15 June 2021 By email only

Open Letter to Charles Randell – Chairman of Financial Conduct Authority

CC:
John Glen - Economic Secretary to the Treasury
Mel Stride – Chair of the Treasury Select Committee
Nikhil Rathi – Chief Executive of the Financial Conduct Authority
Richard Lloyd - Senior Independent Director of the Financial Conduct Authority
Amerdeep Somal - Complaints Commissioner

Dear Mr Randell

FCA Complaints Scheme

Thank you for your letter dated 27 April 2021.

Unfortunately, your letter does not properly, fully, or accurately deal with the serious points raised in our letter of the same date.

Having listened to evidence before the Compensation (London Capital & Finance plc and Fraud Compensation Fund) Bill Committee (Tuesday 15 June 2021 Meeting), we consider it important that you answer the queries in our original letter and that the Treasury Select Committee is updated.

In summary, we strongly believe that your arguments in this matter are not just evasive and morally bankrupt but are contrary to the will of both Parliamentarians and the Complaints Commissioner. As the former Complaints Commissioner states (see below), you appear to be operating based on principles that are a "*myth*", ignoring that "*compensation payments are a core feature of the Scheme, as provided by statute".*

We set out our responses to the points raised in your letter below and ask for the FCA's response within 14 days so that we can determine whether to escalate our concerns:

50 Sloane Avenue, London, SW3 3DD
+44 (0)20 7838 8650
www.trueandfaircampaign.com

The True and Fair Campaign was launched in 2012 by Gina and Alan Miller to increase transparency, consumer protection and competition in UK Financial Services, and is wholly funded the Millers.

1. Remedies Statement and CP20/11

You have continued to maintain that FCA has not sought to apply the proposed revised version of the Scheme set out in CP20/11: "Complaints against the Regulators", and that the Remedies Statement is simply a reflection of the current approach adopted by the FCA. This is overly simplistic at best and deceptive at worst. It is no excuse to adopt an approach that does not accord with the existing Complaints Scheme, simply because there were 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*". No doubt the Complaints Commissioner sought transparency, but not an adoption of a process that effectively abandons the rights of consumers to receive payment of compensation because of regulatory failures on the part of the FCA.

Our view is shared by the previous Complaints Commissioner who stated[1] that it is a myth that "*reference has been made to 'modest payments', 'having regard to the source of the regulators' funds', and 'not undermining statutory immunity' – but that has proved unsatisfactory to complainants and to me. 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**".*

2. Continued and Contradictory Reliance upon the Causation Test

You have failed to clarify the basis upon which the FCA has limited the grounds when compensation will be payable. In this regard, you appear to accept on the one hand that the legal test of causation is neither necessary nor appropriate and yet you state it is "*in general appropriate*" to limit compensation to cases where the FCA is solely or primarily responsible. This contradictory approach has no legal basis under the current legislative framework. It is no excuse to justify compensation payments only when there is "*evidence that they have suffered a quantifiable financial loss caused solely or primarily by the actions or inaction of the FCA*" simply because you have done this in the past when there is no justification in law.

[1] Response-to-CP20-11-for-publication.pdf (frccommissioner.org.uk)

50 Sloane Avenue, London, SW3 3DD
+44 (0)20 7838 8650
www.trueandfaircampaign.com

The True and Fair Campaign was launched in 2012 by Gina and Alan Miller to increase transparency, consumer protection and competition in UK Financial Services, and is wholly funded the Millers.

The March 2016 Complaints Scheme[2] - which is the Scheme you confirm is the current Scheme - clearly states: *"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**."* (Emphasis added).
There is no mention of restricting awards by amount, or by only when loss is solely or primarily due to the FCA's fault. Similarly, restricting awards in this way was not envisaged by the FSA/Bank of England in its 2012 consultation on the matter.[3]

3. Compensation v Firm Failings v Statutory Immunity

It is no excuse to effectively abandon the payment of compensation simply because "*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*." Further, it is no excuse that "*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*" and that this somehow accords with the FSMA and FSA 2012 when you present no evidence whatsoever to support this argument.

In this regard, you appear to be conflating the concepts of statutory immunity; responsibility for authorised firms' failures; and compensation under the Scheme. These are separate (albeit related) concepts and to justify the approach you have adopted in the Remedies Statement as being required because of statutory immunity and where responsibility for firm failings should fall, is misleading. We note that you support your position by stating that "*Parliament has not expressed any intention that the FCA ought to make payments to investors in respect of losses primarily caused by others/firms*."

The fact that the FCA enjoys statutory immunity does not however mean that it cannot, and should not, be held to account for its own actions (as distinct from the actions of the firms it supervises): to suggest otherwise would render section 87(5) of the FSA 2012 meaningless.

[2] https://www.bankofengland.co.uk/-/media/boe/files/complaints-against-the-regulators/complaints-scheme.pdf?la=en&hash=B0BCCBFE2671F8F3A97D2684C22AE1BD232B1844
[3] https://www.fca.org.uk/publication/consultation/cp12-30.pdf

50 Sloane Avenue, London, SW3 3DD
+44 (0)20 7838 8650
www.trueandfaircampaign.com

The True and Fair Campaign was launched in 2012 by Gina and Alan Miller to increase transparency, consumer protection and competition in UK Financial Services, and is wholly funded the Millers.

A parliamentary debate on 27 January 2000[4] indicates senior politicians supported this view.

Mr Flight argues (emphasis added) "*We shall come in due course to the issue of legal immunity. The two issues might best have been debated together, but it is absolutely clear that, in achieving a fair and sensible balance of power--if there continues to be effective legal immunity, as the Bill at present prescribes--**it is essential, as the Burns committee made clear, to have an independent system of complaints, and for the body concerned to be able to recommend, if not award, fair payments for damage suffered by businesses as a result of the FSA's mistakes.**"* Sir Nicholas Lyell adds *"We are setting up a huge institution. What we are doing is unprecedented. We really must be big about it: we must not be frightened--Governments, whatever their complexion, must not be frightened--to **be prepared to pay compensation to those who suffer when mis regulated**."* Mr Heathcoat-Amory adds *"It is important for complaints to be dealt with promptly by an independent inspector who is seen to be independent, and who can receive them separately from any filter mechanism that may exist in the authority. The inspector must be properly resourced, and able to respond to complaints--including, we believe, complaints involving **financial awards against the authority**."*

4. The Scheme, FSCS and FOS:

It is no excuse to limit the situations in which compensation will be paid by the FCA, simply because there are other courses for remedy e.g., the FSCS and the FOS. Conflating the principles behind each of those schemes is yet another example of the FCA avoiding explaining the true consequences of the approach it has adopted in the Remedies Statement ahead of the proposed revised Scheme.

FSCS and the FOS are separate and distinct bodies which focus upon the responsibility of the *firms* in question. By contrast, the Scheme focuses upon the actions or inactions of the *FCA*. An award under one scheme does not negate an award under another – there is no substitution or cancellation mechanism between the schemes mentioned in law. There is no legal impediment to a claimant receiving compensation from all schemes, dependent upon the facts of their case; the actions of the firm in question and the actions of the FCA in supervising the firm.

[4] https://publications.parliament.uk/pa/cm199900/cmhansrd/vo000127/debtext/00127-18.htm

At the same time, in the 16 April 2021 Board minutes, we note that the Board approved the principle that investors "*should not receive in total more than Financial Services Compensation Scheme (FSCS) limit of £85K from all sources*", but such limit or principle does not feature within the FSCS at all – the scheme merely limits their own compensation and does not consider other schemes.[5] Again, we can only conclude that this action is another mechanism by which the FCA is attempting to circumvent the rights of consumers to fair compensation.

Considering the lack of a full and frank response to our letter, we are left with no option but to conclude that the FCA wishes to mislead consumers as to the principles of the existing Scheme and the proposed revised Scheme; ignore the clear interpretations made by the Complaints Commissioner (the independent body empowered by statute to hold the FCA to account); and to ignore Parliamentarians and Statute itself.

At the same time, we note that this is the second time (the first being our letter regarding the Woodford investigation) in which you have responded on behalf of the Non-Executive Directors (NEDs) of the FCA. **This gives rise to the critical question of their independence and how both your and their legal responsibilities are operating in practise.**

We note in this regard that the 16 April 2021 FCA Board minutes as regards the proposed approach for making ex gratia compensatory payments to LCF Investors states *"The Board agreed that the final communications on this subject should be signed off by the Chair and Chief Executive*." One might have expected on such an important matter, the NEDs would wish to see the final communications and approve them to exercise their duty to provide objective, independent and constructive challenge to the Executive Board.

We very much look forward to hearing from you.

Yours sincerely,

Gina Miller

Alan Miller

Gina Miller

Alan Miller

[5] https://www.fscs.org.uk/what-we-cover/

50 Sloane Avenue, London, SW3 3DD
+44 (0)20 7838 8650
www.trueandfaircampaign.com

The True and Fair Campaign was launched in 2012 by Gina and Alan Miller to increase transparency, consumer protection and competition in UK Financial Services, and is wholly funded the Millers.