

Claims management regulation: response to the consultation on secondary regulations and policy statement for transitional provisions



HM Treasury

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July 2018



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ISBN 978-1-912225-94-1 PU 2183

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Chapter 1

Introduction

- 1.1 At Budget 2016, the government announced its intention to transfer claims management regulation to the FCA. The Financial Guidance and Claims Act 2018 (“the Act”) enables this transfer by making claims management activity a Regulated Activity under section 22 of the Financial Services and Markets Act 2000 (FSMA) and a Controlled Activity under section 21 of FSMA (restrictions on financial promotion). In addition to this, it extends FCA regulation of claims management companies (CMCs) to Scotland, where CMC activity is currently unregulated. The Act also enables the transfer of CMC complaints handling from the Legal Ombudsman (LeO) to the Financial Ombudsman Service (FOS).
- 1.2 In April this year, the government launched a consultation document that invited interested parties to comment on the details associated with claims management secondary legislation defining claims management services for the purposes of each of the Regulated Activities Order and the Financial Promotion Order. The government invited views on 15 questions, which covered regulated activities, exemptions, territorial scope, FCA exemptions from consultation requirements, and the temporary permissions regime.
- 1.3 During the consultation period a total of 51 responses to the consultation were received from a range of CMCs, firms in the financial services industry, and professional and trade bodies (see Annex A for a list of organisations that responded). The government has considered the responses to the consultation and, overall, there was broad agreement to the government’s proposals.
- 1.4 There are two parts to this document. Chapters 2 to 4 set out some of the key themes through the consultation responses and confirms the final approach to defining the scope of claims management activities for the purposes of FCA regulation and the temporary permissions regime. Chapter 5 sets out the government’s policy intent for transitional provisions. A draft of the SI, including transitional and consequential provisions, is published alongside this document. This will be subject to further amendment, legal checks and parliamentary approval.

Chapter 2

Draft secondary regulations

Regulated activities

- 2.1 In the consultation, the government proposed to make one change from the current regime to create seven different permissions for regulating the scope of claims management activities. This will make it possible for the FCA to account for the different types of work across each of the six sectors and different activities. The government's view is that the activities of seeking out, referring and identifying claims are consistent in nature across each sector, and do not require sector-specific competency or knowledge.
- 2.2 Firms will need to be able to demonstrate to the FCA that they have suitable competency for each sector in which they wish to carry on business. However, they will not need to be assessed for competency or suitability in sectors which are unrelated to their business model, which is intended to help minimise the regulatory burden placed on firms. It will also help to ensure the FCA's resources are used in an efficient and effective manner.
- 2.3 Overall the responses agreed with the proposal to introduce multiple permissions to ensure adequate consumer protection. As such the government intends to implement multiple permissions, as set out in the consultation document.
- 2.4 Responses also broadly agreed that the draft SI achieved the aim of maintaining the scope of regulated claims management activity, but with multiple permissions. There were a number of queries about whether 'financial services and products' should be defined, particularly given that there is no existing statutory definition. However, the government believes that the definition is broad enough to capture a range of activities and does not want to create a definition that might limit its applicability.
- 2.5 Overall, where respondents had an opinion, they were content that claims made under section 75 of the Consumer Credit Act 1974 should be in scope of the FCA's claims management regime and some respondents believed that the draft SI already included these types of claims. The government wants to ensure that there is no doubt and therefore has made express provision in the draft SI to make clear that claims made under section 75 of the Consumer Credit Act 1974 are included within the scope of claims for financial services and products.
- 2.6 A number of responses suggested that additional sectors should be added to the scope of CMC regulation, particularly in relation to claims for cavity wall insulation, aviation and timeshares. The government believes that regulation should be proportionate and further work is needed to understand whether these claims sectors should be regulated in future. The government does not want to delay the

transfer of the existing regime to the FCA and therefore will maintain the scope as set out in the consultation paper, but with a view to further consider whether new sectors should be within the scope of regulation in a future SI.

- 2.7 There were also a number of responses that suggested Credit Hire Organisations and Medical Reporting Organisations should be included in scope of the FCA's regulation. The government was clear during passage of the Financial Guidance and Claims Act that while these issues are linked to the claims management process, they are separate to the issue of claims management regulation. These issues are being considered through other work, taking into account the broader context of the market.

Exemptions

- 2.8 The government proposed that the current exemptions are broadly retained, with a number of small changes. It also proposed that the Code of Practice for trade unions was maintained, alongside the Monitoring Board which oversees the code, with the Treasury replacing the Ministry of Justice on the board. The government also proposed that the Scottish Trades Union Congress would be represented on the Monitoring Board.
- 2.9 With the exception of a minority of responses, respondents agreed that the exemptions should be maintained as in the current regime. There was also general agreement that compliance with a Code of Practice should remain a condition of trade union exemption, with the Treasury replacing the Ministry of Justice on the Monitoring Board, alongside an additional Scottish Trades Union Congress representative. Most responses agreed that the existing trade union Code of Practice remains fit-for-purpose, although some suggested that the government should consider updating it given the length of time it has been in place. The government will consider this carefully before laying the SI before Parliament.
- 2.10 A number of responses expressed concerns that legal practitioners, particularly solicitors, will continue to be exempt from claims management regulation and stressed the importance of the regulators communicating with each other. Solicitors in England and Wales are regulated by the Solicitors Regulation Authority (SRA) and both the SRA and FCA have agreed to review their memorandum of understanding, which sets out how they work together to effectively regulate relevant firms. The Financial Guidance and Claims Act also contains provisions in relation to fees charged by certain legal services providers for claims management services. The SRA will have the same fee capping powers as the FCA, with a similar duty to restrict fees in relation to financial services claims, and the interim cap for services in relation to PPI claims applies to both CMCs and legal services providers.
- 2.11 A number of responses suggested that expert witnesses should be exempt from regulation. This group has already been exempted under section 27 of the Act.

Territorial scope of regulation

- 2.12 The government has extended the scope of claims management regulation through the Act to include Scotland. There were a number of suggestions that the SI should extend its scope to Northern Ireland. This cannot be done through secondary legislation.

2.13 Broadly, responses welcomed the government's proposals for claims management activity to be regulated if it is carried out in Great Britain or is carried out in respect of a claimant or potential claimant ordinarily resident in Great Britain and agreed that the draft SI achieved this aim. The government will therefore proceed on that basis.

FCA consultation requirements (rules and guidance)

2.14 The government proposed that the FCA should be exempt from its responsibility to conduct a cost benefit analysis on draft rules for Scotland which are the same as, or have the same effect as, the current regulatory framework for England and Wales. It was proposed the FCA will also be exempt from its competition duty in respect to rules or guidance that are the same as, or have the same effect as, CMRU's rules or guidance.

2.15 The majority of respondents agreed with these proposals and the government intends to proceed as set out in the consultation. However, some concern was expressed about disapplying the FCA's competition duty in relation to CMCs on a permanent basis. The government would like to clarify that disapplication of the competition duty is a transitional measure. It will only apply as part of the transfer, where the FCA is implementing rules that are the same as, or have the same effect as, those under the existing regime. For rules that go further than the existing regime, or for changes that the FCA makes in future the competition duty will apply.

2.16 In addition to the proposals set out in the consultation document, following the decision to make clear that claims under section 75 of the Consumer Credit Act are included in regulation, the government also intends to exempt the FCA from conducting a cost benefit analysis in relation to section 75 claims where the rules are the same or have the same effect as those under the current regime.

Chapter 3

Temporary permissions regime

- 3.1 As set out in the consultation document, the government is aware that strengthening claims management regulation under the FCA will be a significant change for firms, particularly for those being brought into regulation for the first time. As such, the government put forward proposals for a temporary permissions regime.
- 3.2 Respondents to the consultation generally agreed that the temporary permissions regime was appropriate and the government will proceed with the temporary permissions regime, as set out in the consultation document. The draft SI published alongside this document sets out the proposed draft legislative framework for the temporary permissions regime, and the FCA's consultation on how it intends to regulate claims management companies provides more detail on what the temporary permissions regime will mean in practice for CMCs.

Chapter 4

Further comments

- 4.1 A number of respondents provided additional comments. Two of the key themes were cold calling and fees in relation to personal injury claims.
- 4.2 There were some concerns about the volume of cold calling in the claims management sector and use of data from cold calls. The government was clear during the passage of the Financial Guidance and Claims Act that it takes this issue seriously and introduced a ban on cold calling in relation to claims management services, unless prior consent has been given. In addition to that, under the General Data Protection Regulation 2018 and the Data Protection Act 2018, where personal data is obtained through an unlawful cold call, the further use of that data (for example, in order to make further calls in the future) would be contrary to that legislation. The FCA is also consulting on proposals to require CMCs that buy leads from third parties to carry out sufficient due diligence to determine whether the lead generator is authorised and has appropriate systems and processes in place to ensure compliance with relevant data protection legislation, and the Privacy and Electronic Communications (EC Directive) Regulations 2003.
- 4.3 As the government also set out during the passage of the Financial Guidance and Claims Bill, it does not currently believe there is a need for a cap on fees in relation to personal injuries. Different types of CMCs manage claims in different ways. In the financial services claims sector, CMCs tend to represent clients in making a claim and charge them directly for this service. CMCs dealing with personal injury claims typically focus on marketing activities and refer clients to lawyers. However, the government understands the market could change in future, which is why the FCA has been given a power to cap fees more widely.

Chapter 5

Transitional provisions

- 5.1 The transitional provisions in the SI will put in place the framework for the transfers of CMC regulation and complaints handling to the FCA and FOS respectively. A draft of these provisions is included in the SI published alongside this document. It provides further detail of the proposed legislative framework. The SI is subject to further amendment, legal checks and parliamentary approval. This chapter sets out an overview of the transitional provisions for the transfer.
- 5.2 The overall aim of the transitional provisions is to create a smooth transfer for both CMCs and the consumers that use them. For consumers, the impact on their consumer journey should be minimal, whether they are pursuing a claim through a CMC or pursuing a complaint against one. It is important that CMCs have the opportunity to transfer successfully to the FCA regime and are able to continue business as usual while doing so. There also need to be measures in place to ensure that after the transfer date, the FCA can act on conduct issues which occurred prior to the transfer date by firms that were regulated at the time the conduct issue occurred (this would not apply to activity in Scotland or in relation to section 75 claims, which will be in scope of claims management regulation for the first time).

Transfer of CMC regulation to the FCA

- 5.3 The table below sets out the high level transitional arrangements in relation to the transfer of claims management regulation to the FCA that are provided for in the draft SI published with this document.

Table 5.A: Transfer of CMC regulation to the FCA

Issue	Transitional arrangement at point of transfer
Moving to the FCA's temporary permissions regime	<ul style="list-style-type: none">• Already regulated by CMRU – register for temporary permissions regime• Application made to CMRU but not determined – application will be treated as an application for FCA regulation and a top-up fee and top-up application form will need to be provided• Firms that do not need to be regulated under the current regime but will need to be regulated under the new FCA regime – register for the temporary permissions regime• Applications made after transfer – not eligible for temporary permissions, will need to apply for full authorisation

Variation of authorisation	<ul style="list-style-type: none"> Will transfer to FCA as variations of authorisation under the temporary permissions regime
Cancellation of authorisation	<ul style="list-style-type: none"> Where process is ongoing, the FCA will effectively continue the process in the CMRU's place, using the FCA's equivalent processes as set out under FSMA
Suspension of authorisation	<ul style="list-style-type: none"> Where process is ongoing, the FCA will effectively continue the process in the CMRU's place, using the FCA's equivalent processes as set out under FSMA
Failure to comply with an information request	<ul style="list-style-type: none"> Requests that have already been made will be treated as requests made by the FCA. When determining penalties for non-compliance the FCA must have regard to the penalty that could have been imposed on the firm pre-transfer The FCA will also be able to re-request information, or issue new requests, using FSMA powers
Civil penalties	<ul style="list-style-type: none"> Where process is ongoing, the FCA will effectively continue the same process in the CMRU's place and the amount will be restricted to the amount that the CMRU could have imposed The FCA will also be able to start new actions for breaches of the CMRU's rules prior to the transfer
Information and investigation powers	<ul style="list-style-type: none"> Where process is ongoing, the FCA will effectively continue the same process in the CMRU's place
Decision notices	<ul style="list-style-type: none"> Where process is ongoing, the FCA will effectively continue the same process in the CMRU's place
Appeals	<ul style="list-style-type: none"> Where process is ongoing, the FCA will take over from CMRU in the ongoing appeal at the First Tier Tribunal Where no steps have been taken, the firm can appeal to the Upper Tribunal as under standard FCA processes

Transfer of CMC complaints handling to FOS

5.4 The table below sets out the high level transitional arrangements in relation to the transfer of CMC complaints handling to the FOS that are provided for in the draft SI published with this document.

Table 5.B: Transfer of CMC complaints handling to FOS

Issue	Transitional arrangement at point of transfer
Determination of complaints	<ul style="list-style-type: none"> Where the complaint has been received by LeO but has not been determined – it will transfer to the FOS who will determine it, so far as is practicable, by reference to the criteria that the LeO scheme would have applied

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- Where the complaint was received after transfer but the event being complained about occurred before the transfer – the FOS will determine the complaint following its scheme rules, and may take into account the determination or remedy that might have been awarded by the LeO
 - Where the LeO has determined a complaint and has made an enforcement application¹ to the court in relation to that complaint – the LeO will be able to continue the ongoing enforcement action which it has decided to pursue (the ability of complainants to take enforcement action will also remain unaffected)

Funding and fees

- Where the complaint has been determined by the LeO but fee has not been decided – the FOS will calculate the case fees based on the LeO scheme rules
- When the complaint was received by LeO but determined by the FOS – the FOS will decide what the fees will be based on its own rules

¹Enforcement applications as made under section 141 of the Legal Services Act 2007

Chapter 6

Next steps

- 6.1 There are a number of steps that the government and the FCA will take to put the framework for the transfer of regulation in place:
- legislation: the government will continue to work on the draft SI and will lay it before Parliament in due course
 - FCA rules: the FCA is consulting on its proposals for regulating CMCs. The consultation closes on 3rd August and the FCA will announce its final rules once it has fully considered the responses
 - transfer date: the FCA will take over regulation of claims management activity on 1st April 2019 and the transfer of CMC complaints handling to the FOS will take place at the same time

Annex A

List of respondents

- Airlines UK
- Airpacks Ltd
- Association of British Insurers
- Association of British Travel Agents
- Association of Personal Injury Lawyers
- Badger insulation
- Bar Council
- BAR UK
- Barclays
- Baxters Business Consultants
- BHP Wealth Management
- British Insurance Brokers' Association
- Cavity Insulation Guarantee Agency
- Centrica
- Congruent
- Consumer Credit Trade Association
- Consumer Finance Association
- Cosyhome Insulation
- Crashcare Group and Project SLC
- Crystal Legal
- DWF LLP
- European Regions Airline Association
- Finance and Leasing Association
- Forum of Scottish Claims Managers
- Gladstone Brooks

- IFPC Ltd.
- Institute of Chartered Accountants in England and Wales
- Insulation and Energy Saving Solutions
- Insulation Panda
- International Air Transport Association
- Law Society of England and Wales
- Lloyds Banking Group
- LV=
- Mineral Wool Insulation Manufacturers Association
- Motor Insurers' Bureau
- Ofgem
- Professional Financial Claims Association
- Resort Development Organisation
- Rockstead
- RSA Insurance Group
- Scottish Power
- Solicitors Regulatory Authority (SRA)
- Solid Wall Insulation Guarantee Agency
- SSE Plc
- Superglass
- Trades Union Congress (TUC)
- UK Finance
- UNISON
- Whitehall and Randall Associates
- Zurich

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