

## SRA response

### *Financial Conduct Authority consultation paper - detailed proposals for the FCA regime for consumer credit (CP13/10)*

Published on 05 December 2013

Read consultation paper CP13/10 - Detailed proposals for the FCA regime for consumer credit [<http://www.fca.org.uk/news/cp13-10-consumer-credit-detailed-proposals>] .

#### *Introduction*

1.

This response is submitted on behalf of the Solicitors Regulation Authority (SRA), the independent regulatory body of the Law Society for England and Wales (TLS). We regulate individual solicitors and their firms, other lawyers and non lawyers with whom they practise, and other organisations providing legal services to consumers in England and Wales.

2.

We welcome the opportunity to take part in this consultation and set out our comments below. Where we have not made comment in response to a specific issue or question, we remain neutral on issues/proposals discussed.

#### *The SRA*

3.

The SRA is the independent regulatory body established by the Law Society for the regulation of legal services provided by law firms and solicitors in England & Wales. The SRA's powers arise from various statutes and regulations including the Solicitors Act 1974, the Administration of Justice Act 1985, the Courts and Legal Services Act 1990, the Legal Services Act 2007 (LSA) and the SRA's Handbook.

4.

The SRA has adopted a risk-based outcomes-focused approach to regulation. This is a regulatory regime that focuses on the high level principles and outcomes which drives the provision of services to clients and promotes the effective management of a solicitor's business. This

approach allows the SRA to focus on issues which really matter and fosters an environment where practitioners are required to take responsibility for managing risks in particular contexts whilst allowing flexibility in how they deliver services to their clients.

5.

The SRA regulates in the public interest and is determined to ensure that the public are able to access safe, ethical, good quality legal services that meet their needs. The SRA Principles and the SRA Code of Conduct requires all to provide a good standard of service to their client's, and to exercise competence, skill and diligence.

### *The current legal services market*

6.

Today's expanding legal services market is in a state of rapid development and transition, triggered by regulatory and other developments, primarily as a result of the LSA which sets out eight regulatory objectives in respect of the supply of legal services.

7.

The LSA was passed with the intention of liberalising the legal services market by, for example, allowing Alternative Business Structures (ABS) and encouraging innovative new models for the provision of legal services. The continuing advances in technology; globalisation; demographic and social changes; demands for better value for money and the rise of consumerism have all led to altered expectations of what is required from providers of legal services.

### *The SRA's regulated community*

8.

The SRA authorises individuals and firms to carry on reserved legal activities as defined by the LSA. The SRA is the largest of the approved regulators in England and Wales. The SRA regulates 128,169 practising solicitors, 4,653 other lawyers and 10,827 entities and their employees and managers<sup>1</sup> [note 1]. The total number of solicitors on the roll (the record of individuals who are admitted as solicitors but not necessarily practising or are practising with a statutory exemption) at the end of February 2013 was 164,998.

1 SRA Regulated population statistics [<https://www.sra.org.uk/sra/how-we-work/archive/reports/statistics/regulated-community-statistics/>] , accessed 22 March 2013.

### *OFT Group licence regime*

9.

Group licences have been issued by the Office of Fair Trading (OFT) in terms that permit specified descriptions of persons and/or businesses (the specified members of the group falling within the parameters as stated on the group licence) to carry out the credit – and/or ancillary credit – activities specified on the licence, under cover of that licence.

10.

The OFT has granted a group consumer credit licence to the Law Society (managed by the SRA) which covers consumer credit work carried out in the course of practice by persons/bodies regulated by the SRA.

11.

SRA authorised persons/bodies (law firms) undertake consumer credit activities set out in the group licence. These activities include consumer credit, credit brokerage, debt adjusting and debt counselling, debt collecting, debt administration and provision of credit information services. The way in which law firms carry out this work is governed by their duties as members of the profession, including their obligations to their clients, to third parties and to the administration of justice as set out in the SRA Handbook and other regulatory provisions.

### *The proposals*

#### *Chapter 2 - Implementing our new regime and registering interim permission*

12.

We note the amendments which have been made since the March 2013 consultation especially so in relation to the higher and lower risk consumer credit activities. It is also noted that as a result of the feedback to the cost-benefit analysis that further research has been conducted which has highlighted key points. We would ask the FCA to consider the points in further detail and look at ways to ensure that firms are not forced out of the market due to higher compliance costs or due to a lack of guidance which maybe hindering firms from making decisions. The need for guidance is needed more so, where firms have previously fallen under the OFT group licence regime and are now considering authorisation by the FCA.

13.

With regards to the interim permission regime, the FCA may wish to reconsider their decision in respect of professional firms covered under the OFT group licence regime and allow those firms to use the group licence for the purposes of registering for interim permission.

### *Chapter 3 - Authorisation and the potential alternatives*

14.

The risk-based approach to authorisation is in line with the SRA's approach to authorisation and it is anticipated that the approach will ensure that only those suitable will be able to carry on consumer credit activities.

15.

Our position with regards to approved persons is neutral. We do however, endorse the expectation that all consumer credit firms have the right people responsible for certain functions to ensure that consumers are protected.

### *Exempt professional firms*

16.

We are working to ensure that our Handbook has provision for the regulation and supervision of firms carrying out consumer credit activities as an exempt professional firm.

17.

Part 20 of the Financial Services and Markets Act 2000 (FSMA) requires, among other things, that the regulated activities "...arise out of, or are complementary to, the provision of a particular professional service to a particular client..." (s332(4) of FSMA) and in our view that necessitates an assessment of the services provided on a case by case basis rather than by the firm overall.

18.

It seems fairly clear that firms that specialise in debt collecting as their main activity will not be able to satisfy the "incidental manner" condition in Part 20 and will need to be authorised by the FCA.

19.



The more difficult area is where debt collecting does not form a major part of the firm's income. There are exclusions in relation to various consumer credit activities including debt collecting, where the regulated activity is carried on by a solicitor (within the meaning of the Solicitors Act 1974) acting in the course of contentious business (as defined in section 87(1) of that Act).

20.

We understand that these exclusions will only be available where proceedings have been issued and will not exclude the pre-issue work. In our view firms that carry on debt collecting activities for clients in matters that do not result in the issue of proceedings will be carrying on regulated activities and will only be able to rely on the Part 20 exemption where those activities "...arise out of, or are complementary to..." another service provided to that client. It may not always be possible to satisfy this requirement.

21.

The exclusions referred to above were added to the FSMA (Regulated Activities) (Amendment) (No 2) Order 2013 at a very late stage and did not appear in the draft of the Order that was consulted upon. Consequently, we did not have the opportunity to consider and comment on the impact of the wording of these exclusions before the Order was made. Although there is a similar exemption in the Consumer Credit Act 1974, this is in the context of the group licence and any pre-issue work would be covered by the group licence so does not need to be covered by the exemption. Therefore, the problem that we have identified does not exist under the current regime.

22.

There are similar problems in other areas of consumer credit activities, such as debt counselling. There may be circumstances in which the main purpose for which the client has instructed the solicitor is for debt counselling and it may not always be possible to demonstrate that the debt counselling activities "...arise out of, or are complementary to..." another service provided to that client.

23.

It would be helpful if the FCA were able to provide urgent guidance on the Part 20 exemption so that SRA authorised firms are sufficiently informed and able to make the appropriate decisions about whether or not they need to apply for interim permission. Our firms do not want to be exposed to the risk of committing a criminal offence and may decide to become authorised



by the FCA on a precautionary basis to avoid this risk. This would lead to a significant increase in the number of FCA Authorised Professional Firms.

24.

Alternatively, firms may decide that they no longer wish to carry on any consumer credit activities. This would not be compatible with two of the regulatory objectives under the LSA, namely, "improving access to justice" and "promoting competition in the delivery of legal services". Further, in the area of debt counselling, the individuals that benefit most from these services are more likely to be vulnerable and in greatest need of protection. We do not believe that it would be in the public interest for firms to stop providing consumer credit services and would be very concerned if these changes resulted in a reduction in the number of our firms offering these services.

#### *Chapter 4 - Supervision of firms and data collection*

25.

We are working to ensure that our Handbook has provision for the regulation and supervision of firms carrying out consumer credit activities as an exempt professional firm.

#### *Chapter 5 - Conduct standards for all consumer credit firms*

26.

We have previously responded to the OFT's consultations with regards to Misleading or Otherwise Undesirable Names and Debt management (and credit repair services) and continue to support the guidance which has been issued.

27.

We have endorsed the OFT's guidance with regards to debt collection and this has been referred to in the SRA's warning note which was published setting out regulatory issues which might arise in connection with debt recovery work including arrangements between firms and debt recovery companies.

28.

We note that the FCA is proposing to carry across many of the standards set out in the Consumer Credit Act and its secondary legislation as well as OFT guidance into its own rules. We are concerned that in some cases this more prescriptive approach will not be consistent with our approach to



regulation, which is outcomes-focused and risk-based and allows our regulated community the flexibility to achieve the right outcomes for their clients and protect the public interest.

29.

Our position with regards to proposals for financial promotions and industry codes is neutral.

*Chapter 6 - High-cost short-term credit, including payday loans*

30.

We are pleased to see the effort made to improve outcomes for consumers and address the issues being caused by harmful business practices and support the proposals. The Law Commission have worked continuously to manage out aggressive and harmful practices and we hope this work continues with the support of the FCA.

31.

We agree that consumers should be provided with sufficient information so that they are in a position to consider the risks and benefits of borrowing and entering into arrangements with providers.

32.

In January 2014, legal regulators will launch a new online network ('Legal Choices') for members of the public in England and Wales to get more involved in legal services, and the ways in which these services are regulated. 'Legal Choices' will provide consumers with interactive features, all of which will be designed to help people have more of a say about legal services, legal problems, and lawyers. Consumers will also be able to access factual information about the many different types of lawyer and the ways that they are regulated, and how to approach some of life's common legal problems. This may help some people to build up a more complete picture of the things to look out for when they next come up against a legal issue. The FCA is invited to engage with the SRA on this initiative and where possible use this online forum to share information that will be of use to consumers. By way of example, the Money Advice Service have been working with the SRA and discussed building links between their website and 'Legal Choices'.

*Chapter 7 - Prudential standards for debt management firms*

33.

Our position with regards to proposals for prudential standards for debt management firms and not for profit advice bodies is neutral.

*Chapter 8 - Conduct standards for specific consumer credit activities*

34.

Having previously responded to the OFT's consultation regarding Debt management/Debt collection and the associated guidance, which we endorsed, we note that this will be incorporated into FCA's conduct rules. It is vital from a consumer protection perspective that aggressive practices are ruled out and consumers/third parties are not taken advantage of. However, we reiterate the comments made in paragraph 30 and the prescriptive nature of rules firms will have to comply with.

*Chapter 9 - Proposals for debt management firms holding client money*

35.

The proposals mirror some, if not all, of the requirements placed on SRA authorised firms holding client money. Where there are dual-regulated firms we could ask that there is consistency in approach to ensure that the cost of compliance is not overly burdensome on those we regulate.

36.

We do however, support the proposals as applying to all FCA authorised firms.

*Chapter 10 - Proposals for debt management firms holding client money*

37.

Our position with regards to proposals discussed under this section is neutral.

*Chapter 11 - Complaints to the ombudsman service and redress for consumers*

38.

Our position with regards to proposals discussed under this section is neutral.



*Chapter 12 - Enforcing our rules and tackling financial crime*

39.

Our position with regards to proposals discussed under this section is neutral.

*Closing remarks*

40.

The proposals discussed reflect the SRA's and FCA's common objective which is to protect consumers from harm and protect and promote the public interest. We do however, ask the FCA to consider the impact of the authorisation process on SRA authorised firms and of those needing to apply for full authorisation and the need for clarity of what work will fall within the Part 20 exemption.

41.

We look forward to continuing to work with the FCA on issues of common concern to achieve these objectives.