped provide a fuller picture on issues around the FCA perimeter and we will continue to use it to give visibility on areas which may need amendment.

3 <https://www.fca.org.uk/publication/correspondence/dear-ceo-letter-promotions-regulated-unregulated-business.pdf>

Warnings on financial products

The FCA must not in future be constrained, or feel constrained, from providing warnings on financial products that may cause consumer detriment. The FCA should be given the remit to highlight the risks faced by financial services consumers including where an activity is beyond the perimeter of regulation. This should be written into the relevant primary legislation, and include any necessary powers needed to fulfil that remit. This would allow the FCA to identify and provide clear warnings about products and activities that might pose risks to consumers, without fear of breaching its remit. In providing such a remit, the Government should ensure that the FCA has the power to act swiftly and without undue restraint as it sees risks arise.

We agree that it is important that the FCA's ability to provide warnings on financial products that may cause consumer detriment is not constrained.

We have reviewed our powers and remit for highlighting risks and issuing consumer warnings when we become aware of unauthorised activities that may cause significant consumer harm. We believe that we currently have the powers we need to issue relevant warnings, alerts or other information—and have done so, for example on mini-bonds.⁴ The guidance power in section 139A FSMA gives us the broad ability to give information or advice on any matters which appear to us to be desirable.

Last year, for example, we issued 521 consumer alerts. This included some general alerts on activities or products that we do not regulate, but where we saw significant scales of consumer detriment (for example on unregulated cryptoassets).

A key challenge we currently face is the speed with which misleading financial promotions and scams that we have closed down re-appear on the web under a different name. For every website that we close down, there is likely to be a new one which appears, often within a matter of days, offering similar products or making similar financial promotions. We are determining the options available to us to take more targeted and effective action to alert consumers more quickly about individual scams or misleading schemes.

At the moment, we do not have the powers to require a technology firm to block access to a website, short of seeking a court injunction. Currently we rely on technology firms to cooperate with our requests, and we are actively encouraging them to do more to block scam websites promptly. We are discussing with Government and technology firms how we can deal with the issue.

We also run our ScamSmart campaign to educate consumers on the risks of investment and pension fraud. The campaign—which has been run across TV, print, radio and digital advertising—targets those most at risk and aims to increase their awareness of the warning signs and the actions they can take to avoid it.

The Scamsmart website⁵ gives consumers tips on how to spot the techniques used by fraudsters and hosts the FCA Warning List. The Warning List⁶ is a list of firms and

4 <https://www.fca.org.uk/consumers/mini-bonds>

5 www.fca.org.uk/scamsmart

6 <https://www.fca.org.uk/scamsmart/warning-list>

individuals that the FCA knows are operating without its authorisation. The web tool helps members of the public search this list, find out more about the risks associated with an investment or pension opportunity, and outlines the steps they can take to avoid scams.

Since the campaign launched in October 2014 to August 2019:

- Over 1.2 million people have visited the FCA's ScamSmart website;
- Over 19,500 people have been warned about an unauthorised firm after using the Warning List tool.

If each of those people warned avoided a scam as a result, then we have potentially stopped more than £595m from falling into the wrong hands.⁷

Powers to order additional information from unregulated entities

The FPC has the power to recommend that the Treasury order additional information from unregulated entities to help meet its objectives. At the very least, this should be replicated for the FCA in relation to its own present objectives. Indeed, there may be a good case to exceed the FPC's power, given the fast-paced nature of risks consumers may face at the perimeter, and the FCA itself should be able to, determine whether it should gather data from non regulated entities, as needed to meet an expanded remit beyond the perimeter. The Committee recommends the Treasury undertake research on this point, and in doing so canvass the views of FCA. The Committee would then welcome the Treasury's views in its response to this Report.

We share the Committee's concern in ensuring the FCA is well prepared to deal with the fast moving nature of risks that consumers face and pre-empt these risks where possible.

There may be circumstances when such a tool could be helpful. For example, given fast evolving business models there will be times when it is unclear whether a firm is undertaking activity which falls within the FCA perimeter and the power to acquire additional information may help.

However, we are also conscious of the need to ensure that any power the FCA has is clear including ensuring it is well understood how the power will and can be used.

In addition to considering this further with HMT, we would need to consider the balance between the costs and benefits of such a power. The FCA already has wide ranging powers to seek information and documents from persons who are under investigation;⁸ persons who are connected to a person under investigation;⁹ unconnected persons where the investigator is satisfied that the requirement is necessary or expedient for the purposes of the investigation;¹⁰ and third parties that are in possession of a document relevant to an investigation, including banks in certain circumstances.¹¹ Additionally, if a firm is authorised, we can ask for information to be provided as part of the supervision of the firm and authorised firms are required to cooperate with the FCA as its regulator.¹²

7 Based on a £29,000 average loss to an investment scam

8 (s171, FSMA)

9 (ss171, 172(1))

10 (s172)

11 (s175)

12 Principle 11

Our information gathering power¹³ may also be used to gather information from certain entities who may be unregulated, for example a person who is connected to an authorised person such as members of the authorised person's group.¹⁴

We are giving thought to how such a power might operate, and considering the kind of information we would seek from unregulated entities and how we would be able to take supervisory or enforcement action using this information.

I hope that you find this response helpful. If you need anything further on any of the points covered, please do let me know. We will keep the Committee updated on the progress of our work on the perimeter.

Yours Sincerely


Andrew Bailey

Chief Executive

13 (s.165)

14 (s165(7) and (11))