Financial Services Consumer Panel
AN INDEPENDENT VOICE FOR CONSUMERS OF FINANCIAL SERVICES

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By email

Dear Sir / Madam,

Financial Services Consumer Panel response to SRA consultation on protecting consumers from excessive charges in financial service claims

The Financial Services Consumer Panel (the Panel) is an independent statutory body. We represent the interests of individual and small business consumers in the development of financial services policy and regulation in the UK. We have a particular focus on ensuring that consumers have easy access to redress and protection, and that the schemes that exist in the financial services sector are available and accessible to consumers and work effectively to underpin consumer confidence in the sector.

Our focus is predominately on the work of the FCA, however, we also look at the impact on consumers of other bodies' activities and policy where relevant to the FCA's remit.

The Panel welcomes the opportunity to respond to this consultation on the SRA's draft rules to protect consumers from excessive charges when they are represented by solicitors in claims relating to financial products and services. We have worked with the FCA over the last few years as it analysed the activities of CMCs, and we welcomed the regulatory action the FCA took to target areas of CMC activity that have historically driven high levels of consumer harm.

The Panel responded[1] to the FCA's consultation on the CMC Fee Price Cap dated 21st April 2021. Many of the issues we refer to in that response remain relevant to the issues and questions raised in your consultation with the primary concerns around the level of fees CMCs were typically charging, and consumer awareness of complaints and redress mechanisms. The FCA has a specific duty to make rules to deliver an appropriate degree of

[1] https://www.fscp.org.uk/sites/default/files/final_fscp_20210413_response_to_fca_consultation_on_cmc_fee_price_cap_3.pdf

consumer protection from excessive charges by financial service CMCs, and that same duty is placed on the SRA. We welcome the fact that the SRA has identified the two key issues of excessive fees and the availability of consumer information about redress and protection schemes as the focus of this consultation and is proposing largely to mirror the rules introduced by the FCA.

We would caution that from our experience the SRA may receive strong and loud representations from the financial services industry but comparatively little from consumers and consumer bodies who are very likely to be less well co-ordinated, resourced, and vociferous. The Panel would also ask the SRA to ensure they recognise and address this imbalance and counter any disproportionate industry-driven approach/perspective, by purposefully amplifying the consumer voice in this consultation process.

We recognise that a number of key risks have already been flagged by consumer groups in the engagement process and some have called for careful monitoring of the impacts of your rules on access to justice. These risks include concerns that there might be unintended incentives for solicitors to avoid the proposed charging rates and maximum charges by pushing more claimants to the courts from the outset, rather than towards the Ombudsmen schemes. We agree that these are genuine risks which need to be properly understood and this gives rise to the need for close and regular monitoring of the rules when they are finally implemented.

We also believe that there may be a risk of CMCs taking on consumer claims and then passing them over to solicitors / firms to provide litigation services, with little or no scrutiny or understanding on the part of the consumer of how the case got to that stage and whether the advice, guidance and options the consumer/client may have received along the way has been appropriate.

The Panel are pleased to see your intention to bring the terms upon which consumers access and use solicitors as CMCs into a position where they mirror the terms upon which consumers access and use other CMC services, and in particular on the question of fees. Therefore, we would encourage you to match any fee limits with those imposed by the FCA and to ensure the limits for CMCs regulated by the FCA, and solicitors and firms regulated by the SRA, remain aligned over time. This level of consistency can only benefit consumers for whom there can often be no clear understanding of the distinction between services provided by CMCs regulated by the FCA, or similar services provided by solicitors/firms regulated by the SRA.

The Panel will be encouraging the FCA in collaboration with yourselves to do more in gathering and sharing detail on claims information on an ongoing basis, addressing vexatious claims generated by CMCs which are a significant component of costs, and working to address the lack of consumer awareness about protections and consumers' ability to access free redress and to claim direct.

The Panel would expect the SRA to engage with the FSCS and FOS given their experience of and insight into CMC and solicitor involvement in financial services claims.

While we do not support all of the proposals to exempt some claims management activity provided by solicitors, we welcome the proposal that where such activity would be exempt from the maximum charges and rates specified in the banding framework, the SRA will still require any charges to be reasonable.

We are very supportive of the focus you are bringing to this area, the Panel would encourage you to consider what further could be done in this area and would be happy to discuss any of these issues further with you.

Our responses to the questions posed in the consultation are included at Annex A below.

Yours sincerely,

Helen Charlton

Chair, Financial Services Consumer Panel

Annex A – responses to questions

Q1. Do you agree with our assessment of financial service claims management activity provided by law firms and solicitors? If not, please explain why and, where possible, provide evidence to support your view.

The SRA assessment of activity in this area seems sensible and corresponds with many of the FCA's findings[2] in its earlier assessment of FCA-regulated CMCs. However, the two operating models identified for SRA-regulated law firms, could present a risk that consumers of services provided by 'Model A' firms will clearly benefit from the new fee limits, while consumers of 'Model B' firms may not.

While the Panel do not support all of the proposals to exempt some claims management activity provided by solicitors, we welcome the proposal that where such activity provided would be exempt from the maximum charges and rates specified in the banding framework, the SRA will still require any charges to be reasonable.

As explained below, the Panel do not believe it is possible or appropriate to divide firms in this way if the models are used to decide whether the new rules apply or whether a firm's activities will be exempt (although still subject to 'reasonableness' of charges). And it is certainly not possible for consumers to make such a judgment about the operating model when instructing a solicitor.

There are a great number of cases[3] involving mis-selling of pensions, pensions and investment advice which may be complex to the consumer but would still be appropriate to be dealt with by the existing redress schemes. We noted from our work with FCA and FOS that the most common claims are loans, packaged bank accounts, pensions and savings & investments, with the highest revenue per claim for CMCs from pension claims, which make up the largest percentage of revenue for CMCs. With a rising trend in pension complaints and claims, and the likelihood that the value of these claims will only increase, the Panel has concerns that CMCs will increasingly target this higher yielding area where excessive charging is most likely to occur, and we have similar concerns about the possibility for solicitors and firms regulated by SRA to do the same.

In terms of 'complex' or 'novel' financial services claims, we believe there has to be greater clarity about what these terms mean, and certainty for consumers around whether their individual claim would qualify as 'complex' or 'novel' and why. This is important to ensure that consumers are able to make an informed decision at an early stage on whether to instruct a law

[2] https://www.fca.org.uk/publication/research/iff-research-claims-management-companies-cmc-fee-rules-research-financial-services-claims.pdf

[3] https://www.fca.org.uk/publication/research/iff-research-claims-management-companies-cmc-fee-rules-research-financial-services-claims.pdf

firm or solicitor in their case, and to have a clear understanding of whether their claim can still be dealt with by a recognised alternative redress mechanism in which case the limits on charges should apply.

The Panel welcome the inclusion in the objectives of reference points for SRA to monitor and evaluate their impacts in the future. We would suggest an additional review of a sample of 'Model B' firms after one year to ensure that any action can be taken quickly, limiting the harm to the consumer. We would also strongly encourage the SRA to supervise solicitor behaviour and the relevant operating models closely, including the targeting of pension and investment claims. The SRA should intervene quickly whenever harm is found, considering its full regulatory toolkit.

Q2. Do you agree we are using the right objectives as the basis for developing our rules? If not, please explain why.

The Panel support the objectives set out in the consultation. In particular, we believe that when properly applied, objectives 2 and 4 could secure consistent and sector wide parameters to protect consumers from excessive charges in relation to the majority of financial service claims. Many law firms and CMCs are operationally similar, both in terms of categories of financial service claims being progressed, and services they provide to consumers. We think it is important to have consistency of approach for these cases so that consumers have clarity about charges regardless of the type of provider they use. This is also important to reduce the risk of regulatory arbitrage between the FCA's regulatory framework and the SRA's.

While we support the requirement to disclose cost information and free options available to consumers upfront, the effectiveness of providing consumers with information about claiming direct should be tested to establish how the presentation of the statement and choice of wording affects consumer awareness and understanding of the option to claim without a solicitor. The SRA would need to monitor how the proposed requirement is implemented to understand whether it improves awareness and understanding. Ultimately, this should result in more direct claims made by consumers, which should be included as a measure of success for the intervention and measured/monitored by the SRA.

The Panel remain concerned that protections and the route to redress are confusing for consumers, who appear to be unfamiliar with the ombudsman (the FOS and the Pensions Ombudsman) and have a poor understanding of the Financial Services Compensation Scheme (FSCS). Even when consumers do understand the level of protections afforded to them, they may be discouraged from seeking redress due to a lack of clarity around the processes involved or due to sludge practices (including any advice they may receive about the complexity or novelty of their particular claim which most consumers would be ill-equipped to challenge).

The FCA's findings in this area have shown that there is an absence of shopping around and limited demand sensitivity to price in this market, in addition to a lack of awareness about protections and free redress. We are not aware that the proposed requirement has been tested on consumers to gauge whether it would lead to more direct claims so including this as a success measure would help to assess success. This would require an understanding of whether the disclosure of free options had been understood and acted upon.

Q3. Do you agree with our proposal to replicate the FCA's banding framework for CMCs in our rules in its entirety, but with specific limited circumstances where the banding model and maximum charges are not to apply? Where possible, provide evidence or examples that illustrate why you think this.

The findings[4] of the FCA's research on FCA regulated CMCs in this area were concerning and the Panel supported many of the FCA's regulatory changes. So, we are pleased to see that the SRA is proposing to replicate the FCA's rules for CMCs in its own rules for solicitors and SRA-regulated law firms.

The Panel support the proposal to replicate the FCA's banding model in its draft rules for solicitors and law firms. What has long been needed is consistency across the market for advice on financial services claims that protects consumers from excessive charges irrespective of the type of provider the consumer chooses to be represented by. Adopting the FCA's banding framework and its maximum percentage charges in the SRA's own rules should go a long way to achieve that.

In a well-functioning market, the Panel would expect the fees charged to consumers for handling claims to reflect the cost of handling the claim As consumers find it difficult to put a value on services they receive from CMCs and solicitors and are often paying fees which are disproportionate to or even in excess of the redress they receive, the Panel support the imposition of the fee cap to protect consumers.

We maintain our concern about the assessment by the FCA and similarly by the SRA about whether the maximum amounts for each redress band represent value for money for consumers. We set out our views on this in our response[5] to the FCA consultation and those concerns remain. While we believe that having consistency across charges consumers face whether they use FCA-regulated CMC services, or those claims management services offered by SRA-regulated providers is an important step-forward,

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[4] https://www.fca.org.uk/publication/research/iff-research-claims-management-companies-cmc-fee-rules-research-financial-services-claims.pdf

[5] https://www.fscp.org.uk/sites/default/files/final_fscp_20210413_response_to_fca_consultation_on_cmc_fee_price_cap_3.pdf

we would urge the SRA to work closely with the FCA to ensure that value for money is reviewed and assessed as a key outcome from the setting of these charges.

The proposed rules will secure consistent and sector wide parameters to protect consumers from excessive charges in relation to the majority of financial service claims. Many law firms and CMCs are operationally similar, both in terms of categories of financial service claims being progressed, and services they provide to consumers. The Panel think it is important to have consistency of approach for these cases so that consumers have clarity about charges regardless of the type of provider they use. This consistency is key as many consumers may be unaware of whether they are being contacted and offered services by a solicitor, law firm or CMC.

This is also important to reduce the risk of regulatory arbitrage between the FCA's regulatory framework and SRA's, a risk that is recognised and addressed in this consultation.

Q4. Do you think our proposed circumstances for charges to be eligible for exemption from the parameters of the banding framework are appropriate? If not, please explain why.

The proposal that 'certain activity connected to the preparation of litigation proceedings (and distinct from the conduct of litigation itself) may be eligible to be charged outside the maximum rate and maximum total fee parameters' is unclear. Is it clear to consumers what would amount to 'activity connected to the preparation of litigation proceedings? Is it clear to consumers at what point that stage in any claims management process is reached and when that activity begins? What does 'connected with' mean? How obvious will this be to the consumers?

Q5. Do you consider that there are any circumstances in which exemptions from the parameters of the banding framework would be appropriate for a claim entirely dealt with through a statutory redress scheme (the third exemption we are considering)? Please provide evidence where possible to support your view.

The Panel do not believe there are any circumstances where exemptions would be appropriate for claims that can be entirely dealt with through a statutory redress scheme. Fees for claims which could be taken through the statutory redress system but (for any reason) are pursued in some other way should also be subject to the cap.

We believe this should be the default situation even if the claim may be considered complex. The purpose of the statutory redress schemes is to allow access to redress without legal advice or other assistance. The established Ombudsman providers provide assistance to claimants and the process ensures that consumers have every opportunity to submit all the required evidence.

The SRA is proposing rules that will allow solicitors to exempt their charges from the banding model in some specific circumstances, and instead make charges that are reasonable. We believe that this might inadvertently incentivise solicitors to unduly direct consumers towards litigation activity, or to increasingly define financial service claims as being complex or otherwise capable of being exempt from the fee rules. The risk is that this could purposely avoid the maximum charges required through the banding model.

While the Panel cannot challenge the assumption that this risk may be low and can possibly be mitigated, we question whether the 'checks and balances' in the courts that are referred to would be sufficient to mitigate any 'undue or inappropriate' attempts to litigate as by that stage the consumer will have experienced what is inevitably an extended and more costly process that could have been avoided. This in itself presents a real risk of consumer harm.

We understand that the SRA's Principles and specific requirements in the SRA Code of Conduct[6] could also mitigate this risk but we would suggest that if implemented, the proposed exemptions set out in 2.5 of the draft Rules (Annex 2) should be kept under close monitoring and evaluation by SRA not only through the ongoing supervisory work but also through annual focused review of consumer experiences to assess whether consumer harm is being caused.

Where the redress systems are not available, the Panel agree that it is possible that solicitors could provide different value so we welcome the proposal that where such activity provided would be exempt from the maximum charges and rates specified in the banding framework, the SRA will still require any charges to be reasonable.

Q6. Do you have any comments about information transparency for consumers, and our proposed requirements and approach?

As shown by the FCA's research[7] on CMCs, consumers are too often not aware that they can make complaints and pursue their claim for free. The Panel's view is that if consumers are more aware of the free options available to them, and that making a claim directly was likely to be more straightforward than they expect, the value they might place on services they receive from solicitors may be lower.

The Panel agree that information transparency and accessibility for consumers must be a key component of the SRA's regulatory framework. This applies equally to information for prospective clients with financial

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6 https://www.sra.org.uk/globalassets/documents/sra/consultations/lttf-annex-2-solicitors.pdf?version=4a1acc

7 https://www.fca.org.uk/publication/research/iff-research-claims-management-companies-cmc-fee-rules-research-financial-services-claims.pdf

services claims about their options to pursue their claim without representation, and signposting to the relevant redress scheme, as well as to clear costs information before they enter into a contract. These are fundamental issues that allow consumers to make well-informed decisions about what action is right for them.

Q7. What areas do you think we should cover in guidance to support the introduction of the new rules?

The Panel does not have any additional comments other than to remind the SRA of the need to target areas of concern as set out within the Panel's response.

Q8. Do you agree we have identified and are considering the right impacts? If not, what else do you think we should consider?

No comment.

Q9. Do you agree with our assessment of equality, diversity and inclusion considerations in our impact assessment? If not, what else do you think we should consider?

The Panel agree with the assessment of equality, diversity and inclusion considerations in the impact assessment.