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Independent Banking Code Review
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Dear Mr Young

Triennial independent review of the Banking Code and the Business Banking Code

Further to your letter of November 2006, inviting our views on areas of the Banking Code and Business Banking Code that might be changed, I am pleased to provide the response of the Financial Ombudsman Service. In keeping with our commitment as an organisation to the principles of openness and accountability, this response will also be published on our website.

Diminution of the effect of the Codes

Prior to March 2003, the Banking Code and Business Banking Code included an unqualified key commitment to “... *act fairly and reasonably in all our dealings with you*”. But the March 2003 editions qualify this commitment by limiting it to just four specific areas. The limitations on this key commitment seemed to us at the time to represent a significant down-grading of the Codes, and we remain of that opinion.

In our experience, better subscribers have always tried to act within the spirit – and not just the letter – of the Codes. So it was unfortunate that the approach of less good subscribers, who might look to just ‘tick the boxes’ rather than to do the right thing, was apparently reinforced in this way.

Given the recent focus on a movement towards a more principles-based approach to financial services regulation, we would welcome some reflection of this in the revised Codes.

Over-reliance on Guidance that is not readily apparent to consumers

We appreciate that it is important for the Codes to be concise and accessible for consumers and subscribers. But they must also cover a wide range of issues and situations. The parallel Guidance for Subscribers is intended to augment the Codes and provide greater clarity about what is expected of subscribers.

However, we have some concerns about the use of the Guidance as a means of effecting change to the Codes. And we do not consider that the average consumer is likely to appreciate that the Guidance exists, let alone realise what it says.

So we would suggest greater transparency in how the Guidance is worded, produced and made available – perhaps as *Guidance for Consumers and Subscribers*.

Lending assessment

Section 13.1 of the Banking Code says: *“Before we lend you any money or increase your overdraft, or other borrowing, we will assess whether we feel you will be able to repay it.”* The Guidance for Subscribers reveals that, to comply with the Code, this assessment could be as little as checking on the customer’s identity and finding out what he wants to borrow the money for.

This appears very light indeed in terms of what subscribers undertake to do, given the growing concerns in many areas about affordability in lending. And it is surprising when compared with the stronger commitments that exist in some other codes within the lending industry.

For example, the Finance and Leasing Association’s Lending Code includes a commitment that: *“As responsible lenders, under this Code we must make sure that all loan applications (including pre-approved loans and credit-card cheques) go through a sound and proper credit assessment.”*

The Finance Industry Standards Association Code of Practice undertakes that: *“Members and their Intermediaries will comply at all times with the principles of responsible lending. They will give proper assessment to the consumer’s ability to repay, and take account of all relevant circumstances in order to ensure that consumers do not take on any commitment which they are unlikely to be able to fulfil.”*

We believe that consumers and other stakeholders would expect the Banking Code to be at least as effective in discouraging unaffordable lending as are those other codes, and would welcome a significantly stronger commitment in this area.

Issues around disability – including mental health

Allied to issues of responsible lending are those surrounding customers with disabilities, including those with mental health difficulties.

We recognise that the area is one that requires particular sensitivity. There is a need to balance the rights of the disabled consumer to be considered for facilities such as lending without the imposition of additional hurdles, with the desire to ensure that vulnerable consumers are given a reasonable degree of protection.

However, the Banking Code as it stands does not touch on this area at all. By contrast, the latest edition of the Finance and Leasing Association’s Lending Code undertakes that:

“We will take particular care if you are suffering from health problems, including mental health difficulties, when we are made aware of this.”

This includes:

- *appropriately training staff to handle accounts, including those dealing with complaints and collecting debts for us; and*
- *being sensitive to your condition and responding appropriately when dealing with you or someone authorised to act on your behalf.”*

We believe that the revised Banking Code should include some appropriate acknowledgement of – and commitment around – this area.

Financial difficulties

The Banking Code undertakes that subscribers will “..*consider cases of financial difficulty sympathetically and positively.*”

We recognise that what *sympathetic and positive* means in an individual consumer’s case is likely to depend on the particular facts and circumstances. The Guidance for Subscribers includes a substantial amount of text about this section, including some practical steps that a subscriber could take to help.

But the consumer will not normally have seen the Guidance. And much of what the Guidance says appears to be geared towards telling a subscriber what it could expect the consumer to do about his or her debt, rather than telling the consumer what he can expect a subscriber to do to help him.

The undertaking to treat cases of financial hardship sympathetically and positively is a helpful one. But we would welcome guidance that is more transparent and which supports – rather than dilutes – this commitment.

Current account charges

The area of current account charges is one that has given rise to a significant number of complaints to us. The Office of Fair Trading (OFT) is currently carrying out a fact-finding exercise, following which it will consider whether a further detailed investigation of the fairness of individual bank charges is needed.

Against that background, making any specific suggestions about Code commitments around bank charges would seem premature. However, given the importance of the topic, we would press for Code provisions that support fair, clear and transparent charging structures.

Plastic cards – liability for misuse

Sections 12.11 and 12.12 of the Banking Code still refer to a consumer’s potential liability if he or she acts without *reasonable care* in relation to his card. Whilst the Guidance for Subscribers makes clear that the standard to be applied remains whether the customer acted with gross negligence, this guidance is not apparent to the consumer.

Moreover, we have found that some subscribers believe that the consumer must now demonstrate a higher standard of care – and seem not to appreciate that the change in wording of the Banking Code was intended only to make its language more accessible.

We would support a change in the wording of the Code in this area from “*If you act without reasonable care*” to “*If you act very negligently*”. We believe that this would make it much clearer to consumers (and to subscribers) what standard of care is expected.

We would also like a clear acknowledgement in this section of the consumer's rights under sections 83 and 84 of the Consumer Credit Act 1974 – which take effect when a plastic card transaction is made using credit, and which (as a statutory protection) take precedence over any provision of the Banking Code. This is an important area of protection for consumers, but one about which they are often unaware.

On a broader note, we have some concerns about the way in which information is set out in Section 12 *Protecting Your Accounts* – which is sometimes mistakenly interpreted (by subscribers as well as by consumers) as imposing conditions that bind the consumer. A good example is 12.11 (Liability for losses), where the provisions of 12.5 (Taking care) are cited.

We consider that much of this confusion arises out of mixing security advice with information about liability for losses. We recommend that these different issues be addressed in separate sections of the revised Code.

Individual notification of rate changes on savings products

Following the round table meeting at the Financial Services Authority (FSA) on 6 July 2005, we were encouraged by the apparent agreement of the industry that a clear, fair and consistent individual notification regime for rate changes should be put in place without delay.

So we have been disappointed to note that no real progress has been made in that regard, and would welcome an appropriate revision of the relevant parts of section 4 of the Banking Code.

Yours sincerely

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