

Consumer Redress Schemes sourcebook

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Key definitions

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Chapter 1

General

1.1 Introduction

- 1.1.1** **G** This part of the *FCA Handbook* relates principally to *consumer redress schemes*. For these purposes, a *consumer redress scheme* is a set of *rules* under which a firm is required to take one or more of the following steps:
- (1) investigate whether, on or after a specified date, the firm has failed to comply with particular requirements that are applicable to an activity it has been carrying on;
 - (2) determine whether the failure has caused (or may cause) loss or damage to consumers; and
 - (3) if the firm determines that the failure has caused (or may cause) loss or damage to consumers, the firm must:
 - (a) determine what the redress should be in respect of the failure; and
 - (b) make the redress to the consumers.
- 1.1.2** **G** Chapter 1 contains *guidance* on *consumer redress schemes* in general and explains what they are and the circumstances in which the *FCA* may impose a requirement to establish and operate a *consumer redress scheme*. The *rules* and *guidance* relating to particular *consumer redress schemes* are set out in the remainder of the sourcebook.
- 1.1.3** **G** Chapter 1 is relevant to current and former *authorised persons*, *electronic money issuers* and *payment service providers*. Except where otherwise specified, it uses "firm" to refer to all such persons.
- 1.1.4** **G** ■ CONRED 1.2 to 1.7 explain the power in section 404 of the *Act* which enables the *FCA* to make *rules* requiring firms to establish and operate *consumer redress schemes*. Unless the context otherwise requires, references to *consumer redress scheme* in ■ CONRED 1.2 to 1.7 are references to a scheme established under section 404 of the *Act* (that is, a scheme falling within paragraph (a) of the *Glossary* definition) and references to a "scheme" in those sections should be read accordingly.
- 1.1.5** **G** ■ CONRED 1.8 explains the circumstances in which the *FCA* can impose a requirement on a firm under section 404F(7) to establish and operate a scheme that corresponds to or is similar to a scheme under section 404 of the *Act*. Unless the context otherwise requires, references to *consumer redress scheme* in ■ CONRED 1.8 are to a scheme established under section 404F(7) of

the *Act* (that is, a scheme falling within paragraph (b) of the *Glossary* definition) and references to a “scheme” in that section should be read accordingly.

1.1.6**G**

The term “consumer” has a number of different meanings both in the *Glossary* and in the *Act*. For this reason, except where indicated, *CONRED* does not use the term as defined in the *Glossary*. However, ■ **CONRED 1.4.6G** to 1.4.14G explains which consumers can be covered by a *consumer redress scheme* established under section 404 of the *Act*.

1.2 Process for making a consumer redress scheme

Consultation

- 1.2.1 **G** The power in section 404 of the *Act* is a *rule-making* power. *Rules* made by the *FCA* under this power will be subject to a formal public consultation, including a cost benefit analysis (CBA). The consultation paper will fully and clearly explain the *rules* of the scheme and set out the sources of evidence upon which the scheme is based. The consultation period will usually be three *months* long. There is, however, an exemption from the *FCA* consultation requirements for cases where the *FCA* considers that the delay would be prejudicial to the interests of consumers. This exemption is unlikely to be applicable in relation to *consumer redress schemes* because the importance of consulting to ensure a scheme is appropriate and workable in practice would be likely to outweigh any prejudice that the delay from the consultation process may bring.
- 1.2.2 **G** The *FCA* must have regard to any representations made to it during the consultation process. The *FCA* will issue a statement following the consultation which will explain how it has taken these into account in formulating the final *rules*. A further cost benefit analysis will be provided if the final *rules* differ significantly from the consultation draft. In addition, an explanation of any differences between the rules consulted on and the final *rules* made will be provided.
- 1.2.3 **G** All *FCA rules* are made by the *FCA* Board. The Treasury appoints the *FCA* Board and a majority of the Board are non-executive members.

Pre-consultation

- 1.2.4 **G** The *FCA* will actively seek to engage in discussions with the industry and consumer groups about the issue. This process will assist in the consideration of all the available options and, if it is ultimately decided that a scheme to address the issue should be pursued, it will ensure the *FCA* has a clear understanding of the matters that will need to be addressed in the formal consultation.
- 1.2.5 **G** This discussion process will allow the particular nature of the issue in relation to which a scheme is proposed to already be visible to key stakeholders. In addition, the issue may have been publicised more widely through comment and action by the *FCA* (e.g. the *FCA* may have published the findings of thematic projects, mystery shopping exercises or enforcement actions).

1.2.6

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The FCA will also consult with the Financial Services Practitioner Panel, the Smaller Businesses Practitioner Panel, the Financial Services Consumer Panel, the *Financial Services Compensation Scheme Limited* and the *Financial Ombudsman Service Limited* before issuing a formal consultation.

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1.3 Trigger for making a consumer redress scheme

- 1.3.1** **G** The trigger is set out in section 404(1) of the *Act*. It states that the power can be used if:
- (1) it appears to the *FCA* that there may have been a widespread or regular failure by relevant firms to comply with requirements applicable to the carrying on by them of any activity;
 - (2) it appears to the *FCA* that, as a result, consumers have suffered (or may suffer) loss or damage in respect of which, if they brought legal proceedings, a remedy or relief would be available in the proceedings; and
 - (3) the *FCA* considers that it is desirable to make *rules* for the purpose of securing that redress is made to consumers in respect of the failure (having regard to the other ways in which consumers may obtain redress).
- Meaning of “widespread or regular” failure**
- 1.3.2** **G** There is no further explanation in the *Act* of what is meant by “widespread or regular”. The *FCA’s* view is that the phrase is primarily directed at the volume of failings that have occurred. However, we do not think the test is subject to further precise definition. Rather, we think the test is a matter for regulatory judgement, to be interpreted in the round with reference to all the relevant evidence.
- 1.3.3** **G** The *FCA* will not need to have specific evidence of failure by each of the firms subject to the scheme. The *FCA* will be entitled to extrapolate reasonably from the evidence it has to determine whether the failure appears to be “widespread or regular”.
- 1.3.4** **G** Section 404(1)(a) of the *Act* refers to “failure...to comply with requirements”. The reference to “requirements” rather than “requirement” means that there does not have to be evidence of widespread or regular failure for each requirement covered by a scheme. Rather, the failure may exist in relation to different requirements affecting the same type of activity.
- 1.3.5** **G** The *FCA* will only proceed if it has robust evidence to support its view that it appears there may have been a widespread or regular failure. Sources of evidence which the *FCA* might use and extrapolate from include the results

of the *FCA's* thematic work, enforcement investigations, mystery shopping, complaints to the *FCA*, firms or to the *Financial Ombudsman Service*, and information from consumer groups and reports from *skilled persons*.

1.3.6 **G** However, it is important to understand that the purpose of section 404(1)(a) is to require the *FCA* to establish whether there may have been a widespread or regular failure. The purpose is not to prove that all or most relevant firms have failed (or may have failed) to comply with requirements in respect of all or most relevant consumers.

Failures that can be dealt with under a consumer redress scheme

1.3.7 **G** The requirements that can be included in a *consumer redress scheme* include both *FCA rules* and the general law (e.g. the tort of negligence or the *Unfair Terms Regulations* – see section 404F(3) and (4) of the *Act*).

1.3.8 **G** The failures that the *FCA* can take into account in deciding if the trigger is satisfied are those where, as a result of the failure, consumers have suffered (or may suffer) loss or damage in respect of which, if they brought legal proceedings, a remedy or relief would be available in the proceedings (see section 404(1)(b) of the *Act*). The relevance of the “may suffer” wording is that it makes clear that schemes may cover cases where loss is foreseeable but may not yet have crystallised (e.g. pensions mis-selling cases where the loss may not crystallise until retirement).

1.3.9 **G** The *FCA* will be able to give examples of things done or omitted to be done that are to be regarded as constituting a failure to comply with a requirement. However, the *FCA* can only give examples that have been, or would be, held by a court or tribunal to constitute a failure (see section 404A(2) of the *Act*).

1.3.10 **G** So in other words, the section 404 power is limited so that the only failures a *consumer redress scheme* can address are those that a court or tribunal would find to have been failures at the time the activities were carried on. Consumers will not need to have actually brought an action forward for the *FCA* to be able to make a scheme.

1.3.11 **G** Deciding whether a particular act or omission constitutes a failure will necessarily involve the *FCA* interpreting its *rules* and the general law. If the law is unclear in a particular area, the *FCA* will have two broad options available to it. It may decide either:

- (1) not to develop a scheme, having regard to the other ways in which consumers can seek redress, including through the courts; or
- (2) to take steps to clarify the law.

1.3.12 **G** The *FCA* will seek an opinion from a Queen’s Counsel for any *consumer redress scheme* it proposes in relation to the question of whether the failures proposed to be addressed by a scheme are those that a court or tribunal

would find to constitute as failures to comply with a requirement. If stakeholders disagree with the *FCA's* interpretation of the law as expressed in the draft scheme *rules*, they will be able to say so during the consultation process. Any representations made will be carefully considered by the *FCA* as set out in ■ CONRED 1.2.

1.3.13 **G** In addition, the *FCA* has the option of seeking a court declaration to clarify the law (the bank charges test case brought by the Office of Fair Trading which the *FCA* supported with a *waiver* of certain *DISP rules* is an example of this sort of approach).

1.3.14 **G** The process of interpreting what the *FCA's rules* require will involve the usual process of analysing relevant surrounding materials (e.g. consultation papers) as is the practice when interpreting any piece of legislation. Other *FCA rules* and *guidance* may also be relevant to interpreting what a particular *rule* requires. The *FCA's rules* are given a purposive interpretation (see ■ GEN 2.2.1R). The purpose of a *rule* is gathered predominantly from the text of the *rule* itself as well as its context among other relevant *rules*.

1.3.15 **G** The *FCA* will not be able to impose higher requirements on firms retrospectively. The requirements to be applied by the *FCA* will be those in force at the time of the relevant act or omission, not current or later requirements.

1.3.16 **G** *Consumer redress schemes* can only be used to require redress in relation to those failures in respect of which a remedy or relief would be available in legal proceedings. A *consumer redress scheme* could not, therefore, be used to require redress for:

- (1) breaches of the *Principles* (*FCA rules* currently provide that breaches of the *Principles* do not give rise to a right of action in court under section 138D of the *Act* – a change to this would be subject to the consultation requirements under the *Act* in the usual way); or
- (2) breaches of any other *FCA rules* where the right of action under section 138D of the *Act* has been switched off in the *rules* (e.g. the *rules* in the *SYSC* sourcebook); or
- (3) departure from *FCA guidance*; or
- (4) non-compliance with any non-binding code of practice (e.g. industry guidance confirmed by the *FCA*).

1.3.17 **G** The fact that a *consumer redress scheme* cannot be used to require redress in relation to breaches of the *Principles* would not prohibit a consideration of the *Principles* for the purposes of interpreting one of the *FCA's* more detailed *rules*. This is because the *FCA* believes that a court would also take into account surrounding legislative provisions when seeking to interpret a particular piece of law. However, this does not mean that the scheme could be based on the *Principles*: there always needs to be a legally-actionable failure.

1.3.18 **G** Finally, it is necessary that the loss or damage which was suffered (or may be suffered) is as a result of the failure. As part of this, the *FCA* will need to consider whether any indirect or consequential loss is recoverable under the applicable law.

‘Desirability’ of making a consumer redress scheme.....

1.3.19 **G** The *FCA* will be required to make an objective, evidence-based judgement on the overall appropriateness of a *consumer redress scheme* as a remedial tool. Cost benefit analysis (CBA) is likely to be a key part of this decision. An important characteristic of a *consumer redress scheme* is that it can ensure consumers obtain redress without the *FCA* having to first identify every individual firm specifically involved. CBA will necessarily rely in part upon the *FCA*’s judgement as to how widespread or regular the failure is.

1.3.20 **G** A comparison of the advantages and disadvantages of a *consumer redress scheme* against other available tools will form part of the decision-making process. The *Act* provides a range of other tools (e.g. imposition of requirements on a firm under section 55L to take remedial action in respect of past conduct) and the *FCA* will need to consider which power is most appropriate in the circumstances.

1.3.21 **G** As a public body, the *FCA* will also have regard to general administrative law principles such as proportionality and reasonableness. For example, the extent to which firms have already provided redress will be a factor to which the *FCA* will have regard (e.g. following enforcement action or the implementation of a voluntary industry redress scheme). See also ■ CONRED 1.5.25G.

1.3.22 **G** Lastly, the *FCA*’s *operational objectives* (particularly its *consumer protection objective*), together with the regulatory principles in section 3B of the *Act*, will also be relevant. For example, the *Act* requires the *FCA* to have regard to the principle that a burden or restriction which is imposed on a person should be proportionate to the benefits, considered in general terms, which are expected to result from the imposition of that burden or restriction.

1.4 Scope of a consumer redress scheme

The financial services that a consumer redress scheme can apply to

- 1.4.1** **G** In accordance with section 404E(2) of the *Act*, a *consumer redress scheme* can secure redress for consumers of services provided by:
- (1) *authorised persons* in carrying on *regulated activities*;
 - (2) *authorised persons* in carrying on a consumer credit business in connection with the accepting of deposits (insofar as section 404E relates to, or applies for the purposes of, anything done under the *Act* concerning things done (or not done) before 1 April 2014);
 - (3) *authorised persons* in communicating, or approving the communications by others of, invitations or inducements to engage in investment activity;
 - (4) *authorised persons* who are *investment firms*, or *credit institutions*, in providing relevant ancillary services;
 - (5) *persons* acting as *appointed representatives*;
 - (6) *payment service providers* in providing *payment services*; and
 - (7) *electronic money issuers* in issuing *electronic money*.
- 1.4.2** **G** A *consumer redress scheme* could apply to all *authorised persons*, *electronic money issuers* or *payment service providers* or to a specified description of *authorised person*, *electronic money issuer* or *payment service provider*. This means the *FCA* could create a scheme that applied to a named list of firms. Given that a scheme can apply to *authorised persons*, it could also apply to *incoming EEA firms* that are authorised under Schedule 3 to the *Act*. However, the *FCA* would need to consider on a case-by-case basis the extent to which this was both practicable and appropriate (having regard to the division of responsibilities between *Home* and *Host State regulators* under the various *EU Directives* that apply to financial services firms).
- 1.4.3** **G** The *FCA* will be able to determine, on reasonable grounds, how to characterise the particular activity that a scheme applies to. This will enable the *FCA* to ensure that a scheme is appropriately focused (e.g. limited to activities carried on in relation to particular products or sectors of the market in question, during specified periods of time). It is possible that a scheme

could be combined with the use of other regulatory tools (i.e. a package of measures would be put in place to ensure an issue was addressed comprehensively). Should this be the case, the *FCA* will clearly set out in its consultation paper how the different elements of the package inter-relate.

1.4.4 **G** Where the financial services to which a scheme applies are those provided by *authorised persons* in carrying on *regulated activities*, the limitation to '*regulated activities*' means that a *consumer redress scheme* cannot apply to services that were provided before the activity in question first became regulated by the *FSA* or *FCA* (e.g. the start date of a scheme applying to general insurance mediation could not be earlier than 14 January 2005, which was the commencement of regulation of general insurance mediation).

1.4.5 **G** That said, it would be possible for the Treasury by order to widen the type of financial services that a *consumer redress scheme* can cover in order to encompass pre-regulation activities (see section 404G of the *Act*).

Consumers that can be covered by a consumer redress scheme

1.4.6 **G** For the purposes of a scheme, a consumer can be any person who has used, or may have contemplated using, any of the financial services listed in section 404E(2) of the *Act* (see ■ CONRED 1.4.1G), or has relevant rights or interests in relation to any of those services. As such, the section 404 power is not limited to retail customers only.

1.4.7 **G** That said, a *consumer redress scheme* can only be used to secure redress for consumers who have a legal cause of action. In some cases, the cause of action is limited to private persons in any event. For example, rights of action in respect of breaches of *FCA rules* are generally limited to *private persons*, and the *Unfair Terms Regulations* are limited to individuals acting outside their trade, business or profession. In contrast, claims for misrepresentation can be brought under the general law by all types of *person*.

1.4.8 **G** In addition, the *FCA* may choose to focus a scheme on retail customers, having regard in particular to the fact that they tend to have less experience and expertise. However, the *FCA* will also have regard to the fact that many retail customers are also investors in, or beneficiaries of, funds and pension schemes which may have incurred loss from the failure. It may be that the inclusion of such funds or pension schemes amongst those to whom redress ought to be given will bring benefit to the underlying retail customers.

1.4.9 **G** The section 404 power could be used in relation to non-UK consumers if they are protected by the underlying law (e.g. some *FCA rules* apply to *UK* firms doing business in another *EEA State*).

1.4.10 **G** The fact that a consumer "who may have contemplated using" a relevant financial service can be covered by a *consumer redress scheme* is unlikely to catch many cases in practice. One example of a case where it might be used is where there has been widespread discrimination: the section 404 power could be used to ensure redress for consumers who were unlawfully denied

access to a financial service contrary to any relevant equality legislation. All the restrictions and evidence requirements explained in ■ CONRED 1 would apply equally to any scheme developed in this sort of area.

- 1.4.11 **G** The Treasury may by order widen (or cut back) the type of consumers that a *consumer redress scheme* can cover (see section 404G of the *Act*).

Applicability of a scheme to other situations

- 1.4.12 **G** The limits of a *consumer redress scheme's* application will be clearly defined within the scheme *rules* and a scheme will only bind those firms to which it applies. Firms that are unsure whether or not a scheme applies to their activities are encouraged to raise the issue with their supervisory contact in the normal way.
- 1.4.13 **G** It is possible that the approach taken by the *FCA* in a particular scheme could influence its approach to other situations. The *FCA* will aim to be consistent in its regulatory approach where possible.
- 1.4.14 **G** For example, the *FCA* could put in place a scheme in relation to unfair variation terms in *regulated mortgage contracts*. The underlying reasons for the *FCA's* decision that a variation term in a *regulated mortgage contract* is unfair could potentially apply to a variation term in an insurance contract that fell outside the scope of the scheme. However, the *Unfair Terms Regulations* expressly state that all the circumstances attending the conclusion of the contract must be taken into account when assessing the unfairness of a contractual term. Therefore, if the *FCA* wanted to take action in relation to the term in the insurance contract using its other regulatory powers, it would need to ensure that it had considered all the relevant issues separately to those considered as part of the scheme for *regulated mortgage contracts*.

1.5 Operation of a consumer redress scheme

Investigation of cases under a consumer redress scheme

- 1.5.1** **G** Firms will be responsible for investigating individual cases, within the framework set out by the *FCA*. The *FCA* will have a number of options when formulating a scheme. For example, the *FCA* could:
- (1) require firms to undertake a proactive file review of all cases falling within the period covered by the scheme; or
 - (2) require firms to contact their customers individually to ask whether they wish their cases to be investigated under the scheme and only investigate the cases of those customers who opt-in; or
 - (3) require firms to publicise the existence of the scheme (e.g. through newspaper advertisements) and only investigate the cases of those customers who opt-in; or
 - (4) publicise the existence of the scheme through an *FCA* publicity campaign and require firms to investigate the cases of those customers who subsequently opt-in.
- 1.5.2** **G** It would also be possible to require a combination of these methods within a scheme (e.g. for different types of case). The choice of investigation method would be one of the issues on which the *FCA* would consult and perform cost benefit analysis (CBA). In doing so, the *FCA* will have to consider the likely effectiveness of consumer contact exercises.
- 1.5.3** **G** In the event that a scheme required customers to 'opt-in' by a specified date, the *FCA* would ensure that the scheme covered how to deal with customers who nevertheless contacted firms after that date.
- 1.5.4** **G** In some cases, the *FCA* (or someone acting on its behalf) may carry out the investigation under the scheme instead of the relevant firm (see section 404A(1)(k) of the *Act*). The scheme rules may provide for this in relation to, for instance, a firm which was refusing to operate a scheme. Another example is provided in ■ CONRED 1.5.6G in relation to formerly *authorised persons*.
- 1.5.5** **G** The *FCA* will be mindful of issues relating to professional indemnity insurance when making *rules* in this area. For example, the *FCA* is aware that

certain policies prohibit admissions of liability without the written consent of the *insurer*.

Firms that are no longer authorised by the FCA or have transferred their business to another firm

1.5.6 **G** The *FCA* has a number of options for dealing with firms that have ceased to be authorised. For example:

- (1) Where the firm continues to exist and still has assets, the scheme could still apply to that firm (see section 404F(5)(a) of the *Act*). Alternatively, the scheme *rules* could provide for the *FCA* itself (or a third party acting on its behalf) to investigate the cases of formerly *authorised persons*.
- (2) Where the firm has ceased to exist, cannot readily be traced or has no assets, the *FSCS* could declare the firm in default. See **CONRED 1.6.23G** for details of how the *FSCS* will deal with cases that fall within a scheme.

1.5.7 **G** Where there has been a transfer of business, the *FCA* can apply the scheme to the successor firm if it has assumed liability (e.g. where there has been a transfer of a banking business under Part VII of the *Act* or a firm is otherwise legally liable for the failures of another firm – see section 404F(5)(b) of the *Act*). Where the successor firm has no legal liability for the failures, the scheme itself could not apply to the successor firm (and so redress would need to be obtained through the options set out above). It may be the case, however, that the successor firm has access to information that may assist in the investigation of *persons* who have ceased to be authorised. The *FCA* will be mindful of this.

1.5.8 **G** In these sorts of cases it would be for either the *FCA*, the third party acting on its behalf, the *FSCS* or the successor firm (as relevant) to contact affected consumers. The *FCA* and the *FSCS* will work together closely to ensure all relevant firms are captured.

Other matters that may be included in the rules of a consumer redress scheme

1.5.9 **G** Section 404A of the *Act* sets out an illustrative list of particular matters that the *FCA* may cover in the *rules* of a scheme.

1.5.10 **G** One of the most important areas where the *FCA* may be likely to make *rules* is to set out examples of things done or omitted to be done that are to be regarded as constituting a failure to comply with a requirement (see section 404A(1)(b) of the *Act*). However, as explained in **CONRED 1.3.7G** to **1.3.18G**, the *FCA* can only give examples that have been, or would be, held by a court or tribunal to constitute a failure.

1.5.11 **G** Giving examples that are clear and sufficiently comprehensive will be an area to which the *FCA* pays particular attention, both in its work leading up to a consultation and during the consultation process itself. The *FCA* will work with relevant stakeholders to ensure the final scheme *rules* give examples

which provide clarity and certainty as to how a firm is expected to operate under the scheme.

1.5.12 **G** Another important area where the *FCA* can make *rules* concerns setting out matters to be taken into account, or steps to be taken, by firms for the purpose of:

- (1) assessing evidence as to a failure to comply with a requirement; or
- (2) determining whether such a failure has caused (or may cause) loss or damage to consumers (see section 404A(1)(c) of the *Act*).

Again, the *FCA* will only be able to do this if the matters set out have been, or would be, taken into account by a court or tribunal for the purpose mentioned. In particular, the *FCA* cannot disregard the normal legal rules on causation or remoteness of loss. The reference to ‘matters’ is to legally relevant considerations, not to any procedural steps which firms may be required to take. For example, firms may be required to gather certain categories of evidence. Examples of ‘steps’ would be requiring firms to gather evidence by specified methods or to record their decision making in a certain form.

1.5.13 **G** A third significant area relates to the period under review. The *consumer redress scheme rules* will specify a start date (referred to as the ‘specified date’ in section 404(3) of the *Act*) and most likely also an end date (see section 404A(1)(f) of the *Act*) for the activities and sales to be reviewed. This will limit the scope of a firm’s investigations under a scheme.

1.5.14 **G** A fourth area that could be covered in *consumer redress scheme rules* is the content of a firm’s communication to consumers about the outcome of their investigation under a scheme. Detailing the content of the communications that consumers can expect to receive will ensure consistency across firms as well as clarity for consumers. It will also be of benefit to firms should *complaints* subsequently be referred to the *Financial Ombudsman Service*. This is because a comprehensive communication may help to make it apparent to the *Ombudsman* at the outset that a firm has undertaken its investigation in accordance with the scheme. Firms may also be required to draw the scheme to the attention of the *Financial Ombudsman Service* in any individual cases that are referred to it. As such, the *FCA* will consult the *Financial Ombudsman Service* on the content of such communications.

1.5.15 **G** Fifthly, the *scheme rules* could require firms to provide information to the *FCA* (e.g. information about how they are conducting their investigations under the scheme, how many consumers have opted to have their cases reviewed, etc.).

Issues that come to light during the period in which the scheme is running

1.5.16 **G** The *FCA* will monitor schemes while they are running. If it became apparent during the operation of a scheme that it would be desirable for the *scheme rules* to cover other issues (e.g. if firms or consumer groups informed the *FCA* that it would be helpful if further examples of failures pursuant to section

404A(1)(b) of the *Act* were given), the *FCA* would be able to amend the *rules* accordingly. Any such amendments would be subject to the usual consultation process as set out in ■ CONRED 1.2.

1.5.17 **G** Alternatively, the *FCA* could give general or individual *guidance* to firms on issues that arise during the operation of a scheme. General *guidance* would also be subject to the consultation process.

Types of redress a firm can be required to make under a consumer redress scheme

1.5.18 **G** The *FCA* is able to set out in scheme *rules* the kinds of redress that are to be made to consumers. The only kinds of redress the *FCA* can secure in this way are those which it considers to be just (see section 404A(4) and section 404F(1) of the *Act*). For example, instead of providing cash compensation, the *FCA* could require firms to top up pensions or offer to alter the terms of a contract.

1.5.19 **G** That said, the *FCA* is required to have regard to the nature and extent of the losses or damage in question (see section 404A(5) of the *Act*) and so will take into account the type of relief that a court would grant.

1.5.20 **G** Redress made under a *consumer redress scheme* may include interest (see section 404F(1) of the *Act*). Decisions regarding the rate of interest and the basis for calculation will be made on a scheme-by-scheme basis and will be subject to the consultation process.

1.5.21 **G** A *consumer redress scheme* cannot extend normal limitation periods. Under the Limitation Act 1980, the general position regarding time limits for bringing a claim in England and Wales is as follows:

- (1) 6 years from the event for claims in contract and claims in tort concerning non-latent damages; and
- (2) 3 years from actual or constructive awareness for claims in tort concerning latent damages until 15 years from the event at which point (for most cases) the right to claim expires irrespective of any awareness considerations.

[**Note:** This is only a summary of the position and the legislation itself should be consulted when determining the limitation period applicable to any particular case. It should also be noted that the position under the law in Scotland and Northern Ireland is different.]

1.5.22 **G** Firms may only be required to make redress to consumers who are within the limitation period for bringing their case to court at the time the *FCA* makes the *rules* (see section 404(8) of the *Act*). In other words, once a scheme has been made the 'clock will stop' on the relevant limitation period. For example, if a scheme began in July 2015 and the limitation period for a consumer to take their case to court would have expired in September 2015, the firm would still need to deal with the consumer's case under the scheme,

even if it did not investigate that consumer’s particular case until, for example, November 2015.

1.5.23 **G** The *FCA* will endeavour to provide as much direction as possible in the scheme *rules* as to how redress is to be calculated (e.g. by setting out a formula or other methodology) in order to assist both firms and the *Ombudsman*.

1.5.24 **G** The section 404 power does not in itself remove a consumer’s right to take a case to the courts. However, any redress received in court proceedings would be discounted from compensation payable under a *consumer redress scheme* and vice versa. Scheme *rules* would also deal with the situation where a consumer had previously received redress from the *Financial Ombudsman Service*.

Waivers or modifications of the scheme rules

1.5.25 **G** Firms can apply for a *waiver* or modification of the scheme *rules*. For example, if a firm believes that it has already provided redress to relevant customers through a voluntary past business review it can apply to the *FCA* for a *waiver* from, or modification of, the *rules* in the usual way (see section 138A of the *Act*).

1.5.26 **G** The *FCA* may not give a *waiver* or modification unless it is satisfied that:
(1) compliance by the firm with the *rules*, or with the *rules* as unmodified, would be unduly burdensome, or would not achieve the purpose for which the *rules* were made; and
(2) the *waiver* or modification would not adversely affect the advancement of any of the *FCA’s operational objectives*.

1.5.27 **G** The *FCA* may impose conditions on a *waiver* or modification (e.g. additional reporting requirements).

Dealing with complaints when a consumer redress scheme is in place

1.5.28 **G** To avoid the risk of potential overlaps between the *rules* in *DISP* and the operation of any *consumer redress scheme*, the *FCA* has switched off the *complaints resolution rules*, the *complaints time limits rules*, the *complaints record rules* and the *complaints reporting rules* in relation to complaints where the subject matter falls to be dealt with (or has been dealt with) under a *consumer redress scheme*. *Complaints* which fall outside the scope of a scheme will continue to be subject to *DISP* in the usual way.

1.5.29 **G** The *FCA* will also consider whether it is appropriate to grant a *waiver* or modification of the *DISP rules* whilst a scheme is being consulted on. As set out in ■ CONRED 1.5.27G, the *FCA* may impose conditions on a *waiver* or modification (e.g. conditions relating to handling *complaints* from complainants who claim to be in financial difficulty).

Non-compliance with the consumer redress scheme rules

- 1.5.30 **G** The *FCA* has a variety of tools at its disposal if a firm does not comply with a scheme. For example, the *FCA* will be able to take disciplinary action if a firm is failing to operate a scheme properly (see Part XIV and section 404C of the *Act*). The *FCA* is also able to take over the conduct of the investigation required under the scheme, or appoint a third party to do so (see section 404A(1)(k) of the *Act*).

Publication of the existence of a scheme

- 1.5.31 **G** The *FCA* will apply the approach to transparency it has set out in its 'Transparency discussion paper: Summary of feedback and our response' (FS13/1) at <https://www.fca.org.uk/your-fca/documents/feedback-statements/transparency-framework>. The *FCA* has a presumption in favour of transparency, unless there are compelling regulatory, legal or other reasons to the contrary, when considering whether, when and how to publicise a scheme or proposed scheme, over and above its publicity obligations under the *Act*.
- 1.5.32 **G** As set out in ■ CONRED 1.2.4G, the *FCA* would be likely to publicise the work it has been doing in the run up to the launch of a formal consultation paper. The consultation paper itself will be available on the *FCA*'s website.
- 1.5.33 **G** Assuming the scheme *rules* are made following consultation, the final *rules* will also be available on the *FCA*'s website. The *rules* will clearly set out the type of firms and activities to which the scheme applies. The information available on the website will enable third parties such as consumer groups to disseminate information about the scheme.
- 1.5.34 **G** The *FCA* will also be able to go further than this in appropriate cases and run its own publicity campaign. This might include newspaper or radio advertisements designed to increase awareness of the scheme amongst consumers. Such advertisements would aim to make clear the scope of the scheme (e.g. the types of products and services the scheme covers) and any action that consumers need to take (e.g. the extent to which they need to contact their firm directly or whether their case will automatically be investigated by the firm without the need for any action on their part).
- 1.5.35 **G** In addition, the *FCA* has the option to include in the scheme *rules* a requirement on firms to publicise the scheme themselves.
- 1.5.36 **G** In considering whether to publish the names of individual firms that are subject to a scheme, the *FCA* will also have regard to the *FCA*'s transparency framework, and in particular its confidentiality restrictions, the extent to which naming firms will enable consumers to make informed judgements (e.g. it may not always be possible to ensure that the list of firms subject to a scheme is exhaustive), as well as relevance and timeliness (e.g. the extent to which consumers will be made aware of the firms involved in a scheme through any customer contact exercise prescribed in the scheme).

1.6 Role of the Financial Ombudsman Service and the Financial Services Compensation Scheme

How the Financial Ombudsman Service will deal with complaints where there is a relevant consumer redress scheme

- 1.6.1 **G** *Complaints about:*
- (1) an act or omission of a firm where the subject matter of the *complaint* falls to be dealt with (or has properly been dealt with) under a *consumer redress scheme*; or
 - (2) a determination made by a firm under a *consumer redress scheme*; or
 - (3) a failure by a firm to make a determination under a *consumer redress scheme*;
- will all fall within the compulsory jurisdiction of the *Financial Ombudsman Service* (see section 404B(11) of the *Act*).
- 1.6.2 **G** Whether the *Ombudsman* will, or will not, consider a complaint and, if so, on what basis will depend on the circumstances of the complaint, including in particular on when the complaint is received by the *Financial Ombudsman Service* and also on whether the firm and consumer agree that the *complaint* should not be determined by reference to what, in the opinion of the *Ombudsman*, the determination under the consumer redress scheme should be or should have been (see section 404B(1A) and (2B) of the *Act*).
- ### Complaints received by the Financial Ombudsman Service before a scheme comes into effect
- 1.6.3 **G** A scheme must be established by the *FCA* in accordance with the *FCA's* rule-making processes, including consultation and cost benefit analysis (CBA). Publicity in the run up to formal consultation may lead to a rapid rise in the number of *complaints* to the *Financial Ombudsman Service* about the issue in question. Alternatively, the *Financial Ombudsman Service* may already have received a number of *complaints* about the issue for which a scheme is being developed to address.
- 1.6.4 **G** As these are *complaints* that were referred to the *Financial Ombudsman Service* before the scheme came into effect, the *Ombudsman* would have to determine the *complaint* on the usual fair and reasonable basis under section 228 of the *Act*.

Complaints received by the Financial Ombudsman Service while a consumer redress scheme is in effect

1.6.5 **G** Where the *complaint* is about the subject matter of a scheme or a failure by a firm to make a determination under a scheme (where the firm has not yet dealt with it because the time limit for the firm to deal with cases under the scheme has not expired) under **■ DISP 3** the *Ombudsman* will (unless **■ DISP 2.8.1R(4)** applies) refer the *complaint* back to the firm to be dealt with in accordance with the scheme.

1.6.6 **G** In other cases the *Ombudsman* may have to consider the merits of the *complaint*. However, the *complaint* will be determined by reference to what, in the opinion of the *Ombudsman*, the determination under the *consumer redress scheme* should be or should have been (unless the firm and consumer agree that the *complaint* should not be so determined – see **■ CONRED 1.6.7G**). Examples would be where:

- (1) the firm does not offer redress in the determination, or makes no determination within the time limit for doing so, and the consumer claims that (under the terms of the scheme) the firm should have done so; or
- (2) the scheme provides for different forms of redress depending on the circumstances of the case, but the firm has offered one form of redress and the consumer claims that (under the terms of the scheme) the firm should have offered another form of redress.

1.6.7 **G** Where the firm and the consumer agree that the *complaint* should not be determined by reference to what, in the opinion of the *Ombudsman*, the determination under the *consumer redress scheme* should be or should have been (see section 404B(1A) and (2B) of the Act), the *Ombudsman* will determine the *complaint* by reference to what is fair and reasonable in all the circumstances of the case (see **■ DISP 3.6**).

Complaints received by the Financial Ombudsman Service after a consumer redress scheme has ended

1.6.8 **G** If a *complaint* is about:

- (1) a firm’s determination under the scheme (or failure to make a determination in accordance with the scheme); or
- (2) an act or omission the subject matter of which has been dealt with under the scheme;

the *complaint* will be determined by reference to what, in the opinion of the *Ombudsman*, the *redress determination* under the *consumer redress scheme* should have been, rather than by reference to what is ‘fair and reasonable’ (unless the firm and the consumer agree otherwise – see **■ CONRED 1.6.7G**).

1.6.9 **G** The point at which a scheme ends will be set out in the scheme and some schemes may be of indefinite duration. In relation to an ‘opt-in’ scheme, the FCA would ensure that the scheme covers how to deal with customers who nevertheless contacted firms after that date.

1.6.10 **G** The *Financial Ombudsman Service* may also receive *complaints* about cases that have been dealt with by a firm under a *consumer redress scheme* when the firm should have dealt with the issue under the normal *complaints* process in *DISP*. In such cases the *Ombudsman* will determine the *complaint* in accordance with its usual ‘fair and reasonable’ jurisdiction and the usual *DISP* rules will apply. *DISP* seeks to clarify this point by referring (in appropriate places) to *complaints* that have properly been dealt with under a *consumer redress scheme*. It is important to note that “properly” here refers to the scope of the scheme (i.e. should the *complaint* have been dealt with under the scheme at all?) rather than the way in which the scheme has been applied in a particular case (i.e. the *complaint* did fall within the scheme but the firm applied the scheme incorrectly).

Non-consideration and dismissal of complaints by the Ombudsman

1.6.11 **G** The relevant *DISP* provisions provide that the *Ombudsman* can usually (unless the firm and the consumer consent) only consider a *complaint* which falls to be dealt with under a *consumer redress scheme* if the firm has already provided a *redress determination* (akin to a *final response*) or failed to do so within the time limits specified in the scheme (see ■ **DISP 2.8.1R**).

1.6.12 **G** *DISP* sets out the circumstances in which the *Ombudsman* may dismiss a *complaint*. There are no express rules which allow the *Ombudsman* to dismiss a *complaint* which falls to be dealt with (or has been dealt with) under a *consumer redress scheme* (see ■ **DISP 3.3.4AR**). Whether a *complaint* which falls to be dealt with (or has been dealt with) under a *consumer redress scheme* should be dismissed is a matter for the *Ombudsman* to decide.

Case fees

1.6.13 **G** The definition of *chargeable case* contains an exception which provides that a case fee may not be charged where the *Ombudsman* considers it apparent from the *complaint* when it is received, and from any *redress determination* issued by the firm, that the firm has reviewed the subject matter of the *complaint* and issued a *redress determination* in accordance with the terms of the *consumer redress scheme*. However, this exception does not apply where the complainant and the firm agree that the *complaint* should not be dealt with by the *Ombudsman* in accordance with the *consumer redress scheme*.

1.6.14 **G** If it is not apparent to the *Ombudsman* from the *complaint* when it is received, and from any *redress determination* issued by the firm, that the firm has reviewed the subject matter of the *complaint* and issued a *redress determination* in accordance with the terms of the *consumer redress scheme*, a case fee will be chargeable. It will therefore be in firms’ interests to ensure that a *redress determination* clearly sets out the outcome of their investigation under the scheme as well as the basis for it.

Time limits

1.6.15 **G** Similar time limits will apply to *complaints* to the *Financial Ombudsman Service* about the outcome of a firm’s investigation under a scheme as

currently apply to other complaints referred to the *Financial Ombudsman Service*.

- 1.6.16 G Consumers will have six months from the date on which the firm sent them a *redress determination* to complain to the *Financial Ombudsman Service*. If a firm has failed to provide a *redress determination* (e.g. because it omitted to deal with a particular consumer's case under the scheme), consumers will have the longer of six years from the event complained of and three years from the date on which the consumer became aware (or ought reasonably to have become aware) that they had cause for complaint, to complain to the *Financial Ombudsman Service* (in accordance with the existing standard time limits in ■ DISP 2.8). A firm cannot consent to the *Ombudsman* considering the complaint outside these standard time limits where the complaint is a "relevant complaint" within the meaning of section 404B(3) of the *Act*. However, the *Ombudsman* can consider complaints outside of these standard time limits where, in the view of the *Ombudsman*, the consumer's failure to comply with the time limits was as a result of exceptional circumstances.

Awards

- 1.6.17 G Where a *consumer redress scheme* is in place, money awards and directions will reflect what, in the opinion of the *Ombudsman*, the outcome of the firm's investigation should be (or should have been) under the *consumer redress scheme* (see section 404B(5) and (8) of the *Act*). This applies unless the firm and the consumer agree that the *complaint* should not be determined in this way (see section 404B(1A), (2B) and (3) of the *Act*).
- 1.6.18 G The money award may specify the date by which the amount awarded is to be paid and may provide for interest to be payable, at a rate specified in the award, on any amount not paid by that date (see section 404B(7) of the *Act*).
- 1.6.19 G The cap on the maximum money award the *Ombudsman* can make will also apply in relation to *consumer redress schemes* (see section 404B(5) of the *Act*). Even so, when making *scheme rules*, the *FCA* may decide to specify a different monetary limit in relation to *complaints* falling within the scope of the scheme (see section 229(7) of the *Act*). Such a *rule* would normally be subject to consultation before the scheme takes effect (see ■ CONRED 1.2.1G). As is usual practice, the *Ombudsman* will be able to recommend that the firm pay a larger amount than the cap (but this will not be binding on firms in any way). This does not mean that the *Ombudsman* can recommend a larger amount than should be paid under the scheme.

Firm-by-firm past business reviews that have already been agreed by a firm before a consumer redress scheme is made

- 1.6.20 G If a firm had fairly reached a voluntary settlement with its consumers on a full and final settlement basis, the *Financial Ombudsman Service* would not usually look to re-open this.

Waivers of the scheme rules for particular firms

- 1.6.21 G If a firm is granted a *waiver* of the scheme *rules* as a whole, the *consumer redress scheme* will not apply to that firm. Consequently, any *complaints*

about the firm that are referred to the *Financial Ombudsman Service* will be dealt with in accordance with the *Ombudsman’s* usual approach of determining what is, in their view, fair and reasonable in all the circumstances of the case.

Failures by firms that span the period before and after an activity became regulated by the FCA

1.6.22 **G** In this situation, the *Act* would require the *Financial Ombudsman Service* to decide *complaints* within the scope of a scheme by applying the scheme (unless the relevant firm and consumer otherwise agreed – see section 404B of the *Act*) and *complaints* outside the scope of a scheme on the basis of its usual approach (see section 228 of the *Act*). However, as explained in ■ CONRED 1.4.5G, it would be possible for the Treasury by order to widen the type of financial services that *consumer redress schemes* can cover in order to encompass the pre-regulation activities (see section 404G of the *Act*).

The FSCS

1.6.23 **G** The *FSCS* will consider claims that fall within the scope of a *consumer redress scheme* in accordance with the scheme (see ■ COMP 12.4.22R). However, the *FSCS* has discretion to depart from the terms of the scheme where it considers it essential in order to provide the claimant with fair compensation. An example might be the *FSCS* paying compensation in cash rather than augmenting a consumer’s current pension plan (as the *FSCS* is not in a position to advise the consumer to set up a new, or amend an existing, pension plan in the way that a firm may be able to).

1.6.24 **G** The *FSCS’s* limits on the amount of compensation it can pay in the event of a claim will apply.

1.7 Challenging a consumer redress scheme

Method of challenge

- 1.7.1 **G** Any *person* (e.g. firms, consumers or their representatives) may apply to the Upper Tribunal for a review of any *rules* made (see section 404D of the *Act*). The contact details for the Upper Tribunal are as follows:

The Upper Tribunal (Tax and Chancery Chamber)

5th Floor, Rolls Building

7 Rolls Buildings

Fetter Lane

London EC4A 1NL Tel: 020 7612 9730

Email: uttchmcts.gsi.gov.uk

- 1.7.2 **G** The Upper Tribunal is independent of the *FCA*. Its usual role in relation to financial services is to hear references arising from *decision notices* or *supervisory notices* issued by the *FCA*. However, it has also been given a special role in relation to *consumer redress schemes*.

- 1.7.3 **G** The judge presiding at *consumer redress scheme* proceedings in the Upper Tribunal will be a judge of the High Court, the Court of Appeal or Court of Session (or such other person as may be agreed by the Lord Chief Justice, the Lord President or the Lord Chief Justice of Northern Ireland; and the Senior President of Tribunals) (see section 404D(12) of the *Act*).

Dealing with consumer redress scheme cases

- 1.7.4 **G** The general rule is that, in determining an application, the Upper Tribunal will apply the principles applicable on an application for judicial review (see section 404D(5) of the *Act*). Therefore, the Tribunal will consider issues such as:

- (1) whether the *FCA* has acted within its powers;
- (2) whether the *FCA* has followed a fair process;
- (3) whether the *FCA* has specified kinds of redress that are 'just'; and
- (4) whether the *FCA* has acted irrationally or unreasonably (e.g. is the amount of time in which firms are given to conduct an investigation unreasonable?).

1.7.5 **G** Nonetheless, in relation to two particular aspects of a *consumer redress scheme*, the Upper Tribunal will be able to conduct a full merits review to consider whether the *FCA's* interpretation of the law was correct (see section 404D(6) and (7) of the *Act*). These two aspects are:

- (1) any examples that the *FCA* has set out in the scheme *rules* of things done, or omitted to be done, that are to be regarded as constituting a failure to comply with a requirement; and
- (2) any matters to be taken into account, or steps to be taken, that the *FCA* has set out in the scheme *rules* for the purposes of:
 - (a) assessing evidence as to a failure to comply with a requirement; or
 - (b) determining whether such a failure has caused (or may cause) loss or damage to consumers.

1.7.6 **G** In relation to these two aspects, the *FCA* is restricted to what a court or Tribunal would do. As such, the Upper Tribunal's role will be to check whether the *FCA* came to the correct view.

Procedure in the Upper Tribunal

1.7.7 **G** The detailed rules that govern the practice and procedure to be followed in the Upper Tribunal are available on the Government's website (<https://www.gov.uk/government/publications/upper-tribunal-procedure-rules>) and are subject to periodic revision.

Possible outcomes of an application to the Upper Tribunal

1.7.8 **G** The Upper Tribunal may:

- (1) dismiss the application (so that the scheme *rules* will stand); or
- (2) make an order quashing any rules made under section 404 or any provision of those *rules* (see section 404D(2) of the *Act*).

1.7.9 **G** The Upper Tribunal may also award damages to the applicant (see section 404D(10) of the *Act*).

1.7.10 **G** It is possible to appeal an Upper Tribunal decision to the Court of Appeal on a point of law.

1.8 Imposing a consumer redress scheme on a firm under section 404F(7) of the Act

Triggers that must be met before the FCA can impose a consumer redress scheme under section 404F(7)

- 1.8.1 **G** Section 404F(7) of the *Act* empowers the *FCA* to require a firm “to establish and operate a scheme which corresponds to, or is similar to, a consumer redress scheme” established under section 404 of the *Act* (see ■ CONRED 1.2 to 1.7).
- 1.8.2 **G** The process by which the *FCA* may vary the authorisation of a *payment service provider* or *electronic money issuer* is not specifically addressed in this *guidance*.
- 1.8.3 **G** The relevant triggers for determining whether the *FCA* can require an *authorised person* with a *permission* to establish and operate a scheme which corresponds to, or is similar to, a *consumer redress scheme* are different to those that apply for an ‘industry wide’ *consumer redress scheme* established under section 404 of the *Act*. Rather than considering the test set out in section 404(1) of the *Act*, the *FCA* has to consider the relevant legal triggers for varying a *permission* or varying or imposing a *requirement* on a firm (see sections 55H, 55J and 55L of the *Act*).
- 1.8.4 **G** However, before the *FCA* varies a firm’s *permission* under section 55J(2) of the *Act* on its own initiative, or imposes a *requirement* on a firm under section 55L of the *Act*, the *FCA* must consider whether it would be ‘more appropriate’ to proceed under the Competition Act 1998. If the *FCA* considers that it would be more appropriate to proceed under the Competition Act 1998, the *FCA* must not exercise its powers under sections 55J(2) or 55L of the *Act* (see section 234K of the *Act*). In the remainder of this section, it is assumed that the *FCA* considers that it is able to exercise its powers under the *Act* rather than under the Competition Act 1998.
- 1.8.5 **G** The *FCA* may vary a firm’s *permission* under section 55J of the *Act* or impose or vary a *requirement* under section 55L of the *Act*, on its own initiative, if it appears to the *FCA* that:
 - (1) the firm is failing, or likely to fail, to satisfy the *threshold conditions* for which the *FCA* is responsible; or

- (2) the firm has failed, for at least a year, to carry on a *regulated activity* to which its *permission* relates; or
- (3) it is desirable to exercise the power in order to advance one or more of the *FCA's operational objectives*, for example, its *consumer protection objective* of securing an appropriate degree of protection for *consumers*.

1.8.6 **G** Further information about varying a firm's *permission* or varying or imposing *requirements* on the *FCA's own initiative* under section 55J or section 55L of the Act is set out in EG 8.

1.8.7 **G** The *FCA* has no power to accept an application from an *authorised person* to vary its *permission* where the *authorised person* is a *PRA-authorised person* (see sections 55H and 55I of the Act). For all other firms, an *authorised person* with a *permission* can voluntarily apply to the *FCA* to vary its *permission* under section 55H of the Act. The *FCA* may refuse the application if it appears to the *FCA* that it is desirable to do so in order to advance any of its *operational objectives*, for example, its *consumer protection objective* (see section 55H(4) of the Act). The *FCA* also has the power to impose or vary a *requirement* under section 55L of the Act, in order to establish and operate a scheme which corresponds to, or is similar to, a scheme established under section 404 of the Act. However, where the *authorised person* is a *PRA-authorised person* (or is a member of a group which includes a *PRA-authorised person*), the *FCA* must consult the *PRA* (see section 55L(7) of the Act). As with voluntary applications to vary a *permission*, the *FCA* may refuse an application to voluntarily impose, vary or cancel a requirement if it appears to the *FCA* that it is desirable to do so in order to advance any of its *operational objectives* (see section 55L(5) of the Act).

1.8.8 **G** Further information about the voluntary variation of a *permission* or the voluntary imposition or variation of a *requirement* is set out in ■ SUP 6.

Consultation

1.8.9 **G** The decision to require a firm to establish and operate a scheme pursuant to section 404F(7) affects a firm, or a small number of firms, each individually rather than the whole industry or sector of the industry. As with any supervisory or enforcement action it takes against a specific firm, the *FCA* is not obliged to consult before deciding to vary a firm's *permission* or impose or vary a *requirement*.

Circumstances in which the FCA will engage section 404B

1.8.10 **G** As already explained, when determining whether to vary a firm's *permission* under sections 55H or 55J or to impose a *requirement* under section 55L to establish and operate a scheme pursuant to section 404F(7), the *FCA* will need to consider whether the statutory tests referred to in ■ CONRED 1.8.5G (for own initiative action) and ■ CONRED 1.8.7G (where a firm applies voluntarily) have been met. This will often involve a consideration of the *FCA's operational objectives* and, in particular, the *consumer protection objective*. The *FCA* will also consider the regulatory principles in section 3B of the Act and follow the normal principles of administrative law.

- 1.8.11** **G** This exercise will be undertaken on a case-by-case basis and in the round by looking at all of the proposed terms, including any terms which have been included to make provision corresponding to section 404B (under section 404F(7)(b)). It is important to note that engaging section 404B will not automatically or always advance one or more of the *FCA's operational objectives*, for example its *consumer protection objective*, even if the other terms of the proposed scheme do.
- 1.8.12** **G** If section 404B is engaged then broadly the *Ombudsman* is normally required to decide a *complaint* referred to the *Financial Ombudsman Service* after the scheme comes into effect on the basis of what, in the opinion of the *Ombudsman*, the determination under the scheme should be (or should have been). This will mean that the *Ombudsman* will not determine the *complaint* by reference to what, in their view, they consider to be fair and reasonable in all the circumstances of the case. To assist the *Financial Ombudsman Service* in identifying relevant cases, firms may be required to draw the scheme to the attention of the *Financial Ombudsman Service* in any individual cases that are referred to it. However, if the firm and the consumer agree that the *complaint* should not be determined by reference to what, in the opinion of the *Ombudsman*, the determination under the *consumer redress scheme* should be or should have been, or if the subject matter of the *complaint* does not fall to be dealt with under the scheme (or part of it does not) then the *Ombudsman* may determine the *complaint* (or that aspect of the *complaint*) in accordance with what they consider to be fair and reasonable in the usual way.
- 1.8.13** **G** It is likely that many section 404F(7) schemes will be set up because, in the *FCA's* view, it is desirable to advance the *consumer protection objective* of securing an appropriate degree of protection for *consumers*. In determining what is desirable to advance that objective, the *FCA* will have regard to a wide range of factors. Many of these are likely to be interdependent considerations rather than standalone issues. These may include (but are not limited to):
- (1) how many consumers have been (or may be) affected by the act or omission to which the proposed scheme relates. It will normally only be appropriate to consider engaging section 404B where the issue affects a large number of consumers;
 - (2) whether engaging section 404B would result in higher or faster redress for consumers (whether or not they have complained individually) than would otherwise be the case. In other words, the extent of any difference in redress between the proposed scheme and what consumers may receive through the *Financial Ombudsman Service* or the courts;
 - (3) the extent to which the overall effect of the proposed scheme provides a fair and reasonable outcome for individual consumers, having regard to the desired outcome for the group of affected consumers overall; and
 - (4) whether the *Financial Ombudsman Service* has had a material number of *complaints* about the act or omission, has an established approach to dealing with them and the extent to which the proposed scheme aligns with this approach.

Consultation with the Financial Ombudsman Service when the FCA is considering engaging section 404B

- 1.8.14 **G** Where the *FCA* is considering engaging section 404B, it will consult with the *Financial Ombudsman Service* at an early stage and allow time for a fully-considered, written response. The *Financial Ombudsman Service* is in a position to say:
- (1) whether it has already received cases about the particular firm and acts/omissions, whether any cases have been decided and (if so) what the outcomes were;
 - (2) insofar as the acts/omissions are not fact-specific, whether it has previously considered similar cases and has adopted a particular approach;
 - (3) the sorts of *complaints* it can foresee might be made in future by consumers about the firm in relation to the acts/omissions concerned;
 - (4) how the outcomes of cases decided by the *Ombudsman*, or the *Ombudsman's* approach to similar cases, would compare to the outcomes under the proposed scheme; and
 - (5) if the *Financial Ombudsman Service* is likely to encounter any practical issues in implementing the proposed scheme.

- 1.8.15 **G** The *Financial Ombudsman Service* is impartial between *consumers* and firms. The *FCA* will not treat the *Financial Ombudsman Service's* input as a proxy for input on behalf of *consumers*.

- 1.8.16 **G** The *Financial Ombudsman Service* cannot lawfully guarantee how it will decide cases that fall outside the scope of the scheme (e.g. pre-regulation cases or those referred to the *Financial Ombudsman Service* before the scheme came into effect). It may, however, be willing to describe its general approach to such cases.

Internal process to be followed if the FCA proposes to engage section 404B

- 1.8.17 **G** Where the proposal is to engage section 404B, the *FCA* will apply the following governance procedure in addition to its usual processes:
- (1) all decisions to engage section 404B will be taken by the *FCA's* Executive Committee or a sub-committee;
 - (2) the Committee/sub-committee will need to be satisfied that there has been adequate consultation internally to ensure full consideration of consumers' interests;
 - (3) the Committee/sub-committee will consider written views from the *Financial Ombudsman Service* before reaching a decision; and
 - (4) if section 404B is engaged, the document outlining the terms of the scheme will be published on the *FCA's* website, either in the *FCA Register* or (with cross-reference from the *FCA Register*) in a register of such schemes.

Challenging a consumer redress scheme imposed under section 404F(7)

- 1.8.18** G If the firm has voluntarily applied to establish and operate the scheme, it is unlikely to challenge the *FCA* for accepting its application. If the *FCA* proposes to refuse a firm’s application for a section 404F(7) scheme, the *FCA* must give the firm a *warning notice* (section 55X(2)). If, after consideration by the *FCA*’s decision makers, the *FCA* decides to refuse the application, the *FCA* must give the firm a *decision notice* (section 55X(4)). The firm would be able to challenge the *decision notice* by referring the *FCA*’s decision to the Upper Tribunal (section 55Z(3)).

- 1.8.19** G If the *consumer redress scheme* was imposed on the *FCA*’s own initiative, the *FCA* must give the firm a *supervisory notice* (section 55Y). The firm would be able to challenge the *supervisory notice* by referring the *FCA*’s decision to the Upper Tribunal (section 55Z(3)). The Tribunal may dismiss the reference or remit the matter to the *FCA* with a direction to reconsider and reach a decision in accordance with the Tribunal’s findings (section 133(6) of the *Act*).

Chapter 2

Arch cru Consumer Redress Scheme

2.1 Application and subject matter of the scheme

2.1.1

R

Application to firms which made personal recommendations.....

- (1) The whole of this chapter applies to a *firm* which made a *personal recommendation* in relation to an Arch cru fund, after which a *consumer* made an investment in the Arch cru fund, and to which the suitability requirements (specified at paragraph 5.1R of the instructions in ■ CONRED 2 Annex 13) applied.
- (2) The Arch cru funds referred to in *CONRED* are any of the following sub-funds of the CF Arch cru Investment Funds and CF Arch cru Diversified Funds:
 - (a) CF Arch cru Investment Portfolio;
 - (b) CF Arch cru Specialist Portfolio;
 - (c) CF Arch cru Income Fund;
 - (d) CF Arch cru Balanced Fund;
 - (e) CF Arch cru Global Growth Fund; or
 - (f) CF Arch cru Finance Fund.

2.1.2

R

Application to persons who have assumed a firm's liabilities.....

- (1) The whole of this chapter also applies to a *person* who has assumed a liability (including a contingent one) in respect of a failure by a *firm* to whom this chapter applies.
- (2) A *person* in (1) must either:
 - (a) perform such of the obligations as the *firm* is required to perform under this chapter; or
 - (b) ensure that those obligations are performed by the *firm*;

and must notify the *FCA*, by 29 April 2013, by email to ArchCruProject@fca.org.uk, as to whether that *person* or the *firm*, or both, will be performing those obligations.
- (3) References in this chapter to a *firm* are to be interpreted as referring to a *person* in (1) where the context so requires.

Wider application of certain provisions

2.1.3

R

■ CONRED 2.2, ■ CONRED 2.4.1R (1), ■ CONRED 2.8.1 R, ■ CONRED 2.8.2 R, ■ CONRED 2.8.3 R and ■ CONRED 2.8.4 G also apply to any *firm* which has carried out any of the following *regulated activities* for a *customer* in relation to an Arch cru fund:

- (1) *advising on investments*; or
- (2) *arranging (bringing about) deals in investments*; or
- (3) *making arrangements with a view to transactions in investments*; or
- (4) *managing investments*;

except for a *firm* which, at the relevant time, was a platform service provider; meaning it:

- (5) provided a service which involved *arranging* and safeguarding and administering assets;
- (6) distributed *retail investment products* which were offered to *retail clients* by more than one product provider; and
- (7) did not carry on the *regulated activities of advising on investments or managing investments*.

Duration of the scheme

2.1.4

R

The consumer redress scheme created by this chapter comes into force on 1 April 2013 and has no end date.

Subject matter of the scheme

2.1.5

R

The subject matter of the scheme is whether a *firm* complied with the suitability requirements (specified in paragraph 5.1R of ■ CONRED 2 Annex 13 R) in cases where the conditions in ■ CONRED 2.4.2 R are satisfied (these are referred to in this chapter as "scheme cases").

2.1.6

R

A scheme case ceases to be within the subject matter of the scheme if the *firm*:

- (1) did not have sufficient information to determine the scheme case and has taken the required steps to obtain further information from the *consumer* but still does not have sufficient information (as more fully described in ■ CONRED 2.5.9 R); or
- (2) has not received an opt-in from the *consumer* by 22 July 2013 (or later, where the provision in ■ CONRED 2.5.1R (2) in relation to exceptional circumstances applies); or
- (3) is unable to contact a *consumer* (as more fully described in ■ CONRED 2.8.3R (2)).

2.1.7 **G** Where the *firm* has not received, by 22 July 2013, a response from the *consumer* to the letter required by ■ CONRED 2.4.4 R or (where applicable) to the letter required by ■ CONRED 2.4.5R (1) or ■ (2), the *firm* should handle any complaint received from a *consumer* after this date in relation to the sale of Arch cru funds in accordance with the complaint handling rules in *DISP*, unless ■ CONRED 2.5.1R (2) (in relation to exceptional circumstances) applies.

Defined terms

2.1.8 **R** Certain words and phrases specific to CONRED are defined in ■ CONRED App 1 and the *Glossary*. All words in italics are defined in the *Glossary*.

2.3 Notifications and reports to the FCA

2.3.1 **R** Notifications and other reports required by these *rules* to the *FCA* must be sent to the email address specified.

2.3.2 **G** If the *firm* is to send an encrypted email to the *FCA* it will need to download the public PGP key from the *FCA* website and import the key into its email client software.

2.4 Consumer redress scheme: identifying scheme cases and inviting consumers to request a review

Deadlines to complete the steps in this section

- 2.4.1 **R**
- (1) By 29 April 2013, a *firm* must take the first and second steps set out in this section and send a *redress determination* in the form set out in ■ CONRED 2 Annex 1 R to any *customer* in ■ CONRED 2.1.3 R who falls outside the subject matter of the scheme.
 - (2) A *firm* must, by the deadlines set out in ■ CONRED 2.4.5 R, take the third step set out in this section.

First step: identify cases within subject matter of scheme

- 2.4.2 **R**
- The first step is to identify all cases within the subject matter of the scheme; ie, where each of the following conditions is satisfied ("scheme cases")
- (1) the *firm* made a *personal recommendation* to a *consumer* to invest in an Arch cru fund specified above at ■ CONRED 2.1.1R (2) and after that recommendation the *consumer* did so invest;
 - (2) the suitability requirements (specified at paragraph 5.1R of ■ CONRED 2 Annex 13 R) applied to the recommendation;
 - (3) the law applicable to the obligations of the *firm* arising in connection with the *personal recommendation* is that of a UK territory (that is, England, Wales, Scotland or Northern Ireland) (see ■ CONRED 2.4.7 R);
 - (4) if the applicable law in (3) is that of England, Wales or Northern Ireland, the *consumer's* investment in Arch cru funds was on or after 13 December 2006;
 - (5) if the applicable law in (3) is that of Scotland:
 - (a) the *consumer's* investment in the Arch cru fund was on or after 13 December 2007; or
 - (b) where the *consumer's* investment in the Arch cru fund was before 13 December 2007, the *consumer* did not know, and could not with reasonable diligence have known, before 13 December 2007, that he had suffered loss;

- (6) the *consumer* has not, prior to 1 April 2013, accepted an offer of redress from the *firm* or other *person* in full and final settlement of all potential claims arising out of the recommendation in (1); and
- (7) the *consumer* has not, prior to 1 April 2013, asked the *Financial Ombudsman Service* to deal with a complaint against the *firm* arising out of the recommendation in (1).

2.4.3 **E** The adoption by a *firm* of any date earlier than the date of suspension (13 March 2009) as the date when the *consumer* knew, or could with reasonable diligence have known, that he had suffered loss, may be relied upon as tending to show contravention of ■ CONRED 2.4.2 R.

Second step: send initial letters to consumers

2.4.4 **R** The second step is, for all scheme cases, to send to the *consumer* a letter in the form set out in ■ CONRED 2 Annex 2 R inviting the *consumer* to opt-in to the scheme.

Third step: send follow-up letters to consumers

2.4.5 **R** The third step is to do the following:

- (1) for all scheme cases where the *firm* has not received an opt-in, by 27 May 2013, the *firm* should send the *consumer* an opt-in reminder (in the form set out in ■ CONRED 2 Annex 3 R) by 3 June 2013 (unless the *firm* has received an opt-in in the interim);
- (2) for all scheme cases where the *firm* has not received, by 24 June 2013, an opt-in or (where applicable) by (1), the *firm* should send the *consumer* an opt-in reminder letter (in the form set out in ■ CONRED 2 Annex 4 R) by 1 July 2013 (unless the *firm* has received an opt-in in the interim); and
- (3) for all scheme cases where the *firm* has not received, by 22 July 2013 an opt-in or, where applicable by (1) or (2), the *firm* should send the *consumer* a letter in the form set out in ■ CONRED 2 Annex 5 R by 29 July 2013 (unless the *firm* has received an opt-in in the interim when it must follow the steps in ■ CONRED 2.5.1R (2)).

2.4.6 **R** For the purpose of ■ CONRED 2.4.5 R:

- (1) an 'opt-in' is an indication from, or on behalf of, a *consumer* that he wishes the *firm* to carry out a case review (as detailed in ■ CONRED 2.5); and
- (2) if a *firm* receives a *complaint* relating to the subject matter of the scheme from a *consumer* on or after 1 April 2013 and before 23 July 2013 it must treat the *complaint* as an 'opt in' to the scheme.

Applicable law

2.4.7

R

For the purposes of ■ CONRED 2.4.2R (3), the applicable law is:

- (1) where, in connection with the *personal recommendation*:
 - (a) the *consumer* has agreed to the *firm's terms of business*; and
 - (b) these include a clause providing for the application of the law of a particular UK territory (that is, England, Wales, Scotland or Northern Ireland);
that UK territory; or
- (2) if (1) does not apply: where the *firm* and the *consumer* are habitually resident in the same UK territory, and the *personal recommendation* is made there, that UK territory; or
- (3) if neither (1) nor (2) applies: where the conditions in ■ CONRED 2.4.8 R apply, the UK territory in which the *consumer* is habitually resident; or
- (4) if none of (1), (2) or (3) applies: the UK territory in which the *firm* made the *personal recommendation*.

2.4.8

R

The conditions referred to in ■ CONRED 2.4.7R (3) are that:

- (1) in the UK territory in which the *consumer* has his habitual residence, either:
 - (a) the contract under which the *personal recommendation* was provided was preceded by a specific invitation addressed to the *consumer*, or by advertising, and the *consumer* took all the steps necessary to engage the *firm*; or
 - (b) the *firm* or its agent received the *consumer's* order; and
- (2) the *personal recommendation* was provided at least in part in that UK territory.

Reporting requirement: opted-in scheme cases

2.4.9

R

By 29 July 2013, a *firm* must report to the FCA by email to archcureview@fca.org.uk ; or (if the email is encrypted) archcureviewpgp@fca.org.uk with the following information:

- (1) the total number of scheme cases (cases falling within ■ CONRED 2.4.2 R);
- (2) the total number of investments in Arch cru funds resulting from the *regulated activities* for a *customer* in ■ CONRED 2.1.3 R which fall outside the subject matter of the scheme (see ■ CONRED 2.1.5 R and ■ CONRED 2.4.2 R), with a summary explanation of the reason why in each case; and
- (3) the total number of opted-in scheme cases.

[Note: for details of how to obtain an encryption key see *guidance* above at ■ CONRED 2.3.2 G]

2.5 Consumer redress scheme: case review

Deadline to complete the steps in this section

- 2.5.1** **R** A *firm*:
- (1) in respect of any scheme case where the *firm* has received an opt-in by 22 July 2013, must take the steps set out in this section by 9 December 2013; and
 - (2) in respect of any scheme case where the *firm* has received an opt-in later than 22 July 2013, must take the steps set out in this section if the *consumer's* failure to comply with that time limit was caused by exceptional circumstances; in such a case, the deadline in (1) is extended according to the length of the delay caused by the *consumer's* failure to comply with the time limit.
- 2.5.2** **G** The *guidance* on exceptional circumstances at **CONRED 2.6.3 G** is relevant to **CONRED 2.5.1R (2)**.
- 2.5.3** **R**
- (1) For any scheme case where the *firm* has received an opt-in, but the *firm*, does not consider **CONRED 2.5.1R (2)** requires it to take the steps set out in this section, and does not intend to do so, the *firm* must send the *consumer* a *redress determination* in the form set out in **CONRED 2 Annex 6 R** within 14 days of receiving the opt-in.
 - (2) For any opted-in scheme case, the *firm* must send the *consumer*, within 14 days of receiving the opt-in, a letter in the form set out in **CONRED 2 Annex 7 R**.
- ### First step: case review of each opted-in scheme case
- 2.5.4** **R** The first step is to carry out a review (a case review) of each opted-in scheme case, by completing the template at **CONRED 2 Annex 12 R**, in accordance with the *rules* set out in the instructions at **CONRED 2 Annex 13**.
- 2.5.5** **E** Non-compliance with any of the *evidential provisions* set out in the instructions at **CONRED 2 Annex 13** may be relied upon as tending to show contravention of **CONRED 2.5.4 R**.

2.5.6 **G** In complying with **■ CONRED 2.5.4 R**, *firms* should have regard to the *guidance* set out in the instructions at **■ CONRED 2 Annex 13**.

Second step: cases of insufficient information

2.5.7 **R** (1) The second step applies only in respect of an opted-in scheme case where a *firm* has attempted to comply with the first step (**■ CONRED 2.5.4 R**) but does not have sufficient information to determine all of the following matters:

- (a) whether it has failed to comply with any of the suitability requirements specified at paragraph 5.1R of **■ CONRED 2 Annex 13**;
- (b) if so, whether that failure has caused loss or damage to the *consumer*; and
- (c) if so, what the redress should be in respect of its failure.

(2) The second step is to:

- (a) send the *consumer* a letter in the form set out in **■ CONRED 2 Annex 8 R**;
- (b) if no reply is received by the *firm* within four weeks of a letter in (a) being dispatched, the *firm* must send a letter to the *consumer*, within one further week, in the form set out in **■ CONRED 2 Annex 9 R**, and take all reasonable steps to contact the consumer by other means; and
- (c) if a reply is received from a *consumer* but the information it contains is insufficient to determine all the matters in (1), the *firm* should take all reasonable steps to obtain further information from the *consumer*.

[Note: see also **■ CONRED 2.8.7 R**.]

2.5.8 **R** A *firm* which, having carried out the second step, has acquired sufficient information to determine all of the outstanding matters must then complete the first step (**■ CONRED 2.5.4 R**).

2.5.9 **R** Where a *firm* has carried out the second step in relation to an opted-in scheme case (falling within **■ CONRED 2.4.2 R**) but still does not have sufficient information to determine all of the outstanding matters, the opted-in scheme case no longer falls within the subject matter of the consumer redress scheme created by this chapter. The *firm* must send the *consumer* a letter in the form set out in **■ CONRED 2 Annex 10 R** promptly on completion of the second step.

2.5.10 **G** Opted-in scheme cases to which the second step (**■ CONRED 2.5.7 R**) applies are likely to be exceptional, having regard to the record-keeping requirements applicable to *authorised persons* under *FCA rules* (notably *SYSC*).

Third step: redress determination

2.5.11 **R** The third step is to send the *consumer* a *redress determination* in the form of the letter set out in **■ CONRED 2 Annex 11 R** in respect of each opted-in scheme case.

Taking steps by or on behalf of FCA

- 2.5.12** **R** The *FCA* may (on giving notice to the firm) take any of the steps in ■ CONRED 2.3 to ■ CONRED 2.5, instead of the *firm*, or may appoint one or more competent persons to do so on behalf of the *FCA*, if there is a material failure by the *firm* to take any of the actions required under this chapter, including where the *firm* informs the *FCA* that it is unable or unwilling to take any of those actions because to do so would be in breach of a condition of its professional indemnity insurance. In such a case, the *firm* must:
- (1) not carry out (or, as the case may be, continue) any of the steps to be taken by the *FCA* or competent person, unless so directed by them; and
 - (2) render all reasonable assistance to the *FCA* or competent person (but any assistance, the rendering of which would invalidate the *firm's* professional indemnity insurance, is not reasonable for the purposes of this rule).
- 2.5.13** **G** The *FCA* would expect a *firm* to make reasonable efforts to obtain the consent of its professional indemnity insurer to take the relevant steps, in line with its obligations under *Principle 11* (Relations with regulators).
- 2.5.14** **R** If, where the *FCA* or a competent person takes any steps under ■ CONRED 2.5.12 R, the *FCA* proposes to make any determination of:
- (1) whether a failure by a *firm* has caused loss to a *consumer*; or
 - (2) what the redress should be in respect of the failure;
- the *FCA* must give the *firm* a *warning notice* specifying the proposed determination.
- 2.5.15** **R**
- (1) If the *FCA* decides to make a determination of the matters in ■ CONRED 2.5.14 R, the *FCA* must give the *firm* a *decision notice* specifying the determination.
 - (2) If the *FCA* decides to make such a determination, the *firm* may refer the matter to the *Tribunal*.
- 2.5.16** **R** Part 26 of the *Act* (including the provisions as to final notices) applies in respect of notices given under ■ CONRED 2.5.14 R and ■ CONRED 2.5.15 R.
- 2.5.17** **G** Where, under ■ CONRED 2.5.12 R, the *FCA* (or a competent person) communicates with a *customer* (or *consumer*) instead of the *firm*, it will do so in its own name, making clear (in the case of a competent person) its authority from the *FCA* to do so.
- 2.5.18** **G** Where the *FCA* (or a competent person), instead of the *firm*, carries out the third step in ■ CONRED 2.5.11 R, it will do so no earlier than seven *days* after the issue of a final notice in respect of the *FCA's* decision to make a

determination of the matters in ■ CONRED 2.5.14 R, and will send the *firm* a copy of the *consumer's* response to the *redress determination*.

2.5.19 **G** A fee is payable by the *firm* (or *person* falling within ■ CONRED 2.1.2R (1)) in any case where the *FCA* exercises its powers under ■ CONRED 2.5.12 R: see the table at ■ FEES 3.2.7 R.

2.5.20 **G** The completion of the steps in ■ CONRED 2.3 to ■ CONRED 2.5 by, or on behalf of, the *FCA*, as provided in ■ CONRED 2.5.12 R, does not affect the ability of the *Ombudsman* to consider a *complaint*, in particular where the *firm* has not sent a *redress determination* in accordance with the time limits specified under the scheme.

2.6 Consumer redress scheme: paying redress

2.6.1 **R** A *firm* must pay the redress determined to be payable to a *consumer*, calculated in accordance with the requirement in section 10 of the instructions at ■ CONRED 2 Annex 13 :

- (1) within 28 *days* of receiving a claim from the *consumer* for the redress determined to be payable, following the issue of the *redress determination*; and
- (2) in accordance with the instructions set out by the *consumer* in his response to the *redress determination* in which he makes the claim

but a *firm* need not pay redress where the *consumer* did not send a claim for it within six months of the date of the *redress determination*, unless the *consumer's* failure to comply with that time limit was as a result of exceptional circumstances, except where the *consumer* refers a *complaint* in respect of the *redress determination* to the *Financial Ombudsman Service* within the time limits provided in ■ DISP 2.8.2 R (or ■ DISP 2.8.2R (3) applies).

2.6.2 **R** (1) Simple interest is payable on the redress determined to be payable from the end of the 28-day period referred to in ■ CONRED 2.6.1R (1) until the date of payment, at a rate of 8% per annum.

- (2) After the expiry of 28 *days* following the *consumer's* claim for the redress, the redress, including interest, may be recovered as a debt due to the *consumer* and, in particular, may:
 - (a) if a county court so orders in England and Wales, be recovered by execution issued from the county court (or otherwise) as if it were payable under an order of that court; or
 - (b) be enforced in Northern Ireland as a money judgment under the Judgments Enforcement (Northern Ireland) Order 1981; or
 - (c) be enforced in Scotland by the sheriff, as if it were a judgment or order of the sheriff and whether or not the sheriff could himself have granted such judgment or order.

[**Note:** This *rule* is imposed by the *FCA* using the powers granted to it under section 404A(1)(m) of the *Act* to make *rules* providing for the enforcement of any redress under a consumer redress scheme.]

2.6.3 **G** (1) An example of exceptional circumstances in ■ CONRED 2.6.1 R might be where the *consumer* has been or is incapacitated.

- (2) In considering whether circumstances are exceptional, *firms* may wish to have regard to the guidance on exceptional circumstances justifying the extension of the time limits, in the online technical resource titled "the six-month time limit" on the website of the *Financial Ombudsman Service*.

2.7 Supervision and delegation of scheme process by firms

- 2.7.1** **R** A *firm* must ensure that the steps required by this chapter are undertaken or supervised by the individual appointed by the *firm* under **■ DISP 1.3.7 R** where that *rule* applies. In any other case, those steps must be taken or supervised by a person of appropriate experience and seniority.
- 2.7.2** **G**
- (1) Any *firm* intending to outsource any of the obligations imposed on it under this chapter should have due regard to the *rules* and *guidance* on outsourcing which are applicable to it, notably in SYSC.
 - (2) A *firm* which outsources any of the obligations imposed on it under this chapter in respect of communications with *consumers* should ensure that those communications are clear as to the identity of the *firm*.

2.8 Provisions relating to communications with consumers

- 2.8.1** R Whenever a *firm* is required by a provision of this chapter to send a letter in a form set out in an Annex, it must do so enclosing any documents referred to, following the instructions in the standard form set out in the relevant Annex, complying with any instructions in that Annex to insert, delete, select or complete text.
- 2.8.2** R All letters to *consumers* required under this chapter must be printed on the letterhead of the *firm* and dispatched by recorded delivery mail.
- 2.8.3** R

 - (1) Where a *firm* becomes aware that the contact details it holds for a *customer* (or *consumer*) are out of date, it must take all reasonable steps to obtain up-to-date contact details and, where appropriate, resend any letter and repeat the steps to contact the *customer* (or *consumer*) required by this chapter.
 - (2) If, having complied with (1), a *firm* is unable to contact a *customer* (or *consumer*), it need not take any further action pursuant to this chapter in relation to that *customer* (or *consumer*) unless (3) applies.
 - (3) If, in reliance on (2), the *firm* has ceased taking action but subsequently becomes aware of up-to-date contact details for that *customer* (or *consumer*), the *firm* must, where appropriate, resend any letter and repeat the steps to contact the *customer* (or *consumer*) required by this chapter. Each applicable deadline for those actions by the *firm* is extended according to the length of the delay incurred by the application of (2).
- 2.8.4** G The reasonable steps in ■ CONRED 2.1.3R (1) might include checking public sources of information, but without incurring excessive cost.
- 2.8.5** G The reasonable steps in ■ CONRED 2.5.7R (2)(b) might include attempting to contact the *consumer* by telephone (at a reasonable hour when the *consumer* is likely to be available to receive the call) or by email.
- 2.8.6** R A *firm* must not make any communication to a *consumer* which seeks to influence, for the benefit of the *firm*, the outcome of the processes undertaken pursuant to this chapter, either by seeking to influence the content of information provided by the *consumer* in response to the *firm's* requests made under ■ CONRED 2.5.7 R or otherwise.

2.8.7

R

A *firm* must tailor the questionnaire at ■ CONRED 2 Annex 8 R so that it does not request more information than is sufficient for it to determine all of the outstanding matters.



2.9 Consumer redress scheme: information requirements

Requests for information by the FCA

2.9.1 **R** In relation to any matter concerning or related to the consumer redress scheme created by this chapter, section 165 (Regulator's power to require information: authorised persons etc) of the Act and any provision of Part 11 (Information Gathering and Investigations) of the Act which relates to that section, apply to any *firm* (or person in ■ CONRED 2.1.2 R) which is not an *authorised person* as if it were an *authorised person*.

Reporting requirement: by 9 December 2013

2.9.2 **R** A *firm* must, by 9 December 2013, a *firm* must report to the FCA, by email to archcrureview@fca.org.uk or (if the email is encrypted) archcrureviewpgp@fca.org.uk , the following information:

- (1) the total number of opted-in scheme cases (cases falling within ■ CONRED 2.5.1 R);
- (2) the total number of completed templates;
- (3) the total number of incomplete templates, with an explanation as to why the templates have not been completed;
- (4) the total number of redress cases;
- (5) the total number of *redress determinations* sent to *consumers*;
- (6) the total number of *consumers* that have been paid redress to date;
- (7) the total amount of redress paid to date; and
- (8) the total amount of redress unpaid to date.

[Note: for details of how to obtain an encryption key see guidance above at ■ CONRED 2.3.2 G]

2.10 Record-keeping requirements

2.10.1

R

- (1) A *firm* must keep the following records:
 - (a) the certificate of posting for each letter sent in accordance with this chapter;
 - (b) a copy of each letter sent in accordance with this chapter;
 - (c) a record of any attempts to contact the *consumer*, or obtain further information, in accordance with ■ CONRED 2.5.7R (2)(b) or ■ (c);
 - (d) the completed template (■ CONRED 2 Annex 12 R) for each opted-in scheme case; and
 - (e) all information on the *consumer* file and any information received from a *consumer*.
- (2) A *firm* must keep the records required by (1) for a minimum of five years from the date of their creation or (for the records in (1)(e)) the date when the information is located on the *consumer* file or obtained.

Redress determination for customers outside subject matter of Arch cru consumer redress scheme

*Redress determination for customers outside subject matter of Arch cru consumer redress scheme -
CONRED 2 Annex 1 R*

Letter to consumers confirming existence of review and inviting request to opt-in

Letter to consumers confirming existence of review and inviting request to opt-in - CONRED 2 Annex 2
R

First reminder letter to consumers inviting request for review

First reminder letter to consumers inviting request for review - CONRED 2 Annex 3 R

Second reminder letter to consumers inviting request for review

Second reminder letter to consumers inviting request for review - CONRED 2 Annex 4 R

Final letter to consumers who have not sent a request for review

Final letter to consumers who have not sent a request for review - CONRED 2 Annex 5 R

Redress determination where firm considers opt-in ineffective

Redress determination where firm considers opt-in ineffective - CONRED 2 Annex 6 R

Letter to consumers confirming their case will be reviewed

Letter to consumers confirming their case will be reviewed - CONRED 2 Annex 7 R

Initial letter requesting information/enclosing questionnaire

Initial letter requesting information/enclosing questionnaire - CONRED 2 Annex 8 R

Reminder letter

Reminder letter - CONRED 2 Annex 9 R

Redress determination where consumer has not provided requested information

Redress determination where consumer has not provided requested information - CONRED 2 Annex 10 R

Redress determination letter for scheme cases

Redress determination letter for scheme cases - CONRED 2 Annex 11 R

Arch cru product advice suitability assessment template

Arch cru product advice suitability assessment template - CONRED 2 Annex 12 R

CF Arch cru funds template instructions

1 Limitations on use of template and instructions

- 1.1 G The Arch cru advice suitability assessment template reproduced at CONRED 2 Annex 12 R (referred to in these instructions as the "template") and the instructions in this Annex are only to be used for the purpose of complying with the requirements under CONRED 2 to assess sales of the Arch cru funds identified at CONRED 2.1.1R (2). They should not be used for any other purpose.

2 Using the template

- 2.1 G The template contains factors to take into account to determine whether there has been a failure to comply with the suitability requirements (specified at 5.1R, below) in an opted-in scheme case.
- 2.2 R The template is divided into sections which must be completed in full, except where indicated in these instructions.
- 2.3 R Before completing the template you must familiarise yourself with the features and risks of the Arch cru funds that a reasonably competent *firm* should have identified, as specified in CONRED 2 Annex 15 R.
- 2.4 R Answer the questions in the template and complete your assessment by reference to the available evidence (information on the *consumer* file and any information received from a *consumer*), and the features and risks of the Arch cru funds that a reasonably competent *firm* should have identified, as specified in CONRED 2 Annex 15 R.

3 Admission of failure to comply with suitability requirements

- 3.1 R Where you admit that the *firm* has failed to comply with a suitability requirement (specified at 5.1R, below) in an opted-in scheme case complete the following sections of the template:
- (1) *firm* and case details;
 - (2) *consumer* details;
 - (3) transaction input;
 - (4) admission of failure in an opted-in scheme case;
 - (5) causation; and
 - (6) redress.

4 Completing the template

- 4.1 R Fill in the following sections of the template as follows:
- (1) **Firm and case details:** enter the *firm*-specific information as it appears on the *Financial Services Register*.
 - (2) **Consumer details:** enter the *consumer* details and the date of the advice to the *consumer*. Advice was given on a joint basis if it was given to two people where the *personal recommendation* relates to a "joint" portfolio. This includes cases where the advice is directed at a couple but where the investment is in one spouse's name for tax purposes.
 - (3) **Transaction input:** take the following steps:
 - (a) Select the date of investment in the "transaction date" box. If you cannot identify the date of investment from the *consumer* file, insert the date of advice as the approximate date of the investment.

- (b) Select the Arch cru fund(s) invested in.
- (c) Select the transaction type from the drop-down menu. The transaction types to select from are:
 - **Investment:** an investment into an Arch cru fund. Enter the amount invested, the share class, and the wrapper (if applicable).
 - **Partial withdrawal:** the sale of part of the *consumer's* share capital in the *consumer's* investment, excluding interim hardship withdrawals.
 - **Final withdrawal:** the sale of all of the *consumer's* share capital in the *consumer's* investment, excluding final hardship withdrawals.
 - **Income distribution:** any income distribution received by the *consumer* in respect of their shares in the *consumer's* investment prior to the date of suspension of the Arch cru funds.
 - **Capital distribution:** any capital distribution received by the *consumer* in respect of their shares in the *consumer's* investment after the date of the suspension.
 - **Capita offer:** the amount offered to the *consumer* under the *CF Arch cru payment scheme*.
 - **Interim hardship withdrawal:** interim distributions received by the *consumer* from the Capita Hardship Scheme (ie, the hardship scheme for investors in Arch cru funds as set out by Capita Financial Managers Ltd in a letter to investors of 7 December 2009) after the date of the suspension.
 - **Final hardship withdrawal:** the amount received by the *consumer* for any full surrender of the investment from the Capita Hardship Scheme (as described above) after the date of the suspension.
- (d) Input the amount corresponding to the transaction type.
- (4) **Admission of failure to comply with a suitability requirement in the opted-in scheme case:** Select "yes" or "no" and proceed with the steps outlined at 3.1R, above.
- (5) **Consumer investment objectives:** take the following steps:
 - (a) Identify and select whether any of the objectives listed on the template is recorded (yes/no) and override the "yes" with "priority" if the *consumer* says, or the firm recorded that, this objective was a priority.
 - (b) If a *consumer* was investing a lump sum to obtain an income, identify and record what level of annual income the *consumer* wanted from the recommended Arch cru fund.
 - (c) The objective 'Realignment of portfolio' must be used when the *consumer's* circumstances or overall investment objective has changed.
 - (d) If the *consumer* had other investment objectives not identified in the list above, record these objectives in the box provided and identify whether they were a priority.
 - (e) Complete the "Comments on consumer investment objectives" box where you have further comments on the *consumer's* investment objectives relevant to your assessment.
- (6) **Consumer attitude to risk ("ATR"):** take the following steps:
 - (a) In the "Consumer's attitude to risk" box record the *firm's* short description of the *consumer's* ATR, using the headline description used on their risk scale (eg, "balanced", "medium", "5/10").

- (b) In the "Firm's description of the consumer's ATR" box record the *firm's* description of the *consumer's* ATR, using the *firm's* own wording (eg, "balanced means the *consumer* will invest in x, y types of assets and wants to take x risk with their capital").
 - (c) In the "Comments on the firm's assessment of the consumer's ATR" box record any comments you have on the *firm's* assessment of the *consumer's* attitude to risk and whether the firm's assessment was, in your view, a reasonable representation of the *consumer's* ATR. You should also include any information about the *consumer's* ATR in relation to this particular investment.
 - (d) This section does not record information on the *consumer's* capacity for loss (which is different to a *consumer's* ATR). This information must be noted in the "Comments on the consumer's capacity for loss" box in the "Consumer's financial situation" section of the template.
 - (e) Where there is evidence that the *consumer's* ATR was wrongly assessed by the *firm*, complete the suitability section based on your assessment of the *consumer's* ATR.
- (7) **Consumer financial situation:** take the following steps:
- (a) Record information on the *consumer's* savings and investments portfolio before and after the *consumer's* investment in the Arch cru funds in the boxes provided.
 - (b) The template provides the following categories:
 - Cash (including cash ISAs)
 - Investments
 - Arch cru funds (this is a drop-down menu).
 - (c) When completing the table of the *consumer's* investments, take into account the following:
 - Where advice is being provided on a "joint" basis (see 4.1R(2), above), record the combined total of, for example, a married couple's investments. Where advice is on a 'single' basis but the *consumer* is married or in a relationship include the value of the proportion of investments owned by the *consumer* (these will usually be in the *consumer's* name). Where the *consumer's* share of investments is unclear from the file you can assume the proportion owned by the *consumer* is 50%.
 - Only include pension policy values where the fund is held in a pension wrapper (eg a self-invested personal pension (*SIPP*) or a small self-administered scheme (*SASS*)).
 - Where the source of funds is existing investments, use the surrender value of the investments.
 - (d) In the "Comments on portfolio before and after sale" box record your observations about the level of diversification within the portfolio and how the advice to invest in the selected Arch cru fund has met the *consumer's* investment objectives for their portfolio.

Your comments must include whether the evidence supports an assessment that the risk profile of the *consumer's* overall portfolio was suitable given the *consumer's* personal and financial circumstances and objectives before and after the advice to invest in an Arch cru fund. This information will be relevant later in the template.
 - (e) In the "Comments on consumer's capacity for loss" box, record the *firm's* comments on the *consumer's* capacity for loss (also referred to as the level of risk the *consumer* is able to take). This is different to the level of risk that the *consumer* was willing or would have pre-

ferred to take. In doing so, consider whether, in the light of the available evidence:

- the *consumer* was able to take any risk with the *consumer's* capital or income;
- there would have been an impact on the *consumer* of a total or partial loss of capital;
- the *consumer* could, considering his personal and financial circumstances, afford to take this level of risk.

(8) **Suitability requirements:** take the steps set out at 5.1 to 5.4, below.

(9) **Causation:** take the steps set out at 9.1 to 9.5, below.

(10) **Redress:** take the steps set out at 10.1 to 10.15, below.

5 Suitability requirements

5.1 R The following requirements are specified:

- (1) for a *personal recommendation* made on or before 31 October 2007, COB 5.3.5 R (1);
- (2) for a *personal recommendation* made on or after 1 November 2007, COBS 9.2.1 R (1);
- (3) the common law duty in contract or tort to exercise reasonable skill and care in advising the *consumer* on investments.

5.2 G The contract between the *firm* and the *consumer* may have included a specific term providing that the *firm* would exercise reasonable skill and care in advising the *consumer* on investments. If it did not do so, such a duty is likely to have been implied into the contract.

5.3 G The standard of care under the *FCA rules* and the common law is that of a reasonably competent *firm* carrying on a similar business to that of the *firm* assessed.

5.4 G COB 5.2 and COBS 9.2.1 R (2), COBS 9.2.2 R and COBS 9.2.3 R indicate particular matters of which you should take account when assessing whether the *firm* failed to comply with the suitability requirements at 5.1R, above. In summary, these are the *consumer's*:

- (1) investment objectives;
- (2) financial situation; and
- (3) experience and knowledge of investments similar to the recommended Arch cru fund.

6 Assessing opted-in scheme cases

General

6.1 G The "Suitability section" in the template and associated additional provisions in these instructions contain examples which tend to show failure to comply or compliance with the suitability requirements ("example").

6.2 G The suitability requirements arise from *FCA rules* and the common law. For the requirements specified, the standards required of the *firm* are broadly the same whether their origin is a *rule* or the common law.

6.3 R You must in each opted-in scheme case falling within CONRED 2.4.2 R:

- (1) fairly consider and give appropriate weight to all information on the *consumer* file and any information received from a *consumer* of the *firm's* compliance or non-compliance with applicable suitability requirements at 5.1R, above; and
- (2) decide, with reference to the examples in the suitability requirements section of the template, whether it is more likely than not that the *firm* failed to comply with the suitability requirements specified at 5.1R, above.

6.4 R In considering the information on the *consumer* file and any information received from a *consumer*, you must:

- (1) not assume that a *firm* complied with a suitability requirement (specified at 5.1R, above) solely on the basis that:
 - (a) the *consumer* signed documentation that records his understanding or agreement to matters set out in that documentation;
 - (b) the *personal recommendation* was given to a *consumer* who had already invested in an Arch cru fund or a predecessor of that fund;
- (2) give more weight to evidence of the particular circumstances of a *personal recommendation* than to general evidence of the selling practices of the *firm* or its advisers at the relevant time;
- (3) determine that an example in the suitability requirements section of the template is present on the "balance of probabilities" when it is more likely than not to have occurred.

Reliance on others

- 6.5 R You must take into account that:
- (1) the duty of a *firm* to advise on the suitability of investments cannot be delegated to, or discharged by reliance on, another;
 - (2) where the *firm* made a *personal recommendation* in reliance on the advice or opinions of *persons* other than the *firm*, a *firm* must not be regarded as complying with the suitability requirements at 5.1R, above, because of that reliance; and
 - (3) the suitability requirements at 5.1R, above, require a *firm* in all cases to form its own view of the suitability of the recommended Arch cru fund for the particular *consumer*, based on the information that the *firm* had, or ought reasonably to have obtained, regarding that Arch cru fund and its suitability for the *consumer's* circumstances.
- 6.6 R If, in relation to any rating, before coming to a view that the *firm* came to a reasonable, albeit erroneous, conclusion on the risks of the recommended Arch cru fund and sold the Arch cru fund on this basis, you must take into account:
- (1) that the *FCA's* guidance on the Responsibilities of Providers and Distributors for the Fair Treatment of Consumers (*RPPD*) says that a *firm* distributing products:
 - (a) should consider, when passing provider materials to *consumers*, whether it understands the information provided;
 - (b) should ask the provider to supply additional information or training where that seems necessary to understand the product or service adequately; and
 - (c) should not distribute the product or service if it does not understand it sufficiently, especially if it intends to provide advice;
 - (2) any due diligence: a *firm* providing a *personal recommendation* should have formed its own view on the risks of investing in an Arch cru fund, based on the information that it had or ought to have gathered about the fund;
 - (3) that the reliance on other *rules* (COB 2.3.3 R and COBS 2.4.6 R) enable a *firm* to place reasonable reliance for some purposes on factual (ie, not opinion-based) information provided by an unconnected *authorised person*; but that these *rules* do not absolve a *firm* from forming its own view on the risks of investing in an Arch cru fund;
 - (4) the features and risks of the recommended Arch cru fund set out in CONRED 2 Annex 15 R; and
 - (5) that COBS 2.4.8 G states that "it will generally be reasonable... for a *firm* to rely on information provided to it in writing by an unconnected *authorised person* ... unless it is aware or ought reasonably to be aware of any fact that would give reasonable grounds to question the accuracy of that information". In the absence of those grounds, it will generally have been reasonable for a *firm* to have relied on factual statements provided by

Arch or Cru on the Arch cru funds, such as information about the funds' underlying assets.

7 Assessing compliance with the suitability requirements

- 7.1 R When assessing whether a *firm* complied with the suitability requirements specified at 5.1R, above, you must take into account the following:
- (1) the *consumer's* investment objectives, including his willingness to bear the risks associated with the recommended Arch cru fund;
 - (2) the *consumer's* financial situation, including his financial ability to bear the risks associated with the recommended Arch cru fund consistent with his investment objectives;
 - (3) the *consumer's* ability, in the light of the following, to understand the risks associated with the recommended Arch cru fund:
 - (a) the experience and knowledge of the *consumer* relevant to an investment in the recommended Arch cru fund; and
 - (b) any correspondence between the *firm* and the *consumer* (which may include references to promotional materials, such as fund factsheets or offer documents or prospectuses) regarding the recommended Arch cru fund.
- 7.2 R When assessing the reasonableness of a *firm's* conduct in relation to a *personal recommendation*, you must:
- (1) assess the *firm's* conduct against what was reasonable at the time when the *firm* made the *personal recommendation*; and
 - (2) conclude that the conduct of the *firm* assessed was reasonable only where that *firm* displayed the degree of skill, care and diligence that would at that time have been exercised in the ordinary and proper course of a similar business to that of the *firm*.

Consumer instructions

- 7.3 R In all cases, you must take into account any specific instructions the *consumer* gave the *firm* about the sale.
- 7.4 G Specific instructions include, for example, where the *consumer* asked the *firm* to advise only on the sum to be invested and not on the *consumer's* pension arrangements.
- 7.5 G As the Arch cru funds are high-risk investments, the *firm* should have asked for further information about the *consumer's* wider portfolio, and have taken this into account when making its *personal recommendation* to the *consumer* to invest in an Arch cru fund.
- 7.6 G If there is clear evidence on file that the *consumer* has given specific instructions that the *firm* is not to review the *consumer's* entire portfolio, but to advise on this investment only, the suitability assessment could involve a narrower review, focusing on the *consumer's* objectives in relation to the specific amount to be invested. However, any *personal recommendation* should still have taken into account how the specific investment would fit within the *consumer's* overall savings and investments portfolio.

8 Suitability section

Filling in the suitability requirements section

- 8.1 G The suitability requirements section is used to record your assessment of whether or not the *firm* complied with the suitability requirements specified at 5.1R, above.
- 8.2 R To complete the suitability requirements section you must take the following steps for an opted-in case falling within CONRED 2.5.1 R (an "opted-in scheme case"):
- (1) review the information on the *consumer* file, any information received from a *consumer* and the information recorded in the data section of the template ("the available evidence");

- (2) determine whether the available evidence shows overall that any or all of examples (1) to (7) is present or not;
 - (3) indicate whether any or all of examples (1) to (7) is present, or not, by selecting "yes" or "no";
 - (4) conclude, taking into account the available evidence, whether the *firm* complied with the suitability requirements specified at 5.1R, above; and
 - (5) insert your commentary on whether or not the *firm* complied with the suitability requirements specified at 5.1R, above, with reference to the example(s) that support your conclusion. Your comments can refer to relevant sections of the fund summary in CONRED 2 Annex 15 R.
- 8.3 G If an example is present, this will tend to show the *firm's* compliance or non-compliance with the suitability requirements. The presence of the example is not definitive as to whether a *firm* has complied with the suitability requirements. There may be other factors which mean that the *firm* has, despite the presence of the example, complied, or not complied, with the suitability requirements at 5.1R, above.
- 8.4 G The template sale rating will automatically default to "Compliant" or "Non-compliant" depending on your answer to the example questions in the template. The "Non-compliant" rating indicates that the *personal recommendation* does not comply with the suitability requirements at 5.1R, above.
- 8.5 G This table contains *rules, evidential provisions, and guidance* for determining whether the available evidence shows overall that an example is present, or not:
- (1) **The consumer was willing to take a high degree of risk with the sum invested**
- R Compare:
- (1) the information on the *consumer* file, and any information received from the *consumer* and, in particular, the information recorded in the template on the *firm's* assessment of the *consumer's* attitude to risk (ATR), focusing on the degree of risk the *consumer* was willing to take with this investment (not, for the purposes of this question, the degree of risk the *consumer* was able to take); with
 - (2) the high degree of risk a *consumer* must have been willing to take for a *personal recommendation* to invest in an Arch cru fund to be suitable.
- E Answer "no" to this question where:
- (1) the *consumer* was not willing to take a high degree of risk with the sum invested (by reference to the risk scale used by the *firm*); or
 - (2) the *consumer* was not willing to put his capital at risk for the potential of a higher return and had expressed a preference for lower-risk investments.
- G This question relates to the level of risk a client is willing to take with the sum invested.
- (2) **The risk profile of the consumer's overall savings and investment portfolio after the sale was suitable for the level of risk he was willing to take to meet his investment objectives**
- R Take the following steps:
- (1) refer to the information recorded on the *consumer's* stated attitude to risk in the template;
 - (2) with reference to the *firm's* risk scale, identify the risk level in the *consumer's* portfolio after the sale; and
 - (3) compare the level of risk in the *consumer's* overall portfolio after the sale with the level of risk the *consumer* was willing to take to meet his investment objectives.
- E Answer "no" where the risk profile of the *consumer's* portfolio was higher than the level of risk he was willing to take to meet his investment objectives.
- G This question relates to how the investment fits into the client's portfolio of investments.

(3) The consumer's portfolio was sufficiently diversified after the sale to meet his investment objectives

R Take the following steps:

- (1) refer to the information on the *consumer* file, any information received from a *consumer* and the information recorded on the *consumer's* investment objectives section of the template;
- (2) identify the concentration of Arch cru funds in the *consumer's* portfolio after the sale; and
- (3) taking into account in particular:
 - (a) the concentration of Arch cru funds;
 - (b) the liquidity in the *consumer's* portfolio;
 - (c) the exposure to different asset classes; and
 - (d) the level of stability of returns or security of invested capital in the portfolio;

determine whether the *consumer's* portfolio was sufficiently diversified to meet his investment objectives.

- E
- (1) Answer "no" where the *consumer* has a large portfolio of savings and investments but his preferences regarding risk-taking indicate that he would prefer to diversify and invest in a wide range of assets and he has invested a high concentration of his assets in Arch cru funds and the risk of this investment is not offset by the potential return offered by the Arch cru funds.
 - (2) Answer "yes" where the *consumer* wanted a significant portion of his capital to be invested in higher-risk or alternative investments and has a low proportion of Arch cru funds. This may be recorded in specific instructions the *consumer* gave the *firm*.

(4) The consumer was reliant on income from this investment

- E
- (1) Answer "yes" where a *consumer* needed a minimum level of income from this fund (for example, to pay household bills and expenses).
 - (2) Answer "no" where a *consumer* did not need a specific level of income from the fund, for example, because it was not essential to maintain his standard of living.

- G
- (1) Whether a *consumer* had a need for income from this investment may be reflected in the information on the *consumer* file and any information received from a *consumer* about the *consumer's* household income and whether the income from this investment was necessary for household expenses and personal outlays or whether it was "disposable income" (which is money left over after bills and household expenses are paid).
 - (2) The Arch cru funds that offered income shares are the Investment Portfolio, Specialist Portfolio and Income Fund. These funds aimed to pay income on a half-yearly basis but did not provide a set level of income.

(5) The consumer had the capacity to bear the risk of investing [x%] of his savings and investments in the selected Arch cru fund

R (1) Take the following steps:

- (a) refer to the information on the *consumer* file, any information received from a *consumer* and the information recorded on the *consumer's* financial situation in the data section of the template;
- (b) identify the concentration of Arch cru funds in the *consumer* portfolio after the sale; and
- (c) taking into account in particular:
 - (i) the concentration of Arch cru funds;
 - (ii) the source and extent of the *consumer's* assets;

- (iii) the liquidity in the *consumer's* portfolio;
- (iv) the exposure to different asset classes;
- (v) the level of stability of returns or security of invested capital in the portfolio; and
- (vi) the impact the loss of the capital invested would have on his standard of living overall;

determine whether the concentration of Arch cru funds in the *consumer's* portfolio was suitable for his financial situation.

- E (1) Answer "no" where any loss of the investment would have had a materially detrimental effect on the *consumer's* standard of living.
- (2) Answer "yes" where the investment was speculative: the consumer had no need for the capital and would not be using it to maintain his standard of living.

(6) The firm took reasonable steps to ensure the consumer had the necessary experience and knowledge to invest in the selected Arch cru fund

R Take the following steps:

- (1) refer to the information on the *consumer* file, any information received from a *consumer* and the information recorded on the template;
- (2) identify the *consumer's* level of investment experience and knowledge of investments both:
 - (a) in relation to investments similar to Arch cru funds; and
 - (b) generally;
- (3) identify the steps that the *firm* took to establish that the *consumer* could appreciate the nature of the risks they were taking with his investment in the Arch cru fund;
- (4) taking into account, in particular:
 - (a) information about the *consumer's* existing portfolio and the nature, volume, and frequency of the *consumer's* transactions in investments;
 - (b) how long the *consumer* had been an investor;
 - (c) the *consumer's* experience with, and knowledge of, high-risk investments similar to Arch cru funds;
 - (d) the *consumer's* profession (if any);
 - (e) insofar as it was clear, fair and not misleading, information the *firm* gave the *consumer* over and above any Capita Financial Managers Limited, Arch Financial Products LLP or Cru Investment Managers Limited produced documentation (if that was provided);
 - (f) how the *firm* communicated the risks of investing and the underlying assets in the selected Arch cru fund listed in CONRED 2 Annex 15 R; and
 - (g) the overall impression that the *consumer* would reasonably have had of those features and risks, particularly in the light of:
 - (i) the entirety of the communications referred to in (1);
 - (ii) the extent to which such communications were consistent in their presentation of those features and risks; and
 - (iii) the *consumer's* relevant experience and knowledge;

conclude whether the *firm* had a reasonable basis for believing that the *consumer* had the necessary experience and knowledge to understand the risks involved in investing in Arch cru funds.

E Answer "no" where:

- (1) the *firm* did not communicate in substance the risks and features of the selected Arch cru fund listed in CONRED 2 Annex 15 R; and
 - (2) one or more of the following is present:
 - (a) prior to the *personal recommendation*, the *consumer* had experience and knowledge of investing in capital protected products only;
 - (b) prior to the *personal recommendation*, the *consumer* had no experience and knowledge of investments in bonds or shares traded on public markets;
 - (c) prior to the *personal recommendation*, the *consumer* had no experience and knowledge of investing in high-risk investments.
- G A *firm* may rely on the simplified prospectus to disclose the risks in CONRED 2 Annex 15 R, but disclosure will not be "clear" if, in particular:
- (1) the information was contradicted by the *firm* in correspondence between the firm and the consumer (which may include references to promotional materials, such as monthly reports, fund factsheets or offer documents or prospectuses); or
 - (2) given the *consumer's* experience and knowledge, it is unlikely that the *consumer* would have understood the risks as disclosed in the prospectus without further explanation from the *firm*.
- (7) The recommendation is not suitable for the consumer's investment objectives or financial situation for some other reason**
- R Take the following steps:
- (1) refer to the information on the *consumer* file, any information received from a *consumer* and the information recorded on the *consumer's* financial situation in the template;
 - (2) refer to the risks and features of the Arch cru funds in CONRED 2 Annex 15 R; and
 - (3) consider whether there is any reason, other than the reasons at questions (1) to (6) why the *personal recommendation* to invest in an Arch cru fund was unsuitable for the *consumer's* investment objectives or financial situation.
- E Answer "yes" where:
- (1) the *consumer's* financial situation was likely to change in the near future so that he would not be able to bear the risks of this investment; or
 - (2) the *consumer* had existing debts which it would have been in his best interests to repay before making this investment; or
 - (3) following the *personal recommendation*, the *consumer* did not have an adequate emergency fund and cash reserve; or
 - (4) the *consumer* would need the money invested within five years of investment in the fund; or
 - (5) any of the risks or features of the Arch cru fund set out in CONRED 2 Annex 15 R were unsuitable for the *consumer's* financial situation; or
 - (6) an existing product in the *consumer's* portfolio could have been changed to meet the *consumer's* investment objective with less cost or less risk.
- G (1) The features and risks of the Arch cru fund may have been unsuitable for the *consumer's* investment objectives if any of the following applies:
- (a) the *consumer* did not want to invest through an offshore vehicle or in non-UK assets;
 - (b) the *consumer* did not want an investment that did not have a transparent secondary market for its underlying assets;
 - (c) the *consumer* did not want to invest through *collective investment schemes*;

- (d) the *consumer* was not prepared to put capital at risk in stock markets;
- (e) the *consumer* did not want to be exposed to risks associated with *commodities or derivatives*;
- (f) the *consumer* did not want an investment that invested in *illiquid assets*;
- (g) the *consumer* did not want an investment that was exposed to non-traditional asset classes;
- (h) the *consumer* did not want an investment where the investment manager employed investment techniques such as gearing, that would not normally have been used in more commonly encountered *UCITS*.

- (2) In relation to whether the *consumer's* financial situation was likely to change in the near future so that the *consumer* would not be able to bear the risks of this investment, consider whether the *consumer* was expecting a change in his personal circumstances, such as the birth of a child, redundancy or retirement and the impact this was likely to have on his financial situation.
- (3) In relation to whether the *consumer* had existing debts which it would have been in his best interests to repay before making this investment, consider the particular circumstances of the debt, including:
 - (a) the size of the debt (excluding mortgage debt);
 - (b) whether the debt had an early repayment penalty or fixed repayment schedule;
 - (c) the interest rate on the debt in relation to what they could reasonably expect in relation to the performance of the investment.
- (4) An adequate emergency fund should be at least three times monthly outgoings but, depending on the *consumer's* circumstances, this could be more. The *consumer* should also have held sufficient 'cash reserves' to meet known or reasonably anticipated future expenses, such as the payment of care fees, or spending on home improvements, or a new car or dependents.

Outcome: overall assessment on suitability requirements

- 8.6 R Take the following steps to determine whether the *firm* complied with the suitability requirements:
 - (1) review the information on the *consumer* file, any information received from a *consumer* and the features and risks of the Arch cru fund in CONRED 2 Annex 15 R;
 - (2) determine whether the *firm* took reasonable steps to ensure that the *personal recommendation* was suitable, and select the appropriate outcome in the Firm sale rating box "Compliant" or "Non-Compliant"; and
 - (3) in all cases, insert your commentary on whether or not the *firm* complied with the suitability requirements specified at 5.1R, above, with reference to the example(s) that support your conclusion. Your comments can refer to relevant sections of the fund summary in CONRED 2 Annex 15 R.
- 8.7 E For the purposes of 8.2R(2) above, in any case where you have answered:
 - (1) "no" to any of the questions in sub-paragraphs (1), (2), (3), (5) or (6) of paragraph 8.5; and/or
 - (2) "yes" to either of the questions in sub-paragraphs (4) and (7) of paragraph 8.5;

this will tend to indicate that the *personal recommendation* was "Non-Compliant".

- 8.8 G The presence of an example in the suitability section of the template is not determinative as to whether a *firm* has complied with the suitability requirements. There may be other factors which mean that the *firm* has, despite the presence of the example, complied, or not complied, with the suitability requirements.
- 8.9 G Where the *personal recommendation* is to invest in more than one Arch cru fund and one investment is suitable but the other is not suitable, the *firm* should conclude overall that the *personal recommendation* does not comply with the suitability requirements. The template will take into account the suitable part of the investment in the redress section.
- 9 Causation section**
- 9.1 G The causation section is used to record your assessment of whether or not the *consumer's* loss was caused by the *firm's* failure to comply with the suitability requirements specified at 5.1R, above. The causation section proceeds on an assumption that the *consumer* suffered a loss. Whether or not there was actually a loss is dealt with in the redress section.
- 9.2 G Complete the causation section where you have concluded that the *firm* has failed to comply with the suitability requirements specified at 5.1R, above.
- 9.3 R To fill in the causation section you must:
- (1) review the information on the *consumer* file, any information received from a *consumer* and the information recorded in the template ("available evidence");
 - (2) determine whether the *firm's* failure to comply with the suitability requirements caused the *consumer's* loss; and
 - (3) explain your conclusion on causation with reference to the available evidence.
- 9.4 R In assessing the available evidence, you must have regard to:
- (1) the impact of the *firm* failure(s) on the *consumer's* decision to invest in the Arch cru fund(s) in all the circumstances of the *consumer's* case;
 - (2) the position at law that, irrespective of the actions of third parties, the *firm* is responsible for all losses that flow from its failure to comply with the suitability requirements; and
 - (3) the position at law that no actions of Capita Financial Managers Limited; Arch Financial Products LLP; cru Investment Management Limited; HSBC Bank plc and BNY Mellon Trust and Depository (UK) Limited break the chain of causation, so that the *firm* is still responsible for all losses that flow from its failure to comply with the suitability requirements.
- 9.5 E You should conclude "yes" (that the *firm's* failure caused the *consumer's* loss) unless you are satisfied on the basis of the available evidence that the *consumer* did not rely on the *personal recommendation* in making the decision to invest.
- 10 Redress Section**
- 10.1 R Complete the redress section in each opted-in scheme case where you have determined that the *consumer's* loss was caused by the *firm's* failure to comply with any of the suitability requirements at 5.1R, above.
- 10.2 G The redress section is used to identify and record an investment benchmark to compare the position the *consumer* is in with the position they would have been in if the *firm* had complied with the suitability requirements.
- 10.3 R For a redress case where a *personal recommendation* resulted in more than one investment in one or more Arch cru funds, complete the redress section for each of the *consumer's* investments in Arch cru funds.
- 10.4 R Take the following steps in each redress case:
- (1) select the Arch cru fund that the consumer invested in;

- (2) having regard to what investment the *consumer* would have invested if the *firm* had complied with the suitability requirements at 5.1R above, and other requirements applicable to it at the time (referred to in this chapter as a "suitable investment"), either:
 - (a) select investment benchmark "1", "2", or "3"; or
 - (b) select investment benchmark "4" (suitable investment); or
 - (c) select investment benchmark "5" (other);
 - (3) where investment benchmark 4 or 5 is selected:
 - (a) determine what would have been a suitable investment in accordance with the instructions at (for investment benchmark 4) 10.6R, below, and (for investment benchmark 5) 10.7R and 10.8R, below; and
 - (b) record the suitable investment identified and the reasons for selecting it in the 'SI selection justification' box (for investment benchmark 4, this will be the selected Arch cru fund); and
 - (4) submit a redress calculation request to the *FCA* following the instructions at 10.13R, below.
- 10.5 E For the purposes of paragraph 10.4R(2), above:
- (1) have regard to the investment benchmarks in CONRED 2 Annex 14 R;
 - (2) consider which investment benchmark best reflects the risks and features of a suitable investment;
 - (3) subject to 10.7R, above, select that investment benchmark; and
 - (4) record your reasons for the selection of that investment benchmark in the Comments box.
- 10.6 R You may select investment 4 (suitable investment) only if you are satisfied on the basis of the information on the *consumer* file, and information received from the *consumer*, that the *consumer* would have made an investment in the Arch cru fund if the *firm* had complied with the suitability requirements.
- 10.7 R You may select investment benchmark 5 (other) only where you are able to identify a specific investment:
- (1) which would have been a suitable investment; and
 - (2) in which a *consumer* could have made an investment at all times from the date on which the *consumer's* investment was made to the date of calculation.
- 10.8 G For the purposes of 10.7R, above, a *firm* might be able to identify a specific investment in circumstances where:
- (1) at the time when the *firm* made the *personal recommendation* to the *consumer* to invest in Arch cru funds, the *firm* also recommended other specific investments which would have been suitable for the *consumer*; or
 - (2) the *firm* recommended that a *consumer* disinvest from a specific investment, which was suitable for the *Consumer*, in order to invest in Arch cru funds.
- 10.9 R In cases where you have selected investment benchmark 5 (other) you must, following the instructions at 10.12R, below, and determine and record the value which sums initially invested by the *consumer* in the *consumer's* investment would have had at the date of calculation if such sums had been invested in investment benchmark 5.
- 10.10 R In a redress case where the *consumer* retained any shares in the *consumer's* investment at the date of suspension, redress is equal to the sum of A - B - C - D where:
- (1) "A" is the value of sums initially invested by the *consumer* at the date of calculation if they had been invested in a suitable investment;

		(2)	"B" is the net asset value of the <i>consumer's</i> investment in the Arch cru fund at the date of calculation;
		(3)	"C" is the value of income distributions received by the <i>consumer</i> by the date of suspension; and
		(4)	"D" is the value of sums under the <i>CF Arch cru payment scheme</i> that the <i>consumer</i> is, or was, eligible to receive (whether or not it has been received) where the <i>consumer</i> has retained shares in the <i>consumer's</i> investment.
10.11	R		In a redress case where the <i>consumer</i> has sold all of the shares in the <i>consumer's</i> investment prior to the date of suspension, redress is equal to the sum of A - C - E + I where:
		(1)	"A" is the value of sums initially invested by the <i>consumer</i> at the date of the sale of the <i>consumer's</i> share capital if they had been invested in a suitable investment;
		(2)	"C" is the value of income distributions received by the <i>consumer</i> prior to the date of sale;
		(3)	"E" is the capital realised on the sale of the <i>consumer's</i> share capital; and
		(4)	"I" is simple interest on the result of A - C - E at the Bank of England base rate prevailing from time to time over the relevant period + 1%/365 for each day between the date of the sale of the <i>consumer's</i> share capital and the date of the <i>redress determination</i> .
10.12	R		When calculating the value of "A", "D" and "E" to take into account the net effect of any partial sale of the <i>consumer's</i> share capital during the term of the <i>consumer's</i> investment:
		(1)	deduct the amount of any sale of shares or distribution (including interim or final hardship withdrawals) in respect of the <i>consumer's</i> investment at the date that the sale or capital distribution is made; and
		(2)	for each sale or capital distribution, account for:
		(a)	the growth rate from the time of the original investment, or previous sale or capital distribution, until the time of sale or capital distribution;
		(b)	the value of the residual investment after any sale or capital distribution; and
		(c)	the growth rate from the time of sale or capital distribution up to the date of calculation.
10.13	R		To submit a redress calculation request, send a completed copy of the template to the <i>FCA</i> by email to archcrureview@fca.org.uk or (if the email is encrypted) archcru-reviewpgp@fca.org.uk .
10.14	G		If the <i>firm</i> is to send an encrypted email to the <i>FCA</i> it will need to download the public PGP key from the <i>FCA</i> website and import the key into its email client software.
10.15	G		Following receipt of the redress calculation request the <i>FCA</i> will send the <i>firm</i> a summary detailing the redress payable for each <i>consumer's</i> investment and the total redress payable to the <i>consumer</i> in the redress case.

Investment benchmarks

() The following investment benchmarks apply:

Comparator 1:	this comparator is a return equal to the Bank of England official Bank Rate (the 'base rate').
Comparator 2:	this comparator is a return equal to a 50/50 combination of the APCIMS Conservative Index and the IMA Mixed Investment 20-60% Shares sector. This comparator has a listed equity exposure of 20-60% (IMA) and 32.5% (APCIMS).
Comparator 3:	this comparator is a return equal to a 50/50 combination of the APCIMS Balanced Index and the IMA Mixed Investment 40-85% Shares sector. This comparator has a listed equity exposure of 40-85% (IMA) and 67.5% (APCIMS).

Further details of the sectors and indices referred to in the *rule* above can be found at the websites of the relevant organisations:

<http://www.apcims.co.uk/private-investor-indices/about-the-indices/>

<http://www.investmentfunds.org.uk/fund-sectors/sector-definitions/>

Risks and features of Arch cru funds

- 1 The Arch cru funds consist of two open-ended investment companies, the CF Arch cru Diversified Funds and the CF Arch cru Investment Funds, and their respective sub-funds, sold to consumers during the following periods:
Investment funds
Investment Portfolio: July 2006 to March 2009
Specialist Portfolio July 2006 to March 2009
Diversified funds
Balanced Fund September 2007 to March 2009
Global Growth Fund: September 2007 to March 2009
Income Fund: September 2007 to March 2009
Finance Fund: October 2008 to March 2009
- 2 Dealings in the Arch cru funds were suspended by the authorised corporate director, Capita Financial Managers Ltd ("Capita"), on 13 March 2009.
- 3 The Arch cru funds aimed to achieve their objectives by investing in a broad range of main-stream and non-mainstream assets.
- 4 The Arch cru funds, through transferable securities, ultimately invested in the following asset classes, in various combinations:
 - (a) unlisted equity;
 - (b) unlisted debt instruments;
 - (c) non-UK investments;
 - (d) venture capital or project finance investments;
 - (e) private markets, private equity, private finance;
 - (f) private and structured finance;
 - (g) asset-backed lending;
 - (h) investments in developing countries;
 - (i) collateralised debt and collateralised cash flow financings;
 - (j) life settlements; and
 - (k) commodities.
- 5 Information about each Arch cru fund and its sub-funds is set out below.
CF Arch cru Diversified Fund
- 6 The Diversified Fund was incorporated in June 2002 and originally named "Insinger de Beaufort Manager Selection ICVC".
- 7 The Diversified Fund was re-named the CF Arch cru Diversified Funds in mid-2007. The firms involved in the diversified fund were:
Authorised corporate director (ACD): Capita
Investment manager: Arch
Depository: HSBC Bank PLC

Marketing and distribution: Cru Investment Management Limited, Arch Financial Products LLP

Income fund

Promotions

8 The Income Fund was promoted to advisers as an investment in the IMA "Cautious Managed" sector and "a strong alternative to cash based investments and bond based investments".

Features

9 The features of the Income Fund as described to advisers are:

- (a) its objective is long-term capital and income growth.
- (b) it offers both net income and net accumulation shares. For income shareholders, net income was to be distributed half-yearly. For net accumulation shareholders, net income was retained and accumulated for the benefit of shareholders and reflected in the price of the shares;
- (c) from October 2007, its aims were to provide returns of cash + 3% per annum from a diversified pool of assets;
- (d) it can invest in a range of assets including:
 - (i) *collective investment schemes* (which invest principally in equities), *transferable securities*, cash, deposits and money market instruments; and
 - (ii) non-mainstream assets including: private equity; private finance; structured finance and commodities;
- (e) from October 2007, the investment classes are described as bonds, equities and other assets to demonstrate low volatility and correlation with equities and bonds to improve diversity;
- (f) Transactions in *derivatives* will only be used for the purposes of hedging and will not affect the risk profile of the fund.

Risks

10 It is the FCA's view that an investment in the income fund is likely to be high risk and, as such, investors must understand and be willing to accept the following investment risks:

- (a) risk to invested capital and return, in general - the risk that the investment may fall in value;
- (b) exchange rate risk - some of the assets are located overseas and would, therefore, be affected by exchange rate movements;
- (c) credit risk - the risk of failure of an entity or counterparty to an underlying investment. For some of the assets, this risk was greater than for more mainstream listed assets;
- (d) governance risk - where equity or debt instruments are not listed on an exchange, then there may be a higher associated corporate governance risk than with listed assets. Similarly, where assets are located in developing countries, the same increased risk may apply;
- (e) liquidity risk - the risk associated with the fund manager being unable to realise assets quickly without significantly affecting the position of investors; and
- (f) valuation risk - assets not traded on a recognised market can be difficult to value accurately.

Balanced fund

Promotions

11 The balanced fund was promoted to advisers as investment in the IMA "Balanced Managed" sector and:

- (a) may be suitable for investors with a low-level risk appetite;
- (b) may be a strong alternative to cash based investments and bond based investments.

Features

- 12 The features of the Balanced Fund, as described to advisers, are:
- (a) its objective is long-term capital growth;
 - (b) it offers net accumulation shares;
 - (c) from May 2008, its aims were to provide returns of cash + 4% per annum particularly over the medium term;
 - (d) it can invest in a range of assets including:
 - (i) *collective investment schemes* (which invest principally in equities), *transferable securities*, cash, deposits and money market instruments; and
 - (ii) non-mainstream assets including: private equity; private finance; structured finance and commodities;
 - (e) it will have a UK overweight portfolio;
 - (f) transactions in *derivatives* will only be used for the purposes of hedging and will not affect the risk profile of the fund.

Risks

- 13 It is the FCA's view that an investment in the balanced fund is likely to be high risk and investors must understand and be willing to accept the following investment risks:
- (a) risk to invested capital and return, in general - the risk that the investment may fall in value;
 - (b) exchange rate risk - some of the assets are located overseas and would, therefore, be affected by exchange rate movements;
 - (c) credit risk - the risk of failure of an entity or counterparty to an underlying investment. For some of the assets, this risk was greater than for more mainstream listed assets;
 - (d) governance risk - where equity or debt instruments are not listed on an exchange, then there may be a higher associated corporate governance risk than with listed assets. Similarly, where assets are located in developing countries, the same increased risk may apply;
 - (e) liquidity risk - the risk associated with the fund manager being unable to realise assets quickly without significantly affecting the position of investors; and
 - (f) valuation risk - assets not traded on a recognised market can be difficult to value accurately.

Global Growth fund

Promotions

- 14 The Global Growth Fund was promoted to advisers as an investment in the IMA "Global Growth" sector and:
- (a) may be suitable for investors with a low-level risk appetite;
 - (b) to deliver decent absolute returns through a broad exposure to the major asset classes;
 - (c) investing in equity and bond funds and also other assets.

Features

- 15 The features of the Global Growth Fund, as described to advisers, are:
- (a) its objective is long-term capital growth;
 - (b) it offers net accumulation shares;
 - (c) from May 2008, its aims were to provide returns of 6% per annum more than cash returns;
 - (d) it can invest in a range of assets including:
 - (i) *collective investment schemes* (which invest principally in equities), *transferable securities*, cash, deposits and money market instruments; and
 - (ii) non-mainstream assets including: private equity; private finance; structured finance and commodities;

- (e) from October 2007, the investment classes are described as bonds, equities and other assets to demonstrate low volatility and correlation with equities and bonds to improve diversity;
- (f) transactions in *derivatives* will only be used for the purposes of hedging and will not affect the risk profile of the fund.

Risks

- 16 It is the FCA's view that an investment in the Global Growth Fund is likely to be high risk and investors must understand and be willing to accept the following investment risks:
- (a) risk to invested capital and return, in general - the risk that the investment may fall in value;
 - (b) exchange rate risk - some of the assets are located overseas and would, therefore, be affected by exchange rate movements;
 - (c) credit risk - the risk of failure of an entity or counterparty to an underlying investment. For some of the assets, this risk was greater than for more mainstream listed assets;
 - (d) governance risk - where equity or debt instruments are not listed on an exchange, then there may be a higher associated corporate governance risk than with listed assets. Similarly, where assets are located in developing countries, the same increased risk may apply;
 - (e) liquidity risk - the risk associated with the fund manager being unable to realise assets quickly without significantly affecting the position of investors; and
 - (f) valuation risk - assets not traded on a recognised market can be difficult to value accurately.

Finance Fund

Promotions

- 17 The Finance Fund was promoted to advisers as an investment in the IMA "Cautious Managed" sector and:
- (a) providing "steady returns, low risk";
 - (b) aiming to beat both cash and bond returns;
 - (c) as a superior investment to cash deposits and bonds.

Features

- 18 The features of the finance fund, as described to advisers, are:
- (a) its objective is steady capital appreciation over the medium to long-term through exposure to a diversified portfolio of private finance-related instruments;
 - (b) it offers net accumulation shares;
 - (c) from November 2008, its aims were to provide returns of cash + 3% per annum;
 - (d) from November 2008, the investment category is defined as private finance, including bridging finance and term lending;
 - (e) it can invest in a range of assets including:
 - (i) *collective investment schemes* (which invest principally in equities), *transferable securities*, cash, deposits and money market instruments; and
 - (ii) non-mainstream assets including: private equity; private finance; structured finance and commodities;
 - (f) transactions in *derivatives* will only be used for the purposes of hedging and will not affect the risk profile of the fund;
 - (g) it will have a UK overweight portfolio.

Risks

- 19 It is the FCA's view that an investment in the Finance Fund is likely to be high risk, and investors must understand and be willing to accept the following investment risks:
- (a) risk to invested capital and return, in general - the risk that the investment may fall in value;

- (b) exchange rate risk - some of the assets are located overseas and would, therefore, be affected by exchange rate movements;
- (c) credit risk - the risk of failure of an entity or counterparty to an underlying investment. For some of the assets, this risk was greater than for more mainstream listed assets;
- (d) governance risk - where equity or debt instruments are not listed on an exchange, then there may be a higher associated corporate governance risk than with listed assets. Similarly, where assets are located in developing countries, the same increased risk may apply;
- (e) liquidity risk - the risk associated with the fund manager being unable to realise assets quickly without significantly affecting the position of investors; and
- (f) valuation risk - assets not traded on a recognised market can be difficult to value accurately.

CF Arch cru investment fund

- 20 The investment fund was incorporated on 29 June 2006. It has two sub-funds: the investment portfolio and specialist portfolio.
- 21 The firms involved in the investment fund were:
 Authorised corporate director (ACD): Capita Financial Managers Limited
 Investment manager: Arch Financial Products LLP
 Depository: Bank of New York Mellon Trust and Depository (UK) Ltd
 Marketing and distribution: Cru Investment Management Limited, Arch Financial Products LLP

Investment Portfolio

Promotions

- 22 The Investment Portfolio was promoted to advisers as an investment in the IMA "Cautious Managed" sector and "an excellent replacement for cash based and bond based investments."

Features

- 23 The features of the Investment Portfolio as described to advisers are:
- (a) its objective is to generate consistent returns to provide wealth preservation and capital appreciation;
 - (b) it offers net accumulation and net income shares;
 - (c) in March 2007, its aims were to provide consistent returns of LIBOR + 4% with a significant focus on risk management, this was revised to cash + 4% in August 2007;
 - (d) from March 2007, investment classes are stated as being public market securities and private investments. In September 2007 it is stated that the premise since inception of the fund was that public markets did not represent sufficient future reward for the fund.

Risks

- 24 It is the FCA's view that an investment in the Investment Portfolio is likely to be high risk and investors must understand and be willing to accept the following investment risks:
- (a) risk to invested capital and return, in general - the risk that the investment may fall in value;
 - (b) exchange rate risk - some of the assets are located overseas, and would therefore be affected by exchange rate movements;
 - (c) credit risk - the risk of failure of an entity or counterparty to an underlying investment. For some of the assets, this risk was greater than for more mainstream listed assets;
 - (d) governance risk - where equity or debt instruments are not listed on an exchange, then there may be a higher associated corporate governance risk than with listed assets. Similarly, where assets are located in developing countries, the same increased risk may apply;

- (e) liquidity risk - the risk associated with the fund manager being unable to realise assets quickly without significantly affecting the position of investors; and
- (f) valuation risk - assets not traded on a recognised market can be difficult to value accurately.

Specialist Portfolio

Promotions

- 25 The Specialist Portfolio was promoted to advisers as an investment in the IMA "Active Managed" sector and "an excellent replacement for cash based and bond based investments."

Features

- 26 The features of the Specialist Portfolio as described to advisers are:
- (a) its objective is "to seek capital growth from an aggressively managed portfolio which may take high cash weightings at times when the investment manager lacks confidence in the outlook for equities, bonds and other asset classes. There is a moderate risk to capital";
 - (b) it offers net accumulation and net income shares;
 - (c) in March 2007, its aims were to provide consistent returns of LIBOR + 6% with a significant focus on risk management; this was revised to cash + 6% in August 2007;
 - (d) from March 2007, investment classes are stated as being public market securities and private investments which are leveraged up to 25%. In September 2007, the fund is described as having a low correlation with traditional public investments such as bonds and equities.

Risks

- 27 It is the FCA's view that an investment in the Specialist Portfolio is likely to be high risk and investors must understand and be willing to accept the following investment risks:
- (a) risk to invested capital and return, in general - the risk that the investment may fall in value;
 - (b) exchange rate risk - some of the assets are located overseas and would, therefore, be affected by exchange rate movements;
 - (c) credit risk - the risk of failure of an entity or counterparty to an underlying investment. For some of the assets, this risk was greater than for more mainstream listed assets;
 - (d) governance risk - where equity or debt instruments are not listed on an exchange, then there may be a higher associated corporate governance risk than with listed assets. Similarly, where assets are located in developing countries, the same increased risk may apply;
 - (e) liquidity risk - the risk associated with the fund manager being unable to realise assets quickly without significantly affecting the position of investors; and
 - (f) valuation risk - assets not traded on a recognised market can be difficult to value accurately.

Appendix 1

Key definitions

1.1 Key definitions

[**Note:** the following definitions relevant to *CONRED* are extracted from the *Glossary*.]

<i>CF Arch cru payment scheme</i>	the requirements included in the <i>permissions</i> of Capita Financial Managers Limited, BNY Mellon Trust & Depository (UK) Limited and HSBC Bank plc at their request under what was then (but is no longer) section 44 of the <i>Act</i> on 31 August 2011.
<i>consumer</i>	<ul style="list-style-type: none"> (a) where the <i>personal recommendation</i> was made on or before 31 October 2007, a <i>private customer</i> for the purposes of COB 2 and COB 5, as defined by the version of the <i>Handbook</i> then in force; or (b) where the <i>personal recommendation</i> was made on or after 1 November 2007, a <i>retail client</i> in accordance with COBS 3.4.1 R.
<i>firm</i>	<ul style="list-style-type: none"> (a) an <i>authorised person</i>; or (b) a <i>person</i> who was an <i>authorised person</i> when the relevant activity took place but has since ceased to be one.
<i>personal recommendation</i>	<p>a recommendation which is <i>advice on investments</i> and:</p> <ul style="list-style-type: none"> (a) where given on or before 31 October 2007, was given to a specific <i>person</i>; or (b) where given on or after 1 November 2007, was presented as suitable for the <i>person</i> to whom the recommendation was made, or was based on a consideration of the circumstances of that <i>person</i>, other than a recommendation issued exclusively through distribution channels or to the public.

Consumer Redress Schemes sourcebook

Schedule 1 Record keeping requirements

Sch 1.1 G

- | | |
|---|---|
| 1 | The aim of the <i>guidance</i> in the following table is to give the reader a quick overall view of the relevant record-keeping requirements. |
| 2 | It is not a complete statement of those requirements and should not be relied on as if it were. |

Sch 1.2 G

Handbook reference	Subject of record	Contents of record	When record must be made	Retention period
CONRED 2.10.1R(1)(a)	Arch cru consumer redress scheme	Certificate of posting for each letter sent	When letter sent	Five years
CONRED 2.10.1R(1)(b)	Arch cru consumer redress scheme	Copy of each letter sent	When letter sent	Five years
CONRED 2.10.1R(1)(c)	Arch cru consumer redress scheme	Record of attempts to contact consumer or obtain further information	When attempts made	Five years
CONRED 2.10.1R(1)(d)	Arch cru consumer redress scheme	Completed template for each opted-in scheme case	When template completed	Five years
CONRED 2.10.1R(1)(e)	Arch cru consumer redress scheme	All information on the consumer file and information received from the consumer	When located on consumer file or obtained	Five years

Consumer Redress Schemes sourcebook

Schedule 2 Notification requirements

Sch 2.1 G

Handbook reference	Matters to be notified	Contents of notification	Trigger event	Time allowed
CONRED 2.4.9R	Information on the total number of scheme cases; opted-in scheme cases, and investments in Arch cru funds	(1) total number of scheme cases; (2) The number of such investments resulting from the <i>regulated activities</i> for a <i>customer</i> in CONRED 2.1.3R; and the number of such investments falling outside the scheme with an explanation of the reason why, in each case; (3) the total number of opted-in scheme cases.	None: notification required in all cases	Until 29 July 2013
CONRED 2.9.2R	Information on the number of opted-in scheme cases; completed and incomplete templates and the results of such; the total number of redress cases; the total number of <i>redress determinations</i> sent to <i>consumers</i> ; the total number of <i>con-</i>	(1) the total number of opted-in scheme cases; (2) the total number of completed templates; (3) the total number of incomplete templates, with an explanation as to why the templates have not	None: notification required in all cases	Until 9 December 2013

Handbook reference	Matters to be notified	Contents of notification	Trigger event	Time allowed
	<p><i>sumers</i> paid redress and the amount of such; and the total amount of redress unpaid to date.</p>	<p>been completed;</p> <p>(4) the total number of redress cases;</p> <p>(5) the total number of redress determinations sent to <i>consumers</i>;</p> <p>(6) the total number of <i>consumers</i> paid redress to date;</p> <p>(7) the total amount of redress paid to date; and</p> <p>(8) the total amount of redress unpaid to date.</p>		

Consumer Redress Schemes sourcebook

Schedule 3 Fees and other required payments

Sch 3

There are no provisions for fees in CONRED. As noted in CONRED 2.5.19G, a fee is payable in any case where the *FCA* exercises its powers under CONRED 2.5.12R to take steps instead of a firm, or appoint one or more competent persons to do so. This fee is as specified in the table at FEES 3.2.7 R.

Consumer Redress Schemes sourcebook

Schedule 4 Powers exercised

Sch 4.1 G
[deleted]

Sch 4.2 G
[deleted]

Consumer Redress Schemes sourcebook

Schedule 5 Rights of action for damages

Sch 5.1 G

The table below sets out the *rules* in CONRED contravention of which by an *authorised person* may be actionable under section 138D of the Act (Actions for damages) by a *person* who suffers loss as a result of the contravention.

Sch 5.2 G

If a "Yes" appears in the column headed "For private person?", the rule may be actionable by a *private person* under section 138D (or, in certain circumstances, his fiduciary or representative; see article 6(2) and (3)(c) of the Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001 (SI 2001/2256)). A "Yes" in the column headed "Removed" indicates that the FCA has removed the right of action under section 138D(3) of the Act. If so, a reference to the *rule* in which it is removed is also given.

Sch 5.3 G

The column headed "For other person?" indicates whether the *rule* may be actionable by a *person* other than a *private person* (or his fiduciary or representative) under article 6(2) and (3) of those Regulations. If so, an indication of the type of *person* by whom the *rule* may be actionable is given.

Sch 5.4 G

Rule	Right of action under section 138D		
	For private person?	Removed?	For other person?
All <i>rules</i> in CONRED with the status letter 'E'	No	No	No
All other <i>rules</i> in CONRED	Yes	No	No

Consumer Redress Schemes sourcebook

Schedule 6 Rules that can be waived

Sch 6.1 G

As a result of regulation 10 of the Regulatory Reform (Financial Services and Markets Act 2000) Order 2007 (SI 2007/1973) the *FCA* has power to waive all its *rules*. However, if the *rules* incorporate requirements laid down in European directives, it will not be possible for the *FCA* to grant a waiver that would be incompatible with the *United Kingdom's* responsibilities under those directives.

