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27 April 2021

Dear Alan Miller and Gina Miller,

FCA Complaints Scheme

1. I write further to your letter to the Economic Secretary to the Treasury dated 1 April 2021, which was copied to me, and your open letter dated 27 April 2021. Your letters raise a number of concerns in relation to the FCA's approach to handling complaints, including complaints regarding its regulation of London Capital & Finance Plc ("**LC&F"**).

2. Subsequent to your letter dated 1 April 2021, the FCA has set out its general approach to the award of compensation to affected bondholders in a statement published on the FCA's website: https://www.fca.org.uk/news/statements/fca-sets-out-broad-approach-assessing-lcf-complaints (the "**LC&F Compensation Statement**"). In summary, the LC&F Compensation Statement explains that, while each complaint will be considered individually, the FCA expects to offer *ex gratia* compensation to a small number of investors who were given incorrect information in direct communications with the FCA which may have led those investors to conclude their investment was safer than it was. The Statement goes on to explain that (again, subject to an individual review of each complaint), the FCA does not expect to make *ex gratia* compensatory payments to the other complainants, but expects instead to respond by acknowledging the errors which the FCA made in relation to LC&F and reiterating its apology.

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3. In light of the concerns raised by your letters, I am writing to explain the basis for the approach which the FCA has adopted, and why the FCA considers that this is the appropriate response. I should make clear at the outset that the LC&F Compensation Statement reflects what the FCA considers is the appropriate general approach, having regard to the terms of the "*Complaints against the regulators: the Scheme"*, published by the FCA and Prudential Regulation Authority ("**PRA**") (the "**Scheme**"), and the FCA's statement "*Complaints Scheme: our approach to remedies"* (the "**Remedies Statement"**). The FCA has not sought to apply the proposed revised version of the Scheme set out in CP20/11: "*Complaints against the Regulators*" which, as you note, is still under consideration following public consultation.

The Scheme

4. Section 87(5) of the Financial Services Act 2012 ("**FSA 2012"**) requires that the FCA, PRA and the Bank of England (together, the **"Regulators"**) operate a complaints scheme which confers a discretion on the investigator (known as the "**Complaints Commissioner**"), to recommend that the Regulator to which a complaint relates makes a compensatory payment. The Regulators have complied with this obligation in the Scheme, which has been in effect from 1 April 2013 and was most recently updated in March 2016.

5. The Scheme provides (at §6.6) that the FCA will, where it considers that a complaint is well-founded, itself consider (at the first stage of the investigation) whether it would be appropriate to make an offer of an *ex gratia* compensatory payment. The FCA will, accordingly, consider any individual complaints to decide whether it is appropriate to make an *ex gratia* payment of compensation. Its consideration will be guided by its published Remedies Statement, which refers to the factors set out in §7.14 of the Scheme (to which I return below), and concerns the circumstances in which the FCA considers it is likely to be appropriate to make such an offer. While the FCA will consider representations as to why *ex gratia* compensation ought to be paid in circumstances not provided for by the Remedies Statement, the purpose of having such a published statement is to assist with ensuring a consistent, transparent and fair approach to proposals for compensation based on the individual features of the complaint and the gravity of the FCA's misconduct. Further, the Remedies Statement was published to address specific requests from the Complaints Commissioner that the FCA be more transparent about its approach to providing remedies to complainants, and to set out its approach in straightforward and clear language for consumers to understand. For the avoidance of doubt, the Remedies Statement did not replace or modify the factors set out in the Scheme; it merely

sought to clarify the FCA's existing approach. This is explained in the introduction to the Remedies Statement, which states:

> *"This statement explains our current approach to deciding what we do when we agree that a complaint made about the FCA under the Complaints Scheme (the Scheme) is well founded. We aim to apply a consistent and fair approach to ensure remedies are appropriate and proportionate, based on the individual features of the complaint and what went wrong."*

6. The Remedies Statement goes on to explain that in order for the FCA to consider it appropriate to offer an *ex gratia* payment, a complaint would be expected to provide "*evidence that they have suffered a quantifiable financial loss caused solely or primarily by the actions or inaction of the FCA*". This reflects the FCA's longstanding approach to the offer of *ex gratia* payments in recognition of financial loss. Additionally, the FCA will consider making an offer of payment in respect of distress and inconvenience directly caused by its actions.

7. The reasons for this approach are set out in the Remedies Statement itself, which explains that:

> "*The FCA has legal immunity from liability to pay damages (compensation) unless it is found that we have acted in bad faith or have breached a complainant's human rights. Therefore, whilst the Scheme does include a provision for ex gratia payments, we do not award compensation or damages in the same way as a court would do.*
>
> *In some cases, a complainant may have suffered a specific inconvenience or an emotional impact, for example due to delays or poor service by the FCA. In such cases, we consider whether a payment might be appropriate to recognise their distress and inconvenience. We do not have set amounts that we award in such cases as individual complainants are affected differently depending on their specific circumstances. Typically, such payments are in the region of £25-£100. Where an impact is more severe or prolonged, a payment in the region of £100-£300 may be appropriate.*
>
> *We sometimes receive complaints from individuals seeking reimbursement of financial losses they have suffered. In many of these cases, the loss is caused by a third party, such as a regulated firm, and so we do not make any payment. The complaint made about the FCA is typically that our regulation lacked sufficient care, or failed to prevent their loss*."

8. The FCA is of the view that this general approach is appropriate in light of the statutory framework of regulation established by (in particular) the Financial Services and Markets Act ("**FSMA**") and the FSA 2012. By establishing this framework, Parliament has entrusted the FCA with the task of regulating the conduct of approximately 60,000 businesses, while at the same time ensuring that this regulation is conducted proportionately and without imposing an undue burden on those whom it regulates.

9. The FCA is funded by levies imposed on those whom it regulates, which are ultimately passed on to consumers in the form of higher prices for regulated products and services. The consequence is that the FCA is required to exercise judgement as to how its finite resources are best deployed, which necessarily means that it prioritises some areas over others. In some cases, hindsight will indicate that better outcomes could have been achieved if different decisions had been made. However, Parliament has made clear (in paragraph 25 of Schedule 1ZA to FSMA) that so long as those decisions were not made in bad faith, or in breach of human rights, the FCA ought not to be liable to individual investors in respect of them.

10. Furthermore, the regulatory framework established by Parliament is one which permits investors to take risks. Where it intends for consumers to have legal recourse in respect of financial losses, it provides for this expressly and in detail, as it has done e.g. in respect of the Financial Services Compensation Scheme ("**FSCS**") (Part XV of FSMA) and the Financial Ombudsman Service ("**FOS**") (Part XVI of FSMA). The former addresses the level of protection which Parliament intended consumers to have where a firm is unable to meet its liabilities for loss which it has caused to investors, the latter provides a means of obtaining redress in respect of loss suffered due to failures by a firm (and sits alongside s 138D(2) FSMA, which renders civilly actionable, in certain circumstances, contravention by authorised persons of the rules in the FCA Handbook).

11. Parliament has not expressed any intention that the FCA ought to make payments to investors in respect of losses primarily caused by others/firms. Indeed, the contrary intention is clear from the FCA's exemption from liability in damages referred to in paragraph 9 above. The exemption applies to anything done or omitted in the discharge, or purported discharge, of the FCA's functions. The exemption covers both the acts and omissions of the FCA as well as any person who is, or is acting as, a member, officer or member of staff. This is subject only to two narrow exceptions, that is, where the act or omission was unlawful as a result of section

6(1) of the Human Rights Act 1998 or where the act or omission has been done in bad faith. Neither of these exceptions applies in this case.

12. This may be contrasted with Part XVI of FSMA, establishing the FOS. Here, Parliament has expressly provided that the FOS may, in the exercise of its compulsory jurisdiction, make awards of compensation for "loss or damage". This power is found in s. 229 of FSMA, which explicitly authorises the FOS to make a money award to compensate for (amongst other things) "financial loss". No such provision is made in respect of complaints regarding the FCA's exercise of its regulatory functions.

13. Furthermore, unlike the FOS, the Scheme is not intended to be, in effect, an informal alternative to the Courts. Notably:

    (1) The respondent to matters before the FOS will be the authorised firm or individual themselves. Furthermore, the determination of what is "fair and reasonable" by way of compensation must be determined having regard to the relevant law, and if the FOS wishes to depart from it, it must provide cogent reasons for doing so. Any failure to do so, or any arbitrary or inconsistent departure from the law is a reason for setting aside a determination: *R (Heather Moor & Edgecomb Ltd) v Financial Ombudsman Service* [2008] Bus LR 1486 (CA). Furthermore, where a consumer accepts a FOS final determination, they are not then able to pursue a claim on the same facts for the same losses in civil proceedings, as the FOS is a "tribunal" and its final determinations "judgments" for the purposes of the merger doctrine (whereby a claimant's rights are extinguished by a judgment of a tribunal): *Clark v In Focus Asset Management & Tax Solutions Ltd* [2014] 1 WLR 2502 (CA).

    (2) In respect of complaints about the FCA's regulatory conduct, the position is entirely different. There can be no question (absent bad faith or violation of the Human Rights Act) of any action in the Courts against the FCA. Furthermore, were a consumer to be compensated on an *ex gratia* basis by the FCA in respect of financial loss, there would be no such barrier on the consumer seeking to recover from the relevant firm.

14. Accordingly, while the FCA agrees that it would be neither necessary nor appropriate strictly to apply legal tests of causation, liability and quantum when determining eligibility for compensation, it considers that it is in general appropriate to limit compensation offers to cases where the FCA is solely or primarily responsible for the loss suffered. However, this is subject always to assessment of the individual

circumstances of a complaint. In exceptional cases, the FCA may consider it appropriate to offer *ex gratia* compensation despite not being the sole or primary cause of the consumer's losses. As explained below, this is the position in respect of some LCF bondholders.

15. If any individual is dissatisfied with the approach adopted by the FCA, then it will be open to them to refer the matter to the Complaints Commissioner. Should the Complaints Commissioner ultimately recommend that the FCA make an offer of *ex gratia* compensation, then that recommendation will be individually considered by the FCA. That consideration will be guided by the factors set out in §7.14 of the Scheme, approved following a statutory consultation carried out pursuant to s 86 of the FSA 2012 which, consistent with the principles set out in the Remedies Statement, provides that:

> "*In deciding how to respond to a report from the Complaints Commissioner, the relevant regulator(s) will normally take into account:*
>
> *a) the gravity of the misconduct which the Complaints Commissioner has identified and its consequences for the complainant;*
>
> *b) the nature of the relevant regulator(s)' relationship with the complainant and the extent to which the complainant has been adversely affected in the course of their direct dealings with the relevant regulator(s)*
>
> *c) whether what has gone wrong is at the operational or administrative level;*
>
> *d) the impact of the cost of compensatory payments on firms, issuers of listed securities and, indirectly, consumers*."

The LC&F Compensation Statement

16. Turning to the case of LC&F, as you will be aware the FCA accepted and has committed to implementing each of the nine recommendations directed at it by Dame Elizabeth Gloster in her report into the FCA's regulation of LC&F. The FCA has also accepted that, with hindsight, better judgements could have been made.

17. The FCA does not, however, consider that this should translate into a general entitlement to compensation through the Scheme. This is because these are the types of judgements which Parliament has tasked the FCA with making in good faith, and which it has specifically excluded liability for. As such, and for the reasons set out above, the FCA's general approach is to compensate individuals for financial loss

only where it is the sole or primary cause of that loss. While any representations from individual complainants to the contrary will be considered on their merits, the FCA does not accept that (as a general proposition) it was the sole or primary cause of the loss to investors in LC&F. Rather, the FCA considers that the primary cause of the bondholders' losses was the actions of LC&F itself, and its senior management.

18. Notwithstanding that the FCA does not consider that it is the primary cause of bondholders' losses, the LC&F Compensation Statement reflects the FCA's conclusion that it is likely to be appropriate (exceptionally) to offer a payment of *ex gratia* compensation to a small number of investors who were given incorrect information in direct communications with the FCA which may have led those investors to conclude their investment was safer than it was. This conclusion was reached having regard to the terms of the Scheme and the Remedies Statement and reflects the fact that, while not the primary cause of these investors' losses, those direct and individual communications, involving the provision of specific information which was inaccurate, may have been a factor in their decision to invest, or to remain invested.

The clarifications you seek

19. In relation to the clarifications which you seek, I respond as follows (taking each in turn):

    (1) The 2013 Scheme, which was subject to minor amendments in 2016, is the current Scheme.

    (2) As noted above, the Remedies Statement sets out the FCA's current general approach as to how it approaches decisions on remedies.

    (3) The purpose of the Remedies Statement was to provide further information to complainants on the FCA's current general approach in keeping with the FCA's commitment to the consistent, transparent and fair handling of complaints. Further, the Remedies Statement was published to address specific requests from the Complaints Commissioner that the FCA be more transparent about its approach to providing remedies to complainants. The Remedies Statement was separate from the consultation on the proposed alterations to the Scheme.

    (4) The Remedies Statement sets out the FCA's longstanding approach, which is fully supported by the Board. Where a complaint is referred to the Commissioner and she makes a recommendation on remedies which is contrary to the FCA's view, the FCA considers carefully whether it should change its

approach based on the individual circumstances of each case, in accordance with the approach set out in the Scheme.

20. I hope that this has provided the clarification which you requested both as to the specific issues you raised and the operation of the Scheme more generally.

Yours sincerely



Charles Randell
Chair