Appendix 1 Handling Mortgage Endowment Complaints

1.5 Additional considerations

Introduction

App 1.5.1 G This section addresses issues which may be relevant to the standard redress for unsuitability cases, as well as some post-retirement cases upheld on the grounds of affordability.

Continuing life cover and other policy benefits

App 1.5.2 G *Firms* will need to consider the importance for many complainants of having life assurance in place to ensure a mortgage is paid off in the event of death.

App 1.5.3 G If a complaint is upheld and the *policy* is to be surrendered as part of the settlement, the *firm* should remind the complainant in writing that the life cover within the endowment will be terminated and that it may therefore be appropriate to take advice about the merits or otherwise of taking out a stand-alone *life policy* in substitution.

App 1.5.4 G If a need for life assurance at inception has been established so that a deduction representing its cost has been made from the redress payable under DISP App 1.2.4 G, the *firm* should advise the complainant that the *firm* would be responsible for paying any *premium* for an appropriate replacement *policy* which exceeds that used for calculating the deduction or alternatively will, where possible, provide the cover itself at that cost. If it is not possible for the *firm* to provide the cover itself at the original cost, it may choose to discharge that obligation by the payment of an appropriate lump sum. Any such amount should enable the complainant to effect the cover at the original cost, with no additional cost in respect of increased age or deterioration in health. This option may be particularly relevant if the *firm* against which the complaint has been made is an independent intermediary which cannot itself provide the cover, although it may be possible for such a *firm* to arrange for the product provider to offer cover to

the complainant at the original *premium* on payment by the independent intermediary of an appropriate lump sum to meet any increased cost.

App 1.5.5 G *Firms* will not be responsible for any increased costs resulting from the complainant choosing another *product provider* or for increased *premiums* charged by another provider chosen by the complainant in respect of the risk now presented, for example, higher *premiums* charged by the other provider due to deterioration in health, unless the original *product provider* no longer writes new business and is unable to offer revised life cover on a decreasing term assurance basis.

App 1.5.6 G There can be exceptional circumstances where, in order to retain suitable life cover, the endowment *policy* has to be retained and any additional costs will be the responsibility of the *firm* that sold the endowment *policy*.

App 1.5.7 G The same considerations will apply to the establishment of the need for other *policy* benefits including critical illness cover, disability cover and waiver of *premium*.

Taxation

App 1.5.8 G *Firms* will need to consider the likely taxation implications for complainants if *policies* are surrendered or reconstructed, or any form of underpinning or guarantee is given.

App 1.5.9 G If there is potential tax liability for the complainant, it will be appropriate for *firms* to undertake in writing to the complainant to reimburse any tax payable, or which becomes payable, and make payment on production of appropriate evidence of the liability and payment having been made.

"Underpinning"

App 1.5.10 G *Firms* proposing to offer arrangements involving some form of minimum underpinning or 'guarantee' should discuss their proposals with the *FCA* and HM Revenue and Customs at the earliest possible opportunity (see ■ DISP App 1.5.8 G). The *FCA* will need to be satisfied that these proposals provide complainants with redress which is at least commensurate with the standard approaches contained in this appendix.

Reference to the guidance in firms' complaints settlement letters

App 1.5.11 G One of the reasons for introducing the *guidance* in this appendix is to seek a reduction in the number of complaints which are referred to the *Financial Ombudsman Service*. If a *firm* writes to the complainant proposing terms for settlement which are in accordance with this appendix, the letter may include a statement that the calculation of loss and redress accords with the *FCA guidance*, but should not imply that this extends to the assessment of whether or not the complaint should be upheld. *Firms* should point out that if the complainant remains dissatisfied, he may refer the complaint to the *Financial Ombudsman Service*.

App 1.5.12 G A statement under ■ DISP App 1.5.11 G should not give the impression that the proposed terms of settlement have been expressly endorsed by either the *FCA* or the *Financial Ombudsman Service*.

Identification of windfall benefits

App 1.5.13 G Windfall benefits should be determined in accordance with the principle in Needler Financial Services and Taber ('Needler'). The basic legal principle in Needler is that a windfall benefit is not to be taken into account in determining the amount of an investor's recoverable loss. The following paragraphs explain our views as to how *firms* may act in accordance with that principle.

App 1.5.14 G A windfall benefit arises where:

(1) there has been a demutualisation, distribution or reattribution of the inherited estate, or other extraordinary corporate event in a *long-term insurer*; and

(2) the event gave rise to 'relevant benefits', as defined in ■ DISP App 1.5.15 G (below).

App 1.5.15 G 'Relevant benefits' are those benefits that fall outside what is required in order that *policyholders*' reasonable expectations at that point of sale can be fulfilled. (The phrase '*policyholders*' reasonable expectations' has technically been superseded. However, the concept now resides within the obligations imposed upon *firms* by *FCA* Principle 6 ('...a firm must pay due regard to the interests of its *customers* and treat them fairly....') Additionally, most of these benefits would have been paid prior to *commencement*, when *policyholders*' reasonable expectations would have been a consideration for a *long-term insurer*.)

App 1.5.16 G The issue of free *shares* or cash on a demutualisation, and additional bonuses and *policy* enhancements given by way of incentive to approve a reattribution or distribution of an inherited estate should, unless there is evidence to the contrary, be treated as relevant benefits for the purposes of ■ DISP App 1.5.15 G. Whether additional bonuses and *policy* enhancements on a demutualisation are relevant benefits should be determined by applying the test in ■ DISP App 1.5.15 G to each benefit.

App 1.5.17 G *Firms* should review the terms on which proposals were put to *policyholders* and the reasons given for a corporate event when determining whether a benefit should be treated as a relevant benefit.

App 1.5.18 G *Firms* should not normally bring windfall benefits which are relevant benefits (as defined in ■ DISP App 1.5.14 G) to account when assessing financial loss and redress. Where a windfall benefit is in the form of a *policy* augmentation the benefit should be deducted from the overall value of the *policy* when making this assessment.

App 1.5.19 G A relevant benefit derived from a corporate event may only be brought to account if the *firm* is able to demonstrate, with written records created at the time of the advice, that:

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(1) The *firm* foresaw the prospect of the event and the benefit;

(2) The *firm's* advice included a statement recommending the particular policy because of the possibility of the benefit in question; and

(3) The statement was a material factor in the context of the advice and the decision to invest.

App 1.5.20 G If a *firm* considers that it can meet this requirement, the *firm* should by letter explain clearly to the complainant the reasons why it proposes that the benefit should not be treated as a windfall and should be taken into account. The *firm* should provide the complainant with copies of the relevant documents.

App 1.5.21 G The letter should also explain how the proposed value of the benefit has been calculated and should inform the complainant that if he does not accept the proposal to take the benefit into account he may tell the *firm*, with reasons. The letter should also say that, if he remains dissatisfied with the *firm's* response, he may refer the matter to the *Financial Ombudsman Service*.