

Regulation of pre-paid funeral plans: consultation on a policy proposal

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Executive summary

Following concerns about the risk of consumer detriment in the pre-paid funeral plan market, the government launched a call for evidence on the regulation of the sector in June 2018. The call for evidence sought views and information on how the funeral plan market currently operates and the government's initial policy proposal to bring all funeral plan providers within the remit of the Financial Conduct Authority ("the FCA"). The government's objectives are that any regulation of the sector should seek to ensure that:

- all pre-paid funeral plan providers are subject to robust and enforceable conduct standards
- there is enhanced oversight of providers' prudential soundness
- consumers have access to appropriate dispute resolution mechanisms if things go wrong

Responses to the call for evidence have confirmed that consumer detriment is present in the market and that there is broad demand for the sector to come under compulsory regulation.

In the light of the responses to the call for evidence and meetings with stakeholders from across the sector, the government has maintained its position that bringing funeral plan providers within the remit of the FCA would be the most effective policy response for strengthening the regulation of the market.

This consultation document provides a summary of the responses to the call for evidence and consults on the government's proposed amendments to the regulatory framework for bringing all funeral plan providers within the remit of the FCA.

Consultation and how to respond

The purpose of publishing the consultation document is to enable any interested parties or stakeholders to make representations on the government's proposed approach to bring all funeral plan providers within the remit of the FCA. Stakeholders are also invited to comment on the drafts of the statutory instrument and impact assessment for this policy proposal, which are included in Annexes A and B, respectively.

The consultation will be published on HM Treasury's website. Responses are invited by 25th August 2019 and should be sent to funeralplans@hmtreasury.gov.uk.

Responses will be shared with the FCA unless otherwise requested.

Chapter 1

Introduction

1.1 A funeral plan contract 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.

1.2 Under the current regulatory framework, entering into a funeral plan contract as a provider is a regulated activity. However, a provider is excluded from carrying on this regulated activity if the plans into which it enters are either insurance or trust-backed and meet certain conditions. As a result, since the regulated activity was introduced, the Financial Services Authority/FCA have not authorised any firm for the purpose of entering into funeral plan contracts. The exclusions were introduced in 2001 because the then government considered that plans which met the conditions afforded sufficient consumer protection such that their providers did not require authorisation.

1.3 Some providers elect to become registered with the voluntary regulator of the sector, the Funeral Planning Authority (“the FPA”). The FPA requires its members to abide by a set of rules and a Code of Practice that include standards on: conduct; marketing and advertising; information; contracts and documents; plan funds; and complaints and disputes.

1.4 Over the past few years, concern has grown about the potential risk of consumer detriment within the pre-paid funeral plan sector. While the demand for funeral plans has grown considerably in recent years, with data from the Funeral Planning Authority indicating a 200% increase in sales between 2006 and 2018, the regulatory framework that was developed for the sector in 2001 remains unchanged.

1.5 The government recognises the important role the FPA has played as the voluntary regulator of the sector to date. In view of substantial growth in the market and detriment to consumers, the government has concluded that compulsory regulation is necessary. The FPA has had some success with its voluntary regime, as evidenced by the fact that reports of detriment have mainly been attributed to non-members. FPA membership therefore carries reputational benefits, and consumers may wish to consider using providers that are registered with the FPA, during the implementation period between FPA and FCA regulation.

1.6 In the light of the reports produced by Citizens Advice Scotland¹ and Fairer Finance², as well as informal consultation between HM Treasury and relevant stakeholders in the market, the government came to the conclusion in 2018 that the

¹ https://www.cas.org.uk/system/files/publications/funeral_poverty_in_scotland_0.pdf

² <https://www.fairerfinance.com/assets/uploads/documents/The-road-to-regulating-prepaid-funeral-plans.pdf>

current regulatory regime is not sufficient to ensure the fair treatment of consumers and a more robust regulatory framework is required.

1.7 The government launched a call for evidence into the regulation of the pre-paid funeral plan market in June 2018. The call for evidence sought views and information on how the funeral plan market currently operates and how best to regulate the sector in the light of concerns relating to consumer treatment.

1.8 In the call for evidence, the government indicated that it was minded to strengthen the regulatory framework by bringing all funeral plan providers within the remit of the FCA. The government set out its initial policy proposal for achieving this, namely to amend the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (“the RAO”) to allow for additional, and stronger, regulation of the sector by the FCA.

Chapter 2

Summary of evidence

2.1 This chapter summarises the information and views which the government received from respondents to the call for evidence.

2.2 The government launched the call for evidence in order to seek views and information on:

- how the funeral plan market currently operates
- the potential risk of consumer detriment under the current regulatory framework and where this risk is most acute
- the government's initial policy proposal to amend the RAO to allow for additional regulation of the sector by the FCA

2.3 In total, the government received 57 responses to the call for evidence from funeral plan providers, funeral directors, trade associations, consumer groups, burial societies, charities and individual members of the public.

2.4 HM Treasury also held 15 meetings with a range of stakeholders in the funeral plan market following the call for evidence.

2.5 The government would like to thank all respondents for taking the time to respond to the call for evidence and for sharing their views.

How the pre-paid funeral plan market currently operates

The structure of funeral plans

2.7 In line with the view expressed by the FCA ahead of the call for evidence,¹ the majority of respondents to the call for evidence noted that funeral plans were most commonly backed either by assets held in trust or by a whole-of-life insurance policy, and therefore met one of the two exclusion criteria set out in the RAO.

2.8 One trade association noted that a third structure for funeral plans had emerged in the market, called insured funeral plans. Under this structure, when a customer purchases a plan, the customer takes out a whole-of-life contract of insurance which, upon their death, pays for a defined set of funeral services. Providers of this type of product are already regulated by the FCA.

2.9 In terms of the fees paid to funeral directors, respondents noted that funeral plans are structured to cover two types of fees: first, the funeral director's professional services, such as the provision of the coffin and hearse; and second,

¹ See paragraph 1.3 of the call for evidence.

disbursements, which are the fees the funeral director pays on behalf of the client for services that the funeral director does not provide, for example, doctor's fees. Respondents noted most plans are structured to guarantee the payment of the funeral director's professional services, with a contribution towards disbursements. Respondents also identified that certain providers offer fully-guaranteed plans, that cover both the direct costs to funeral directors and the disbursement costs.

2.10 Some respondents highlighted that certain "Guaranteed Over 50s" insurance policies are marketed as funeral plans. Providers of Guaranteed Over 50s insurance policies are already subject to FCA regulation. Therefore, this type of business is beyond the scope of this consultation.

2.11 The government also received one response from a religious burial society which offers funeral services. The body in question operates on a non-commercial and non-profit basis (reinvesting all surplus for future funerals), and does not have contracts with individual customers. The government does not consider that such services would come within the scope of any amended regulatory framework, on the basis that these services are unlikely to meet the definition of a funeral plan as set out in article 59 of the RAO.

Trust-backed plans

2.12 Of the funeral plan providers that offer trust-backed plans, many noted that their trusts adopted a low risk investment strategy. There was a general concern expressed by respondents about the lack of transparency on the investment strategy employed by trusts. While it was noted that providers who are members of the FPA are required to have a Statement of Investment Principles (SIP) in place in relation to their trusts, this is not compulsory across the market

2.13 On the withdrawal of trust returns, many funeral plan providers noted that, to withdraw funds as a surplus, the withdrawal would need ratification from an actuary. The call for evidence also identified that some providers' trust deeds allowed for funds to be withdrawn by the plan provider as ongoing administration fees.

Insurance-backed plans

2.14 As to insurance-backed plans, respondents considered that in the majority of circumstances, funeral plan providers were the policy holders of the underlying insurance policy. However, some noted that in a small number of cases the plan holder could be named on the insurance policy.

2.15 Respondents noted that they were not aware of insurance intermediation taking place in the funeral plan market, but noted that it did occur in the wider life planning industry, particularly with the inclusion of "funeral benefit options" (i.e. a provision in an insurance policy that contributes a cash sum to the provision of your funeral) as part of Guaranteed Over 50s policies. As noted above, Guaranteed Over 50s policies are outside the scope of this consultation as providers of these products are already regulated by the FCA.

Communication between providers and consumers

2.16 Responses to the call for evidence highlighted that communication between funeral plan providers and consumers usually takes place in one of two ways, either (i) by way of direct contact between the provider and the consumer, or (ii) through third parties. Respondents highlighted that funeral plan providers and third parties use many channels in order to distribute information relating to funeral plans. These include: television and magazine advertisements, leaflet drops, email, online advertising, social media and direct selling.

2.17 Several respondents noted that they had been aware of cold-calling in the funeral plan market and that they viewed this as a significant cause of consumer detriment. However, some noted that this practice had been in decline in recent years.

2.18 Many respondents also noted the use of lead generation websites in the funeral plan market. A lead generation website is a third party which seeks to provide contact details of potential customers to a funeral plan provider. The funeral plan provider can then get in contact with the customer, with a view to selling a plan.

Funeral plan providers engagement with third parties

2.19 In terms of third-party engagement, respondents noted that funeral plan providers primarily engaged with third-parties as a means to sell, market and promote their funeral plans. Respondents noted that intermediaries were widely used in the funeral plan market for this purpose.

2.20 Respondents divided these third-parties into two groups: funeral directors and third-party distributors (such as cold call centres, lead generation websites and will writers).

2.21 Respondents identified that funeral directors are remunerated from the money held in trust or from the insurance policy at the time of need, although some funeral directors are able, under the arrangements they have in place with funeral plan providers, to claim an administration fee when they sell a plan. It was noted that funeral directors were predominately concerned with securing future business for their firm.

2.22 Respondents noted that third-party distributors are usually remunerated on a commission basis. The commission is usually removed from the sum paid by the consumer, before the monies are placed in either a trust or insurance policy. Respondents noted that commission rates ranged from c.£200 to c.£1,000. Several respondents noted concerns about the high levels of commission that some third-party distributors could claim in the market, given that these distributors do not have a stake in the final outcome of the transaction. Respondents noted that the high levels of commission could result in the pursuit of high pressure sales tactics by some third-party distributors. Furthermore, respondents noted that, in circumstances where a third-party distributor sold plans from numerous providers, a conflict of interest may arise, whereby the third-party was incentivised to sell plans that offered the highest commission, rather than those which best met the customer's needs.

The cost of a funeral and how money is paid

2.23 Respondents noted a broad range of prices for funeral plans, ranging from c.£2,500 to c.£5,000. As to how payment is made, respondents indicated that there are several instances where a consumer or the consumer's estate pays money directly to a funeral director (rather than to the funeral plan provider), namely:

- at the point of sale, when a plan is bought directly through a funeral director, in which case the funeral director would subsequently send the money to the funeral plan provider
- at the time of need, when the plan included a "contribution towards" disbursement costs, rather than a guarantee, and the plan did not have sufficient money to cover those costs
- when additional items were added to the plan at the time of need

Current consumer protections

2.24 In terms of consumer protections currently available in the market, several respondents indicated that funeral plan providers had internal complaints procedures for their customers. If the complaint was not satisfactorily resolved between the funeral plan provider and the consumer, the complaint could be escalated to the FPA, if the provider were a member. Respondents noted that the FPA's complaints procedure includes conciliation and arbitration services. Separately, it was also noted that the provisions in the Consumer Rights Act apply to the funeral plan sector.

2.25 Respondents also noted that the FPA operates a 'pledge to customers', in the event that a registered provider were to become insolvent. The pledge provides that other FPA members will examine ways in which the FPA might assist in arranging the delivery of the plans of the insolvent provider. The effectiveness of this measure has not been tested because no FPA-registered provider has become insolvent.

Consumer detriment

2.26 The call for evidence sought to gather views and information about the scale and nature of consumer detriment, both at the point of sale and after a plan had been entered into.

2.27 The vast majority of respondents to the call for evidence noted that there was consumer detriment in the funeral plan market. Some respondents commented that such consumer detriment occurred mostly in the section of the market that was not regulated by the FPA.

Consumer detriment at the point of sale

2.28 Respondents to the call for evidence provided several examples of where consumer detriment may occur at the point of sale of a funeral plan.

2.29 Firstly, respondents noted the use of high pressure sales tactics by some funeral plan providers and third-party distributors, identifying that this was most common either in the use of cold calling or door-to-door selling. Several respondents noted that high pressure sales tactics were often driven by high commissions in the market. In circumstances where a third-party distributor sold

plans from a number of different providers, respondents noted that conflicts of interest could arise, whereby the third-party distributor may be incentivised to sell the plan which offered the highest commission, rather than that which best met the customer's needs.

2.30 Secondly, respondents identified that mis-selling is present in the funeral plan market. Respondents commented that consumers were sometimes misled about the extent to which the 'contribution towards disbursements' would cover the necessary third-party funeral costs. Respondents also noted occasions where consumers were led to believe that a specific funeral director would provide the funeral service, before the funeral plan had been offered to the funeral director in question.

2.31 Thirdly, respondents noted poor standards of disclosure at the point of sale of a funeral plan. In particular, respondents noted that consumers were unaware of the amount that could be removed up-front in the form of commission and administration fees, as well as the amount that could be removed from the trust in ongoing administration fees. Respondents also noted that consumers were often not informed about which services are guaranteed as part of a plan and those which may require a further injection of capital at the time of need.

2.32 Finally, respondents highlighted the use of misleading lead-generation websites in the market. Several respondents noted that some lead generation websites posed as comparison websites, despite having an agreement to offer funeral plans from certain, selected providers (rather than providing a genuine comparison of all products available in the market). Under these circumstances, the lead-generation website only promoted the plans from the providers with which they had a commercial arrangement, not those offered across the entire market. Respondents noted that, in some circumstances, this commercial arrangement was not made clear to the customer.

Consumer detriment once a plan has been entered into

2.33 Respondents to the call for evidence also noted instances of consumer detriment that could arise after a consumer had entered into a funeral plan.

2.34 Respondents identified concerns relating to the impact that the removal of high up-front costs (e.g. in commission or administration fees) might have on the ability of the funeral plan provider to fulfil its liability (i.e. the funeral plan). Respondents noted that any ongoing withdrawals of funeral plan monies held in trust could also adversely affect the provider's ability to pay out on a plan. Respondents considered that such withdrawals could ultimately result in trusts developing deficits, and that this risk was particularly pronounced for new providers entering the market.

2.35 The call for evidence identified concerns about funeral plan providers who chose to allocate their plans to funeral directors at the time of need. Respondents noted that this could result in the funeral plan being passed around a number of funeral directors when the family of the plan holder wanted certainty around who was going to deliver the end service. Respondents noted that this detriment was particularly acute where the funeral plan provider had indicated at the point of sale that the funeral may be delivered by a specific funeral director.

2.36 Respondents noted that consumer detriment also occurred in circumstances where the funeral plan's contribution towards disbursements did not meet the cost of disbursements at the time of need. Several respondents noted that the families of the plan holder were often disappointed to be given the choice between either (i) having to make additional payments towards the cost of the funeral, or (ii) having to find another (cheaper) funeral director to provide the funeral. Some respondents noted that, in some circumstances, this was partly as a result of family members of the deceased being unaware of what was specifically covered by the plan.

2.37 Respondents also noted that there was poor disclosure around the management of some trusts in the funeral plan market. This included disclosures around: (i) the financial health of the trust; (ii) the investment strategy of the trust; and (iii) any ongoing withdrawals from the trust (for example, in administration fees, or surplus withdrawals).

2.38 Concerns were also raised by respondents about:

- high cancellation and re-allocation costs
- the lack of a standardised cooling off period across the market
- the high charges placed on consumers in the event they lapsed in the payment on instalment plans
- the treatment of "orphan plans" (i.e. plans that are unclaimed after death)

Proposals for additional regulation of the funeral plan market and its potential impact

2.39 In the call for evidence, the government noted that it had come to the provisional conclusion that the current regulatory framework for funeral plans is not sufficient to ensure the fair treatment of consumers, and a more robust regulatory regime is needed to deliver the objectives outlined above.

2.40 The vast majority of respondents to the call for evidence welcomed the government's proposal to implement a more robust regulatory framework for the pre-paid funeral plan market. 84% of stakeholders who directly answered question 14 of the call for evidence suggested that any future regulation should be compulsory across the whole funeral plan market.² Views were split, however, between respondents who supported the government's initial proposal for the sector to be brought within the regulatory remit of the FCA and those that supported a move to place the FPA on a statutory footing. There was also a general consensus that intermediaries should be regulated under any amended regulatory framework.

FCA regulation

2.41 Of those who supported the government's initial policy proposal to bring all funeral plan providers within the remit of the FCA, many noted that they expected

² Question 14 of the call for evidence: What are your views on the government's proposal for FCA regulation of all funeral plan contracts and whether such a proposal will meet the government's stated objectives (as set out above)? Do you consider that an alternative proposal could better meet these objectives?

FCA regulation to have a positive impact in improving the current sales practices and standards of disclosure in the industry.

2.42 A number of these respondents considered that FCA regulation of the market would achieve the government's stated objectives for the future regulatory framework.

2.43 Respondents did raise some concerns about the impact of FCA regulation on the current market including:

- concerns about the proportionality of bringing all plan providers within the scope of FCA regulation
- concerns about the financial burden of FCA regulation on the smaller funeral plan providers and funeral director businesses. Respondents noted the potential impact this could have on competition in the market, as well as concerns that this could limit consumer access to information and choice
- concerns that the additional cost of regulation could be passed onto the consumer
- concerns that the FCA's risk-based approach to regulation could lead to the funeral plan market being over-looked in terms of supervisory focus

Statutory regulator

2.44 As noted above, some respondents considered that the funeral plan market should come within the remit of a new statutory regulator. Of these respondents, the majority advocated for the FPA to be placed on a statutory footing. Respondents envisaged that, by placing the FPA on a statutory footing, the organisation would be equipped with enhanced rule-making and sanctioning powers, and that all funeral plan providers would be required to be registered with the FPA.

2.45 Respondents who supported this approach highlighted the FPA's expertise in the funeral plan market and the FPA's recent reforms to update its Code of Practice and Rules.

The Financial Ombudsman Service ("FOS") and the Financial Services Compensation Scheme ("the FSCS")

2.46 In terms of bringing the activities of funeral plan providers within the scope of FOS and the FSCS, respondents generally thought the sector should have an ombudsman and a compensation scheme, albeit some respondents were unsure how the FSCS would apply to funeral plans, given that they did not consider a funeral plan to be a financial service. Concerns were also raised about the cost of joining the FSCS, particularly on smaller firms.

2.47 Respondents noted that the FPA currently offers conciliation and arbitration services as part of its complaints procedure, where complaints cannot be resolved between the funeral plan provider and the customer. However, it was also noted that this procedure only applies to providers who are members of the FPA.

2.48 Respondents also noted that the FPA operates a 'pledge to customers', in the event that a registered provider were to become insolvent. The pledge provides

that other FPA members will examine ways in which the FPA might assist in arranging the delivery of the plans of the insolvent provider. The effectiveness of this measure has not been tested because no FPA-registered provider has become insolvent.

Application of the new regulatory regime to existing plans

2.49 In the call for evidence, the government sought views on how the new regulatory framework should apply to existing plans (i.e. those that had already been entered into at the point at which the regulatory regime is amended). Respondents were broadly supportive of bringing existing plans within the scope of the future regulatory framework, with over half of the responses supporting this approach. Others had concerns that this approach might not be feasible and could lengthen the time it would take to implement any amendments to the regulatory framework.

Chapter 3

Policy proposal to bring all funeral plan providers within the remit of the FCA

3.1 This chapter sets out the government's proposal to bring all funeral plan providers within the remit of the FCA. The detail of the regulatory regime will be developed by the FCA. This includes the creation of rules and consideration of whether funeral plan providers will come within the remit of the FSCS.

The current regulatory framework

3.2 As noted in Chapter 1, entering into a funeral plan contract as a provider is currently a specified activity under article 59 of the RAO. However, article 60 excludes providers from regulation in circumstances where the provider offers trust- or insurance-backed funeral plans. Since this regulated activity was first introduced, the FCA has not authorised any firm for the purposes of entering into a funeral plan contract.

The government's policy proposal

3.3 In the light of the evidence obtained it is clear that consumer detriment is present in the funeral plan market. At the point of sale, the government has identified that some funeral plan providers and their intermediaries employ high-pressure and misleading sales tactics. Furthermore, the government has identified prudential concerns in the market, including the impact that high-up front removals of funeral plan monies may have on the ability of the funeral plan provider to meet its liabilities. There are also reports of questionable management of some trusts in the market. The government considers that these issues need to be addressed.

3.4 The government has considered a range of options to address the consumer detriment in the market, including:

- maintaining the current regulatory framework
- strengthening the current framework by placing the FPA on a statutory footing
- bringing the activities of all funeral plan providers within the scope of FCA regulation

3.5 The government is of the view that it needs to take action, on the basis that there are clearly issues in the market that are currently not being addressed by the FPA. Maintaining the current regulatory framework would also not meet the

government's objectives for the future regulatory framework, as set out in the call for evidence.¹

3.6 As noted in Chapter 2, responses to the call for evidence demonstrated strong support for the market to come under compulsory regulation. Respondents noted two possible approaches for amending the current regulatory framework in this way, namely (i) placing the FPA on a statutory footing, with enhanced rule-making, enforcement and sanctioning powers, or (ii) bringing the all funeral plan providers within the remit of the FCA.

3.7 In terms of placing the FPA on a statutory footing, the government has concluded that this is not preferable for the following reasons:

- this proposal would require the construction of a new regulatory architecture, which would provide the FPA with enhanced rule-making, supervision, enforcement and sanctioning powers. This would, in the government's view, take considerable time to develop and would require primary legislation to implement, meaning the current levels of consumer detriment would persist in the market for a lengthy period
- this proposal would be expensive to implement, with the burden of cost falling directly on the sector
- the approach would be out of step with the government's broader approach to financial services regulation

3.8 Having given careful consideration to the most proportionate policy response, the government has decided that the most appropriate approach to strengthening the regulation of the funeral plan market is to bring all funeral plan providers within the remit of the FCA.

3.9 FCA regulation is judged to be the most proportionate and effective response because:

- the FCA has a reputation for being an effective regulator and has a track record of taking strong regulatory action where necessary. The FCA's experience of conduct and prudential regulation, alongside their extensive rule-making powers will provide a solid basis for strengthening the regulatory framework for funeral plans
- the FCA can develop a targeted and proportionate regulatory regime for funeral plan providers. The FCA is required to undertake a cost-benefit analysis and publicly consult on the rules for any new sectors that come within their perimeter. As a result, the FCA is well placed to develop an effective regulatory regime in advance of its operational objectives of securing an appropriate degree of protection for, and promoting effective competition in the interests of, consumers
- bringing the activities of all funeral plan providers within the regulatory remit of the FCA could be achieved through secondary legislation, which would ensure that the consumer detriment identified in the market could be tackled as quickly as possible

¹ <https://www.gov.uk/government/consultations/pre-paid-funeral-plans/pre-paid-funeral-plans-call-for-evidence>

- this policy proposal would result in a more coherent regulatory framework, as the FCA already regulates providers of products which compete with funeral plans (e.g. Guaranteed over 50s Life Insurance)

Chapter 4

Amendments to the current regulatory framework

4.1 This chapter explains the amendments the government is seeking to make to the current regulatory framework in order to bring all funeral plan providers within the remit of the FCA.

4.2 The government proposes to make amendments to the regulatory framework by way of secondary legislation. A draft Order, which gives effect to the amendments discussed below, can be found at Annex A.

4.3 The amendments to the regulatory framework will be relevant to all those who sell or administer products that meet the definition of a funeral plan as set out in article 59 of the RAO. As such, Guaranteed over 50s insurance products (see 2.10 of Chapter 2) will not be caught by these amendments as they are considered “contracts of insurance” and providers of this type of product are already subject to FCA oversight.

The “entering into” of a funeral plan contract

4.4 As noted in Chapter 2, the call for evidence identified that consumer detriment is particularly evident in the funeral plan market at the point of sale, including through the use of high pressure sales tactics and poor standards of disclosure.

4.5 In the light of this, the government intends to ensure that funeral plan providers need to be authorised in relation to the entering into of funeral plan contracts, i.e. to effect a sale.

4.6 In order to achieve this, the government intends to remove the exclusions contained in article 60 of the RAO, so as to require providers to be authorised in relation to the entering into of all funeral plan contracts going forward. The result of this is that, in order to enter into new funeral plan contracts after the date on which the relevant provisions of the new legislative framework come into force, providers will need to be FCA authorised.

4.7 The draft Order contained in Annex A amends the RAO so as to omit article 60 in its entirety.

The “carrying out” of a funeral plan contract

4.8 The call for evidence also identified concerns about the administration of funeral plans, including the removal of high up-front costs from funeral plan monies as well as reports of the mismanagement of some trusts in the market.

4.9 In order to address these concerns and to make sure that the FCA has regulatory oversight after a funeral plan contract has been entered into, the

government intends to introduce a new specified activity, namely the “carrying out” of a funeral plan contract as provider.

4.10 This regulated activity will ensure that the FCA is able to place requirements on funeral plan providers with respect to the administration of a consumer’s funeral plan contract. This will therefore ensure that the FCA can introduce rules to tackle the detriment that has been identified after the point of sale. Furthermore, this specified activity will enable the FCA to enhance the rules that the FPA currently have in place with regards to the management of funeral plans after the point of sale and ensure that these rules are applied across the whole of the funeral plan market.

4.11 Such provisions may relate to:

- the handling of claims
- the settlement and payment of funeral plan contracts
- restrictions on the types of assets that consumers’ money can be invested in
- capital adequacy requirements
- the amount that can be levied in administration and cancellation fees
- the collection of premiums in relation to customers who pay by instalments
- the engagement of funeral directors on the death of a plan holder

4.12 However, the FCA will not regulate the activities of the funeral director providing the end service. In this regard, the regulatory model would be similar to that of motor insurance, whereby the FCA regulate the insurer, but not the garage that provides the end service. The Competition and Markets Authority are currently conducting a market investigation into the funeral sector, which includes the services supplied by funeral directors arising from the redemption of pre-paid funeral plan.¹

4.13 The government intends to require funeral plan providers to have FCA authorisation in order to carry out both new (i.e. those entered into *after* the new regulatory framework comes into force) and existing (i.e. those that were entered into *before* the new regulatory framework comes into force) funeral plans. This will ensure that consumers of existing funeral plans will also benefit from the added protection of FCA regulation, in respect of the administration of those contracts, and ensure that the FCA can take a coherent approach to the regulation of the market.

4.14 Responses to the call for evidence broadly supported this approach, on the basis that it would ensure that consumers of existing plans are not, in any way, disadvantaged.

4.15 Any decision not to bring existing plans within the regulatory remit of the FCA in this way would, in the government’s view, leave consumers of existing plans in a less favourable position, particularly if the FPA was no longer able to oversee

¹ https://assets.publishing.service.gov.uk/media/5c9ba9bf40f0b633f6c52a7e/funerals_market_study_-_final_report.pdf

that segment of the market. This approach would also avoid the creation of a two-tiered regulatory regime.

4.16 If the “carrying out” of a funeral plan contract were to only apply to new funeral plan contracts, consumers of existing plans would be likely to lose the regulatory oversight afforded by FPA regulation. This would lead to consumers of existing plans having less protection than they currently have which could result in increased levels of detriment for these consumers.

Question 1: Do you agree with the government’s proposed approach to the amend the RAO to require funeral plan providers to be FCA authorised in respect of the “entering into” of new funeral plan contracts and the “carrying out” of both new and existing plans?

Local authorities

4.17 Respondents to the call for evidence highlighted that some local authorities offer pre-paid cremation plans. The government has not seen evidence to suggest that plans sold by local authorities require further regulation from either a conduct or prudential perspective, and therefore proposes that they should be excluded from FCA regulation.

Regulation of intermediaries

4.18 Responses to the call for evidence identified that funeral plan providers widely use intermediaries to promote and sell funeral plans. Responses noted that intermediaries mainly take the form of dedicated third-party distributors (e.g. cold calling centres, lead generation websites) and funeral directors which sell plans as a way of securing future business. The call for evidence highlighted that the sales practices of some dedicated third-party distributors result in consumer detriment. Cold calling is a particular concern, despite an apparent decline in its usage in recent years. Responses to the call evidence were broadly supportive of the inclusion of intermediaries in any amended regulatory framework. However, several respondents noted concerns as to the proportionality of requiring these businesses to obtain full FCA authorisation.

4.19 The government considers that it is essential that intermediaries who market, sell or promote funeral plan contracts are brought within the scope of the amended regulatory regime, given their prevalence within the market, and their role at the point of sale.

4.20 The government does, however, recognise the concerns raised by stakeholders about the proportionality of requiring intermediaries to obtain full FCA authorisation in order to sell, market and promote funeral plans since many funeral directors are small and micro enterprises and are therefore unlikely to have experience of financial services regulation.

4.21 The government therefore intends to enable intermediaries to become appointed representatives. An appointed representative (AR) is an individual or entity who undertakes regulated activities under the responsibility of an authorised firm. This firm is known as the AR’s “principal”.

4.22 Under this approach, the principal firm (which would most likely be the funeral plan provider) would take responsibility for the conduct of any appointed representatives, in respect of whom they agree to act as principal. Principal firms

are required to ensure that their ARs comply with the relevant regulatory requirements applicable to the activities for which the principal has accepted responsibility. There are no regulatory application fees for appointing an AR. However, the principal firm will be required to pay fees for the regulated income (i.e. commission) that is paid to its ARs. The government therefore considers that allowing intermediaries to operate as ARs is a proportionate approach that will address the concerns about the sales practices of intermediaries in the market.

4.23 By bringing all funeral plan providers within the remit of the FCA, the financial promotion regime will also apply to the communication of invitation or inducements to enter into such plans. The FCA will therefore be able to make rules relating to the promotion of funeral plans.

Dealing in investments as agent

4.24 In relation to the majority of the intermediation activities outlined in paragraph 4.18 above the appointed representatives' regime will be "switched on" automatically as a result of the amendments to the RAO described at paragraphs 4.6 and 4.9 above.

4.25 However, in relation to dealing in investments² as agent (article 21 of the RAO), two amendments are required to (i) ensure that dealing in funeral plan contracts an agent is a regulated activity, and (ii) to "switch on" the appointed representatives' regime to apply to intermediation in this context.

4.26 Taking each of these in turn:

4.26.1 Firstly, Article 21 of the RAO concerns "dealing in investments as agent" and broadly covers circumstances where a person enters into a transaction, as agent, for another party (i.e. becomes a party to a transaction as agent for another person). The government understands that there may be circumstances where an intermediary of a funeral plan provider deals in the rights under a funeral plan contract as agent for the provider. An example of this may be where an intermediary is given the authority to arrange and create bespoke contracts for customers on behalf of a funeral plan provider. At present, funeral plans are excluded from the scope of article 21. The government therefore intends to amend article 21 in order to ensure that all the activities undertaken by intermediaries come within the scope of the new regulatory framework.

4.26.2 Secondly, the appointed representatives' regime needs to be amended in order to bring article 21 into the scope of the Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001 ("the Appointed Representatives Regulations"). These regulations define the activities which appointed representatives may carry on without themselves requiring FCA authorisation. The draft Order at Annex A amends the Appointed Representatives Regulations such that appointed representatives may carry on the activities specified in article 21 of the RAO to the extent that they relate to funeral plan contracts, without themselves requiring authorisation under the Financial Services and Markets Act 2000 ("FSMA").

² Note that "investments" in the context of the RAO encompasses a wider range of products and activities than would normally be understood by the word.

Designated professional bodies

4.27 The call for evidence highlighted that some funeral plans are sold by intermediaries that are already regulated by a designated professional body (“DPB”), for example, lawyers. The government understands that these intermediaries are involved in a relatively small amount of business in the funeral plan market, and has not seen evidence of poor practice in relation to these such third parties.

4.28 Under section 327 of FSMA, members of DPBs are exempt from FCA regulation, provided that they meet certain requirements set out in the legislation.

4.29 The government therefore intends to maintain the position that intermediaries who are members of DPBs will not require FCA authorisation to sell funeral plans, as long as they continue to meet the conditions as set out in section 327 of FSMA. This represents a similar approach to how these intermediaries are regulated in other financial services markets, including insurance.

Question 2: Do you agree with the government’s proposal to allow intermediaries to operate as ARs of principal firms?

Question 3: Do you agree to government’s proposed approach to allow Designated Professional Bodies to be exempt from FCA regulation, provided that they meet certain requirements set out in legislation?

Question 4: Do intermediaries in the market create bespoke funeral plans and enter into these on behalf of funeral plan providers? If so, do providers allow both third-party distributors and funeral directors to create bespoke plans?

Redress schemes

4.30 Responses to the call for evidence identified a strong demand for consumers, under any amended regulatory framework, to have access to both an ombudsman and a compensation scheme.

FOS

4.31 In line with the government’s proposal to bring all funeral plan providers within the remit of the FCA, the government considers that consumers should have access to FOS. This will ensure greater consumer protection in the market and meet the government’s objective of ensuring that consumers have access to appropriate dispute resolution mechanisms.

4.32 The government considers that consumers who purchase a funeral plan after the amendments to the regulatory framework come into force should be entitled to pursue a complaint to FOS in relation to any act or omission by the provider under that contract.

4.33 The government also considers that there should be transitional protections for consumers of existing plans who would otherwise have benefited from the FPA’s complaints procedure.

4.34 In relation to these plan holders, the government proposes to enable FOS to deal with complaints relating to acts or omissions of FPA-registered providers that occurred before FCA regulation comes into force. This will ensure that consumers of providers who were previously members of the FPA continue to have access to a

dispute resolution scheme, and will not be disadvantaged once regulation has transferred to the FCA.

4.35 The government considers that any complaint made to the FPA, but not determined before the introduction of FCA regulation, should be resolved by the FPA (rather than transferring to FOS for determination). The number of this type of complaint is likely to be small (the FPA dealt with a total of 87 complaints in 2017) and therefore the government considers that the FPA would be best-placed to resolve these complaints through its complaints procedure.

FSCS

4.36 The decision as to whether the FSCS will apply to funeral plans rests with the FCA. The FCA has a detailed procedure for analysing the costs and benefits of such a decision, and will consult further with the industry on this point.

Question 5: Do you agree with the government's position that funeral plans should be brought within the remit of FOS?

One-month exemption for funeral plans

4.37 The definition of a funeral plan contract in article 59(2) of the RAO currently excludes contracts where, at the time of entering into them, the customer and the funeral plan provider intend or expect the funeral to occur within one month.

4.38 The government understands such plans are effectively considered to be part of the "at-need" funeral market and has not seen any evidence that the definition of funeral plan contract needs to be revisited in this regard. Accordingly, the government does not propose to make any amendments to the definition in article 59(2) of the RAO.

Question 6: Do funeral plan providers currently sell plans with the expectation that the funeral will occur within one month? If so, how many of these types of plan have been sold in the past year?

Question 7: Do you consider that one month is the appropriate timescale for this exemption?

Territorial scope

4.39 Article 59 of the RAO defines the territorial scope of a funeral plan as a contract where the provider undertakes to provide a funeral in the United Kingdom for the customer. The government has concluded, in the light of the responses to the call for evidence, that there should be no amendment to the territorial scope of the activities outlined in article 59.

Question 8: Do you agree that the territorial scope of the regulatory regime should remain unchanged?

Question 9: Do you consider that the draft Statutory Instrument delivers the stated policy intention?

Question 10: Do you agree with the impact assessment and the assumptions used?

Chapter 5

Implementation period

5.1 This chapter sets out the government's proposals for the implementation period for FCA regulation.

5.2 The government acknowledges that the proposed changes to the statutory regime envisaged by the draft Order at Annex A will lead to increased burdens on the FCA, funeral plan providers and intermediaries.

5.3 In order to allow sufficient time for the FCA to put in place the relevant architecture for the new regulatory regime, and for funeral plan providers and intermediaries to take the necessary steps to meet the requirements of the amended regulatory framework, the government intends to put in place an 18-month implementation period from the point at which the amending legislation is made. Firms will have around 12 months to familiarise themselves with the new regime once the FCA has finalised its rules for the sector.

5.4 All funeral plan providers who intend to carry on administering and/or selling funeral plan contracts will need to apply for FCA authorisation during the implementation period.

5.5 Under the new regulatory regime, funeral plan providers who have existing plans in place have two options available to them: (i) they can become FCA authorised; or (ii) they can sell or otherwise assign those contracts to another provider in the market which is FCA authorised.

5.6 Any funeral plan provider who does not wish to, or is unable to, obtain FCA authorisation will need to divest itself of its book of business during the implementation period, otherwise they will be carrying on a regulated activity without the necessary permissions.¹ It is possible this may lead to a degree of consolidation as providers seek to mitigate the additional costs of regulation through economies of scale.

5.7 The government considers that there will be strong economic incentives for providers who obtain FCA authorisation to take on the book of business of a provider who is unable or unwilling to obtain such authorisation. For example, the regulated provider would expand its market share and, in circumstances where the unregulated provider operated a trust model, may benefit from any surplus in the trust.

5.8 Furthermore, the government considers that regulated providers in these circumstances are likely to want to minimise the risk of reputational damage to the

¹ This would be a breach of the general prohibition under section 19 of FSMA (i.e. carrying out a regulated activity without being authorised or exempt) - <https://www.legislation.gov.uk/ukpga/2000/8/section/19>.

market generally, which could occur if a book of business was “orphaned” without a regulated provider to administer the plans. This is, in part, evidenced by the fact that, under the current voluntary regulatory system, FPA members have signed up to a “pledge”, in which they commit, in the event of a provider becoming insolvent, to try to deliver funerals that have been paid for.

5.9 The government recognises the important role that the FPA has played as the voluntary regulator of the sector to date. In view of substantial growth in the market and detriment to consumers, the government has concluded that compulsory regulation is necessary. The FPA has had some success with its voluntary regime, as evidenced by the fact that reports of detriment were mainly attributed to non-members. FPA membership therefore carries reputational benefits, and consumers may wish to consider using providers that are registered with the FPA, during the implementation period between FPA and FCA regulation.

Question 11: To what extent would funeral plan providers be willing to take on the book of business of a provider who was unable to obtain FCA regulation and operated a trust in surplus?

Question 12: To what extent would funeral plan providers be willing to take on the book of business of a provider who was unable to FCA authorisation and operated a trust in deficit?

Question 13: Are there any other central scenarios that you believe may arise where a funeral plan provider cannot obtain FCA authorisation?

Chapter 6

Impact on stakeholders

6.1 This chapter sets out the impact that the government's policy proposal will have on stakeholders across the funeral plan market.

6.2 The amendments to the regulatory framework are likely to impact on consumers, funeral plan providers and intermediaries. Each of these groups is considered in turn below.

Consumers

6.3 The government's proposal to bring funeral plans within the remit of the FCA would greatly enhance consumer protection in the pre-paid funeral plan market. Under the proposed amendments to the regulatory framework outlined in Chapters 4 and 5, consumers will benefit from improved standards in the sale and administration of funeral plan contracts. The regulatory framework has been designed in order to tackle the consumer detriment identified in the market, including the use of high pressure sales tactics, poor disclosure at the point of sale and prudential concerns. The amendments will therefore ultimately improve consumer confidence in the sector.

6.4 All consumers who purchase a plan after FCA regulation has come into force are likely to benefit from access to FOS' dispute resolution service that is binding on funeral plan providers and can lead to compensatory awards up to £350,000.

6.5 The government is also seeking to ensure that consumers who purchased a plan before the introduction of FCA regulation are protected under the amended regulatory framework. The government has taken two steps to ensure this: (i) the government proposes to require all funeral plan providers who have existing plans in place to be authorised in relation to the "carrying out" of those plans, thereby, ensuring that the administration of existing plans is covered by FCA regulation; and (ii) the government proposes to enable consumers who purchased plans from FPA-registered providers to be able to bring complaints to FOS about any act or omission by that provider that occurred before the introduction of new regulatory framework, thereby ensuring consumers are not left in a position where they cannot get redress they would otherwise have been entitled to.

6.6 The government also understands that the FCA will consult on whether to bring funeral plans within the scope of FSCS. Consumers may therefore have access to compensation if a provider defaults, thereby providing increased consumer protection.

Funeral plan providers

6.7 Bringing all funeral plan providers within the regulatory remit of the FCA will lead to additional regulatory costs to funeral plan providers, as outlined in the

impact assessment at Annex B. The government considers that these costs are proportionate, given the level of consumer detriment that has been identified in the funeral plan market.

6.8 Some providers may choose not to incur the additional costs associated with FCA regulation and exit the funeral plan market. Such firms would need to transfer or sell their book of business to another provider, driving some consolidation in the market. Based on the impacts assessed in Annex B, it is not expected there will be a significant contraction in the number of providers (i.e. by providers exiting the market). The government anticipates that any loss of competition within the market in this regard will be offset by other aspects of the regime which will aim to ensure that the remaining players compete more effectively. This competition will be driven by the fact that all providers will have to abide by the same regulatory rules set by the FCA. This will improve standards in the funeral plan market, both at the point of sale and after a plan has been entered into, thereby increasing competition amongst those providers who choose to remain in the market.

6.9 There are also likely to be reputational benefits for the funeral plan industry as a whole as a result of the fact that increased regulation will improve service standards. This will likely drive increased consumer confidence in the sector, which may result in increased sales in the market, once regulation has been introduced.

6.10 Furthermore, under the government's policy proposal outlined above, funeral plan providers will be able to administer all funeral plan contracts according to the same regulatory framework. Were the "carrying out" of a funeral plan contract to only apply to new funeral plans, the government would create a two-tiered regulatory framework for providers, whereby providers would have to administer plans sold before the introduction of FCA regulation differently to those sold afterwards. This may be burdensome for providers to administer.

Intermediaries

6.11 As outlined in Chapter 5, the government intends to enable intermediaries to be able to become ARs of 'principal' firms in the funeral plan market. The appointed representatives' model will require principal firms to take responsibility for the conduct of any persons/firms they appoint to sell, market or promote funeral plans. Principal firms are required to ensure that their appointed representatives comply with the relevant regulatory requirements applicable to the activities for which the principal has accepted responsibility.

6.12 Therefore, intermediaries in the funeral plan market will need to familiarise themselves with the FCA's rules in relation to the intermediation of funeral plan contracts.

6.13 There will also be associated costs for becoming an AR. There are no regulatory application fees for appointing an AR. However, the principal firm will be required to pay fees for the regulated income (i.e. commission) that is paid to its ARs. The government expects that the principal may pass the regulatory costs of the AR down to the intermediary. The government considers that allowing intermediaries to operate as the appointed representatives constitutes the most proportionate approach to regulating intermediaries in the market, whilst also ensuring that there is sufficient oversight of their conduct standards.

Chapter 7

Consultation and how to respond

7.1 The purpose of publishing the consultation document is to enable any interested parties or stakeholders to make representations on the government's proposed approach to bring all funeral plan providers within the remit of the FCA. Stakeholders are also invited to comment on the drafts of the statutory instrument and impact assessment for this policy proposal, which are included in Annexes A and B, respectively.

7.2 The consultation will be published on HM Treasury's website. Responses are invited by 25th August 2019 and should be sent to funeralplans@hmtreasury.gov.uk.

7.3 Responses will be shared with the FCA unless otherwise requested.

Chapter 8

Summary of questions

Question 1: Do you agree with the government's proposed approach to the amend the RAO to require funeral plan providers to be FCA authorised in respect of the "entering into" of new funeral plan contracts and the "carrying out" of both new and existing plans?

Question 2: Do you agree with the government's proposal to allow intermediaries to operate as ARs of principal firms?

Question 3: Do you agree to government's proposed approach to allow DPBs to be exempt from FCA regulation, provided that they meet certain requirements set out in legislation?

Question 4: Do intermediaries in the market create bespoke funeral plans and enter into these on behalf of funeral plan providers? If so, do providers allow both third-party distributors and funeral directors to create bespoke plans?

Question 5: Do you agree with the government's position that funeral plans should be brought within the remit of FOS?

Question 6: Do funeral plan providers currently sell plans with the expectation that the funeral will occur within one month? If so, how many of these types of plan have been sold in the past year?

Question 7: Do you consider that one month is the appropriate timescale for this exemption?

Question 8: Do you agree that the territorial scope of the regulatory regime should remain unchanged?

Question 9: Do you consider that the draft Statutory Instrument delivers the stated policy intention?

Question 10: Do you agree with this impact assessment and the assumptions used?

Question 11: To what extent would funeral plan providers be willing to take on the book of business of a provider who was unable to obtain FCA regulation and operated a trust in surplus?

Question 12: To what extent would funeral plan providers be willing to take on the book of business of a provider who was unable to obtain FCA authorisation and operated a trust in deficit?

Question 13: Are there any other central scenarios that you believe may arise where a funeral plan provider cannot obtain FCA authorisation?

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