

**CONSUMER REDRESS SCHEMES
(GENERAL MATERIAL) INSTRUMENT 2016**

Powers exercised

- A. The Financial Conduct Authority makes this instrument in the exercise of the power in section 139A(1) (Power of the FCA to give guidance) of the Financial Services and Markets Act 2000.

Commencement

- B. This instrument comes into force on 22 April 2016.

Amendments to the Handbook

- C. The Consumer Redress Schemes sourcebook (CONRED) is amended in accordance with the Annex to this instrument.

Citation

- D. This instrument may be cited as the Consumer Redress Schemes (General Material) Instrument 2016.

By order of the Board
21 April 2016

Annex

Amendments to the Consumer Redress Schemes sourcebook (CONRED)

In this Annex, striking through indicates deleted text, unless otherwise stated.

1 General

1.1 ~~[To follow]~~

The following text is new and is not underlined.

1.1 Introduction

- 1.1.1 G This part of the *FCA Handbook* relates principally to *consumer redress schemes*. For these purposes, a *consumer redress scheme* is a set of *rules* under which a firm is required to take one or more of the following steps:
- (1) investigate whether, on or after a specified date, the firm has failed to comply with particular requirements that are applicable to an activity it has been carrying on;
 - (2) determine whether the failure has caused (or may cause) loss or damage to consumers; and
 - (3) if the firm determines that the failure has caused (or may cause) loss or damage to consumers, the firm must:
 - (a) determine what the redress should be in respect of the failure; and
 - (b) make the redress to the consumers.
- 1.1.2 G Chapter 1 contains *guidance* on *consumer redress schemes* in general and explains what they are and the circumstances in which the *FCA* may impose a requirement to establish and operate a *consumer redress scheme*. The *rules* and *guidance* relating to particular *consumer redress schemes* are set out in the remainder of the sourcebook.
- 1.1.3 G Chapter 1 is relevant to current and former *authorised persons*, *electronic money issuers* and *payment service providers*. Except where otherwise specified, it uses “firm” to refer to all such persons.
- 1.1.4 G *CONRED* 1.2 to 1.7 explain the power in section 404 of the *Act* which enables the *FCA* to make *rules* requiring firms to establish and operate *consumer redress schemes*. Unless the context otherwise requires,

references to *consumer redress scheme* in *CONRED* 1.2 to 1.7 are references to a scheme established under section 404 of the *Act* (that is, a scheme falling within paragraph (a) of the *Glossary* definition) and references to a “scheme” in those sections should be read accordingly.

- 1.1.5 G *CONRED* 1.8 explains the circumstances in which the *FCA* can impose a requirement on a firm under section 404F(7) to establish and operate a scheme that corresponds to or is similar to a scheme under section 404 of the *Act*. Unless the context otherwise requires, references to *consumer redress scheme* in *CONRED* 1.8 are to a scheme established under section 404F(7) of the *Act* (that is, a scheme falling within paragraph (b) of the *Glossary* definition) and references to a “scheme” in that section should be read accordingly.
- 1.1.6 G The term “consumer” has a number of different meanings both in the *Glossary* and in the *Act*. For this reason, except where indicated, *CONRED* does not use the term as defined in the *Glossary*. However, *CONRED* 1.4.6G to 1.4.14G explains which consumers can be covered by a *consumer redress scheme* established under section 404 of the *Act*.

1.2 Process for making a consumer redress scheme

Consultation

- 1.2.1 G The power in section 404 of the *Act* is a *rule-making* power. *Rules* made by the *FCA* under this power will be subject to a formal public consultation, including a cost benefit analysis (CBA). The consultation paper will fully and clearly explain the *rules* of the scheme and set out the sources of evidence upon which the scheme is based. The consultation period will usually be three *months* long. There is, however, an exemption from the *FCA* consultation requirements for cases where the *FCA* considers that the delay would be prejudicial to the interests of consumers. This exemption is unlikely to be applicable in relation to *consumer redress schemes* because the importance of consulting to ensure a scheme is appropriate and workable in practice would be likely to outweigh any prejudice that the delay from the consultation process may bring.
- 1.2.2 G The *FCA* must have regard to any representations made to it during the consultation process. The *FCA* will issue a statement following the consultation which will explain how it has taken these into account in formulating the final *rules*. A further cost benefit analysis will be provided if the final *rules* differ significantly from the consultation draft. In addition, an explanation of any differences between the rules consulted on and the final *rules* made will be provided.
- 1.2.3 G All *FCA rules* are made by the *FCA* Board. The Treasury appoints the *FCA* Board and a majority of the Board are non-executive members.

Pre-consultation

- 1.2.4 G The *FCA* will actively seek to engage in discussions with the industry and consumer groups about the issue. This process will assist in the consideration of all the available options and, if it is ultimately decided that a scheme to address the issue should be pursued, it will ensure the *FCA* has a clear understanding of the matters that will need to be addressed in the formal consultation.
- 1.2.5 G This discussion process will allow the particular nature of the issue in relation to which a scheme is proposed to already be visible to key stakeholders. In addition, the issue may have been publicised more widely through comment and action by the *FCA* (e.g. the *FCA* may have published the findings of thematic projects, mystery shopping exercises or enforcement actions).
- 1.2.6 G The *FCA* will also consult with the Financial Services Practitioner Panel, the Smaller Businesses Practitioner Panel, the Financial Services Consumer Panel, the *Financial Services Compensation Scheme Limited* and the *Financial Ombudsman Service Limited* before issuing a formal consultation.

1.3 Trigger for making a consumer redress scheme

- 1.3.1 G The trigger is set out in section 404(1) of the *Act*. It states that the power can be used if:
- (1) it appears to the *FCA* that there may have been a widespread or regular failure by relevant firms to comply with requirements applicable to the carrying on by them of any activity;
 - (2) it appears to the *FCA* that, as a result, consumers have suffered (or may suffer) loss or damage in respect of which, if they brought legal proceedings, a remedy or relief would be available in the proceedings; and
 - (3) the *FCA* considers that it is desirable to make *rules* for the purpose of securing that redress is made to consumers in respect of the failure (having regard to the other ways in which consumers may obtain redress).

Meaning of “widespread or regular” failure

- 1.3.2 G There is no further explanation in the *Act* of what is meant by “widespread or regular”. The *FCA*’s view is that the phrase is primarily directed at the volume of failings that have occurred. However, we do not think the test is subject to further precise definition. Rather, we think the test is a matter for regulatory judgement, to be interpreted in the round with reference to all the relevant evidence.
- 1.3.3 G The *FCA* will not need to have specific evidence of failure by each of the

firms subject to the scheme. The *FCA* will be entitled to extrapolate reasonably from the evidence it has to determine whether the failure appears to be “widespread or regular”.

- 1.3.4 G Section 404(1)(a) of the *Act* refers to “failure...to comply with requirements”. The reference to “requirements” rather than “requirement” means that there does not have to be evidence of widespread or regular failure for each requirement covered by a scheme. Rather, the failure may exist in relation to different requirements affecting the same type of activity.
- 1.3.5 G The *FCA* will only proceed if it has robust evidence to support its view that it appears there may have been a widespread or regular failure. Sources of evidence which the *FCA* might use and extrapolate from include the results of the *FCA*’s thematic work, enforcement investigations, mystery shopping, complaints to the *FCA*, firms or to the *Financial Ombudsman Service*, and information from consumer groups and reports from *skilled persons*.
- 1.3.6 G However, it is important to understand that the purpose of section 404(1)(a) is to require the *FCA* to establish whether there may have been a widespread or regular failure. The purpose is not to prove that all or most relevant firms have failed (or may have failed) to comply with requirements in respect of all or most relevant consumers.

Failures that can be dealt with under a consumer redress scheme

- 1.3.7 G The requirements that can be included in a *consumer redress scheme* include both *FCA rules* and the general law (e.g. the tort of negligence or the *Unfair Terms Regulations* – see section 404F(3) and (4) of the *Act*).
- 1.3.8 G The failures that the *FCA* can take into account in deciding if the trigger is satisfied are those where, as a result of the failure, consumers have suffered (or may suffer) loss or damage in respect of which, if they brought legal proceedings, a remedy or relief would be available in the proceedings (see section 404(1)(b) of the *Act*). The relevance of the “may suffer” wording is that it makes clear that schemes may cover cases where loss is foreseeable but may not yet have crystallised (e.g. pensions mis-selling cases where the loss may not crystallise until retirement).
- 1.3.9 G The *FCA* will be able to give examples of things done or omitted to be done that are to be regarded as constituting a failure to comply with a requirement. However, the *FCA* can only give examples that have been, or would be, held by a court or tribunal to constitute a failure (see section 404A(2) of the *Act*).
- 1.3.10 G So in other words, the section 404 power is limited so that the only failures a *consumer redress scheme* can address are those that a court or tribunal would find to have been failures at the time the activities were carried on. Consumers will not need to have actually brought an action

forward for the *FCA* to be able to make a scheme.

- 1.3.11 G Deciding whether a particular act or omission constitutes a failure will necessarily involve the *FCA* interpreting its *rules* and the general law. If the law is unclear in a particular area, the *FCA* will have two broad options available to it. It may decide either:
- (1) not to develop a scheme, having regard to the other ways in which consumers can seek redress, including through the courts; or
 - (2) to take steps to clarify the law.
- 1.3.12 G The *FCA* will seek an opinion from a Queen's Counsel for any *consumer redress scheme* it proposes in relation to the question of whether the failures proposed to be addressed by a scheme are those that a court or tribunal would find to constitute as failures to comply with a requirement. If stakeholders disagree with the *FCA*'s interpretation of the law as expressed in the draft scheme *rules*, they will be able to say so during the consultation process. Any representations made will be carefully considered by the *FCA* as set out in *CONRED 1.2*.
- 1.3.13 G In addition, the *FCA* has the option of seeking a court declaration to clarify the law (the bank charges test case brought by the Office of Fair Trading which the *FCA* supported with a *waiver* of certain *DISP rules* is an example of this sort of approach).
- 1.3.14 G The process of interpreting what the *FCA*'s *rules* require will involve the usual process of analysing relevant surrounding materials (e.g. consultation papers) as is the practice when interpreting any piece of legislation. Other *FCA rules* and *guidance* may also be relevant to interpreting what a particular *rule* requires. The *FCA*'s *rules* are given a purposive interpretation (see *GEN 2.2.1R*). The purpose of a *rule* is gathered predominantly from the text of the *rule* itself as well as its context among other relevant *rules*.
- 1.3.15 G The *FCA* will not be able to impose higher requirements on firms retrospectively. The requirements to be applied by the *FCA* will be those in force at the time of the relevant act or omission, not current or later requirements.
- 1.3.16 G *Consumer redress schemes* can only be used to require redress in relation to those failures in respect of which a remedy or relief would be available in legal proceedings. A *consumer redress scheme* could not, therefore, be used to require redress for:
- (1) breaches of the *Principles* (*FCA rules* currently provide that breaches of the *Principles* do not give rise to a right of action in court under section 138D of the *Act* – a change to this would be subject to the consultation requirements under the *Act* in the usual way); or

- (2) breaches of any other *FCA rules* where the right of action under section 138D of the *Act* has been switched off in the *rules* (e.g. the *rules* in the *SYSC* sourcebook); or
- (3) departure from *FCA guidance*; or
- (4) non-compliance with any non-binding code of practice (e.g. industry guidance confirmed by the *FCA*).

- 1.3.17 G The fact that a *consumer redress scheme* cannot be used to require redress in relation to breaches of the *Principles* would not prohibit a consideration of the *Principles* for the purposes of interpreting one of the *FCA*'s more detailed *rules*. This is because the *FCA* believes that a court would also take into account surrounding legislative provisions when seeking to interpret a particular piece of law. However, this does not mean that the scheme could be based on the *Principles*: there always needs to be a legally-actionable failure.
- 1.3.18 G Finally, it is necessary that the loss or damage which was suffered (or may be suffered) is as a result of the failure. As part of this, the *FCA* will need to consider whether any indirect or consequential loss is recoverable under the applicable law.

‘Desirability’ of making a consumer redress scheme

- 1.3.19 G The *FCA* will be required to make an objective, evidence-based judgement on the overall appropriateness of a *consumer redress scheme* as a remedial tool. Cost benefit analysis (CBA) is likely to be a key part of this decision. An important characteristic of a *consumer redress scheme* is that it can ensure consumers obtain redress without the *FCA* having to first identify every individual firm specifically involved. CBA will necessarily rely in part upon the *FCA*'s judgement as to how widespread or regular the failure is.
- 1.3.20 G A comparison of the advantages and disadvantages of a *consumer redress scheme* against other available tools will form part of the decision-making process. The *Act* provides a range of other tools (e.g. imposition of requirements on a firm under section 55L to take remedial action in respect of past conduct) and the *FCA* will need to consider which power is most appropriate in the circumstances.
- 1.3.21 G As a public body, the *FCA* will also have regard to general administrative law principles such as proportionality and reasonableness. For example, the extent to which firms have already provided redress will be a factor to which the *FCA* will have regard (e.g. following enforcement action or the implementation of a voluntary industry redress scheme). See also *CONRED* 1.5.25G.
- 1.3.22 G Lastly, the *FCA*'s *operational objectives* (particularly its *consumer protection objective*), together with the regulatory principles in section 3B of the *Act*, will also be relevant. For example, the *Act* requires the

FCA to have regard to the principle that a burden or restriction which is imposed on a person should be proportionate to the benefits, considered in general terms, which are expected to result from the imposition of that burden or restriction.

1.4 Scope of a consumer redress scheme

The financial services that a consumer redress scheme can apply to

- 1.4.1 G In accordance with section 404E(2) of the *Act*, a *consumer redress scheme* can secure redress for consumers of services provided by:
- (1) *authorised persons* in carrying on *regulated activities*;
 - (2) *authorised persons* in carrying on a consumer credit business in connection with the accepting of deposits (insofar as section 404E relates to, or applies for the purposes of, anything done under the *Act* concerning things done (or not done) before 1 April 2014);
 - (3) *authorised persons* in communicating, or approving the communications by others of, invitations or inducements to engage in investment activity;
 - (4) *authorised persons* who are *investment firms*, or *credit institutions*, in providing relevant ancillary services;
 - (5) *persons* acting as *appointed representatives*;
 - (6) *payment service providers* in providing *payment services*; and
 - (7) *electronic money issuers* in issuing *electronic money*.
- 1.4.2 G A *consumer redress scheme* could apply to all *authorised persons*, *electronic money issuers* or *payment service providers* or to a specified description of *authorised person*, *electronic money issuer* or *payment service provider*. This means the *FCA* could create a scheme that applied to a named list of firms. Given that a scheme can apply to *authorised persons*, it could also apply to *incoming EEA firms* that are authorised under Schedule 3 to the *Act*. However, the *FCA* would need to consider on a case-by-case basis the extent to which this was both practicable and appropriate (having regard to the division of responsibilities between *Home* and *Host State regulators* under the various *EU Directives* that apply to financial services firms).
- 1.4.3 G The *FCA* will be able to determine, on reasonable grounds, how to characterise the particular activity that a scheme applies to. This will enable the *FCA* to ensure that a scheme is appropriately focused (e.g. limited to activities carried on in relation to particular products or sectors of the market in question, during specified periods of time). It is possible that a scheme could be combined with the use of other regulatory tools (i.e. a package of measures would be put in place to ensure an issue was

addressed comprehensively). Should this be the case, the *FCA* will clearly set out in its consultation paper how the different elements of the package inter-relate.

- 1.4.4 G Where the financial services to which a scheme applies are those provided by *authorised persons* in carrying on *regulated activities*, the limitation to ‘*regulated activities*’ means that a *consumer redress scheme* cannot apply to services that were provided before the activity in question first became regulated by the *FSA* or *FCA* (e.g. the start date of a scheme applying to general insurance mediation could not be earlier than 14 January 2005, which was the commencement of regulation of general insurance mediation).
- 1.4.5 G That said, it would be possible for the Treasury by order to widen the type of financial services that a *consumer redress scheme* can cover in order to encompass pre-regulation activities (see section 404G of the *Act*).

Consumers that can be covered by a consumer redress scheme

- 1.4.6 G For the purposes of a scheme, a consumer can be any person who has used, or may have contemplated using, any of the financial services listed in section 404E(2) of the *Act* (see *CONRED* 1.4.1G), or has relevant rights or interests in relation to any of those services. As such, the section 404 power is not limited to retail customers only.
- 1.4.7 G That said, a *consumer redress scheme* can only be used to secure redress for consumers who have a legal cause of action. In some cases, the cause of action is limited to private persons in any event. For example, rights of action in respect of breaches of *FCA rules* are generally limited to *private persons*, and the *Unfair Terms Regulations* are limited to individuals acting outside their trade, business or profession. In contrast, claims for misrepresentation can be brought under the general law by all types of *person*.
- 1.4.8 G In addition, the *FCA* may choose to focus a scheme on retail customers, having regard in particular to the fact that they tend to have less experience and expertise. However, the *FCA* will also have regard to the fact that many retail customers are also investors in, or beneficiaries of, funds and pension schemes which may have incurred loss from the failure. It may be that the inclusion of such funds or pension schemes amongst those to whom redress ought to be given will bring benefit to the underlying retail customers.
- 1.4.9 G The section 404 power could be used in relation to non-UK consumers if they are protected by the underlying law (e.g. some *FCA rules* apply to *UK* firms doing business in another *EEA State*).
- 1.4.10 G The fact that a consumer “who may have contemplated using” a relevant financial service can be covered by a *consumer redress scheme* is unlikely to catch many cases in practice. One example of a case where it

might be used is where there has been widespread discrimination: the section 404 power could be used to ensure redress for consumers who were unlawfully denied access to a financial service contrary to any relevant equality legislation. All the restrictions and evidence requirements explained in *CONRED 1* would apply equally to any scheme developed in this sort of area.

- 1.4.11 G The Treasury may by order widen (or cut back) the type of consumers that a *consumer redress scheme* can cover (see section 404G of the *Act*).

Applicability of a scheme to other situations

- 1.4.12 G The limits of a *consumer redress scheme's* application will be clearly defined within the scheme *rules* and a scheme will only bind those firms to which it applies. Firms that are unsure whether or not a scheme applies to their activities are encouraged to raise the issue with their supervisory contact in the normal way.
- 1.4.13 G It is possible that the approach taken by the *FCA* in a particular scheme could influence its approach to other situations. The *FCA* will aim to be consistent in its regulatory approach where possible.
- 1.4.14 G For example, the *FCA* could put in place a scheme in relation to unfair variation terms in *regulated mortgage contracts*. The underlying reasons for the *FCA's* decision that a variation term in a *regulated mortgage contract* is unfair could potentially apply to a variation term in an insurance contract that fell outside the scope of the scheme. However, the *Unfair Terms Regulations* expressly state that all the circumstances attending the conclusion of the contract must be taken into account when assessing the unfairness of a contractual term. Therefore, if the *FCA* wanted to take action in relation to the term in the insurance contract using its other regulatory powers, it would need to ensure that it had considered all the relevant issues separately to those considered as part of the scheme for *regulated mortgage contracts*.

1.5 Operation of a consumer redress scheme

Investigation of cases under a consumer redress scheme

- 1.5.1 G Firms will be responsible for investigating individual cases, within the framework set out by the *FCA*. The *FCA* will have a number of options when formulating a scheme. For example, the *FCA* could:
- (1) require firms to undertake a proactive file review of all cases falling within the period covered by the scheme; or
 - (2) require firms to contact their customers individually to ask whether they wish their cases to be investigated under the scheme and only investigate the cases of those customers who opt-in; or
 - (3) require firms to publicise the existence of the scheme (e.g.

through newspaper advertisements) and only investigate the cases of those customers who opt-in; or

- (4) publicise the existence of the scheme through an *FCA* publicity campaign and require firms to investigate the cases of those customers who subsequently opt-in.

- 1.5.2 G It would also be possible to require a combination of these methods within a scheme (e.g. for different types of case). The choice of investigation method would be one of the issues on which the *FCA* would consult and perform cost benefit analysis (CBA). In doing so, the *FCA* will have to consider the likely effectiveness of consumer contact exercises.
- 1.5.3 G In the event that a scheme required customers to ‘opt-in’ by a specified date, the *FCA* would ensure that the scheme covered how to deal with customers who nevertheless contacted firms after that date.
- 1.5.4 G In some cases, the *FCA* (or someone acting on its behalf) may carry out the investigation under the scheme instead of the relevant firm (see section 404A(1)(k) of the *Act*). The scheme rules may provide for this in relation to, for instance, a firm which was refusing to operate a scheme. Another example is provided in *CONRED* 1.5.6G in relation to formerly *authorised persons*.
- 1.5.5 G The *FCA* will be mindful of issues relating to professional indemnity insurance when making *rules* in this area. For example, the *FCA* is aware that certain policies prohibit admissions of liability without the written consent of the *insurer*.

Firms that are no longer authorised by the *FCA* or have transferred their business to another firm

- 1.5.6 G The *FCA* has a number of options for dealing with firms that have ceased to be authorised. For example:
- (1) Where the firm continues to exist and still has assets, the scheme could still apply to that firm (see section 404F(5)(a) of the *Act*). Alternatively, the scheme *rules* could provide for the *FCA* itself (or a third party acting on its behalf) to investigate the cases of formerly *authorised persons*.
- (2) Where the firm has ceased to exist, cannot readily be traced or has no assets, the *FSCS* could declare the firm in default. See *CONRED* 1.6.23G for details of how the *FSCS* will deal with cases that fall within a scheme.
- 1.5.7 G Where there has been a transfer of business, the *FCA* can apply the scheme to the successor firm if it has assumed liability (e.g. where there has been a transfer of a banking business under Part VII of the *Act* or a firm is otherwise legally liable for the failures of another firm – see

section 404F(5)(b) of the *Act*). Where the successor firm has no legal liability for the failures, the scheme itself could not apply to the successor firm (and so redress would need to be obtained through the options set out above). It may be the case, however, that the successor firm has access to information that may assist in the investigation of *persons* who have ceased to be authorised. The *FCA* will be mindful of this.

- 1.5.8 G In these sorts of cases it would be for either the *FCA*, the third party acting on its behalf, the *FSCS* or the successor firm (as relevant) to contact affected consumers. The *FCA* and the *FSCS* will work together closely to ensure all relevant firms are captured.

Other matters that may be included in the rules of a consumer redress scheme

- 1.5.9 G Section 404A of the *Act* sets out an illustrative list of particular matters that the *FCA* may cover in the *rules* of a scheme.
- 1.5.10 G One of the most important areas where the *FCA* may be likely to make *rules* is to set out examples of things done or omitted to be done that are to be regarded as constituting a failure to comply with a requirement (see section 404A(1)(b) of the *Act*). However, as explained in *CONRED* 1.3.7G to 1.3.18G, the *FCA* can only give examples that have been, or would be, held by a court or tribunal to constitute a failure.
- 1.5.11 G Giving examples that are clear and sufficiently comprehensive will be an area to which the *FCA* pays particular attention, both in its work leading up to a consultation and during the consultation process itself. The *FCA* will work with relevant stakeholders to ensure the final scheme *rules* give examples which provide clarity and certainty as to how a firm is expected to operate under the scheme.
- 1.5.12 G Another important area where the *FCA* can make *rules* concerns setting out matters to be taken into account, or steps to be taken, by firms for the purpose of:
- (1) assessing evidence as to a failure to comply with a requirement; or
 - (2) determining whether such a failure has caused (or may cause) loss or damage to consumers (see section 404A(1)(c) of the *Act*).

Again, the *FCA* will only be able to do this if the matters set out have been, or would be, taken into account by a court or tribunal for the purpose mentioned. In particular, the *FCA* cannot disregard the normal legal rules on causation or remoteness of loss. The reference to ‘matters’ is to legally relevant considerations, not to any procedural steps which firms may be required to take. For example, firms may be required to gather certain categories of evidence. Examples of ‘steps’ would be requiring firms to gather evidence by specified methods or to record their decision making in a certain form.

- 1.5.13 G A third significant area relates to the period under review. The *consumer redress scheme rules* will specify a start date (referred to as the ‘specified date’ in section 404(3) of the *Act*) and most likely also an end date (see section 404A(1)(f) of the *Act*) for the activities and sales to be reviewed. This will limit the scope of a firm’s investigations under a scheme.
- 1.5.14 G A fourth area that could be covered in *consumer redress scheme rules* is the content of a firm’s communication to consumers about the outcome of their investigation under a scheme. Detailing the content of the communications that consumers can expect to receive will ensure consistency across firms as well as clarity for consumers. It will also be of benefit to firms should *complaints* subsequently be referred to the *Financial Ombudsman Service*. This is because a comprehensive communication may help to make it apparent to the *Ombudsman* at the outset that a firm has undertaken its investigation in accordance with the scheme. Firms may also be required to draw the scheme to the attention of the *Financial Ombudsman Service* in any individual cases that are referred to it. As such, the *FCA* will consult the *Financial Ombudsman Service* on the content of such communications.
- 1.5.15 G Fifthly, the scheme *rules* could require firms to provide information to the *FCA* (e.g. information about how they are conducting their investigations under the scheme, how many consumers have opted to have their cases reviewed, etc.).

Issues that come to light during the period in which the scheme is running

- 1.5.16 G The *FCA* will monitor schemes while they are running. If it became apparent during the operation of a scheme that it would be desirable for the scheme *rules* to cover other issues (e.g. if firms or consumer groups informed the *FCA* that it would be helpful if further examples of failures pursuant to section 404A(1)(b) of the *Act* were given), the *FCA* would be able to amend the *rules* accordingly. Any such amendments would be subject to the usual consultation process as set out in *CONRED* 1.2.
- 1.5.17 G Alternatively, the *FCA* could give general or individual *guidance* to firms on issues that arise during the operation of a scheme. General *guidance* would also be subject to the consultation process.

Types of redress a firm can be required to make under a consumer redress scheme

- 1.5.18 G The *FCA* is able to set out in scheme *rules* the kinds of redress that are to be made to consumers. The only kinds of redress the *FCA* can secure in this way are those which it considers to be just (see section 404A(4) and section 404F(1) of the *Act*). For example, instead of providing cash compensation, the *FCA* could require firms to top up pensions or offer to alter the terms of a contract.

- 1.5.19 G That said, the *FCA* is required to have regard to the nature and extent of the losses or damage in question (see section 404A(5) of the *Act*) and so will take into account the type of relief that a court would grant.
- 1.5.20 G Redress made under a *consumer redress scheme* may include interest (see section 404F(1) of the *Act*). Decisions regarding the rate of interest and the basis for calculation will be made on a scheme-by-scheme basis and will be subject to the consultation process.
- 1.5.21 G A *consumer redress scheme* cannot extend normal limitation periods. Under the Limitation Act 1980, the general position regarding time limits for bringing a claim in England and Wales is as follows:
- (1) 6 years from the event for claims in contract and claims in tort concerning non-latent damages; and
 - (2) 3 years from actual or constructive awareness for claims in tort concerning latent damages until 15 years from the event at which point (for most cases) the right to claim expires irrespective of any awareness considerations.
- [**Note:** This is only a summary of the position and the legislation itself should be consulted when determining the limitation period applicable to any particular case. It should also be noted that the position under the law in Scotland and Northern Ireland is different.]
- 1.5.22 G Firms may only be required to make redress to consumers who are within the limitation period for bringing their case to court at the time the *FCA* makes the *rules* (see section 404(8) of the *Act*). In other words, once a scheme has been made the ‘clock will stop’ on the relevant limitation period. For example, if a scheme began in July 2015 and the limitation period for a consumer to take their case to court would have expired in September 2015, the firm would still need to deal with the consumer’s case under the scheme, even if it did not investigate that consumer’s particular case until, for example, November 2015.
- 1.5.23 G The *FCA* will endeavour to provide as much direction as possible in the scheme *rules* as to how redress is to be calculated (e.g. by setting out a formula or other methodology) in order to assist both firms and the *Ombudsman*.
- 1.5.24 G The section 404 power does not in itself remove a consumer’s right to take a case to the courts. However, any redress received in court proceedings would be discounted from compensation payable under a *consumer redress scheme* and vice versa. Scheme *rules* would also deal with the situation where a consumer had previously received redress from the *Financial Ombudsman Service*.

Waivers or modifications of the scheme rules

- 1.5.25 G Firms can apply for a *waiver* or modification of the scheme *rules*. For example, if a firm believes that it has already provided redress to relevant customers through a voluntary past business review it can apply to the *FCA* for a *waiver* from, or modification of, the *rules* in the usual way (see section 138A of the *Act*).
- 1.5.26 G The *FCA* may not give a *waiver* or modification unless it is satisfied that:
- (1) compliance by the firm with the *rules*, or with the *rules* as unmodified, would be unduly burdensome, or would not achieve the purpose for which the *rules* were made; and
 - (2) the *waiver* or modification would not adversely affect the advancement of any of the *FCA*'s *operational objectives*.
- 1.5.27 G The *FCA* may impose conditions on a *waiver* or modification (e.g. additional reporting requirements).

Dealing with complaints when a consumer redress scheme is in place

- 1.5.28 G To avoid the risk of potential overlaps between the *rules* in *DISP* and the operation of any *consumer redress scheme*, the *FCA* has switched off the *complaints resolution rules*, the *complaints time limits rules*, the *complaints record rules* and the *complaints reporting rules* in relation to complaints where the subject matter falls to be dealt with (or has been dealt with) under a *consumer redress scheme*. *Complaints* which fall outside the scope of a scheme will continue to be subject to *DISP* in the usual way.
- 1.5.29 G The *FCA* will also consider whether it is appropriate to grant a *waiver* or modification of the *DISP rules* whilst a scheme is being consulted on. As set out in *CONRED* 1.5.27G, the *FCA* may impose conditions on a *waiver* or modification (e.g. conditions relating to handling *complaints* from complainants who claim to be in financial difficulty).

Non-compliance with the consumer redress scheme rules

- 1.5.30 G The *FCA* has a variety of tools at its disposal if a firm does not comply with a scheme. For example, the *FCA* will be able to take disciplinary action if a firm is failing to operate a scheme properly (see Part XIV and section 404C of the *Act*). The *FCA* is also able to take over the conduct of the investigation required under the scheme, or appoint a third party to do so (see section 404A(1)(k) of the *Act*).

Publication of the existence of a scheme

- 1.5.31 G The *FCA* will apply the approach to transparency it has set out in its 'Transparency discussion paper: Summary of feedback and our

response' (FS13/1) at <https://www.fca.org.uk/your-fca/documents/feedback-statements/transparency-framework>. The *FCA* has a presumption in favour of transparency, unless there are compelling regulatory, legal or other reasons to the contrary, when considering whether, when and how to publicise a scheme or proposed scheme, over and above its publicity obligations under the *Act*.

- 1.5.32 G As set out in *CONRED* 1.2.4G, the *FCA* would be likely to publicise the work it has been doing in the run up to the launch of a formal consultation paper. The consultation paper itself will be available on the *FCA*'s website.
- 1.5.33 G Assuming the scheme *rules* are made following consultation, the final *rules* will also be available on the *FCA*'s website. The *rules* will clearly set out the type of firms and activities to which the scheme applies. The information available on the website will enable third parties such as consumer groups to disseminate information about the scheme.
- 1.5.34 G The *FCA* will also be able to go further than this in appropriate cases and run its own publicity campaign. This might include newspaper or radio advertisements designed to increase awareness of the scheme amongst consumers. Such advertisements would aim to make clear the scope of the scheme (e.g. the types of products and services the scheme covers) and any action that consumers need to take (e.g. the extent to which they need to contact their firm directly or whether their case will automatically be investigated by the firm without the need for any action on their part).
- 1.5.35 G In addition, the *FCA* has the option to include in the scheme *rules* a requirement on firms to publicise the scheme themselves.
- 1.5.36 G In considering whether to publish the names of individual firms that are subject to a scheme, the *FCA* will also have regard to the *FCA*'s transparency framework, and in particular its confidentiality restrictions, the extent to which naming firms will enable consumers to make informed judgements (e.g. it may not always be possible to ensure that the list of firms subject to a scheme is exhaustive), as well as relevance and timeliness (e.g. the extent to which consumers will be made aware of the firms involved in a scheme through any customer contact exercise prescribed in the scheme).

1.6 Role of the Financial Ombudsman Service and the Financial Services Compensation Scheme

How the Financial Ombudsman Service will deal with complaints where there is a relevant consumer redress scheme

- 1.6.1 G *Complaints* about:
- (1) an act or omission of a firm where the subject matter of the *complaint* falls to be dealt with (or has properly been dealt with)

under a *consumer redress scheme*; or

- (2) a determination made by a firm under a *consumer redress scheme*; or
- (3) a failure by a firm to make a determination under a *consumer redress scheme*;

will all fall within the compulsory jurisdiction of the *Financial Ombudsman Service* (see section 404B(11) of the *Act*).

- 1.6.2 G Whether the *Ombudsman* will, or will not, consider a complaint and, if so, on what basis will depend on the circumstances of the complaint, including in particular on when the complaint is received by the *Financial Ombudsman Service* and also on whether the firm and consumer agree that the *complaint* should not be determined by reference to what, in the opinion of the *Ombudsman*, the determination under the consumer redress scheme should be or should have been (see section 404B(1A) and (2B) of the *Act*).

Complaints received by the Financial Ombudsman Service before a scheme comes into effect

- 1.6.3 G A scheme must be established by the *FCA* in accordance with the *FCA's* rule-making processes, including consultation and cost benefit analysis (CBA). Publicity in the run up to formal consultation may lead to a rapid rise in the number of *complaints* to the *Financial Ombudsman Service* about the issue in question. Alternatively, the *Financial Ombudsman Service* may already have received a number of *complaints* about the issue for which a scheme is being developed to address.
- 1.6.4 G As these are *complaints* that were referred to the *Financial Ombudsman Service* before the scheme came into effect, the *Ombudsman* would have to determine the *complaint* on the usual fair and reasonable basis under section 228 of the *Act*.

Complaints received by the Financial Ombudsman Service while a consumer redress scheme is in effect

- 1.6.5 G Where the *complaint* is about the subject matter of a scheme or a failure by a firm to make a determination under a scheme (where the firm has not yet dealt with it because the time limit for the firm to deal with cases under the scheme has not expired) under *DISP* 3 the *Ombudsman* will (unless *DISP* 2.8.1.R(4) applies) refer the *complaint* back to the firm to be dealt with in accordance with the scheme.
- 1.6.6 G In other cases the *Ombudsman* may have to consider the merits of the *complaint*. However, the *complaint* will be determined by reference to what, in the opinion of the *Ombudsman*, the determination under the *consumer redress scheme* should be or should have been (unless the firm and consumer agree that the *complaint* should not be so determined – see

CONRED 1.6.7G). Examples would be where:

- (1) the firm does not offer redress in the determination, or makes no determination within the time limit for doing so, and the consumer claims that (under the terms of the scheme) the firm should have done so; or
- (2) the scheme provides for different forms of redress depending on the circumstances of the case, but the firm has offered one form of redress and the consumer claims that (under the terms of the scheme) the firm should have offered another form of redress.

- 1.6.7 G Where the firm and the consumer agree that the *complaint* should not be determined by reference to what, in the opinion of the *Ombudsman*, the determination under the *consumer redress scheme* should be or should have been (see section 404B(1A) and (2B) of the *Act*), the *Ombudsman* will determine the *complaint* by reference to what is fair and reasonable in all the circumstances of the case (see *DISP* 3.6).

Complaints received by the Financial Ombudsman Service after a consumer redress scheme has ended

- 1.6.8 G If a *complaint* is about:
- (1) a firm's determination under the scheme (or failure to make a determination in accordance with the scheme); or
 - (2) an act or omission the subject matter of which has been dealt with under the scheme;

the *complaint* will be determined by reference to what, in the opinion of the *Ombudsman*, the *redress determination* under the *consumer redress scheme* should have been, rather than by reference to what is 'fair and reasonable' (unless the firm and the consumer agree otherwise – see *CONRED* 1.6.7G).

- 1.6.9 G The point at which a scheme ends will be set out in the scheme and some schemes may be of indefinite duration. In relation to an 'opt-in' scheme, the *FCA* would ensure that the scheme covers how to deal with customers who nevertheless contacted firms after that date.

- 1.6.10 G The *Financial Ombudsman Service* may also receive *complaints* about cases that have been dealt with by a firm under a *consumer redress scheme* when the firm should have dealt with the issue under the normal *complaints* process in *DISP*. In such cases the *Ombudsman* will determine the *complaint* in accordance with its usual 'fair and reasonable' jurisdiction and the usual *DISP* rules will apply. *DISP* seeks to clarify this point by referring (in appropriate places) to *complaints* that have properly been dealt with under a *consumer redress scheme*. It is important to note that "properly" here refers to the scope of the scheme (i.e. should the *complaint* have been dealt with under the scheme at all?)

rather than the way in which the scheme has been applied in a particular case (i.e. the *complaint* did fall within the scheme but the firm applied the scheme incorrectly).

Non-consideration and dismissal of complaints by the Ombudsman

- 1.6.11 G The relevant *DISP* provisions provide that the *Ombudsman* can usually (unless the firm and the consumer consent) only consider a *complaint* which falls to be dealt with under a *consumer redress scheme* if the firm has already provided a *redress determination* (akin to a *final response*) or failed to do so within the time limits specified in the scheme (see *DISP* 2.8.1R).
- 1.6.12 G *DISP* sets out the circumstances in which the *Ombudsman* may dismiss a *complaint*. There are no express rules which allow the *Ombudsman* to dismiss a *complaint* which falls to be dealt with (or has been dealt with) under a *consumer redress scheme* (see *DISP* 3.3.4AR). Whether a *complaint* which falls to be dealt with (or has been dealt with) under a *consumer redress scheme* should be dismissed is a matter for the *Ombudsman* to decide.

Case fees

- 1.6.13 G The definition of *chargeable case* contains an exception which provides that a case fee may not be charged where the *Ombudsman* considers it apparent from the *complaint* when it is received, and from any *redress determination* issued by the firm, that the firm has reviewed the subject matter of the *complaint* and issued a *redress determination* in accordance with the terms of the *consumer redress scheme*. However, this exception does not apply where the complainant and the firm agree that the *complaint* should not be dealt with by the *Ombudsman* in accordance with the *consumer redress scheme*.
- 1.6.14 G If it is not apparent to the *Ombudsman* from the *complaint* when it is received, and from any *redress determination* issued by the firm, that the firm has reviewed the subject matter of the *complaint* and issued a *redress determination* in accordance with the terms of the *consumer redress scheme*, a case fee will be chargeable. It will therefore be in firms' interests to ensure that a *redress determination* clearly sets out the outcome of their investigation under the scheme as well as the basis for it.

Time limits

- 1.6.15 G Similar time limits will apply to *complaints* to the *Financial Ombudsman Service* about the outcome of a firm's investigation under a scheme as currently apply to other complaints referred to the *Financial Ombudsman Service*.
- 1.6.16 G Consumers will have six months from the date on which the firm sent them a *redress determination* to complain to the *Financial Ombudsman*

Service. If a firm has failed to provide a *redress determination* (e.g. because it omitted to deal with a particular consumer's case under the scheme), consumers will have the longer of six years from the event complained of and three years from the date on which the consumer became aware (or ought reasonably to have become aware) that they had cause for complaint, to complain to the *Financial Ombudsman Service* (in accordance with the existing standard time limits in *DISP* 2.8). A firm cannot consent to the *Ombudsman* considering the complaint outside these standard time limits where the *complaint* is a "relevant complaint" within the meaning of section 404B(3) of the *Act*. However, the *Ombudsman* can consider complaints outside of these standard time limits where, in the view of the *Ombudsman*, the consumer's failure to comply with the time limits was as a result of exceptional circumstances.

Awards

- 1.6.17 G Where a *consumer redress scheme* is in place, money awards and directions will reflect what, in the opinion of the *Ombudsman*, the outcome of the firm's investigation should be (or should have been) under the *consumer redress scheme* (see section 404B(5) and (8) of the *Act*). This applies unless the firm and the consumer agree that the *complaint* should not be determined in this way (see section 404B(1A), (2B) and (3) of the *Act*).
- 1.6.18 G The money award may specify the date by which the amount awarded is to be paid and may provide for interest to be payable, at a rate specified in the award, on any amount not paid by that date (see section 404B(7) of the *Act*).
- 1.6.19 G The cap on the maximum money award the *Ombudsman* can make will also apply in relation to *consumer redress schemes* (see section 404B(5) of the *Act*). Even so, when making *scheme rules*, the *FCA* may decide to specify a different monetary limit in relation to *complaints* falling within the scope of the scheme (see section 229(7) of the *Act*). Such a *rule* would normally be subject to consultation before the scheme takes effect (see *CONRED* 1.2.1G). As is usual practice, the *Ombudsman* will be able to recommend that the firm pay a larger amount than the cap (but this will not be binding on firms in any way). This does not mean that the *Ombudsman* can recommend a larger amount than should be paid under the scheme.

Firm-by-firm past business reviews that have already been agreed by a firm before a consumer redress scheme is made

- 1.6.20 G If a firm had fairly reached a voluntary settlement with its consumers on a full and final settlement basis, the *Financial Ombudsman Service* would not usually look to re-open this.

Waivers of the scheme rules for particular firms

- 1.6.21 G If a firm is granted a *waiver* of the *scheme rules* as a whole, the

consumer redress scheme will not apply to that firm. Consequently, any *complaints* about the firm that are referred to the *Financial Ombudsman Service* will be dealt with in accordance with the *Ombudsman's* usual approach of determining what is, in their view, fair and reasonable in all the circumstances of the case.

Failures by firms that span the period before and after an activity became regulated by the FCA

- 1.6.22 G In this situation, the *Act* would require the *Financial Ombudsman Service* to decide *complaints* within the scope of a scheme by applying the scheme (unless the relevant firm and consumer otherwise agreed – see section 404B of the *Act*) and *complaints* outside the scope of a scheme on the basis of its usual approach (see section 228 of the *Act*). However, as explained in *CONRED* 1.4.5G, it would be possible for the Treasury by order to widen the type of financial services that *consumer redress schemes* can cover in order to encompass the pre-regulation activities (see section 404G of the *Act*).

The FSCS

- 1.6.23 G The *FSCS* will consider claims that fall within the scope of a *consumer redress scheme* in accordance with the scheme (see *COMP* 12.4.22R). However, the *FSCS* has discretion to depart from the terms of the scheme where it considers it essential in order to provide the claimant with fair compensation. An example might be the *FSCS* paying compensation in cash rather than augmenting a consumer's current pension plan (as the *FSCS* is not in a position to advise the consumer to set up a new, or amend an existing, pension plan in the way that a firm may be able to).
- 1.6.24 G The *FSCS's* limits on the amount of compensation it can pay in the event of a claim will apply.

1.7 Challenging a consumer redress scheme

Method of challenge

- 1.7.1 G Any *person* (e.g. firms, consumers or their representatives) may apply to the Upper Tribunal for a review of any *rules* made (see section 404D of the *Act*). The contact details for the Upper Tribunal are as follows:

The Upper Tribunal (Tax and Chancery Chamber)

5th Floor, Rolls Building

7 Rolls Buildings

Fetter Lane

London EC4A 1NL Tel: 020 7612 9730

Email: uttc@hmcts.gsi.gov.uk

1.7.2 G The Upper Tribunal is independent of the *FCA*. Its usual role in relation to financial services is to hear references arising from *decision notices* or *supervisory notices* issued by the *FCA*. However, it has also been given a special role in relation to *consumer redress schemes*.

1.7.3 G The judge presiding at *consumer redress scheme* proceedings in the Upper Tribunal will be a judge of the High Court, the Court of Appeal or Court of Session (or such other person as may be agreed by the Lord Chief Justice, the Lord President or the Lord Chief Justice of Northern Ireland; and the Senior President of Tribunals) (see section 404D(12) of the *Act*).

Dealing with consumer redress scheme cases

1.7.4 G The general rule is that, in determining an application, the Upper Tribunal will apply the principles applicable on an application for judicial review (see section 404D(5) of the *Act*). Therefore, the Tribunal will consider issues such as:

- (1) whether the *FCA* has acted within its powers;
- (2) whether the *FCA* has followed a fair process;
- (3) whether the *FCA* has specified kinds of redress that are ‘just’; and
- (4) whether the *FCA* has acted irrationally or unreasonably (e.g. is the amount of time in which firms are given to conduct an investigation unreasonable?).

1.7.5 G Nonetheless, in relation to two particular aspects of a *consumer redress scheme*, the Upper Tribunal will be able to conduct a full merits review to consider whether the *FCA*’s interpretation of the law was correct (see section 404D(6) and (7) of the *Act*). These two aspects are:

- (1) any examples that the *FCA* has set out in the scheme *rules* of things done, or omitted to be done, that are to be regarded as constituting a failure to comply with a requirement; and
- (2) any matters to be taken into account, or steps to be taken, that the *FCA* has set out in the scheme *rules* for the purposes of:
 - (a) assessing evidence as to a failure to comply with a requirement; or
 - (b) determining whether such a failure has caused (or may cause) loss or damage to consumers.

1.7.6 G In relation to these two aspects, the *FCA* is restricted to what a court or

Tribunal would do. As such, the Upper Tribunal's role will be to check whether the *FCA* came to the correct view.

Procedure in the Upper Tribunal

- 1.7.7 G The detailed rules that govern the practice and procedure to be followed in the Upper Tribunal are available on the Government's website (<https://www.gov.uk/government/publications/upper-tribunal-procedure-rules>) and are subject to periodic revision.

Possible outcomes of an application to the Upper Tribunal

- 1.7.8 G The Upper Tribunal may:
- (1) dismiss the application (so that the scheme *rules* will stand); or
 - (2) make an order quashing any rules made under section 404 or any provision of those *rules* (see section 404D(2) of the *Act*).
- 1.7.9 G The Upper Tribunal may also award damages to the applicant (see section 404D(10) of the *Act*).
- 1.7.10 G It is possible to appeal an Upper Tribunal decision to the Court of Appeal on a point of law.

1.8 Imposing a consumer redress scheme on a firm under section 404F(7) of the Act

Triggers that must be met before the *FCA* can impose a *consumer redress scheme* under section 404F(7)

- 1.8.1 G Section 404F(7) of the *Act* empowers the *FCA* to require a firm "to establish and operate a scheme which corresponds to, or is similar to, a consumer redress scheme" established under section 404 of the *Act* (see *CONRED* 1.2 to 1.7).
- 1.8.2 G The process by which the *FCA* may vary the authorisation of a *payment service provider* or *electronic money issuer* is not specifically addressed in this *guidance*.
- 1.8.3 G The relevant triggers for determining whether the *FCA* can require an *authorised person* with a *permission* to establish and operate a scheme which corresponds to, or is similar to, a *consumer redress scheme* are different to those that apply for an 'industry wide' *consumer redress scheme* established under section 404 of the *Act*. Rather than considering the test set out in section 404(1) of the *Act*, the *FCA* has to consider the relevant legal triggers for varying a *permission* or varying or imposing a *requirement* on a firm (see sections 55H, 55J and 55L of the *Act*).
- 1.8.4 G However, before the *FCA* varies a firm's *permission* under section 55J(2) of the *Act* on its own initiative, or imposes a *requirement* on a firm under section 55L of the *Act*, the *FCA* must consider whether it

would be ‘more appropriate’ to proceed under the Competition Act 1998. If the *FCA* considers that it would be more appropriate to proceed under the Competition Act 1998, the *FCA* must not exercise its powers under sections 55J(2) or 55L of the *Act* (see section 234K of the *Act*). In the remainder of this section, it is assumed that the *FCA* considers that it is able to exercise its powers under the *Act* rather than under the Competition Act 1998.

- 1.8.5 G The *FCA* may vary a firm’s *permission* under section 55J of the *Act* or impose or vary a *requirement* under section 55L of the *Act*, on its own initiative, if it appears to the *FCA* that:
- (1) the firm is failing, or likely to fail, to satisfy the *threshold conditions* for which the *FCA* is responsible; or
 - (2) the firm has failed, for at least a year, to carry on a *regulated activity* to which its *permission* relates; or
 - (3) it is desirable to exercise the power in order to advance one or more of the *FCA*’s *operational objectives*, for example, its *consumer* protection objective of securing an appropriate degree of protection for *consumers*.
- 1.8.6 G Further information about varying a firm’s *permission* or varying or imposing *requirements* on the *FCA*’s own initiative under section 55J or section 55L of the *Act* is set out in *EG* 8.
- 1.8.7 G The *FCA* has no power to accept an application from an *authorised person* to vary its *permission* where the *authorised person* is a *PRA-authorised person* (see sections 55H and 55I of the *Act*). For all other firms, an *authorised person* with a *permission* can voluntarily apply to the *FCA* to vary its *permission* under section 55H of the *Act*. The *FCA* may refuse the application if it appears to the *FCA* that it is desirable to do so in order to advance any of its *operational objectives*, for example, its *consumer* protection objective (see section 55H(4) of the *Act*). The *FCA* also has the power to impose or vary a *requirement* under section 55L of the *Act*, in order to establish and operate a scheme which corresponds to, or is similar to, a scheme established under section 404 of the *Act*. However, where the *authorised person* is a *PRA-authorised person* (or is a member of a group which includes a *PRA-authorised person*), the *FCA* must consult the *PRA* (see section 55L(7) of the *Act*). As with voluntary applications to vary a *permission*, the *FCA* may refuse an application to voluntarily impose, vary or cancel a requirement if it appears to the *FCA* that it is desirable to do so in order to advance any of its *operational objectives* (see section 55L(5) of the *Act*).
- 1.8.8 G Further information about the voluntary variation of a *permission* or the voluntary imposition or variation of a *requirement* is set out in *SUP* 6.

Consultation

- 1.8.9 G The decision to require a firm to establish and operate a scheme pursuant to section 404F(7) affects a firm, or a small number of firms, each individually rather than the whole industry or sector of the industry. As with any supervisory or enforcement action it takes against a specific firm, the *FCA* is not obliged to consult before deciding to vary a firm's *permission* or impose or vary a *requirement*.

Circumstances in which the FCA will engage section 404B

- 1.8.10 G As already explained, when determining whether to vary a firm's *permission* under sections 55H or 55J or to impose a *requirement* under section 55L to establish and operate a scheme pursuant to section 404F(7), the *FCA* will need to consider whether the statutory tests referred to in *CONRED* 1.8.5G (for own initiative action) and *CONRED* 1.8.7G (where a firm applies voluntarily) have been met. This will often involve a consideration of the *FCA's operational objectives* and, in particular, the *consumer* protection objective. The *FCA* will also consider the regulatory principles in section 3B of the *Act* and follow the normal principles of administrative law.
- 1.8.11 G This exercise will be undertaken on a case-by-case basis and in the round by looking at all of the proposed terms, including any terms which have been included to make provision corresponding to section 404B (under section 404F(7)(b)). It is important to note that engaging section 404B will not automatically or always advance one or more of the *FCA's operational objectives*, for example its *consumer* protection objective, even if the other terms of the proposed scheme do.
- 1.8.12 G If section 404B is engaged then broadly the *Ombudsman* is normally required to decide a *complaint* referred to the *Financial Ombudsman Service* after the scheme comes into effect on the basis of what, in the opinion of the *Ombudsman*, the determination under the scheme should be (or should have been). This will mean that the *Ombudsman* will not determine the *complaint* by reference to what, in their view, they consider to be fair and reasonable in all the circumstances of the case. To assist the *Financial Ombudsman Service* in identifying relevant cases, firms may be required to draw the scheme to the attention of the *Financial Ombudsman Service* in any individual cases that are referred to it. However, if the firm and the consumer agree that the *complaint* should not be determined by reference to what, in the opinion of the *Ombudsman*, the determination under the *consumer redress scheme* should be or should have been, or if the subject matter of the *complaint* does not fall to be dealt with under the scheme (or part of it does not) then the *Ombudsman* may determine the *complaint* (or that aspect of the *complaint*) in accordance with what they consider to be fair and reasonable in the usual way.
- 1.8.13 G It is likely that many section 404F(7) schemes will be set up because, in

the *FCA's* view, it is desirable to advance the *consumer* protection objective of securing an appropriate degree of protection for *consumers*. In determining what is desirable to advance that objective, the *FCA* will have regard to a wide range of factors. Many of these are likely to be interdependent considerations rather than standalone issues. These may include (but are not limited to):

- (1) how many consumers have been (or may be) affected by the act or omission to which the proposed scheme relates. It will normally only be appropriate to consider engaging section 404B where the issue affects a large number of consumers;
- (2) whether engaging section 404B would result in higher or faster redress for consumers (whether or not they have complained individually) than would otherwise be the case. In other words, the extent of any difference in redress between the proposed scheme and what consumers may receive through the *Financial Ombudsman Service* or the courts;
- (3) the extent to which the overall effect of the proposed scheme provides a fair and reasonable outcome for individual consumers, having regard to the desired outcome for the group of affected consumers overall; and
- (4) whether the *Financial Ombudsman Service* has had a material number of *complaints* about the act or omission, has an established approach to dealing with them and the extent to which the proposed scheme aligns with this approach.

Consultation with the Financial Ombudsman Service when the FCA is considering engaging section 404B

1.8.14 G Where the *FCA* is considering engaging section 404B, it will consult with the *Financial Ombudsman Service* at an early stage and allow time for a fully-considered, written response. The *Financial Ombudsman Service* is in a position to say:

- (1) whether it has already received cases about the particular firm and acts/omissions, whether any cases have been decided and (if so) what the outcomes were;
- (2) insofar as the acts/omissions are not fact-specific, whether it has previously considered similar cases and has adopted a particular approach;
- (3) the sorts of *complaints* it can foresee might be made in future by consumers about the firm in relation to the acts/omissions concerned;
- (4) how the outcomes of cases decided by the *Ombudsman*, or the *Ombudsman's* approach to similar cases, would compare to the

outcomes under the proposed scheme; and

- (5) if the *Financial Ombudsman Service* is likely to encounter any practical issues in implementing the proposed scheme.

- 1.8.15 G The *Financial Ombudsman Service* is impartial between *consumers* and firms. The *FCA* will not treat the *Financial Ombudsman Service's* input as a proxy for input on behalf of *consumers*.
- 1.8.16 G The *Financial Ombudsman Service* cannot lawfully guarantee how it will decide cases that fall outside the scope of the scheme (e.g. pre-regulation cases or those referred to the *Financial Ombudsman Service* before the scheme came into effect). It may, however, be willing to describe its general approach to such cases.

Internal process to be followed if the *FCA* proposes to engage section 404B

- 1.8.17 G Where the proposal is to engage section 404B, the *FCA* will apply the following governance procedure in addition to its usual processes:
- (1) all decisions to engage section 404B will be taken by the *FCA's* Executive Committee or a sub-committee;
 - (2) the Committee/sub-committee will need to be satisfied that there has been adequate consultation internally to ensure full consideration of consumers' interests;
 - (3) the Committee/sub-committee will consider written views from the *Financial Ombudsman Service* before reaching a decision; and
 - (4) if section 404B is engaged, the document outlining the terms of the scheme will be published on the *FCA's* website, either in the *FCA Register* or (with cross-reference from the *FCA Register*) in a register of such schemes.

Challenging a consumer redress scheme imposed under section 404F(7)

- 1.8.18 G If the firm has voluntarily applied to establish and operate the scheme, it is unlikely to challenge the *FCA* for accepting its application. If the *FCA* proposes to refuse a firm's application for a section 404F(7) scheme, the *FCA* must give the firm a *warning notice* (section 55X(2)). If, after consideration by the *FCA's* decision makers, the *FCA* decides to refuse the application, the *FCA* must give the firm a *decision notice* (section 55X(4)). The firm would be able to challenge the *decision notice* by referring the *FCA's* decision to the Upper Tribunal (section 55Z(3)).
- 1.8.19 G If the *consumer redress scheme* was imposed on the *FCA's* own initiative, the *FCA* must give the firm a *supervisory notice* (section 55Y). The firm would be able to challenge the *supervisory notice* by referring the *FCA's* decision to the Upper Tribunal (section 55Z(3)). The Tribunal may dismiss the reference or remit the matter to the *FCA* with a direction

to reconsider and reach a decision in accordance with the Tribunal's findings (section 133(6) of the *Act*).