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Dear FCA,

## **Financial Services Consumer Panel response to CP26/9 Modernising the Redress System**

The Financial Services Consumer Panel (the Panel) welcomes the opportunity to respond to the joint consultation paper (the CP) by the FCA and the Financial Ombudsman Service (the FOS) titled Modernising the Redress System. We are an independent panel that represents the interests of consumers of financial services including both individuals and small businesses. Our focus is on the outcomes and impacts to these stakeholders.

The Panel fully supports a desire to update the current redress system to ensure appropriate redress, where necessary, is provided to consumers promptly and efficiently. Key to success is a regime that consumers understand, are confident in and can engage with effectively. The Panel continues to have some reservations about whether the current direction of travel will deliver these goals.

The Panel sets out some general comments in response to the CP below, and then in the Annex provides answers in relation to the specific questions posed in the CP.

### Changes to the regime must be designed with consumers at its heart

The Panel remains concerned that the proposed changes have not been developed with consumers' best interests in mind. Further, taken as a whole, the introduction of numerous procedural changes risks making using the FOS overly complex and confusing for consumers. It is disappointing that the measures of success in the CP do not include any reference to complainant understanding and satisfaction.

It is essential that the time is taken to review how the proposed changes will operate in practice from a complainant's perspective. Complainants to the FOS

want to ensure they are heard and that their complaints are dealt with fairly. The process should not be unduly burdensome or feel unduly administrative.

While consumers need to understand the process, careful consideration needs to be given to how this is presented to consumers. This applies both in advance of consumers making a complaint as well as during the passage of a complaint. There is a balance to be struck between keeping consumers informed and putting people off. Clear guidance for complainants is essential and needs to be drafted extremely carefully, recognising that, for example, many consumers struggle with formal documents, formal processes and operating in a fully digital environment.

Currently, some consumers, especially those in vulnerable circumstances, obtain critical support from the FOS to help them navigate the process when making their complaints. It is essential this support is not lost. For example, what help and support will be provided to consumers whose complaints are 'rejected' for being incomplete? The FOS must be careful not to place too much expectation on consumers, whether vulnerable or not.

#### The regime and the FOS risks becoming overly restricted

We understand that some stakeholders are concerned the FOS has been acting as a quasi-regulator (a view we do not share) and a key driver for the reform is to more closely align the FOS with the work of the FCA.

We support closer collaboration between the FOS and the FCA. However, a key value of any ombudsman system is the ability to respond flexibly to the facts of any complaint before it, so that it can deliver an outcome that is fair and reasonable in all the circumstances of the case. If FOS is – or feels – overly constrained by the rules governing its operation, it will be hindered in its ability to deliver fair outcomes in all circumstances. This would, in our view, be to the detriment of consumers and financial services markets more generally.

Taken as a whole, the direction of travel is one which places a number of operational restrictions on the FOS. We urge the FCA and the FOS to pay extremely close attention to ensuring the FOS has the necessary discretion and flexibility to apply the rules fairly in all circumstances. Such flexibility needs to be set out on paper and safeguarded in practice.

#### The fair and reasonable test should remain unchanged

The Panel is aware that the Government intends to introduce legislation to change the current fair and reasonable test. The Panel remains of the view that changes to the current test are unnecessary and suspects such changes are unlikely to be in the best interests of consumers.

While we recognise the thinking behind FOS' proposals to amend the fair and reasonable test in DISP 3, we do not support the proposed changes. We think it is premature to make such changes before the legislative process has started and the necessary Parliamentary scrutiny has been undertaken. In fact, the Panel is

concerned that to make such changes now risks undermining the proper legislative process.

Crucially, it is not clear to the Panel that the potentially detrimental impact of the proposed changes to the fair and reasonable test have been fully taken into account by the FCA and the FOS. This needs to be properly understood before changes are made to DISP 3, particularly where (as we suspect) the changes are likely to have an adverse impact on (at least some) consumers. Even if the test is ultimately changed by Parliament to the detriment of consumers, it is important for consumer harm to be avoided by the FOS in the meantime.

#### Some dismissal grounds appear unnecessary

The Panel supports the re-introduction of some dismissal grounds. We also support the principle of updating existing dismissal grounds to close lacunas and ensure they are effective in practice.

However, we are not convinced that all of them are needed, or that some of them are workable in practice. For example, it would appear that some can only be exercised after a complaint has been thoroughly investigated. We query whether, in such circumstances, it is more appropriate for a complaint to be resolved in favour of the firm than for the complaint to be dismissed.

Further, we note that virtually all the proposed dismissal grounds provide for extremely wide discretion on the part of the FOS. This concerns the Panel. We recognise that many of the dismissal grounds currently exist in DISP3. However, the increased focus on them in conjunction with the broad direction of travel on the proposals in this CP and the Government's proposed reforms, risks, in our view, placing the FOS under increased pressure to use them.

We think some of the proposed dismissal grounds need to be more narrowly drafted. In any event, it is essential that close and independent monitoring on the use of dismissal powers by FOS going forward is undertaken.

It is essential that the dismissal powers of the FOS remain as powers and are not allowed to become an obligation on FOS (whether absolute or de facto).

Notwithstanding our current concerns, the Panel reiterates its support for the development of a well-functioning redress system that operates in the interests of consumers. We welcome the open dialogue with the FOS and the FCA in relation to the issues set out in the CP and look forward to working constructively with the FOS and FCA as the final policy positions are determined.

Yours sincerely

Chris Pond

Chair, Financial Services Consumer Panel

## Annex

**Question 1: Do you agree with the proposed rules to introduce a registration stage (pre-registration and registration stages), as set out in the Appendix? If not, please give evidence or reasons as to why not.**

**Question 2: Do you agree with the proposal for the Financial Ombudsman to assess whether a case is ready to investigate within the registration stage, recognising that it will develop and publish further supporting guidance to support the rules in due course? If not, please give reasons or evidence as to why not.**

**Question 3: Do you have any other comments, data, evidence, or suggestions regarding the proposed registration stage?**

The Panel is supportive of the introduction of a new registration phase, providing that:

- It does not lead to unnecessary delays to consumer complaints;
- It enhances the experience of consumers taking their complaints to the FOS;
- Consumers understand the process and are not deterred from taking a complaint to the FOS. In particular, it must be clear to consumers what is needed for their complaint to pass through the registration process;
- Unreasonable expectations on consumers are not introduced, for example in terms of the evidence required to be submitted or the applicable timeframes for doing so. Allowances must be made for consumers unfamiliar or unconfident with formal and/or digital processes;
- Appropriate support is provided to help consumers navigate the complaints process, including in particular for those in vulnerable circumstances.

The Panel is concerned by the apparent ability for a complaint to bounce between the pre-registration and registration phase (see proposed wording of DISP 3.1A.9 R). It is unclear what is envisaged here and this provision would not appear to be in the interests of consumers.

**Question 4: Do you agree that the Financial Ombudsman should retain the ability to dismiss complaints that are frivolous or vexatious? If not, please give evidence or reasons as to why not.**

Yes.

**Question 5: Do you agree that the Financial Ombudsman should be able to dismiss complaints where complainants have acted vexatiously,**

**abusively or otherwise unreasonably? If not, please give evidence or reasons as to why not.**

Yes, we are supportive of such a power as we cannot condone aggressive, abusive and unreasonable behaviour towards FOS staff. However, we consider a fairly high threshold should be applied when the FOS is seeking to exercise this power. For example, a complainant may be facing specific mental health challenges (which can be exacerbated by financial difficulties, especially where the person is in dispute with a bank or insurance company). It is important to recognise, therefore, that some complainants who appear to be acting unreasonably need extra support not penalising. More generally, we note there can be a fine line between frustration and unreasonable behaviour, and note that some people will be facing extremely difficult circumstances, whether financial or otherwise.

It is also possible that some people will be responding to poor treatment by FOS staff, and care should be taken to ensure whether this is the case before complaints are dismissed.

**Question 6: Do you agree that the Financial Ombudsman should be able to dismiss complaints where the respondent has reviewed the subject matter of the complaint in accordance with (a) the regulatory standards for the review of such transactions prevailing at the time of the review; or (b) any formal regulatory requirement, standard or guidance published by the FCA or other regulator in respect of that type of complaint? If not, please give evidence or reasons as to why not.**

The Panel is not convinced that such a power is required. It would appear the FOS could only reach such a view following a thorough investigation of the complaint and in such circumstances, it would seem to make more sense for the complaint to be adjudicated than be dismissed. We note that consumers may not distinguish in their complaint between the substance of the complaint and how the complaint has been considered by the respondent. In many cases, the distinction may be extremely fine and not apparent to the complainant.

As a general rule, consumers are likely to be more satisfied if they feel their complaint has been determined (even if the decision goes against them) than if their complaint has been dismissed.

**Question 7: Do you agree that the Financial Ombudsman should be able to dismiss complaints where, the Financial Ombudsman is satisfied, having considered its responsibilities under s. 404B FSMA, the respondent has reviewed the subject matter of the complaint in accordance with a consumer redress scheme? If not, please give evidence or reasons as to why not.**

Please see our response to Question 6, which we think equally applies here.

Further, the Panel would be concerned if complaints are within the scope of a redress scheme but are automatically treated as being without merit without the ability for consumers to take their individual claim to FOS for their own individual circumstances to be assessed.

**Question 8: Do you agree that the Financial Ombudsman should be able to bring finality by dismissing complaints where the subject matter of the complaint has previously been considered or excluded under the Financial Ombudsman Service? If not, please give evidence or reasons as to why not.**

**Question 9: Do you agree with the addition of 'factual' into the existing rule? If not, please give evidence or reasons as to why not.**

Yes.

**Question 10: Do you agree that the Financial Ombudsman should be able to dismiss complaints where the subject matter of the complaint has been dealt with, or is being dealt with, by a comparable complaints scheme, regulatory or law enforcement body or dispute resolution process? If not, please give evidence or reasons as to why not.**

The Panel is concerned that the proposed dismissal ground is drafted too broadly. While we recognise that if another dispute resolution process or complaints scheme has already properly addressed a complaint, it will generally be inappropriate for the FOS to subsequently reopen that complaint. However, the position with regards to other situations covered under this proposed ground is less clear.

In particular, the Panel would be concerned if the FOS could dismiss complaints where, despite there being a related regulatory or law enforcement process underway, it is unclear whether that process is likely to actually resolve the complaint in question (and ensure consumers obtain any redress they are entitled to).

For example, we note the legal burden for a criminal prosecution is significantly higher than the evidential burden necessary to resolve an individual complaint (whether in the courts or at the FOS). Consequently, a prosecution may fail, but this may have little bearing on whether a related complaint should be upheld. We recognise that there may be situations where it is necessary for a particular enforcement (or similar relevant) process to complete before FOS can properly consider a complaint. However, we would very much expect this to be the exception rather than the rule.

Given the above, we consider the dismissal ground should be recast and significantly narrowed. We would also prefer to see the FOS have a power to pause complaints in relevant circumstances rather than dismiss them. Even if a complaint is dealt with through another means, it may not be fully resolved. It should be possible for any outstanding issues that fall within the jurisdiction of the FOS to be picked up again by the FOS without the complainant needing to restart the whole complaints process.

We note the proposed extension of the power to cover 'issues relevant to' a complaint. The Panel would not oppose this extension to the extent this is utilised to prevent the FOS investigating multiple cases raising the same background fact (as the CP suggests). However, we would be concerned if this is otherwise used to extend the scope of the existing power.

**Question 11: Do you agree that the Financial Ombudsman should be able to dismiss complaints where the complaint has been or is the subject of court proceedings? If not, please give evidence or reasons as to why not.**

Yes, to the extent the power is used to dismiss complaints between the same parties relating to the same subject matter.

**Question 12: Do you agree that the Financial Ombudsman should be able to dismiss complaints that are more appropriate for court, arbitration or another complaint scheme or dispute resolution process? If not, please give evidence or reasons as to why not.**

No. We are concerned this power is too broadly drafted and note that this ground only exists currently where dealing with the type of complaint in question would 'seriously impair the effective operation of the FOS'.

If a consumer has a complaint that falls within the FOS' jurisdiction and they have chosen to bring their complaint to FOS, it is not clear why they should be forced to pursue their complaint elsewhere. This does not seem to be a change that is being implemented with the complainant's best interests in mind. If this power is to be retained, we strongly suggest it can only be exercised with the consent of the complainant (as is currently the case in relation to referrals to other complaints schemes).

**Question 13: Do you agree with reintroducing a dismissal ground for complaints about employment matters from an employee, or employees, of a respondent? If not, please give evidence or reasons as to why not.**

Yes.

**Question 14: Do you agree with reintroducing a dismissal ground for complaints purely about investment performance? If not, please give evidence or reasons as to why not.**

Yes, providing this power is only utilised narrowly in line with the intended purpose set out in the CP.

**Question 15: Do you agree with reintroducing a dismissal ground for complaints relating to a respondent's discretion under a will or private trust. If not, please give evidence or reasons as to why not.**

Yes, providing consumers are still able to bring a complaint (and the power will not be used in relation to complaints) where a consumer is challenging whether a trustee has exceeded its powers.

**Question 16: Do you agree that the Financial Ombudsman should be able to dismiss complaints where there is more than one eligible complainant, but they have not all consented to the complaint? If not, please give evidence or reasons as to why not.**

Yes, providing this power is only utilised narrowly in line with the intended purpose set out in the CP and consumers are still protected where, for example, there is evidence of vulnerability such as domestic/economic abuse or coercion.

**Question 17: Do you agree that the Financial Ombudsman should be able to dismiss complaints for other compelling reasons? If not, please give evidence or reasons as to why not.**

**Question 18: Do you agree with the examples that are proposed for DISP 3.3.4D G? If not, please give evidence or reasons as to why not.**

**Question 19: Do you think the six examples that are proposed as guidance for other compelling reasons in DISP 3.3.4D G should instead be separate rules in their own right?**

We do not oppose a more generic power to dismiss cases in appropriate circumstances as this would allow the FOS to deal effectively with novel and unforeseen circumstances. However, we strongly believe that:

- Any such power must be used sparingly;
- The use, and proposed use, of this broad power should be subject to close and independent monitoring to ensure it is being used appropriately;
- Any potential uses are set out by way of examples rather than absolute rules. In particular, we do not consider the current examples should be separate rules in their own right for the reasons set out below.

<b>Comments on provided examples</b>		
<b>1</b>	The complainant has not suffered (or is unlikely to suffer) material financial loss, material distress or material inconvenience	<p>This is problematic to apply in practice given what is material to an individual is extremely subjective and difficult for the FOS to judge in relation to any particular case (especially if the case has not been subject to a detailed investigation).</p> <p>Further, it may be entirely appropriate for a case to be adjudicated notwithstanding the harm caused to a consumer is not likely to be viewed as material by many others. For example where the firm's behaviour is poor and deserves to be called out and where doing so may prevent material harm to future consumers.</p>
<b>2</b>	The complaint clearly does not have any reasonable prospect of success	No comment
<b>3</b>	The respondent has already made an offer of compensation (or a goodwill payment) which is (i) fair and reasonable in relation to the circumstances alleged by the complainant; and (ii) still open for acceptance	A consumer should need to reject a complaint before taking their complaint to FOS. However, if they have done so, they should not have their case dismissed by the FOS – it should instead be subject to a proper investigation. We note that in many cases the FOS will not be in a position to know what a fair and reasonable offer is without undertaking a detailed investigation.
<b>4</b>	With knowledge of the right to refer a complaint to the Financial Ombudsman Service, the complainant has already concluded a full and final settlement with the respondent regarding the subject matter of the complaint	A consumer's complaint should not be dismissed where that consumer has been misled or otherwise been unfairly persuaded into accepting an offer.
<b>5</b>	The Ombudsman considers that the complaint is about the legitimate exercise of a respondent's commercial judgment	This is drafted extremely broadly and so is open to misinterpretation. We suggest it is redrafted to address the specific types of issue envisaged.

6	The compensation sought under the complaint would significantly exceed the award limit in DISP 3.7.4R	<p>Where a consumer properly understands the risks and accepts that they will be prevented from seeking more redress through the courts, a complainant should be able to choose to use the FOS to resolve their complaint.</p> <p>The Panel does not oppose this example to the extent it covers situations where there is evidence that the complainant is using the FOS simply to inform legal proceedings.</p>
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**Question 20: Do you agree with the Financial Ombudsman's proposed changes to DISP 3 (as set out in the Appendix)? If not, please give evidence or reasons as to why not.**

Please see our responses set out above. In particular, we do not support the removal of the requirement for a complainant's consent where the FOS wishes to transfer a complaint to a comparable ADR entity or a court. This does not seem to be in the complainant's best interests (and we note that where the transfer of a complaint is in their best interests, the complainant is likely to consent). The Panel notes the absence of any real justification in the CP for this proposed change, and no obvious assessment of the likely impact on consumers (positive or otherwise).

**Question 21: Do you agree with the proposed changes to DISP 3.6.4R? If not, please give reasons or evidence as to why not.**

No, the Panel strongly disagrees with this proposed change for the reasons set out in the main body of its response.