27 April 2021 **By email only**

Open Letter to Charles Randell – Chairman of Financial Conduct Authority

CC:
Mel Stride – Chair of the Treasury Select Committee
Richard Lloyd - Senior Independent Director of Financial Conduct Authority
Amerdeep Somal - Complaints Commissioner

Dear Mr Randell

We are in receipt of a letter from the Economic Secretary to the Treasury, John Glen, dated 19 April 2021 in response to a letter from ourselves in which we set out serious concerns about the reforms to the FCA Complaints Scheme. In our view many of the proposed reforms appear to be noncompliant with the obligations placed on the Regulator by Part 6 of the Financial Services Act 2012 ('the Act'), yet many of these proposals have been implemented prior to the FCA's consultation process being completed, let alone approved. This does not seem to be consistent with the normal principles of due process.

In the Minister's response, he states: '*The details of the complaints scheme, including how the regulators consider complaints and the proposals for changes to the scheme in Consultation Paper 20/11, are a matter for the regulators. The specific questions on the scheme raised in your letter are therefore best raised directly with the FCA Chair.'* Accordingly, we are reverting to you to solicit substantive responses to our concerns.

In your letter of 23 March 2021[1] to Mr Stride, Chair of the Treasury Select Committee, you wrote:
'*For the FCA to consider it appropriate to offer an ex-gratia compensatory payment in respect of financial loss, complainants would normally need to evidence that they have suffered a quantifiable financial loss caused solely or primarily by the actions or inaction of the FCA. Any such payment made would not, typically, cover the full loss*.'

However, the current version of the Complaints Scheme, as referred to by the Complaints Commissioner, last updated on March 2016[2], and displayed on the FCA's own website, states [our emphasis added]:

[1] https://committees.parliament.uk/publications/5318/documents/52976/default/
2 https://frccommissioner.org.uk/wp-content/uploads/LCF-wording-update.pdf

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6.6 Where it is concluded that a complaint is well founded, the relevant regulator(s) will tell the complainant what they propose to do to remedy the matters complained of. This may include offering the complainant an apology, taking steps to rectify an error or, if appropriate, the offer of a compensatory payment on an ex-gratia basis.

9.2 To be eligible to make a complaint under the transitional complaints scheme, a person must be seeking a remedy (which for this purpose may include an apology) in respect of some inconvenience, distress or loss which the person has suffered as a result of being directly affected by the regulators' actions or inaction.

We are not aware of any provision within either the March 2016 Complaints Scheme or the 2012 Financial Services Act that stipulates that any compensatory payment should normally be made only in circumstances in which an individual has '*suffered a quantifiable financial loss caused solely or primarily by the actions or inaction of the FCA'* or that *'any such payment made would not, typically, cover the full loss'*, as you maintain.

It is almost inconceivable that the FCA could ever be considered the sole cause of loss since the financial loss will necessarily involve a third-party firm/individual. Consumers that have lost money in financial scandals will have entered contracts with third party firms/individuals, never the FCA directly and thus the FCA can 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 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 almost no claimant could ever again be monetarily compensated for the contributing factor of the FCA's own regulatory failures. It makes the whole scheme 100% worthless in practise.

The only places in which we are aware of the '*sole or primary cause of loss'* qualification and that "*any such payment would not, typically cover the full loss*" is in the FCA's July 2020 Consultation and the reference in your letter to the FCA's approach to remedies. Neither significant qualification appears in the latest March 2016 updated Complaints Scheme nor the 2012 Financial Services Act. The March 2016 Complaints Scheme places no limits on compensation and states that it covers where "*some inconvenience, distress or loss which the person has suffered as a result of being directly affected by the regulators' actions or inaction."*

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We have subsequently learned that, although the Consultation was not launched until July 2020, the FCA chose to publish its new approach within a webpage entitled '*Complaints Scheme: our approach to remedies'* on 16 June 2020, with a further update three days later, a month before the consultation commenced. Could you please explain this timeline?

We are also deeply concerned that the FCA's new June 2020 'Approach to Remedies' also states that '*Where an impact is more severe or prolonged, a payment in the region of £100-£300 may be appropriate'* and that *'In most cases where a complaint is upheld, we consider that an apology and taking action to address the complaint is the most appropriate remedy*.' Again, we have been unable to find any corresponding text in the Complaints Scheme (updated in March 2016) or the 2012 Financial Services Act, and are puzzled as to how the FCA would be able adequately to assess in advance, what the most appropriate remedy would be to future individual cases?

In the 12 August 2020 submission from the Financial Regulators Complaints Commissioner[3] to yourself, it states (emphasis added): *'The myth (not backed by the statutory provisions) grew up – and was related to me - that the Scheme was 'not primarily a compensation scheme', and that compensation payments should be considered 'exceptional'. In fact, compensation payments are a core feature of the Scheme, as provided by statute.'*.

Furthermore, the Complaints Commissioner does not argue that either payments should be limited in any way or even restricted to those when the regulator is the sole or principal cause, saying that regarding the latter eventuality *"in my view the presumption should be that the regulator will compensate the complainant in full".* He also stated that *"The draft indicates that payments for direct financial loss will be limited to £10,000 save in exceptional circumstances. While I agree that it is likely that the vast majority of such payments would be below that figure, as a matter of principle it seems to me undesirable to impose a ceiling of this kind. It does not seem to me that the statutory immunity granted by Parliament was intended to protect the regulators from major blunders of their own making. In my view, the approach to compensation for financial loss set out in paragraphs 8- 15 is broadly sound, but I think that the caveats in paragraph 16-17 are not, and represent an explicit fettering of compensation for direct financial loss, which makes it especially important that there is proper consultation before it is adopted*.'

What we find even more surprising is that the FCA Board minutes of 12 November 2020 stated: "*2.4 The Board was cognisant of the concerns raised by some respondents regarding the timing of the amendments*

[3] https://frccommissioner.org.uk/wp-content/uploads/OCC-FSRFR-response-final-15-February-2021.pdf

to the Complaints Scheme described in Consultation Paper CP20/11. In light of this, it was proposed that the policy statement on the consultation should not be published until towards the end of Q2 2021. The Board would shortly be asked to give effect to this by written resolution." We note that this Board meeting was chaired by you.

We are therefore at a loss to understand what was intended by your letter to the Treasury Select Committee (TSC), on 23 March 2021, particularly in respect of your points relating to key changes to the compensation process being implemented by the FCA in June 2020, prior to the FCA publishing its finalised policy statement on the matter which is expected towards the end of Q2 2021. We would very much welcome clarification from you on these points.

Our strongly held view is that your statements run contrary to the spirit of Part 6 of the original Financial Services Act 2012 in which legislators clearly envisaged compensation being paid in addition to, or instead of, other remedies, which stated that:

"(5) The complaints scheme must confer on the investigator the power to recommend, if the investigator thinks it appropriate, that the regulator to which a complaint relates takes either or both of the following steps –
(a) makes a compensatory payment to the complainant, or
(b) remedies the matter complained of.

This approach is clearly reflected in the 2016 Scheme but not within your June 2020 approach to remedies[4], implemented prior to the July 2020 FCA Consultation which is described by the FCA as (emphasis added) '*proposing a revised version of our Complaints Scheme*'.[5] Furthermore, within your proposal, it was argued that the scheme was not designed to decide on complex causation issues, and this justified taking a "modest" approach to compensation. Again, we are at a loss to understand how or where such a limitation is provided for in either the Financial Services Act 2012 or the 2016 Scheme.

We consider that this argument flies in the face of the fact that this is exactly what FOS does in relation to complaints against firms – i.e., it considers cases based on principles of fairness and its final determinations are binding on firms that it considers have not acted fairly in all the circumstances, even where there is a complex factual matrix and multiple factors and parties involved. Why, therefore, should the FCA to subject to a different approach, different standards and less stringent levels of scrutiny?

[4] https://www.fca.org.uk/news/statements/complaints-scheme-our-approach-remedies
[5] https://www.fca.org.uk/publications/consultation-papers/cp20-11-complaints-against-regulators-fca-pra-boe

In summary, we believe your urgent clarification is now required to bring clarity, certainty and equity to a range of key issues including the following:

- Is the 2016 updated Scheme the current legally valid scheme?
- How does the FCA approach to remedies as detailed by you in your letter to the TSC accord with the 2016 updated Scheme?
- Why would the FCA publish an approach to remedies on their website, a month prior to its own Consultation began, let alone finished?
- Does the FCA's 19 June 2020 approach to remedies contradict previous approaches by the FCA (none are disclosed on the FCA website) and has this approach ever been ratified by the FCA Board and/or the Complaints Commissioner?

We note that you wrote to the TSC on 27 November 2020 stating that the FCA did not think that the new proposals would result in *"materially different outcomes for most complainants"* and that the primary focus is on making the scheme more user-friendly. We consider this to be woefully misleading and unfair. The introduction of caps, evidential burdens and the move towards an apology being the likely outcome of any complaint, clearly significantly erodes the rights of the consumer.

These are serious and substantive issues which give rise to legitimate and urgent concerns about the processes, quality of decision-making, and accountability of the FCA, and of you as its Chair. Moreover, the evidence we have highlighted in this letter is bound to give rise to the suspicion that you, as Chair of the FCA, are seeking to introduce the FCA's proposed new scheme through the back door, without proper scrutiny or debate.

As longstanding campaigners who are committed to securing improved financial consumer protection, treating customers fairly, and a better regulated industry we are truly astonished by your actions in relation to the FCA Complaints Scheme. These do not seem to us to be the hallmarks of a considered and effective regulator, or the action of a fit and proper person.

More than anything else, the public and victims of failings such as LC&F, Blackmore and Woodford that may occur in the future, are entitled to know that you and the FCA are treating these issues with the utmost importance and timeliness and with appropriate levels of transparency and clarity.

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As an example of how the FCA appears to be currently misinterpreting both the Financial Services Act 2012 and the 2016 Complaints Scheme, the independent report[6] into the Connaught scandal found, "*the Regulator's regulation of the relevant entities and individuals connected to the Fund was not appropriate or effective*" and that "*overall it remains my view that it could have acted in a more effective way to protect investors in the Fund*". However, the FCA recently stated[7] that "*We have now reconsidered these complaints taking account of our approach to remedies, the relevant factors in the complaints scheme and the statutory framework within which we operate. We consider that an apology is the most appropriate remedy in the circumstances*." How can such a stance possibly be justified based on either the basis of the 2012 Financial Services Act or the 2016 updated Complaints Scheme?

In view of the immense gravity of the issues that we have identified, which we believe are anti-consumer and represent an incorrect and potentially unlawful interpretation of the Financial Services Act 2012, we require a reply that answers each of the points raised, clearly and comprehensively, within fourteen days of the date of this letter. Should it be confirmed that there has been a lack of proper regard for consumers and that your own poor leadership and judgment as Chair of the FCA may have contributed to this, then we hope you will not hesitate to do the right thing and, in such circumstances, will consider your own position.

Given this, as well as copying in the Chair of the Treasury Select Committee and the Complaints Commissioner, we are copying in the FCA's Senior Independent Director who under the FCA's corporate governance[8], is mandated to '*provide a sounding board for the Chair and to serve as an intermediary for the other directors when necessary*'.

We very much look forward to hearing from you.

Yours sincerely,

Gina Miller *Alan Miller*

Gina Miller Alan Miller

[6] https://www.fca.org.uk/publication/corporate/connaught-independent-review.pdf
[7] https://www.ftadviser.com/regulation/2021/04/19/fca-to-pay-lcf-complainants-but-not-connaught/
[8] https://www.fca.org.uk/publication/corporate/fca-corporate-governance.pdf

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