TRU£&FAIR

CP20/11: Complaints against the Regulators (The Financial Conduct Authority, the Prudential Regulation Authority, and the Bank of England)

Submission from The True and Fair Campaign – 12 October 2020

Summary

The Financial Services Act 2012 – Part 6, requires the FCA to have in place a scheme to investigate complaints against them, as opposed to complaints against the businesses they regulate. As detailed within the submission below, it is the view of the True and Fair Campaign that the FCA's proposals for this new Compensation Scheme are unfair, immoral, and illegal.

Not only does the proposed scheme contravene the Financial Services Act 2012, it fragrantly breaches one of the FCA's five regulatory objectives under the Financial Services and Markets Act 2000, namely "*The protection of consumers*". It also fragrantly breaches one of its own three operational objectives, "*securing an appropriate degree of protection for consumers*".

Were the proposed scheme to come into force, it is unlikely that there would be any compensation payments due to the proposal in 4.10 that "*we would consider making a compensatory payment only where adequate documentary evidence of the loss has been provided, and the following further conditions have been met: - we are the sole or primary cause of the loss; and - there has been a clear and significant failure by us".*

It is almost certain that the FCA will **never** be the sole cause of the loss and it is highly unlikely to **ever** be the primary cause of the loss, as the primary cause will inevitably be the misconduct of a third party firm/individual rather than the FCA.

This consultation is highly damaging to the credibility of the FCA as a fit and proper regulator in terms of protecting consumers, not just due to the sly manner in which it has been undertaken, or the proposed setting of arbitrary compensation caps, but the fact that the qualifying requirements for claims are nigh on impossible for claimants to ever meet.

It begs the question as to who signed off this scheme draft and Consultation which would materially limit the eligibility of complaints; and whether that person should be considering their position within the FCA?

Timing of this Consultation

We believe there is a need to urgently review the existing compensation scheme, when viewed against the backdrop of increasing incidences of financial scandals in recent years, as identified in our 25 February 2020 Asleep at the Wheel Report[1]; and the disturbingly low total amount paid out by the FCA over the last 18 months to successful complainants in relation to its own conduct failings of just £13,475.[2]

However, the manner and timing of this consultation – quietly launched during the summer holidays, in the midst of a pandemic, without being advertised or press released, with an initial eight week time line for contributions, compounds what appears to be an attempt by the FCA, by stealth, to put in place an anti-consumer and substantively inferior new compensation scheme.

Not only is it our view that the FCA's proposed new scheme would severely disadvantage victims of financial scandals arising from the FCA's own regulatory failures, we also consider it to be morally questionable and, from our understanding, contrary to law.

The fact that the FCA initially chose to rush the Consultation in eight weeks and before three major Independent Reviews of major financial scandals – that will necessarily include an assessment of any regulatory failure by the FCA – are published, raises serious questions.

On the 24 September 2020, the chair of the FCA, Charles Randell acknowledged at the Annual Public Meeting that the reviews into the collapse of London Capital & Finance, the Connaught fund scandal and the mis-selling of interest rate hedging products, expected between October and early next year, would see the regulator facing fierce scrutiny over its handling of these three major scandals. Similar comments have been made by the outgoing Chief Executive, Chris Woolard, who said the regulator was set for some "painful lessons" in reviews of the regulatory system this autumn.

The rush to undertake and conclude this Consultation is highly suspect, in light of the above.

[1] https://www.trueandfaircampaign.com/wp-content/uploads/2020/02/report-asleep-at-the-wheel-report-into-UK-financial-services-failings-25-feb-2020.pdf

[2] https://citywire.co.uk/new-model-adviser/news/revealed-fca-paid-13000-in-complaints-redress-in-last-18-months/a1392104

Breach of the 2012 Act

The scheme which the FCA is consulting on appears to be in technical Breach of the 2012 Act as the investigator specified by this Act would not be free at all times to act independently of the regulators because the proposed scheme would restrict the circumstances under which he or she could investigate complaints.

The initial truncated eight-week consultation period also contravened the Consultation Principles set out by the Government as there was little media announcing the Consultation. We alerted the Treasury Select Committee to our concerns on the 8 September 2020, and Mel Stride MP, Chairman of the Treasury committee wrote to the FCA on the 11 September 2020 stating *"Given the interest in the consultation expressed to the Committee, and elsewhere, I ask that serious and urgent consideration be given to extending the consultation period, as an 8-week period may no longer be sufficient."* [3]

As a result, the consultation period was extended to 12 October 2020, but the True and Fair Campaign remains of the view that this contravenes the section 86 of the 2012 Act as the FCA did not publicise this extension via media, press release or clearly on their website.

The Act specifies that timeframes for consultation should be proportionate and realistic to allow all stakeholders sufficient time to provide a considered response and where the consultation spans all or part of a holiday period, policy makers should consider what, if any, impact there may be and take appropriate mitigating action.

The timing and length of a consultation should also be decided on a case-by-case basis; there is no set formula for establishing the right length. Given the importance of past victims of financial failings to contribute to this consultation, for example victims of Woodford, LCF and Connaught – to name a few, it is our view that even the extended consultation timeframe, against the backdrop of a pandemic, and lack of notification is insufficient and could render the Consultation open to Judicial review.

The proposed Scheme limits both the scope for the payment of compensation to complainants and the scope for doing so. The Act contains no such restrictions, and we therefore believe the proposed Scheme is noncompliant with the obligations on the Regulators imposed by the Act, contrary to what the legislators had in mind when they specified a compensation scheme under the 2012 Act.

[3] the Mel Stride, Chairman of the Treasury committee wrote to the FCA on the 11th September

Disadvantaging Consumers

The new proposals not only reduces the scope for claims, thereby unfairly disadvantaging victims, but sets a cap on compensation awards of £1,000 for victims who have experienced distress and inconvenience; and £10,000 in the case of those who have experienced financial loss – these caps are set at an inexcusably low level and are, by definition, anti-consumer.

We would highlight the response of the outgoing Financial Regulators' Independent Complaints Commissioner, Antony Townsend, in which he expresses significant concern that the proposals may "*represent an explicit fettering of compensation for direct financial loss*"[4]. It is worth noting that, in 2019, the Complaints Commissioner published 63 final reports: 62 relating to the FCA, one to the PSR and none to the BoE and PRA.

In view of the above and the extent of harm caused to individuals and small businesses by regulatory failure by the FCA since 2016, we urge the FCA to suspend this Consultation until such time as all three major independent reviews of financial scandals have reported and published.

Following this, the consultation should recommence but over a more considered and orderly timescale, and with the attending publicity that adequately reflects its importance.

The new proposed scheme amounts to a significant fettering of compensation for consumers who have become victims of financial scandals, partly due to the FCA's regulatory failure.

The primary function of the compensation scheme should be to compensate. Where the FCA is at fault, full compensation should be awarded to victims; especially in light of failures that have occurred even though there have been repeated warnings from campaigners, companies including whistle-blowers and members of the public.

In stark contrast, the proposed new Compensation Scheme appears designed to shield the FCA from liability to consumers who have suffered loss due to regulatory failure by the FCA.

[4] https://www.thetimes.co.uk/article/financial-conduct-authority-rushes-to-minimise-compensation-for-its-failings-jzwpmjvr6

Consultation Questions – Responses

3 Simplifying the Scheme

Q1 Do you agree that the language in Annex 2 is more accessible than the language of the current Scheme? Will the Scheme as proposed achieve the objectives set out in paragraph 3.3?

The language is more accessible than the present scheme and the diagram is most useful, but the law imposes obligations on the Regulators to operate a Scheme that meets certain criteria.

The proposed Scheme imposes severe restrictions on which complaints are eligible for consideration. Due to this, it is very likely fewer people would complain. This appears noncompliant with the obligations placed on the Regulators by Part 6 of the Financial Services Act 2012 ('the Act'), which requires the Regulators to operate a complaints scheme that meets very specific criteria.

Using plain English to achieve the objectives of 3.3

It is more important for victims to have a Scheme that ***favour their interests*** than one that is easier to read but materially limits the eligibility of complaints.

4 Ex-gratia compensatory payments

Q2 Do you have any comments on our approach to ex-gratia compensatory payments for distress or inconvenience?

Q3: Do you have any comments on our approach to ex-gratia compensatory payments in respect of financial loss

Taking these questions together:

The language of lessons learnt and improving policies and process is welcomed but complainants, many of whom may have lost their life savings, would be seeking a financial remedy / compensation, not just words.

One of the reasons given for such modest payments under 4.4 is that *"We are funded by the fees paid by the firms we regulate, and therefore the costs will ultimately fall on the firms and, through them, consumers".*

We do not believe the Scheme should have any such wording or limits. The wording appears to be a threat to the industry that if *material* and *large* sums were awarded, their fee levies would have to increase. This is completely the wrong way round.

If the Regulator fails to properly regulate bad actors in the sector, why should the good actors and their clients be penalised? The legitimate way to reduce fees is for the Regulator to improve its own

performance and fines imposed on failing firms or firms involved in scandalous behaviour should be ringfenced for Scheme payments; not go to the Treasury.

In 4.8 and 4.10 – the word 'significantly' is used. This is unsatisfactory as this is in the hands of the Regulator to define when the complaint is about them. Once a complaint is found to be upheld, all payments should be independently assessed and awarded by the Complaints Commissioner.

In 4.10 – again the word 'adequate' is not defined and would be solely judged by the Regulator. This would deter legitimate claimants whose evidence may be non-documented or incomplete but who nevertheless have a valid claim from seeking redress.

4.8 When considering distress or inconvenience, we would generally only make a compensatory payment when our actions or inactions have contributed significantly to the complainant's distress or inconvenience

4.10 In cases of financial loss, we would consider making a compensatory payment only where adequate documentary evidence of the loss has been provided, and the following further conditions have been met:

- *we are the sole or primary cause of the loss; and*
- *there has been a clear and significant failure by us*

We view the bands proposed in 4.9 in the proposed Scheme as being an insult to victims. Each award should be assessed on a case-by-case basis. Basing them on current or historic payments under the existing system, which many have voiced concerns about, including the outgoing Commissioner, is not improving the Scheme but formalising the Regulator's poor performance. In 2019, for example, the Complaints Commissioner published 63 final reports: 62 relating to the FCA, one to the PSR and none to the BoE and PRA.

We believe section 4 would benefit from waiting for the three Independent Reviews being published.

4.9 While these bands do not appear in the current Scheme, we believe that the outcomes for most complainants, under the revised Scheme, would be broadly consistent with the FCA's current practice:

- *Up to £250 where the complainant has experienced a moderate level of distress or inconvenience.*
- *£250-£500 where the complainant has experienced a high level of distress or inconvenience; and,*
- *£500-£1000 where the complainant has experienced a very high level of distress or inconvenience.*

4.10 In cases of financial loss, we would consider making a compensatory payment only where adequate documentary evidence of the loss has been provided, and the following further conditions have been met:

- *we are the sole or primary cause of the loss; and*
- *there has been a clear and significant failure by us*

Many complaints about financial loss are from consumers who believe they were subject to failures caused by firms or individuals in the industry that the Regulator could and should have properly regulated, or they believe the regulator could have done more to stop detriments suffered by them.

It is almost inconceivable that the FCA could **ever** be considered the sole cause of loss since by definition the financial loss will necessarily involve a third party firm/individual – consumers that have lost money in financial scandals will have entered into contracts with third party firms/individuals, never the FCA directly and thus the FCA can inevitably always argue it is not the sole cause of the loss as another party will always exist.

Furthermore, in almost every case it will be almost impossible to argue that the FCA is the primary cause of loss since the FCA's regulatory inaction will simply be an enabling factor to the third-party firm/individual's misconduct. The conduct of a third-party individual firm/individual will always be the primary cause and the FCA's conduct, where relevant, the secondary cause.

We therefore believe the '*sole or primary cause of loss'* qualification makes it inevitable that no claimant could ever gain compensation from the FCA's own regulatory failures. It makes the whole scheme 100% worthless in practise.

Once the term 'significantly' is qualified in 4.8, we believe payments under 4.8 disqualifies the need for 4.10.

4.15 …. ensure that our decisions on remedies under the Scheme are more predictable, and therefore ensure that the expectations of complainants are realistic.

We do not believe that predictability and expectations of complainants are justifiable reasons for setting the proposed stringent compensation bands, capped at £10,000, when individuals and small business/charity victims could have lost £100,000's.

6 Equality Impact

Q5: What impact do you think our proposals in this consultation paper will have on persons who share protected characteristics?

The age of those likely to seek redress through the proposed Compensation Scheme will reflect the age of those who engage with firms and individuals regulated by the FCA. A scheme that narrows both the scope and the amount of compensation will therefore have a disproportionately negative affect on the elderly and more vulnerable, as age is a protected characteristic.

The proposed Scheme's limited scope is also likely to impact disproportionately on other vulnerable groups, such as those who suffer from mental stress, physical disabilities, or other protected groups.

Submission by Gina and Alan Miller – 12 October 2020

About the True and Fair Campaign

Financial services are one of the UK economy's most important sectors. It represents 7.1% of GDP. It is a major contributor to the UK's public finances and employs more than 2.3 million people. With great success comes greater responsibility – a responsibility on all market participants to uphold the highest standards of probity, transparency, accountability, and fairness.

Since the Financial Crisis in 2007-2008, few lessons have been learnt and there have been even fewer examples of equitable redress in relation to a growing tide of mis-selling scandals and regulatory infractions. Worst of all, it has demonstrated a breath-taking betrayal of the trust that is rightly owed by so-called financial services professionals to their investors, employees, and shareholders.

The True and Fair Campaign, set up and funded by Gina and Alan Miller in February 2012, aims to shine a light on the failures and rip-offs in the sector, and campaign for greater levels of transparency, accountability and product scrutiny, in order to improve customer outcomes and ensure the UK Financial Services industry is trusted, and the regulator fit for purpose.

Since its launch, the True and Fair Campaign successfully contributed text to Article 24 of MiFID II legally requiring MiFID regulated firms to show 100% of their fees and charges; contributed to Packaged Retail and Insurance-based Investment Products (PRIIPs) Regulation and The Shareholder Directive; brought to light examples of wrongdoing, poor market practice and lax regulation; and produced telling research into inflated research costs, closet indexation, illiquid funds and misleading performance reporting, amongst other topics. The Millers have also worked with regulators in Australia, across the European Union and the European Securities and Markets Authority (ESMA), as well as with UK politicians on a cross-party basis.

www.trueandfaircampaign.com