

FOS REFORM: FCA CALL FOR INPUT

A Slaughter and May briefing

1. INTRODUCTION

- (a) Financial services firms have been dealing with a deluge of near-identical customer complaints about single issues, driven largely by claims management companies and claimant-side law firms (CMCs) effectively seeking to use the Financial Ombudsman Service (the FOS) as a forum for class action. This, combined with the recent Court of Appeal [judgment](#) in *Johnson, Wrench and Hopcraft*, has generated widespread concern about the UK consumer redress framework.
- (b) In response, the Chancellor announced on 14 November 2024 that the UK government would work with the financial regulators “to create a surer climate for investment” through reforms to the redress framework. On 15 November 2024, the FCA and the FOS jointly published a [Call for Input](#) on “modernising the redress system” (the Cfi).
- (c) The overall tenor of the Cfi, and the other documents published alongside it, implies that the FCA and the FOS are aware of the deficiencies of the current regime and, in particular, how CMC activity can harm both firms and consumers. The Cfi follows previous work by the FCA to improve cooperation between the FOS and the financial services regulators (including the re-launch of the Wider Implications Framework in 2022).
- (d) The Cfi is likely to be followed by a formal consultation on changes to the rules governing the operation of the FOS. It should be hoped that this will result in far-reaching changes to the UK financial services complaints landscape. The Cfi therefore represents a significant opportunity for market participants to influence the future direction of the UK financial services redress regime, albeit that the core commitment of both the FCA and the FOS to the independence of FOS decision-making will remain.
- (e) In this briefing, we outline the key proposals discussed in the Cfi, which closes on 30 January 2025. We also discuss briefly certain other documents published by the FCA and the FOS on 15 November 2024.

2. KEY PROPOSALS IN THE Cfi

Shorter-term changes

- (a) **Proactive redress obligations:** Under current FCA rules and guidance,¹ when firms identify systemic problems, they must take appropriate action to remedy them, which includes, where appropriate, proactively providing customers redress. The practical application of these requirements is, however, often unclear, which makes it difficult for firms to know exactly when a proactive redress obligation has arisen. The FCA is soliciting views on whether further guidance or rules are necessary to identify more precisely when firms should undertake proactive redress exercises.
- (b) **Two-stage complaints handling:** The FCA has asked for views on reinstating the old ‘two-stage’ complaints handling regime that was in force prior to 2011. Under the old regime, if a complainant was dissatisfied with the firm’s initial response, they first had to appeal within the firm; only if they remained dissatisfied after the firm’s second response could they refer their complaint to the FOS. This process was changed in light of concerns that firms were relying on customer inertia to respond unsatisfactorily to complaints in the first instance. However, given the uplift in the wider

¹ DISP 1.3.6G and PRIN 2A.2.4G.

regulatory scheme since 2011 (most notably, the Consumer Duty rules), the FCA appears to be willing to consider that this concern would not materialise now and therefore reverting to the old regime.

- (c) **FOS appeal process:** The FOS currently issues ‘investigator-level’ decisions in the first instance. Either party is free to ask for the decision to be reviewed afresh by an ombudsman, whose decision is then final. However, according to FOS data, most decisions do not change between investigator and ombudsman level. The FCA is therefore considering whether to permit appeals of investigator-level decisions to the ombudsman only in specified circumstances (for instance, because of errors of fact in the decision or because new evidence has come to light).
- (d) **FOS power to dismiss complaints:** The FCA is considering whether it should allow the FOS to dismiss (i) certain classes of complaints brought by CMCs (e.g. if they are poorly particularised or not properly evidenced) and (ii) complaints in respect of which the FCA has decided to implement a redress scheme or which should otherwise be referred to other bodies (including the FCA). These reforms are intended to avoid mass complaints clogging up the FOS, particularly where the FCA is seeking to handle any underlying issues via its own powers to order redress.
- (e) **Basis of FOS decisions:** The FOS is required to determine complaints on the basis of what, in its opinion, is “*fair and reasonable in all the circumstances of the case*”.² FCA rules list various factors that the FOS is required to take into account in making this assessment.³ The FCA is soliciting views on whether to expand, or amend, this list of factors, including to give more prominence to market practice at the relevant time.
- (f) **Limitation for FOS complaints:** The current rules enable the FOS to consider a complaint about a historical event, as long as the complaint was made less than three years from when the customer became aware, or ought reasonably to have become aware, they had cause to complain.⁴ The FCA is considering whether to introduce a ‘hard’ longstop date to prevent complaints being made about events long in the past.

Longer-term changes

- (g) **Complaints pauses:** The FCA is soliciting views on whether the FOS should have the power to pause its consideration of complaints while it engages with the FCA. This would be helpful, for instance, to ensure the FOS is aligned with the FCA on the proper interpretation of FCA rules and/or to allow complaints to be paused while the FCA considers whether an alternative redress mechanism might be appropriate. The FCA is similarly considering whether the FCA itself should also have the express power to pause complaints handling requirements for firms (such as where there are mass complaints).⁵
- (h) **Redress scheme seniority:** Where the FCA introduces a redress scheme pursuant to its powers under FSMA and a complaint is subsequently referred to the FOS, the FOS is required to handle the complaint as it would be handled under the redress scheme.⁶ However, there is currently a lacuna in the regime for situations in which complaints are before the FOS prior to an FCA redress scheme being established. The FCA is therefore considering whether it should introduce a mechanism for the FOS to ‘hand back’ complaints to firms if a redress scheme is imposed.

Other proposals

- (i) **Complaints reporting:** The FCA is considering whether firms should be required to report mass complaints ahead of the usual complaints reporting cycle.

² Section 228(2), Financial Services and Markets Act 2000 (FSMA) and DISP 3.6.1R.

³ DISP 3.6.4R.

⁴ DISP 2.8.2R(2)(b).

⁵ The FCA can already exercise its statutory rule-making powers to achieve this, as it has done with respect to certain motor finance complaints, but it is seeking views on whether it should have the express power to do so pursuant to its own rules.

⁶ Section 404B, FSMA (read, where relevant, with section 404F(7)(b), FSMA).

- (j) **CMC reporting:** The FCA is considering whether CMCs should have to report mass redress issues (i.e. issues that could lead to mass complaints against firms) to the FCA before they can register complaints against firms.

3. OTHER FCA / FOS DOCUMENTS PUBLISHED ON 15 NOVEMBER 2024

- (a) The FCA and the FOS have agreed a new memorandum of understanding in order to encourage and operationalise cooperation on complaints that are likely to have a broader impact. Most notably, they agree to “*seek to achieve a complementary and consistent approach...including on the interpretation of regulatory requirements where they are relevant to the resolution of disputes*” and to “*communicate regularly...to discuss...emerging redress events*”.⁷
- (b) The members of the Wider Implications Framework (the FCA, the FOS and other regulatory bodies such as the Financial Services Compensation Scheme) have published an updated terms of reference. The main change is to seek greater input from market stakeholders by, for instance, (i) encouraging the regulatory bodies, where appropriate, to invite stakeholders to make representations and (ii) requiring representatives of the regulatory bodies to attend various panels to hear from market participants about issues that affect them.
- (c) The FOS, subject to FCA consent and an anticipated legislative change, has also confirmed that it will introduce new CMC case fee rules. These rules will levy a £250 fee for CMCs per complaint (reducing to £75 if the complaint is successful) and will reduce the case fee payable by firms with respect to unsuccessful CMC complaints by £175.

4. NEXT STEPS

The Cfl provides firms with a real opportunity to influence the future direction of the UK financial services redress regime. We strongly encourage firms to engage with the FCA on its proposals.

CONTACTS



Nick Bonsall
PARTNER



Gayathri Kamalanathan
PARTNER



Ben Goldstein
ASSOCIATE

⁷ Paragraph 23.