

Rt Hon. the Lord Forsyth of Drumlean
Chair, Financial Services Regulation Committee
House of Lords
London
SW1A 0PW

17 January 2025

Dear Lord Forsyth,

RE: Motor finance commission

Thank you for your letter of 20 December 2024 relating to motor finance commission.

Our regulatory system focuses on the outcomes firms deliver for consumers, based on our Principles for Businesses setting out overarching obligations as well as more detailed rules where appropriate. This also allows us to maintain a proportionate regulatory regime for a wide range of businesses that protects consumers and keeps up with and facilitates innovation.

FCA rules on commission disclosure for credit brokers (as set out in the Consumer Credit sourcebook (CONC)) set strong consumer protections. In particular, since we became the consumer credit regulator in 2014, credit brokers have been required to provide meaningful disclosure of the existence of commission arrangements which could potentially affect a consumer's decision or the broker's impartiality.

The rules set a regulatory framework of general requirements that apply to credit brokers both within and beyond the motor finance sector where they are carrying on regulated activity. They are partly derived from Office of Fair Trading (OFT) guidance, which was in place before we assumed responsibilities over consumer credit. As general rules, the provisions in CONC need to be flexible enough to cater for a range of broking services across a number of different consumer credit sectors.

These rules sit alongside additional duties that may arise separately under the common law or equity depending very much on the individual facts of specific cases. The Court of Appeal emphasised that the existence and nature of such duties is case specific and heavily influenced by factors such as the nature of the service the broker agreed to provide to the customer and whether there was a relationship of trust and confidence between them.

I have addressed each of your questions below in turn.

1. The relevant FCA Rules and Principles concerning both discretionary and fixed commissions, both prior to, and following relevant amendments in 2021.

The rules and obligations specific to consumer credit brokers and lenders are set out in CONC, which came into force on 1 April 2014, when we assumed responsibility for consumer credit.¹ The obligations most relevant to commission disclosures are as follows:

- CONC 3.3.1R requires firms to ensure that a communication or a financial promotion is clear, fair, and not misleading, and that it does not disguise, omit, diminish, or obscure important information, statements, or warnings.
- CONC 3.7.4G provides that, in the course of a financial promotion, communications with customers should indicate prominently the existence of any financial arrangements with a lender that might impact on the broker's impartiality in promoting or recommending a credit product.
- CONC 4.5.2G provides that lenders should only offer to enter into commission arrangements with firms that provide for differential commission rates or payments based on the volume of profitability of the business where those arrangements are based on the extra work of the firm that results from that business.
- CONC 4.5.3R requires brokers to disclose, in good time before a credit agreement is entered into, the existence of any commission or fee or other remuneration payable to the broker by a lender (or a third party) if knowledge of the existence or amount of the commission could actually or potentially affect the broker's impartiality in recommending a particular product or have a material impact on the customer's transactional decision.
- CONC 4.5.6R introduced an outright ban in respect of discretionary commission arrangements in relation to motor finance agreements in 2021.
- We consider (and the High Court recently agreed)² that CONC 4.5.3R can require that the nature of commission arrangements be disclosed as well as their existence. This was made explicit in 2021 as part of the package of rule changes giving effect to the ban on DCAs in 2021.³
- Brokers are required to disclose the likely or known amount of commission, fee or other remuneration they receive, in good time before a regulated credit or consumer hire agreement is entered into, if the customer requests it (CONC 4.5.4R).

Firms must comply with our Principles for Businesses, which also came into force when we took over the regulation of the consumer credit industry from the OFT

¹ <https://www.handbook.fca.org.uk/handbook/glossary/G3201.html>

² R. (Clydesdale Financial Services Ltd) v. Financial Ombudsman Service Ltd [2024] EWHC 3237 (Admin)

³ On 28 January 2021, the FCA introduced: (i) an outright ban in respect of discretionary commission arrangements in motor finance; and (ii) amended disclosure rules in CONC 4.5.3R to explicitly provide that the nature of commission arrangements must be disclosed.

in April 2014.⁴ Principles 6, 7 and 8 are most relevant to the Court of Appeal cases:

- Principle 6 states that a firm must pay due regard to the interests of its customers and treat them fairly.
- Under Principle 7, a firm must pay due regard to the information needs of its clients and communicate information to them in a way which is clear, fair, and not misleading.
- Principle 8 requires firms to manage conflicts of interest fairly, both between itself and its customers and between a customer and another client.

Since 2023, the Consumer Duty requires firms to act to deliver good outcomes for retail customers, in particular on consumer understanding. The duty does not apply to activity that took place before it came into force, including the motor finance agreements in question in the Court of Appeal judgment. The Principles continue to apply in any instances where the Consumer Duty does not.

Separate to our rules, section 140A of the Consumer Credit Act 1974 is often relevant to complaints or legal action concerning motor finance commission disclosures. This empowers the court to make a wide variety of remedial orders in connection with a credit agreement if it decides the relationship between creditor and debtor arising out of that agreement (or any related agreement) is unfair because of:

- Any of the terms of the agreement or any related agreement;
- The way in which the creditor has exercised or enforced any of its rights under the agreement or any related agreement; or
- Any other act or omission by or on behalf of the creditor (before or after making the agreement or any related agreement).

The High Court again recently confirmed that when the court is considering a s140A claim, the actions of a motor finance broker when negotiating car finance terms (including commission) can be attributed to the lender.⁵

2. Whether the FCA took legal advice both in connection with its decision to ban DCAs (which it did in 2021) and in connection with the Rules/Principles referred to in 1. above? If so, and in each case, when and from whom was that advice sought? And, if it was sought/given, please provide in full the evidence of that advice.

Your letter sets out that the Committee is considering the implications of the Supreme Court granting leave to appeal the Court of Appeal's decision in the *Johnson & others* cases. We therefore understand the Committee's request is around whether we sought legal advice on the relevance of disinterested or

⁴ <https://www.handbook.fca.org.uk/handbook/PRIN/2/1.html>

⁵ See footnote 2.

fiduciary duties in relation to formulating (and amending) the rules providing for commission disclosure and the DCA ban, or their interaction with the Principles.

The Court of Appeal decision in *Johnson & others* was the first time a higher court has made detailed findings as to the existence and reach of disinterested duties and fiduciary duties for motor dealers acting as credit brokers. One of the reasons the matter was taken up by the Court of Appeal was because different lower courts were coming to different legal interpretations in relation to such protections. Our legal teams were of course heavily involved in the rule changes in the usual way. Up to the point of the Court of Appeal decision, there was no clear judicial guidance for us to factor into an assessment of likely protections under the common law and equity in the motor finance context. Therefore, we did not seek legal advice on the specific issue of the relevance of disinterested or fiduciary duties in relation to formulating (and amending) the rules providing for commission disclosure and the DCA ban, nor did we include this as a question in consultation paper 19/28.⁶ Had a case like *Johnson & others* existed at the time we made the rules, we are confident it would have been given careful consideration.

When the Supreme Court has settled the law in this area, we will consider if any intervention is needed. This will include reviewing our rules to take account of the Supreme Court's judgment.

I hope the above is helpful and thank you again for your time on 13 November. Stephen Braviner Roman, our General Counsel and Chief Risk Officer, would be available to provide a briefing to discuss any questions following this letter, and I also look forward to our next meeting on 22 January.

Yours sincerely,



Nikhil Rathi
Chief Executive

⁶ <https://www.fca.org.uk/publication/consultation/cp19-28.pdf>