

Chapter 1

General

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).