



HM Treasury

Regulation of pre-paid funeral plans –
the role of the Financial Services
Compensation Scheme where a
regulated funeral plan provider fails:
**Response to the consultation and
additional provisions**

April 2022

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– the role of the Financial Services
Compensation Scheme where a
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ISBN: 978-1-911686-88-0 PU: 3212

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Executive summary

In January 2021, the government legislated to bring all pre-paid funeral plan providers and intermediaries¹ within the regulatory remit of the Financial Conduct Authority (FCA). This means that by 29 July 2022 all funeral plan providers must be authorised by the FCA in order to enter into or carry out funeral plan contracts. Those who intermediate sales of funeral plans (e.g. those who advise on or arrange plans) will need to either apply for FCA authorisation or consider whether it would be appropriate and possible to carry on business as an appointed representative under the responsibility of an authorised principal.

We are now 15 months into an 18-month transition period before the new regulatory framework comes fully into force on 29 July 2022. During this time the FCA has been developing its rules for the sector and affected funeral plan firms should be taking the necessary steps to familiarise themselves with the new regulatory requirements.

In its March 2021 consultation paper, [CP21/4 Funeral Plans: proposed approach to regulation](#), the FCA proposed requirements for funeral plan firms to protect funeral plan consumers from potential firm failures. As set out in the response to CP21/4 – [PS 21/8](#) – the FCA considers it prudent to protect consumers from potential firm failures, including by introducing Financial Services Compensation Scheme (FSCS) protection for certain funeral plan activities from July 2022.

Following further consideration, it became clear that further legislative changes were required to ensure that the FSCS could operate effectively for the consumers of pre-paid funeral plan contracts if a regulated funeral plan provider failed. The government therefore launched a [consultation](#) in July 2021 on its proposed approach to protecting consumers in the event of a firm failing.

The government proposed to make a statutory instrument:

- Enabling the FCA to make rules that will allow the FSCS to secure continuity of cover for funeral plan holders in appropriate circumstances.
- Enabling the FCA to make rules that will give the FSCS further rights in relation to the trust assets and insurance policies backing funeral plans.

¹ Save for those which benefit from an exemption, such as local authorities.

These changes would ensure that the FCA could most effectively oversee an orderly wind down of a failed regulated funeral plan provider, thus protecting consumers from the risks posed by a disorderly exit from the market and mitigating the impact on FSCS levy payers.

The FCA published a further consultation in July 2021 – [CP 21/20](#) – setting out the outcomes it wants to see for consumers if a regulated funeral plan provider fails. That consultation included proposals on the resolution of failed regulated providers, associated FSCS protection and requirements for the structure of providers’ trust and insurance arrangements. The FCA’s response to this consultation – [PS21/15](#) – was published in November 2021.

The government has fully considered the responses to its own July 2021 consultation. This document sets out the government’s response.

All those who responded to the consultation supported or strongly supported the government’s proposed approach to ensuring that the FSCS can operate effectively for the consumers of pre-paid funeral plans if a regulated funeral provider fails. The government will therefore bring forward its statutory instrument as planned.

The government has also taken the decision to go further to ensure that funeral plan consumers are adequately protected. This document therefore explains two new provisions of the forthcoming legislation:

- The government will place an additional statutory duty of co-operation on insolvency practitioners. This will require them to co-operate with the FSCS if a regulated funeral plan provider fails (see chapter 3).
- The government will make it easier for funeral plan providers that seek to exit the market to transfer their existing funeral plan contracts to another funeral plan provider for regulatory purposes (see chapter 4).

The government will lay the relevant secondary legislation when parliamentary time allows to amend the regulatory framework. The impact assessment for these changes is annexed to this consultation response.

This legislation will come fully into force on 29 July 2022 - the same time as The Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2021. This will ensure that consumers are protected by the FSCS as soon as funeral plan providers become authorised for acts or omissions after that date.

Chapter 1

Introduction

- 1.1 A funeral plan contract (also referred to as a pre-paid funeral plan) is a contract under which a customer makes one or more payments to a funeral plan provider, who subsequently arranges or pays for a funeral upon the death of the customer (or of another person named in the contract). The payments received by providers are generally either placed into a trust structure or used to purchase an insurance policy. When a plan holder dies the funeral plan provider then provides the funeral or arranges for a third party to provide one, using monies from the trust or insurance contract.
- 1.2 In response to evidence of consumer detriment within the pre-paid funeral plan sector, the government legislated in January 2021 to bring all¹ pre-paid funeral plan providers (hereafter “funeral plan providers”) within the regulatory remit of the Financial Conduct Authority (FCA).
- 1.3 As set out in Chapter 1 of “Regulation of pre-paid funeral plans – the role of the Financial Services Compensation Scheme where a regulated funeral plan provider fails: A consultation”², this legislation followed a comprehensive consultation process.
- 1.4 Following debates in the House of Lords and the House of Commons, The Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2021 was made into law on 28 January 2021³. This Order provided for an 18-month transition period – ending on 29 July 2022 – during which time the FCA has been designing, consulting on, and implementing the regulatory architecture for the new regime. The transition period has also allowed time for funeral plan providers and their intermediaries to take the necessary steps to familiarise themselves with the new regulatory requirements.
- 1.5 The FCA published a [consultation paper](#) on draft rules and guidance for the funeral plan sector on 2 March 2021. This consultation closed on 13 April 2021. The FCA then published its response, and its final rules for the new

¹ Save for those which benefit from an exemption, such as local authorities.

² https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/999203/Consultation_-_Regulated_pre-paid_funeral_plan_providers_and_the_FSCS.pdf

³ <https://www.legislation.gov.uk/uksi/2021/90/contents/made>

regulatory framework in policy statement PS21/8 “Regulation of funeral plans: Feedback to CP21/4 and final rules”⁴ on 5 July 2021.

- 1.6 In its March 2021 consultation paper the FCA proposed to protect funeral plan consumers from potential firm failures including by introducing FSCS protection for certain funeral plan activities from July 2022.
- 1.7 The FCA’s policy statement confirmed that its rules in relation to the FSCS will be made as consulted on. This means that FSCS protection for funeral plans will commence at the same time as regulation of the sector commences on 29 July 2022.
- 1.8 Following further consideration, it was clear that further legislative changes were required to ensure that the FSCS can operate most effectively for the consumers of pre-paid funeral plans should a regulated funeral plan provider fail. The government therefore proposed to make an additional statutory instrument to supplement that which was laid in January 2021.
- 1.9 Consequently, the government launched a consultation in July 2021 which sought views on its proposed legislative approach to protecting consumers in the event of a firm failing. The government sought views on areas including continuity of cover for funeral plan holders, the ability of the FSCS to seek recoveries more effectively from trust assets and insurance monies, and the ability of the FCA to request relevant information from an authorised firm.
- 1.10 The FCA also announced on 5 July 2021 that it would consult on further rules in relation to FSCS protection of funeral plans⁵. That consultation closed on 13 August 2021 and the FCA’s response to that consultation was published on 5 November 2021⁶. The FCA’s policy statement summarised the feedback received to its consultation paper, the FCA’s response to that feedback and its near final rules.
- 1.11 The FSCS is the UK’s statutory compensation scheme of last resort for financial services. FSCS protection already applies to claims made in connection with deposit taking, insurance provision and distribution, certain investment business activities, home finance advice and certain debt management activities. The FSCS plays a critical role in protecting consumers and ensuring they can have confidence in the financial services market. Firms from across the financial services industry pay levies to fund both the FSCS’s operating costs and the compensation it pays out.
- 1.12 Under the Financial Services and Markets Act 2000 (Financial Services Compensation Scheme) Order 2013, the FCA and Prudential Regulation

⁴ <https://www.fca.org.uk/publication/policy/ps21-8.pdf>

⁵ <https://www.fca.org.uk/publication/consultation/cp21-20.pdf>

⁶ <https://www.fca.org.uk/publication/policy/ps21-15.pdf>

Authority are each responsible for making rules in relation to the FSCS – in particular for making rules concerning compensation made by the FSCS and the levies which fund it. The FCA’s responsibilities can extend to include setting the framework for FSCS protection in relation to funeral plans.

- 1.13 The government has fully considered the responses to the consultation. This document sets out the government’s response. In total, the government received six responses from funeral plan providers, trade associations and legal professionals. A list of the respondents can be found at Annex A.
- 1.14 The government would like to thank all respondents for taking the time to respond to the consultation and for sharing their views.
- 1.15 This document also sets out additional provisions to ensure that the new regulatory framework for funeral plans is comprehensive and effective, namely by enabling funeral plan providers exiting the market to transfer their funeral plans more easily to authorised providers for regulatory purposes. This means that where a funeral plan provider does not obtain authorisation it will be more able to transfer its existing funeral plans to an authorised provider, thereby ensuring that more funeral plan consumers benefit from continued plan coverage.

Chapter 2

Ensuring that the FSCS can operate effectively for the consumers of pre-paid funeral plan contracts if a regulated provider fails

This chapter summarises the responses the government received to its consultation. In particular, the government sought views on proposals to:

- Enable the FCA to make rules that will allow the FSCS to secure the continuity of funeral plan contracts, where the provider of these contracts has failed,
- Enable the FCA to make rules that will allow for the FSCS to obtain rights in relation to the trust assets and insurance policies backing funeral plans entered into by the failed provider,
- Enable the FSCS to obtain information from third parties (e.g. trustees and insurers) who were at any relevant time involved in the provision of a failed regulated funeral plan provider's plans, for the purposes of determining claims made by consumers against that provider, and
- Exclude insolvency practitioners from the requirement to be authorised by the FCA in order to carry out funeral plans.

2.1 In its July consultation, the government identified two risks that may arise if a regulated funeral plan provider were to fail under the existing regulatory architecture. These were: i) the FSCS would not be able to secure the continuity of funeral plans for consumers if a funeral plan provider fails, and ii) the FSCS may be unable to recover from trust assets or insurance monies underpinning funeral plans those sums it pays out by way of monetary compensation or in order to secure continuity of cover.

2.2 All respondents agreed that government legislation to achieve these goals was necessary, with one noting the positive impact that increased consumer confidence would have upon the industry.

2.3 The government therefore intends to maintain the position set out in its consultation and proceed with its proposed amendments to the legislative framework. In order to achieve the above policy proposals, the government

intends to make supplemental amendments to the Financial Services and Markets Act 2000 ("FSMA") by way of secondary legislation.

Securing continuity of cover for the consumers of funeral plans

- 2.4 The government is of the view that, if a regulated funeral plan provider failed, in many cases funeral plan holders would be better served through continuity of cover than they would through receiving monetary compensation and the consumer having to purchase a new funeral plan.
- 2.5 To achieve this, the government outlined its proposal to insert a new section 215A into FSMA – "215A. – *Continuity of funeral plan contracts*". Section 215A would specify that the FCA can make rules requiring or enabling the FSCS to make arrangements for securing continuity of cover for the customers of failed funeral plan providers.
- 2.6 The proposed provision would enable the FSCS to take appropriate measures (including making payments) to ensure continuity of cover by either facilitating the transfer of the existing funeral plan contract to another regulated funeral plan provider, or by securing a suitable substitute funeral plan with another regulated funeral plan provider.
- 2.7 Section 215A would also enable the FCA to make rules giving the FSCS the power it needs to impose levies on the industry for the purposes of meeting expenses incurred in arranging continuity of cover for or paying compensation to consumers of failed funeral plan providers.
- 2.8 All respondents agreed with the government's objective to provide continuity of cover. Some respondents provided feedback on the proposed legislative mechanism for achieving this objective.
- 2.9 Some respondents highlighted that not all providers - especially smaller providers - are suitably set up to deliver all types of funeral plan, which may pose delivery challenges in practice. An example of this would be where there is a contractual commitment to provide a specific funeral director, but the new provider does not deal with that funeral director. The government recognises that – in the event of a regulated provider failure – it may not be possible for every funeral plan to be carried out exactly as originally intended if purchased by the new provider, or for a replacement plan to be on exactly the same terms. In such circumstances, if the FSCS cannot arrange for an offer of a contract that it considers to be of the same quality as the original funeral plan contract, then the FSCS would offer the customer the option of receiving compensation instead. The government considers that continuity of cover is nevertheless likely to be the optimal outcome for most funeral plan holders.

- 2.10 One respondent suggested that steps should be taken to ensure that any providers taking on a failed regulated provider's plans do not have to operate at a loss or risk to their own trust or financial position. As no provider will be compelled to take on such plans if they do not wish to, the government does not consider that any further steps need be taken.
- 2.11 The government therefore intends to maintain the position set out in the consultation and proceed with its proposed amendments to section 215A of FSMA.

Enabling the FSCS to seek recoveries more effectively from the relevant trust assets and insurance monies for sums paid out to compensate consumers or in order to secure continuity of cover

- 2.12 The government is of the view that, if a regulated funeral plan provider fails, then the FSCS may not be able to effectively seek recovery of the sums it pays out as monetary compensation to consumers or in securing continuity of cover for funeral plan holders. This is because the usual approach of the FSCS when a firm is unable to satisfy claims against it is to take assignment of the claimant's (i.e. the consumer's) rights in accordance with FCA rules made under section 215 of FSMA. This normally enables the FSCS to seek to recover those sums it pays out to consumers. However, the trust deeds and insurance policies underpinning funeral plans may not have clearly or sufficiently defined the consumer's rights, or there may be no consumer right to those funds.
- 2.13 In order to ensure that the FCA can make the necessary rules that will allow the FSCS to seek recovery from the trust assets and insurance monies underpinning funeral plan contracts, the government proposed to insert new subsections into section 215 of FSMA regarding the rights of the FSCS in relation to failed funeral plan providers and their successors. See 3.13-3.17 of the government's consultation for further detail on its proposed amendments.
- 2.14 All responses except one were in favour of the proposal ensuring the FSCS can seek recoveries from trust assets and insurance monies in circumstances where the claimant would not otherwise have had any (or sufficient) rights to such monies.
- 2.15 The other respondent suggested that rather than seek to address what should happen where customers do not have any rights (i.e. where they are not beneficiaries), a better approach would be to ensure that customers do indeed have some rights and are beneficiaries in the event a regulated funeral plan provider fails and continuity cannot be arranged. The government agrees with this in principle, but does not consider this to be a practicable solution in relation to existing contracts and therefore believes that the proposed

amendments to section 215 of FSMA are still necessary to achieve the desired outcome.

- 2.16 One respondent suggested that it would be unprecedented to enable the FSCS to make changes to trust deeds and a better approach would be to include the necessary provisions within the requirements for funeral trusts under FCA rules. The government notes that the FCA will be enabled to introduce rules to ensure that trust assets are held for the benefit of new customers in relation to new plans entered into following the commencement of regulation. In addition, the intended legislation will also help to ensure that the FSCS is able to recover from pre-existing plans in relation to compensation liabilities arising from the commencement of regulation, where changes to the contractual terms may not be practical.
- 2.17 One respondent suggested that FSCS levies alone were likely to be insufficient for providing continuity. The respondent did not provide detailed evidence for this point and the government has not come across any evidence in its wider engagement that would suggest that this is the case.
- 2.18 Another respondent suggested that while the proposal was sound in principle, trustees who are responsible for plans set up both before and after 29 July 2022 may encounter significant challenges in determining how to properly comply with FSCS requirements. As all existing and new plans¹ will be covered by FCA regulation from 29 July, the government does not consider that trustees will encounter such challenges.
- 2.19 The government therefore intends to maintain the position set out in the consultation and proceed with its further proposed amendments to sections 215, 219 and 223 FSMA.
- 2.20 The government received no comments on the proposed amendments to sections 219 and 223 of FSMA in paragraph 3.17 of the government's consultation and the government will also proceed with these proposed amendments.

Ensuring that the FCA can request the relevant information from an authorised firm and persons "connected with" an authorised firm

- 2.21 Section 165 of FSMA gives the FCA a power to require information from firms authorised by the FCA. Information must be requested in writing and reasonably required in connection with the exercise of the FCA's functions. The government proposed to amend section 165 of FSMA so that persons

¹ except in limited circumstances in which the carrying out of existing funeral plans will only become regulated from 31 October 2022, as set out at paragraph 4.10 of this consultation response

“connected with” an authorised firm include any persons involved in any trust arrangement relating to a funeral plan contract entered into or carried out by an FCA-authorised funeral plan provider.

- 2.22 The government also proposed to amend section 166 of FSMA so that the FCA can request a skilled person report from any person who is or has at any relevant time been involved in any trust arrangement relating to a funeral plan contract entered into or carried out by an FCA-authorised funeral plan provider.
- 2.23 All responses except one were in favour of the proposal to amend sections 165 and 166 of FSMA. One respondent noted that the amendments would likely result in an enhanced ability to access technical expertise from external sources, which would benefit both the regulator and regulated firms.
- 2.24 The other respondent was concerned that the practical impact could well be to make trustees harder to source or more expensive to employ. The government has not seen or been provided with any evidence which suggests this might be the case.
- 2.25 One respondent also raised a query regarding paragraph 3.19 of the government’s consultation, which was read by the respondent as suggesting that any trustee could be asked to provide a “skilled person’s report” to the FCA. The government understands that such a request would be made only if such a trustee met the FCA’s criteria for being a skilled person.
- 2.26 The government therefore intends to maintain the position set out in the consultation and proceed with its further proposed amendments to FSMA.

Excluding insolvency practitioners from the requirement to be regulated in order to carry out funeral plans

- 2.27 Section 19 of FSMA provides that a person (which includes a body corporate) must not carry on a regulated activity in the UK, or purport to do so, unless they are an authorised or exempt person. This is known as the “general prohibition” and breaching it is a criminal offence. Any person therefore normally requires permission from the FCA under FSMA in order to carry on regulated activities specified in the Financial Services and Markets Act (Regulated Activities) Order 2001 (RAO). However, the regulated activities listed in article 72H of the RAO do not require such permission if carried on by a person acting as an insolvency practitioner. The list in article 72H does not currently include carrying out funeral plan contracts, which is a regulated activity under article 59(1A) of the RAO.

- 2.28 The government proposed to rectify this by amending the RAO so that the activity of carrying out funeral plan contracts is explicitly stated to be subject to the exclusion in article 72H. This would ensure that if a regulated funeral plan provider fails and its activities are temporarily taken over by an insolvency practitioner during a winding-up, that insolvency practitioner is duly exempted from needing FCA authorisation to carry out the contract.
- 2.29 While the government considers it unlikely that insolvency practitioners would need to undertake any activities which amount to carrying out funeral plans in the course of discharging their functions, the possibility cannot be discounted. Extending the article 72H exclusion therefore avoids any uncertainty for insolvency practitioners as to whether they may be in breach of the general prohibition when dealing with the failure of a funeral plan provider.
- 2.30 All respondents were in favour of this amendment. One respondent noted that without such an amendment, any insolvency would be likely to incur significant delays for consumers, which would increase the risk of harm and distress to bereaved families.
- 2.31 Another respondent suggested that appointed insolvency practitioners should undergo appropriate vulnerable customer training in view of the vulnerability of bereaved families.
- 2.32 It also came to the government's attention following the consultation that article 72H does not apply to the Official Receiver. The Official Receiver is appointed by the court to act as liquidator where there is no private sector insolvency practitioner appointed. The government therefore intends to replicate the above treatment of insolvency practitioners under article 72H of the RAO, by exempting Official Receivers acting as liquidators from needing FCA permission to carry out the regulated activity specified in article 59(1A) of the RAO (carrying out a funeral plan contract as provider). To accomplish this, the government therefore intends to amend the Financial Services and Markets Act 2000 (Exemption) Order 2001 and specifically exclude the Official Receiver from needing FCA authorisation by adding a new sub-paragraph to paragraph 52 of the Schedule to that Order.
- 2.33 The government welcomes industry's views and has noted the suggested areas for consideration. Recognising the overwhelming support for this approach, the government intends to maintain the position set out in the consultation and proceed with its proposed amendments to FSMA.

Chapter 3

A duty for insolvency practitioners to co-operate with the FSCS

- 3.1 Paragraph 3.11 of the consultation noted that the government was considering whether any further changes might be required to ensure that the FSCS operates effectively for funeral plan consumers, such as how insolvency practitioners should engage with the compensation scheme if a regulated funeral plan provider fails.
- 3.2 Following further consideration, the government will make further amendments to FSMA to place a statutory duty on insolvency practitioners to co-operate with the FSCS.
- 3.3 The government believes that placing a statutory duty of co-operation on insolvency practitioners will maximise the chances of the FSCS being able to provide continuity of cover, rather than monetary compensation, for the customers of a failed regulated funeral plan provider. Without this duty, there is a risk that the FSCS will not be able to obtain what it needs from an insolvency practitioner because (i) of the additional work and costs required by the insolvency practitioner to respond to the FSCS's requests, and (ii) the insolvency practitioner might be susceptible to accusations that they were unfairly prioritising the FSCS (and FSCS-eligible claimants) over other creditors of the failed regulated funeral plan provider.
- 3.4 The duty will require the insolvency practitioner of a failed regulated funeral plan provider – following an express request by the FSCS – to co-operate with the FSCS in securing continuity of cover or compensation for funeral plan holders insofar as the insolvency practitioner has sufficient funding to do so. The FSCS would only be able to ask for assistance which it has “identified as being necessary”.
- 3.5 This duty will apply to administrators, liquidators, and Official Receivers acting as liquidators. The government considers it appropriate to require the same level of co-operation from these three types of office holder because this will help to ensure that the FSCS can request assistance from the insolvency practitioner in any of these three scenarios.
- 3.6 This duty of co-operation will not override an insolvency practitioner's existing statutory duties, nor is the policy intent to change the scope of an insolvency

practitioner's powers. Liquidators will only be required to comply with the duty of co-operation with the FSCS insofar as it is consistent with their functions under Schedule 4 of the Insolvency Act 1986.

- 3.7 The government therefore intends to insert a new section 215B into FSMA in order to require an insolvency practitioner to provide, at the request of the FSCS, any assistance identified by the scheme manager as being necessary to enable the scheme manager to secure continuity of cover or to administer the compensation scheme in relation to funeral plan contracts.
- 3.8 The government will also confer, by way of a further amendment to FSMA, a power on the FCA to make rules enabling the FSCS to provide discretionary funding to the administrator or liquidator (including the Official Receiver acting as liquidator) of a failed funeral plan provider, to meet costs that have been reasonably and exclusively incurred by that administrator or liquidator for the purposes of co-operating with the FSCS under the new duty. The FSCS will be able to provide such funding by way of payments to, or on behalf of, the failed funeral plan provider (as well as payments made directly to the administrator or liquidator).
- 3.9 The government anticipates that, under the FCA's rules, it will be a condition of FSCS funding that the administrator or liquidator has access to insufficient funds to otherwise meet the costs of co-operation. Whether a liquidator or administrator has "insufficient funding" and whether the costs were reasonably incurred would be assessed by the FSCS, based on parameters defined in FCA rules.
- 3.10 The government understands that the FSCS's assessment of whether a firm has insufficient funding – and what counts as a reasonable level of funding if needed – would in practice need to take account of the existing statutory financial obligations of that insolvency practitioner (e.g. Official Receiver administration fees, Official Receiver general fees, and so on). Likewise, the government does not anticipate that the FSCS will be able to require the insolvency practitioner to completely deplete the available resources before FSCS funding is triggered. This would be unreasonable, given the likelihood that the insolvency practitioner will require some funds to deal with the estate.
- 3.11 As with most regulated products, the Treasury defines which activities are subject to regulation and delegates responsibility for this regulation to the FCA. The FCA then develops rules, consults on them, and undertakes a cost benefit analysis.
- 3.12 To facilitate this, the government will grant the FCA an additional rulemaking power within section 215A of FSMA, allowing the FCA to make rules enabling the FSCS to provide discretionary funding to administrators, liquidators and Official Receivers.

- 3.13 The government conducted a targeted consultation with key stakeholders in the insolvency practitioner sector. No respondents disagreed with the government's proposed objective to place a duty of co-operation on insolvency practitioners. Some respondents provided feedback on the proposed mechanisms for achieving this objective.
- 3.14 One respondent suggested that the costs incurred by the insolvency practitioner in complying with the proposed duty should be an obligation borne by the FSCS (rather than being at the discretion of the FSCS), in order to avoid placing an additional burden on the insolvent estate to the detriment of the general body of creditors. The government considers it reasonable for the FSCS to decide whether meeting the costs is reasonable and proportionate, as some cases will not require additional resources. In exercising its power under section 215B the FSCS will be subject to the public law requirement of reasonableness.
- 3.15 One respondent suggested it would be useful to have further clarification about what funds should be considered when calculating the sufficiency of funds in an insolvent estate, given the FSCS's power to fund the continuity of provision in cases where there are insufficient funds. This will be a matter for the FSCS to consider with the relevant insolvency practitioner.
- 3.16 One respondent suggested that it would be useful to have greater clarity on the level of co-operation expected of insolvency practitioners with the FSCS under the new duty, noting that there may be General Data Protection Regulation (GDPR) implications that require indemnification and/or other arrangements to be agreed upon with the FSCS prior to the sharing of information. The government considers that the level of co-operation would differ from case to case but agrees that co-operation relating to the sharing of information would need to be UK GDPR-compliant.
- 3.17 Two respondents suggested that the government should consider whether the insolvency practitioners appointed in respect of funeral providers should also have a special objective to effect a transfer to another provider. The government considers that, while there is merit in this proposal, it would require at least a specific provision in insolvency legislation or more likely a special regime for the sector. Designing a special administration regime for regulated funeral plan providers would be disproportionate given the size of the sector and relatively low probability of failures.
- 3.18 The government welcomes industry's views and has noted the suggested areas for consideration.

Chapter 4

Additional provisions to mitigate transition risks

- 4.1 The government passed legislation in January 2021 to bring all pre-paid funeral plan providers and intermediaries within the FCA's regulatory perimeter. The legislation allows for an 18-month transition period before the new regulatory regime comes fully into force on 29 July 2022. The transition period was designed to give existing providers sufficient time to prepare for the new regulatory requirements.
- 4.2 It is regrettable that bringing a previously unregulated sector into regulation – whatever form that may take – creates the possibility that some providers are not able to meet the threshold conditions for authorisation. Where a provider is unable to obtain FCA authorisation because of underlying issues in its business model or trust arrangements, it is important to understand that this is not an issue created by bringing the sector into regulation. Rather, bringing the sector into regulation exposes these unsustainable business models and prevents these problems from getting worse and impacting more consumers.
- 4.3 The FCA has set out its approach to regulation of the pre-paid funeral plan sector¹. The FCA's guidance is clear that providers who are not seeking or not able to obtain authorisation should either transfer their existing plans to a provider which is seeking authorisation, or wind down in an orderly way before regulation starts. The FCA's guidance also states that providers who will not be authorised should stop selling new funeral plans.
- 4.4 During the transition period, the FCA is acting to protect consumers by publishing a list of those providers that do not intend to apply for authorisation, have withdrawn their applications, or are planning to transfer their books; and warning consumers not to buy plans from firms that haven't applied, have withdrawn their application, or had their application refused.².
- 4.5 The government has been clear throughout that it would look to take further steps to support a smooth transition where appropriate. The government – working closely with the FCA – has been monitoring the implementation of

¹ <https://www.fca.org.uk/firms/regulating-funeral-plans/providers>

² <https://www.fca.org.uk/consumers/funeral-plans>

the new regulatory framework very closely and it has become apparent that there are barriers to transferring funeral plans in some circumstances.

- 4.6 The government has therefore decided to include provisions in its forthcoming legislation to make it easier in such circumstances for funeral plans providers to transfer their contracts to providers that are or expect to become authorised. These provisions will ensure that the sector can ensure continuity of cover for the maximum number of consumers.
- 4.7 The government will take forward three provisions to achieve this aim.

Deemed transfers where FCA notified of attempted novation

- 4.8 The government intends to make an amendment to article 59 of the Regulated Activities Order to allow funeral plans to be treated as if they had been transferred by one provider (Provider A) to another (Provider B) for regulatory purposes, where reasonable steps have been taken by Provider A to seek express customer consent for the proposed transfer to Provider B, but that consent could not be obtained within a reasonable period and the providers have notified the FCA of that fact.
- 4.9 Novation is the legal substitution of a new contract in place of an old one, with one party to the old contract being replaced by another in the new one. In order to take effect, the transfer of a contract by novation requires the express consent of all parties (Providers A and B and the customer). This amendment will help in situations where, despite having taken reasonable steps to do so, Provider A has not been able to obtain express consent to a proposed transfer from every customer, such that a novation is not contractually possible. This amendment will mean that if Providers A and B notify the FCA that they have taken reasonable steps to novate Provider A's funeral plan contracts, these contracts will be treated for regulatory purposes as if they had novated to Provider B. The effect is that in relation to Provider A's funeral plan contracts which Provider B agrees to take on, for the purposes of FCA regulation Provider B will be the person engaged in the regulated activity of carrying out these contracts as provider.
- 4.10 This amendment will be a permanent fixture of the new regulatory framework because the government believes that in any scenario where an authorised provider fails or withdraws from the market in the future, the best consumer outcome would still be a transfer of their plans to another provider. The FCA is considering whether it would be helpful to firms to issue guidance on what steps it considers would be reasonable for securing the express consent of customers in this context.

Transitional period extended to 31 October 2022 for certain firms

- 4.11 The government also intends to make an amendment to the commencement provisions / article 1(3) of The Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2021 to allow some providers a longer transition period - in limited circumstances - until 31 October for the regulated activity of carrying out funeral plan contracts as provider. This will give these firms more time to achieve authorisation, wind down their business or find an authorised provider to take on their funeral plans. The extension to the transition period will only be for the regulated activity of "carrying out a funeral plan contract as provider" (article 59(1A) of the RAO), which means that providers will be able to deliver existing funeral plans but will not be permitted to enter into new funeral plan contracts.
- 4.12 The only providers that will be able to enter the extended transition period are those that are carrying out funeral plans entered into before 29 July 2022, that applied for FCA authorisation before 1 March 2022, but have not obtained authorisation. This will be where the provider is in one of the following situations:
- Their application has not been determined by the FCA before 29 July 2022,
 - They withdrew that application before 29 July 2022 and have not reapplied, or
 - Their application was refused by the FCA before 29 July 2022 and they have not reapplied.
- 4.13 This extension is deemed appropriate in order to protect consumers in the event of providers having insufficient time to arrange the transfer of their plans before 29 July. This could result in those funeral plan contracts being frustrated i.e. no longer enforceable nor capable of transfer to an authorised provider, unnecessarily penalising consumers.

Deemed transfers where FCA notified

- 4.14 The government also intends to make a further amendment to article 59 of the Regulated Activities Order. This will allow an authorised provider to be treated for regulatory purposes as the person carrying out another firm's funeral plans if:
- both firms have agreed to a transfer of plans;
 - both firms have notified the FCA of the planned transfer before 31 October; and

- it is not reasonably practicable for the providers to achieve a transfer by other means (whether by novation, assignment or operation of law), or a deemed transfer for regulatory purposes under the other article 59 amendment (detailed at paragraphs 4.8 – 4.9) before 31 October 2022.

4.15 This amendment is intended for those providers who could in theory transfer their funeral plans to an authorised provider but who do not have sufficient time to take reasonable steps to secure the express consent of their customers before they become subject to the new regulatory framework. For those providers that are not eligible for the limited transition extension this will need to be completed by 29 July 2022, and for those providers that are eligible for the limited transition extension this will need to be completed by 31 October 2022. For example, if Provider A agrees to buy Provider B’s plans but cannot complete the reasonable steps, and if both providers notify the FCA of the agreement to transfer, then Provider A will be treated as the person engaged in the regulated activity of carrying out funeral plan contracts, in relation to Provider B’s funeral plans. This means that Provider B is not committing a criminal offence at the end of the transition period as it would if it were to carry out its funeral plans.

4.16 This provision will be a temporary fixture of the new regulatory framework – and will therefore only apply until 31 October – because in future, where firms have sufficient time to seek consumer consent, it is right that they should do so.

Chapter 5

Impact assessment

- 5.1 This chapter summarises the responses the government received in relation to the draft impact assessment which was annexed to the consultation. The government sought views on the assumptions used in the draft impact assessment.
- 5.2 No respondents raised any objections to the assumptions in the draft impact assessment.
- 5.3 In line with government Better Regulation guidance, a full impact assessment has not been prepared because the government considers that the net impact of the policy proposal on businesses will be less than net £5 million Equivalent Annual Net Direct Costs to Business. Due to this limited impact, a de minimis assessment will be published when the statutory instrument is laid.

Chapter 6

Next steps

The government will lay the necessary secondary legislation and explanatory memorandum before Parliament when parliamentary time allows.

The FCA consulted on further rules in relation to FSCS protection of funeral plans in July 2021 and published the associated policy statement in November 2021. The FCA will finalise these rules, as well as considering the need for any additional rules and guidance, subject to the government's legislation being made.

In order to ensure that consumers are protected by the FSCS as soon as firms become authorised, these supplementary provisions to the new regulatory framework for funeral plans will come fully into force from 29 July 2022.

Annex A

List of respondents to HMT consultation

- Co-Op
- Dignity
- FCA Consumer Panel
- Funeral Planning Association
- Golden Charter
- Womble Bond Dickinson

HM Treasury contacts

This document can be downloaded from www.gov.uk

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