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Dear Julian,

CP16/20 Rules and guidance on payment protection insurance complaints: feedback on CP15/39 and further consultation

The Financial Services Consumer Panel welcomes this further opportunity to comment on the proposed rules and guidance on payment protection insurance complaints. The proposed FCA package of interventions continues to be inadequate. Consumers will risk losing out on potential redress and be subject to complicated complaints processes. Administrative costs will be increased as consumers will need to resubmit previously rejected complaints. Claims management company (CMC) activity will be encouraged, resulting in consumers continuing to be plagued by cold calls and paying potentially billions of pounds in fees.

We are concerned that, in a number of areas, the views and interests of firms have led the FCA's proposals, even though there is evidence from the Financial Ombudsman Service (FOS) that firms are still not dealing with PPI complaints properly. The introduction of a time bar is only acceptable if it comes with a guarantee from firms that they will improve their processes and increase their complaints handling capacity significantly.

We stand by all of the points made in our original response¹. We remain of the opinion that if the FCA is to proceed with its proposed deadline, it is important that:

- Alongside the FCA's advertising campaign, all banks should pro-actively contact their PPI customers explaining the individual deadline that will apply to their complaint, whether or not they have already done this. The FCA's communications do not make it clear that the deadline for some consumers will be earlier than the 2019 time bar. Letters should also highlight the new right of redress from banks' failure to disclose commissions. We believe firms, and the FCA, have underestimated the role that CMCs will play if a decision is taken to continue with a complaints-led approach. The FCA's approach will be inefficient and will not ensure that those consumers entitled to redress will receive their fair share.
- The FCA should use its powers under S404 of FSMA to establish a redress scheme for complaints about undisclosed commission as a result of the Plevin judgment.
- If the level of undisclosed commission goes beyond the FCA's proposed 50% tipping point, then the entire commission should be refunded, not just the proportion over the threshold. This would be consistent with case law, and in particular, consistent with Plevin.

¹ https://www.fs-cp.org.uk/sites/default/files/fscp_response_rules_and_guidance_on_payment_protection_insurance_complaints.pdf

- The proposed deadline should not apply to consumers who make new complaints about rejected PPI claims, now or in the future. Consumers who are not aware, or who do not believe, they were mis-sold, and so who do not make a speculative mis-selling claim, will continue to pay for what they believe is a valid insurance product. Applying the deadline to these consumers before they may need to make a claim, risks leaving future claimants and their families facing significant hardship if their claims are rejected unfairly.
- All complaints received by banks or the FOS after 12th November 2014 should be assessed (or re-assessed) under the two step approach.
- Banks should be required to accept complaints by email and develop a simple tool for consumers to submit their complaints quickly and efficiently. The FCA could also host such a tool on the online "hub" it will develop as part of the communications campaign or link to existing tools provided by consumer groups.
- The FCA should continue with close supervision of banks' PPI complaint handling and take enforcement action against any that fail to treat customers fairly. This should include action against the senior executives responsible for overseeing complaints handling within firms, and use the full range of enforcement tools available to the FCA, including bans from the industry and significant fines. This would require the FCA to overturn the FSA's stated policy that those responsible for overseeing complaints handling within firms would not be subject to enforcement action. If those responsible for poor complaints procedures are not held to account, there is no incentive for them to change.

In addition, we believe that, even if the deadline is implemented, it should be kept under review and extended if firms do not improve their complaints handling processes. One measure of this would be a significant reduction in the number of consumers having their PPI complaints upheld by the FOS. The process for complaining directly to firms should be much easier and in return firms must be prepared for the increased administration involved in helping consumers through the process, rather than rejecting legitimate claims.

We believe the FCA should be clearer on its success measures and ensure consumer outcomes are driving the proposals. Success should mean that industry improves the way it deals with complaints. The FCA should also be able to measure the success of its own process; how will the FCA be sure that its communication campaign and continuation of a complaints led approach will end up being more successful than a proactive S404 redress scheme would have been?

We also make the following points:

- The FCA has not undertaken or sought any independent verification of the claims by many of the banks that it would take 18 to 36 months to prepare to write to PPI customers and a further 24 months to actually send them a letter.
- The Cost-Benefit Analysis undertaken by the FCA is very poor and does not consider any assessment of the costs and benefits of alternative options such as those suggested by the Panel. We are concerned that the FCA has stated that it will only conduct cost benefit analyses for the interventions it proposes and it is "not required to assess a proposed intervention against other possible interventions".² The FCA's approach seems to be in direct contravention of the Government's guidelines on the use of appraisal and evaluation including cost-benefit analysis.³ This states that a short-list of options should be created which should "cover a wide range of potential action" and that the "costs and benefits of [these options] should be valued". The guidance states that "the decision maker can then compare the results between

² FCA, 16/20, Page 139

³ HM Treasury, The Green Book, Appraisal and Evaluation in Central Government

options and help select the best". The FCA appears to use a different approach, of deciding what it wants to do and only then conducting a cost-benefit analysis.

- The FCA has also failed to commission any independent evaluation of its approach to PPI redress. This lack of independent evaluation has probably contributed to the FCA pursuing a policy which has failed to deliver fair redress and easy complaints procedures for consumers, created a CMC industry which has extracted fees of up to £5 billion, and led to additional administrative costs for firms in future. The FCA should ensure that independent evaluation is built into its approach.
- In justifying its failure to use a S404 scheme for redress or to require any proactive contact for customers affected by the Plevin ruling, the FCA concludes that requiring firms to "contact potentially affected consumers would be inappropriate, given that we did not require commission disclosure in our ICOB/ICOBS rules". It seems unfair that consumers should be penalised because of the FSA's failure to regulate the market effectively. We note that the Panel's response⁴ to CP187 in 2003 called for commission disclosure to be compulsory in insurance sales but the FSA decided to agree with industry that such a rule was not necessary. A total banning of commission from all products, would avoid the question of what level of commission was reasonable, in the future.
- The FCA has said that in requiring only the proportion of commission above 50% to be refunded it has noted that the Courts might take a variety of approaches. It has been unable to cite any cases where Courts have agreed with the FCA's proposed approach. The FCA's approach remains inconsistent with that awarded by the Courts with the risk that CMCs will direct a number of consumers to take their complaints to Court, rather than through the FOS – increasing costs for both firms and consumers. We also note that the FCA claims that it is "fair and reasonable" for the firm distributing the PPI to retain "some of the commission from the policy's distribution" (i.e. – the portion under the tipping point). We note that the amount which the FCA considers it fair and reasonable for the firm to retain is more than three times the 16% commission rate which the FCA itself has said are "the genuine distribution costs (including a reasonable profit margin) of the major PPI distributors". There is no legal precedent for arriving at this amount and so, as we say above, this is likely to see CMCs encouraging consumers to take their complaints to Court.

Further consultation questions

Concerning the proposed rules and guidance on PPI complaints and Plevin:

Q19: Do you agree with our proposed modifications of incorporating anticipated profit share sums within our approach to assessing fairness and actual profit share sums within our approach to redress? Do you perceive any particular practical or operational difficulties with this modified approach?

Yes, we welcome this proposal.

Q20: Do you agree with our proposed clarifications that firms should presume that the failure to disclose gave rise to an unfair relationship where the anticipated profit share plus the commission reasonably foreseeable at the time of the sale were more than 50%, but then calculate redress on the basis only of those periods where the actual level of commission and profit share together was more than 50%?

No. Whilst we are pleased that the FCA has included profit share in the calculation, we still believe that in circumstances where the level of commission exceeds the threshold amount the consumer should receive the full amount of commission as redress. This would be consistent with the Plevin judgement.

⁴ https://web.archive.org/web/20050226082948/http://www.fs-cp.org.uk/pdf/030929_CP187response.pdf

If this approach is not taken there is a significant risk that CMCs will direct consumers to complain through the courts, where precedent has already been set in the Plevin case.

Q21: Do you agree with our proposed modification of allowing rebates to be reflected when calculating redress at Step 2?

No. The FCA is still allowing far more commission to be retained by the distributor in commission than the reasonable costs of distributing PPI.

Concerning the proposed package of measures as a whole:

Q22: Do you consider that, taken as a whole, our proposed package of measures – the proposed deadline rule, proposed consumer communication campaign, proposed fee rule, and proposed rules and guidance (as amended) concerning PPI complaint handling and Plevin - is a justified, appropriate and proportionate response to past PPI mis-selling and present trends in PPI complaints handling?

No. We do not believe that a communication campaign alone can take the place of individual communication with affected consumers. Continuing with a complaints-led approach will further fuel the CMCs and will not ensure that every consumer who was mis-sold a policy has had the redress to which they are entitled. We also believe that this approach will be more expensive for firms than a S404 scheme would have been, for all of the reasons we have already set out.

Concerning our updated EIA:

Q23: Do you have any comments on our assessment of the impacts of the proposals on protected groups or vulnerable consumers? Do you have any comments on the proposed mitigations we are taking forward?

We are concerned by the following significant flaws in the FCA's assessment of the impacts of the proposals on protected groups and vulnerable consumers:

- The FCA has undertaken no assessment of the impact of its proposal that, after 2019, consumers making a claim for benefits under a PPI policy and having that claim rejected will not be able to make a complaint. So, for example, someone with cancer or a long-term disability might have a claim for the payment of benefits under a PPI policy turned down and be unable to complain about it. Vulnerable consumers and other protected groups who have a claim on a mortgage or secured loan PPI policy turned down risk losing their home. We are concerned that the FCA has dismissed these concerns and indicates that it believes that "certainty and consistency" for the industry are more important than the risk of consumers losing their homes.
- The EIA assessment also contains no analysis of the impact on consumers of the fact that 5.5 million people will have a deadline⁵ for making a complaint of earlier than 2019 due to the fact that they have been part of earlier customer contact exercises. These people, including vulnerable consumers, risk being misled by the press coverage which has heavily referenced the fact that the deadline will now be in 2019. The FCA's own communications activities so far have increased the risk of these problems as its press releases have failed to note that millions of consumers will have an earlier deadline than 2019.

Yours sincerely

Sue Lewis
Chair, Financial Services Consumer Panel

⁵ For Non-Plevin related complaints