FINANCIAL CONDUCT AUTHORITY

Guidance on regular premium PPI complaints and recurring non-disclosure of commission

Consultation Paper
CP18/18**

July 2018

How to respond

We are asking for comments on this Consultation within two months by 4 September 2018.

You can send them to us using the form on our website at: https://www.fca.org.uk/cp18-18-response-form

Or in writing to:
Julian Watts
Financial Conduct Authority
25 The North Colonnade
London E14 5HS

New address from 13 August 2018
Financial Conduct Authority
12 Endeavour Square
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Email:
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1 Summary

Why we are consulting

1.1 The Supreme Court judgment in *Plevin v Paragon Personal Finance Limited ('Plevin')* related to non-disclosure of high commission at the point of sale of a payment protection insurance (PPI) policy.[1] The Court ruled that the lender's failure to disclose to Mrs Plevin the large commissions payable out of her single premium made its relationship with her unfair under section 140A of the Consumer Credit Act (s.140A CCA).[2] This was despite there being no regulatory obligation to disclose.

1.2 The judgment created uncertainty as to how firms should handle some PPI complaints. So we used our regulatory judgement to create a framework of new rules and guidance (March 2017) that we considered would reduce uncertainty and enable firms to take a fair and consistent approach to handling PPI complaints in light of *Plevin*.[3]

1.3 The *Plevin* judgment focused on non-disclosure of high commission *at the point of sale*, in the context of the large single premium paid by Mrs Plevin. In exercising our regulatory judgement, we also focused our framework on the point of sale. And we considered it appropriate to apply this approach to regular premium PPI – where, typically, a premium (effectively including commission) is paid each month through the life of the policy – as well as to the single premium type that featured in *Plevin*.[4]

1.4 At that time, we were asked whether we would need to amend the scope of our rules and guidance in the future, for example to reflect any extended reach implied by new court decisions. We said that *we would continue to consider future issues and case law, in whatever areas they may arise, on a case by case basis in light of our statutory objectives and regulatory priorities*.[5]

1.5 Recent discussions with stakeholders have shown us that there is uncertainty about some complaints about regular premium PPI. Namely, should firms consider *recurring non-disclosure(s) of the existence of, or level of, commission and/or profit share ('RND') when assessing these complaints?*

1 The judgment was handed down in November 2014: *Plevin v Paragon Personal Finance Limited* [2014] UKSC 61

2 Generally, ss140A-C CCA only apply where the credit agreement is entered into on or after 6 April 2007 or before that date if it remains uncompleted as at 6 April 2008 (see transitional provisions in para 14 Schedule 13 to the Consumer Credit Act 2006) and where the credit agreement is not excluded by s140A(5) CCA.

3 www.fca.org.uk/publication/policy/ps17-03.pdf. This followed two consultations in CP15/39 (November 2015) www.fca.org.uk/publication/consultation/cp15-39.pdf and CP16/20 (August 2016) www.fca.org.uk/publication/consultation/cp16-20.pdf

4 See our discussions of this point in PS17/3, paras 4.61-4.62 and our response.

5 See PS17/3, para 4.67 and our response.

1.6 Specifically, we have become aware that some firms are rejecting, or intend to reject, any complaint involving undisclosed commission for restricted credit PPI sold before 6 April 2007.[6] Their view, as we understand it, is that:

a. Our rules and guidance in light of *Plevin* only apply to the non-disclosure of commission at the point of sale, not to later non-disclosures, and

b. Any non-disclosure at point of sale that took place before 6 April 2007 is not covered by our complaints rules at all. This is because they consider they are not required to consider acts or omissions for restricted credit that took place before 6 April 2007, as these are outside the jurisdiction of our complaint handling rules.

1.7 Some complainants' representatives have contacted us to raise concerns. And we know that some complainants have referred their complaints to the Financial Ombudsman Service (the Ombudsman Service).

1.8 These circumstances have led us to consider these firms' approaches and, by implication, the significance or otherwise of non-disclosures of commission at points in the life of a policy *other than the point of sale,* including for non-restricted credit.[7]

1.9 After careful consideration, our view is that, for regular premium PPI:

- RND *is* a kind of omission or omissions that can make a credit relationship unfair for the purposes of s140A CCA.
- As such, RND *should* be assessed by firms when they handle relevant regular premium PPI complaints, notwithstanding the focus on point of sale in *Plevin* and in our PPI-specific rules and guidance in DISP App 3.[8]
- Firms should assess RND under our general (non-PPI specific) complaint rule in DISP 1.4[9].
- The need to assess RND applies equally to restricted credit *and* non-restricted credit.
- Any complaint involving an act or omission that occurred before 6 April 2007 concerning a restricted credit agreement is not covered by our complaint handling rules where the firm concerned was not subject to the Ombudsman's jurisdiction before 6 April 2007.[10] However, any RND omission occurring on or after 6 April 2007 would *bring the complaint within scope of our complaint-handling rules*, even if the PPI was sold (and credit relationship entered into) *before* that date (provided the credit agreement is in scope of s140A CCA).

6 *Restricted credit* is defined in our Handbook as: *a loan for which, as a result of an existing arrangement between a supplier and a firm, the customer's application to the firm is submitted through the supplier and the terms of the loan require that it be paid to the supplier for goods or services supplied to the customer, not including loans secured by a charge over land or loans or payments by plastic card (other than a store card).*

7 Non-restricted credit includes, among other things, mortgages, credit cards and unsecured personal loans.

8 www.handbook.fca.org.uk/handbook/DISP/App/3/?view=chapter

9 www.handbook.fca.org.uk/handbook/DISP/1/?view=chapter

10 Whilst restricted credit firms were generally not subject to the Ombudsman's jurisdiction before 6 April 2007, we recognise that there could be exceptions in particular circumstances, for example where the act or omission occurred before 1 December 2001 and the respondent was subject to the jurisdiction of the Banking Ombudsman Scheme immediately before 1 December 2001.

1.10 We believe that most firms are not currently assessing RND when dealing with regular premium PPI complaints. So there is a risk of harm to *those PPI complainants whose credit agreements are in scope of s140A CCA and for whom assessment of RND would potentially change the outcomes of their complaints*.

1.11 Those complainants will be *some* among:

i. *Those who complain about regular premium PPI on non-restricted credit.* Some of these complaints are currently rejected because firms assess (potentially legitimately) that the complainant had not suffered non-disclosure at point of sale of a level of commission that gave rise to an unfair relationship, and had not been mis-sold. (In some of these cases, the sales and decisions concerning mis-selling are made by firms that were not the lender. If they reject the complaint, as not mis-sold or as out of jurisdiction[11], they should forward it to the lender for consideration of undisclosed commission.)

ii. *Those who complain about regular premium PPI sold on or after 6 April 2007 on restricted credit.* Some of these complaints are currently rejected because firms assess (potentially legitimately) that the complainant was not mis-sold and/or had not suffered non-disclosure at point of sale of a level of commission that gave rise to an unfair relationship.

iii. *Those who complain about regular premium PPI sold before 6 April 2007 on restricted credit.* As far as we understand, most of these complaints are currently rejected by firms as being outside the jurisdiction of our complaints rules for *Plevin* purposes. (Some of these cases are also rejected as outside jurisdiction for mis-selling purposes.[12] Where the firm doing this is not the lender, it should forward the complaint to the lender for consideration of undisclosed commission.)

1.12 Given the uncertainty about RND and this risk of harm to some complainants, we are proposing new Handbook and non-Handbook guidance to clarify the position (see paras 1.26-1.28 below) and reflect our views in para 1.9 above.

1.13 The proposed guidance is intended to ensure that firms do not reject complaints about regular premium PPI without considering RND.

1.14 The proposed guidance does not set out *how* firms should assess RND and redress it where appropriate. We consider that these aspects can reasonably and better be left to the Ombudsman Service to decide through individual complaints. We note that it will be open to the Ombudsman to take account of our existing framework concerning *Plevin* when determining what is 'fair and reasonable' in all the circumstances of each case. So, we will expect firms to engage promptly, fully and effectively with the Ombudsman Service about how to assess and decide complaints involving RND in fair and reasonable ways and how to redress them fairly where appropriate.

1.15 Where a firm did not consider RND when it rejected a previous regular premium PPI complaint, we consider that the consumer can make a new complaint. The firm would have to treat this complaint as new and (if it is in scope of s140A) assess it in relation to RND.

1.16 Our proposed guidance affects only a small proportion of total PPI complaints because:

11 We recognise that for some firms an act or omission concerning insurance mediation (including the sale of PPI) may be outside the jurisdiction of our complaint handling rules if it occurred before 14 January 2005, when insurance mediation became a regulated activity.

12 See previous footnote.

i. although the number of complaints concerning regular premium PPI on non-restricted credit is a significant part of total PPI complaints, our proposed guidance will only impact the very small proportion of these which are not already being upheld as mis-sold and which are in scope of s.140A CCA and assessed but rejected in light of our rules and guidance on *Plevin*; and

ii. although our proposed guidance will impact a larger relative proportion of complaints concerning regular premium PPI on restricted credit, as fewer of these are currently upheld as mis-sold or upheld in light of *Plevin*, the number of restricted credit regular premium PPI complaints is only a small part of total PPI complaints.

1.17 Our assessment of the costs and benefits of our proposed guidance is set out at Annex 2.

Who does this consultation affect?

1.18 This consultation will primarily affect firms that sold regular premium PPI and/or provided credit agreements which PPI covered.

Is this of interest to consumers?

1.19 This consultation will be of interest to:

- consumers who were – or may have been – sold PPI, in particular regular premium PPI, including where it covered restricted credit
- consumer organisations and claims management companies (CMCs) or other paid advocates who take forward complaints about PPI on behalf of consumers or otherwise help them

1.20 Our proposed guidance makes it more likely that a consumer may have a complaint about regular premium PPI upheld, even if this was sold to them a long time ago (for example, before 6 April 2007). **So consumers should consider and decide whether they want to make a complaint before the 29 August 2019 deadline about regular premium PPI, or any other kind**.

1.21 Consumers need not say that they want firms to consider the issue of high commission and whether they were not told about it at the time of sale or later. Our proposed guidance makes clear that we expect firms to consider these matters anyway when dealing with PPI complaints (see para 1.28 below).

1.22 **To find out more about PPI and how to complain or check for PPI, consumers can visit www.fca.org.uk/ppi/ppi-explained or telephone 0800 101 8800.**

The wider context of this consultation

1.23 Our rules and guidance on handling PPI complaints fairly in light of *Plevin* aimed to ensure the best outcomes for consumers at the earliest stage in the complaints process. They were part of a wider package of measures that also:

- set a deadline of 29 August 2019 by which consumers will need to make their PPI complaints or lose their right to have them assessed by firms or by the Ombudsman Service
- established an FCA-led communications campaign to inform consumers of the deadline, which has been running since 29 August 2017[13]
- required firms that sold PPI to write to those previously rejected mis-selling complainants eligible to complain again in light of *Plevin* to explain this to them

1.24 Our rationale for implementing this package of measures included that it would prompt into action many consumers who want to complain or check whether they had PPI but have not yet done so. To support this aim, we continue to monitor and challenge firms to ensure they deal fairly and promptly with all PPI checking requests and all complaints made before the deadline and cooperate with the Ombudsman Service. We will take action where firms fail to act fairly.

1.25 This consultation is intended to provide certainty to firms about RND and to help ensure fair and consistent outcomes for relevant PPI complainants. It supports our overall aim of bringing the PPI issue to an orderly conclusion in a way that secures appropriate protection for consumers and enhances the integrity of the UK financial system.

What we want to change

1.26 We are proposing Handbook guidance[14] stating that our PPI-specific rules and guidance in DISP App 3 do not set out how a firm that has received a complaint relating to the sale of PPI by the firm, or matters related to the sale, should assess whether RND made the relationship unfair under s140A CCA. Our proposed guidance states that firms should assess complaints concerning such issues under our general complaint handling rule DISP 1.4.1R.

1.27 We are proposing accompanying non-Handbook guidance that:

- *RND is a kind of omission or omissions that can make a credit relationship unfair for the purposes of s140A CCA.*
- *The need to assess RND applies equally to regular premium PPI on restricted credit and on non-restricted credit.*

13 The campaign is paid for by 18 firms who together represented over 90% of all PPI complaints reported between 1 August 2009 and 1 August 2015.

14 This is located at the start of our PPI-specific complaint handling rules and guidance (ie DISP App 3).

- *Any RND on or after 6 April 2007 would bring a complaint about restricted credit within scope of our complaint handling rules in DISP (provided the credit agreement is in scope of s140A CCA), so that the RND after that date would need to be assessed. This will be the case even if the PPI was sold, and credit relationship entered into, before that date.*

- *Firms do not have to consider RND if they decide under our Plevin rules and guidance ('Step 2' in DISP App 3) that not disclosing the existence or level of commission and/or profit share at the point of sale gave rise to an unfair relationship under s.140A of the CCA, and redress the complaint accordingly.*[15] *Nor do firms have to assess RND if they decide under our rules and guidance concerning mis-selling ('Step 1' in DISP App 3) that the PPI was mis-sold and provide full redress.*

1.28 In light of existing guidance in DISP App 3 and DISP 1, we also propose non-Handbook guidance that:

- *Firms should assess whether any RND makes the relationship unfair under s140A CCA even if the complaint does not expressly mention non-disclosure of commission (whether at point of sale or later).*

- *Firms should adopt a fair and consistent approach to making these assessments of RND, including taking into account what they learn from the decisions of the Ombudsman Service.*

1.29 Lastly, for clarity, we also propose Handbook guidance[16] stating that our PPI-specific rules and guidance in DISP App 3 do not set out how a firm that has received a complaint relating to the sale of PPI by the firm, or matters related to the sale, should assess any other issue not covered by our rules and guidance in DISP App 3. Our proposed guidance states that firms should assess complaints concerning such issues under our general complaint handling rule DISP 1.4.1R.

Outcome we are seeking

1.30 We will expect to hear from firms and the Ombudsman Service that, in light of our guidance, firms are engaging promptly, fully and effectively with the Ombudsman Service about how to progress regular premium PPI cases involving RND.

1.31 We expect, in particular, that some firms will assess in detail under our general complaint handling rule many more complaints about regular premium PPI sold before 6 April 2007 on restricted credit than currently.

Equality and diversity considerations

1.32 We have considered the equality and diversity issues that may arise from our proposals. Having regard to our Equality Impact Assessment (EIA) of the package of measures in PS17/3:

15 Given that the approach to redress in Step 2 concerns the whole life of the policy, any complaint upheld there will, in any case, be fully redressed in respect of any loss that might have been caused by RND.

16 This is located at the start of our PPI-specific complaint handling rules and guidance (ie DISP App 3).

i. We do not consider that our proposed guidance here adversely or disproportionately affects any of the groups with protected characteristics.[17]

ii. Some of the customer groups who bought some of the PPI products affected by our proposed guidance have lower than average incomes, and may have lower financial confidence and capability. As we identified in our EIA, this may make them less likely to complain. We have taken this into account when assessing our approach to RND and potential harm, our proposed guidance and our planned supervisory work with firms (if we finalise it following consultation).

iii. More broadly, our ongoing PPI supervisory work is actively focusing on the outcomes from firms' PPI checking enquiry and complaint-handling processes for vulnerable consumers and those with protected characteristics identified in our EIA.

1.33 We will continue to consider the equality and diversity implications of our proposed guidance during the consultation and in light of feedback received. **We ask for input to this consultation on these matters.**

Next steps

1.34 Until the outcome of our consultation, we ask firms not to reach or send reject decisions concerning PPI complaints that our proposed guidance would apply to.[18] Firms should explain this clearly to the complainants (as required by DISP 1.6.2R). This does not prevent firms upholding and making redress offers in light of RND (or, of course, mis-selling or *Plevin* redress offers) in respect of complaints that would fall under our proposed guidance.

1.35 If we make guidance following this consultation, we would then expect firms to resolve complaints where they have sent 1.6.2R responses promptly and fairly in light of our guidance and their engagement with and learnings from the Ombudsman Service.

What you need to do

1.36 We want to know what you think of our proposals. Please send us your comments within two months by 4 September 2018.

How to send us your response

1.37 Please use the online response form on our website, or email us at cp18-18@fca.org.uk, or write to us at the address on page 2.

17 That is, age, disability, sex, marriage or civil partnership, pregnancy and maternity, race, religion or belief, sexual orientation and gender reassignment.

18 This includes complaints firms have received but not yet closed or that they receive after we publish this.

What we will do next

1.38 We will consider your feedback. Subject to our assessment of this, and if we go ahead with some or all of our proposed guidance, we would plan to issue a policy statement with finalised guidance in late autumn 2018, with an immediate implementation date.

2 What we are changing and why

2.1 This chapter discusses in more detail the reasons for our proposed guidance.

The harm we are trying to address and how we are addressing it

2.2 As described, we have carefully considered the significance or otherwise of non-disclosure of commission at points in the life of a policy *other* than the point of sale. Our view is that, for regular premium PPI, RND *is* a kind of omission or omissions that can make a credit relationship unfair for the purposes of s.140A CCA.

2.3 The reasoning behind our view is that:

i. S.140A(1)(c) CCA makes clear that '*any ... thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement...*' can cause the relationship to be unfair for the purposes of ss140A-C CCA .

ii. RND is essentially a thing or things not done. So there is no reason in principle why it cannot amount to such a cause. This is especially the case if there is an identifiable potential harm arising from a specific omission after the point of sale: for example, the borrower was not given an opportunity after the sale to decide whether to terminate the agreement, not having been told about the commission they paid that month in a monthly statement.

iii. Such a view is not inconsistent with the *Plevin* judgment, even though the focus in that judgment was on the point of sale.

2.4 Given this, and our understanding that most firms are not currently assessing RND, we consider there is a risk of harm to those PPI complainants for whom the assessment of RND would potentially change the outcome of their complaint.

2.5 To address this harm, we are proposing Handbook guidance (see para 1.26 above and the draft Instrument at Appendix 1) to make clear that firms, when handling PPI complaints relating to regular premium PPI, should assess RND and whether it makes the relationship unfair under s.140A of the CCA.

2.6 The guidance also makes clear that this assessment of RND should be done under our general non-PPI specific complaint handling rule (DISP 1.4.1). This is because our rules and guidance in light of *Plevin* focus on failure to disclose at the point of sale of the PPI. Whereas, the issue of RND can feature throughout what can be a long relationship between lender and borrower, as the level of commission *could have been disclosed* at various different points in that relationship. So the circumstances are generally more complex than for non-disclosure at point of sale, and firms may need to make more complex assessments in order to decide the complaint fairly. As such, we do not consider it would be appropriate to say that firms should necessarily assess RND in the same way as under our *Plevin* rules and guidance. (However, firms might reach that conclusion themselves. Firms will also need to learn from the Ombudsman Service's approach - see para 2.8 below.)

2.7 We have considered whether we should consult on detailed rules and guidance that focus on RND and set out exactly *how* firms should assess RND in relevant complaints. We recognise that previously, concerning *Plevin*, we considered that the availability of the Ombudsman Service alone was not enough, and that it was more appropriate for us, as a policy making body, to set out a detailed framework. Doing so gave firms a clear idea of our expectations, at a time when there were widely differing views about the significance, if any, of the *Plevin* judgment for PPI complaints, and strengthened our ability to take future action if they did not take a fair and consistent approach.

2.8 Now, however, with that framework well established, we consider that the details of how to assess RND are now reasonably and better left to the Ombudsman Service to decide through individual complaints. We note that it will be open to the Ombudsman Service to take account of our existing framework when determining what is 'fair and reasonable' in all the circumstances of each case. We note in particular that:

- The Ombudsman Service is better placed, in looking at what was fair and reasonable in the detailed circumstances of individual cases, to make the kind of complex assessments mentioned in para 2.6 above.

- The Ombudsman Service shares such individual case assessments with firms and complainants. So a body of tested approaches to RND will emerge that can provide a reference point and guide for firms' assessments of other analogous complaints.

2.9 Our proposed non-Handbook guidance follows straightforwardly and logically from our view of RND and the existing provisions in DISP (including its jurisdictional arrangements). That is, we propose that:

- *RND is a kind of omission or omissions that can make a credit relationship unfair for the purposes of s140A CCA.* This is because of our reasoning in para 2.3 above.

- *The need to assess RND applies equally to regular premium PPI on restricted credit and on non-restricted credit.* This is because the issues involved are the same in each case. We see no grounds to differentiate the potential significance of, or potential harm from RND for consumers of these two broad families of PPI product or their complaints about them.

- *Any RND on or after 6 April 2007 would bring a complaint about restricted credit within scope of our complaint handling rules in DISP (provided the credit agreement is in scope of s140A CCA), so that the RND after that date would need to be assessed. This will be the case even if the PPI was sold, and credit relationship entered into, before that date.* This is because any RND on or after 6 April 2007 concerning such credit is an omission that does fall within the jurisdiction of our DISP rules. So it does need to be assessed by the restricted credit firm in handling the complaint.

- *Firms do not have to assess RND if they decide under our rules and guidance concerning Plevin ('Step 2' in DISP App 3) that not disclosing the existence or level of commission and/or profit share at the point of sale gave rise to an unfair relationship under s.140A of the CCA and redress the complainant accordingly. Nor do firms have to assess RND if they decide under our rules and guidance concerning mis-selling ('Step 1' in DISP App 3) that the PPI was mis-sold and provide full redress.* This is because in these cases there could not be any remaining loss arising from RND. Our existing approach to redressing unfair relationships identified at Step 2 already covers the entire life of the policy. It refunds the excess over the tipping point of any commissions paid after the

point the relationship was made unfair. Our existing approach at Step 1 returns all premiums, including commission.

- *Firms should assess whether any RND makes the relationship unfair under s140A CCA even if the complaint does not expressly mention non-disclosure of commission (whether at point of sale or later).* This is because fair complaint handling requires firms to take into account all relevant factors and identify the true substance of the complaint.[19]

- *Firms should adopt a fair and consistent approach to making these assessments of RND, including taking into account what they learn from the decisions of the Ombudsman Service.*[20]

Firms' potential concerns

2.10 Some firms may question whether our proposed guidance is consistent with our previous statements. In particular, we recognise that in the consultations on our *Plevin* rules and guidance, some industry responses expressed concern that our proposals would apply to any complaint about a credit agreement within the scope of s140A CCA, regardless of whether the complaint itself fell within jurisdiction.[21] They were concerned that this apparent expansion of scope would significantly impact restricted credit firms, including obliging them to consider many complaints which they had hitherto been rejecting as out of jurisdiction.

2.11 We responded that we had not proposed changes to the scope or jurisdiction of our DISP rules or the Ombudsman Service and did not consider that our proposals had any such unintended consequence. We considered that the proposed rules and guidance clearly only applied to '*complaints*'. As before, firms would need to consider whether such a complaint was a '*complaint*' for the purposes of DISP. This required them to consider whether the complaint related to an activity that fell within the jurisdiction of our DISP rules and the Ombudsman Service. Matters which would be outside the scope of our DISP rules or the jurisdiction of the Ombudsman Service, if complained about hitherto, would remain outside, even if we made our proposed rules and guidance in light of *Plevin*.

2.12 However, for the avoidance of doubt, we did add text to our final rules and guidance to indicate that a firm's obligation to assess a case in light of *Plevin* at Step 2 was limited to cases where an expression of dissatisfaction about a failure to disclose commission would itself meet the definition of a *complaint* for the purposes of the DISP and Ombudsman Service jurisdictions.

2.13 But we also emphasised that it is the Ombudsman Service that has to interpret its jurisdiction in individual cases, and that such matters can be part of the dispute.

2.14 It is precisely such jurisdictional matters which the Ombudsman Service and some firms are now having to consider when assessing some of the restricted credit regular premium PPI complaints before them.

19 DISP 1.4.1R(2)(a) and DISP App 3.2.2G
20 DISP 1.3.6G
21 See CP16/20 paras 5.25-6 and our response and PS17/3 para 4.75 and our response.

2.15 So, we are proposing guidance to clarify our view of the jurisdictional position, and address the implications of RND for some non-restricted complaints too. As such, we are acting in line with our statement in PS17/3 that we would continue to consider future issues on a case by case basis in light of our statutory objectives and regulatory priorities.

Wider effects of this guidance

2.16 Where a firm did *not* consider RND when it rejected a previous regular premium PPI complaint, we consider that the consumer can make a new complaint. The firm would have to treat this complaint as new and (if it is in scope of s140A CCA) assess it in relation to RND.

2.17 The new complaint should be made to the lender. The consumer may have been rejected previously by that lender in respect of *Plevin* and/or rejected previously in respect of mis-selling by the same firm or, in some cases, by a different firm.

Q1: **Do you agree RND is a matter that should be assessed by firms when assessing complaints about regular premium PPI covering restricted or non-restricted credit relationships within the scope of s140A CCA?**

Q2: **Do you agree RND should be assessed under our general fair complaint handling rule (DISP 1.4.1R)?**

Q3: **Do you agree with our decision not to propose rules and guidance about how to assess RND in PPI complaints and to let details of how to assess and potentially redress RND emerge from firms' learnings from the Ombudsman Service and its decisions on individual cases?**

Q4: **Do you agree that any RND on or after 6 April 2007 brings a complaint about restricted credit covered by PPI sold before 6 April 2007 into DISP jurisdiction?**

Guidance on other types of PPI complaint

2.18 Our existing rules and guidance in DISP App 3 include a provision (App 3.1.1G(3)) that firms are not required to assess under those rules and guidance whether their conduct of the PPI sale was in breach of a fiduciary duty where they failed to disclose either the existence or level of any commission and/or profit share paid.[22] It provides that firms should deal with such complaints instead under our general complaint handling rule (DISP 1.4.1R). And our proposed new guidance says that complaints involving RND should also be dealt with under DISP 1.4.1R.

22 See for example the case of *McWilliam & Another v Norton Finance (UK) Ltd (t/a Norton Finance)* [2015] EWCA Civ 186.

2.19 In this context, we also want to make clear how firms should assess a complaint (if it is in jurisdiction) concerning any other issue not covered by our rules and guidance in DISP App 3.[23] Our proposed Handbook guidance indicates that firms should assess complaints concerning such issues under our general complaint handling rule DISP 1.4.1R. This will help reduce future uncertainty about how to consider PPI complaints and consequent potential harm to complainants.

Q5: Do you agree that types of PPI complaint which are not covered by our detailed PPI rules and guidance should be assessed by firms under our general fair complaint handling rule?

23 We have already said, in PS17/3 (para 3.27 and our response) that: *To the extent that a PPI complaint raises matters that may be of relevance to s.140A B but does not involve undisclosed commission, those matters would lie outside the scope of our new rules and guidance on Plevin. However, firms would still need to consider them fairly, at Step 1 (assessing mis selling) if the firm was the seller, and/or within the framework of our existing higher level (non PPI specific) complaint rules.*

Annex 1
Questions in this paper

Q1: **Do you agree RND is a matter that should be assessed by firms when assessing complaints about regular premium PPI covering restricted or non-restricted credit relationships within the scope of s140A CCA?**

Q2: **Do you agree RND should be assessed under our general fair complaint handling rule (DISP 1.4.1R)?**

Q3: **Do you agree with our decision not to propose rules and guidance about how to assess RND in PPI complaints and to let details of how to assess and potentially redress RND emerge from firms' learnings from the Ombudsman Service and its decisions on individual cases?**

Q4: **Do you agree that any RND on or after 6 April 2007 brings a complaint about restricted credit covered by PPI sold before 6 April 2007 into DISP jurisdiction?**

Q5: **Do you agree that types of PPI complaint which are not covered by our detailed PPI rules and guidance should be assessed by firms under our general fair complaint handling rule?**

Q6: **Do you have any comments on our cost benefit analysis?**

Q7: **Do you have any comments on our compatibility statement? Are there any issues relating to mutual societies that you believe would arise from our guidance?**

We also ask for input on the equality and diversity implications of our proposed guidance.

Annex 2
Cost benefit analysis

Introduction

1. The Financial Services and Markets Act 2000 (FSMA) requires us to publish a cost benefit analysis (CBA) of proposed rules. Specifically, section 138I requires us to publish 'an analysis of the costs together with an analysis of the benefits' that proposed rules will bring. It also requires us to include estimates of those costs and benefits, unless we cannot reasonably estimate them or it is not reasonably practicable for us to produce this estimate.

2. We are consulting here on Handbook and non-Handbook guidance, not rules. Although we are not obliged to provide a formal CBA for guidance, we take into account the CBA we provided previously (in March 2017) for our PPI package of measures. We consider it appropriate in these circumstances to provide a similar CBA of the guidance we are consulting on here.

Our proposed guidance on RND

3. As in our CBA in PS17/3, our view is that we cannot reasonably estimate the costs and benefits (s.138I(8)(a) FSMA) and it is not reasonably practicable for us to produce an estimate (s.138I(8)(b) FSMA). This is because:

   i. The relative impact on redress costs of our proposed guidance will largely depend on firms' approaches to assessing complaints involving RND and to potentially redressing some. Firms will develop these approaches subsequently through their learnings from Ombudsman Service decisions.

   ii. The absolute impact on administrative and redress costs of our proposed guidance will largely depend also on:

      a. How many restricted credit PPI complaints firms assess in detail in the future, compared to how many they currently reject as out of jurisdiction. But we cannot predict the former, and do not know the latter.[1]

      b. How many restricted credit and non-restricted credit PPI complaints are made in the period before our deadline. These are volumes which, like PPI complaint volumes in general, we cannot predict.[2]

1 This is because firms have not reported these cases (consistent with their regarding them as out of jurisdiction of our complaints rules).

2 In our CBA in PS17/3, we noted that the past pattern of PPI complaints is not a reliable predictor of the future, and concluded that no amount of data or effort could give us reasonably precise and meaningful numbers on the future path of PPI complaints. As a result, we concluded there that we could not construct a meaningful benchmark against which to *quantify* the effects of our proposed package of measures.

4. Nevertheless, we feel able to identify the *dynamics* of costs and benefits likely to flow from our proposed guidance, relative to the current situation, and these are discussed below. We note that these dynamics should be viewed in the context of the small proportion of total PPI complaints that our proposed guidance will affect (see para 1.16 above).

Costs

a. There will be significantly increased administrative costs for restricted credit firms. This flows from them having to make more detailed assessments of complaints about regular premium PPI which they currently reject simply on the basis of the date of sale. They would now need to also consider whether the associated credit agreement was within s.140A CCA and whether RND occurred on or after 6 April 2007 and, if so, whether it made the credit relationship unfair. They will also incur some one-off costs from changing their procedures to undertake this assessment.

b. There will be an increase in redress costs for restricted credit firms and this increase could be significant. This flows mainly from them being more likely to uphold and redress at least some complaints involving regular premium PPI which they currently reject on the basis of the date of sale.

c. There will be increased administrative costs for non-restricted credit firms. This flows from them having to assess whether RND occurred and, if so, whether it made the credit relationship unfair for some regular premium PPI complaints which they currently only assess for mis-selling and for non-disclosure of commission at the point of sale. They will also incur some one-off costs from changing their procedures to undertake this assessment.

d. There will be increased redress costs for non-restricted credit firms. This flows from them now being more likely to uphold and redress at least some complaints involving regular premium PPI which they currently reject as not mis-sold and/or as not having given rise to an unfair relationship at point of sale.

e. Increased redress and administrative costs (including more Ombudsman Service fees[3], and more forwarding of complaints by some non-lenders) will also flow from handling any *increase in PPI complaints* (in particular regular premium PPI complaints) made before the deadline, and redressing some of these. Our proposed guidance will potentially prompt increased CMC activity and make some consumers who did not previously know about non-disclosure of commission aware that they can complain. This will prompt some to complain before the deadline who would not have done so otherwise, or prompt some who have been previously rejected to now make a new complaint before the deadline.

Benefits

f. Some consumers will be paid redress whose complaints about regular premium PPI would currently be rejected without any assessment of RND.

3 For example, if a PPI complaint is rejected by a firm, the complainant has the right to take the case to the Ombudsman Service for further investigation and adjudication. The firm is charged a fee of £550 per case taken on by the Ombudsman Service, regardless of the eventual outcome.

g. Redress will be paid to some consumers who were not previously aware of the issue of non-disclosure of commission. This flows from these consumers being made aware by our guidance (or, for example, by CMC activity following our guidance) and prompted to complain. Some will be prompted to complain for the first time before the deadline, when they would not have done so otherwise. Some will be prompted to make a new complaint before the deadline, having been rejected previously.

h. There will be a saving for firms from a relative reduction in Ombudsman Service case fees. This flows from the greater certainty our proposed guidance would bring, resulting in a lower proportion of regular premium PPI complaints being referred to the Ombudsman Service. This is relative to the situation where the current uncertainty is left to persist.

i. There will be a saving from the reduced likelihood and number of claims in court, with the attendant costs to firms and claimants. This flows from our guidance reducing uncertainty, and is relative to the situation where the current uncertainty is left to persist.

j. There will be saved time and effort for consumers in making complaints involving regular premium PPI, including new complaints where they had been previously rejected.

5. We estimate the impact on the FCA to be broadly neutral. The supervisory resource we will expend following-up with firms after the guidance is broadly equivalent to the resource we would expend dealing with the growing queries from firms, CMCs and complainants that would arise if we did not issue guidance and left the current uncertainty to persist.

Conclusion

6. We consider that, overall, these dynamics of costs and benefits provide us with a reasonable basis for expecting that our proposed guidance will deliver a net benefit for consumers (and other potential benefits), relative to the current situation. We set this out in Table 1 below, though given the uncertainties involved, this overall conclusion is not guaranteed:

Table 1: Summary of costs and benefits of our proposed guidance

	Firms	Consumers	Wider Economy
Costs	Increased redress payments		
	Increased administrative costs of complaint handling		
Benefits	Reduced Ombudsman service fees per complaint involving regular premium PPI	Increased redress receipts	Reduced likelihood and numbers of court claims, with their attendant costs for claimants and firms
		Saved time/effort in making complaints involving regular premium PPI	

Q6: Do you have any comments on our cost benefit analysis?

Annex 3
Compatibility statement

1. Section 1B of FSMA requires the FCA, when discharging its general functions and as far as is reasonably possible, to act in a way that is compatible with its strategic objective and advances one or more of its operational objectives. The FCA also needs, as far as is compatible with acting in a way that advances its consumer protection objective or integrity objective, to carry out its general functions in a way that promotes effective competition in the interests of consumers.

2. We are satisfied that the proposed guidance is compatible with our general duties in accordance with section 1B of FSMA, having regard to the regulatory principles in section 3B. By reducing uncertainty and enabling firms to continue to take a fair and consistent approach to handling PPI complaints, the proposed guidance helps us to deliver our operational objectives of providing an appropriate degree of protection for consumers and protecting and enhancing the integrity of the UK financial system.

3. The scope for promoting effective competition is limited. However, we have considered the FCA's competition duty under s.1B(4) and consider that our proposed guidance would not have a significant effect on competition between firms or a disproportionate impact on the ability of new firms to enter the market.

4. We have also had due regard to the recommendations made by the Treasury under section 1JA FSMA about aspects of the economic policy of Her Majesty's Government. The Treasury published its first set of recommendations for the FCA on 8 March 2017. In particular, our proposed guidance takes into consideration the recommendations relating to better outcomes for consumers. The purpose of the guidance is to provide certainty to firms and ensure consistent handling of complaints that delivers fair, consistent outcomes to consumers.

Expected effect on mutual societies

5. We have given thought to the potential impact of our proposed guidance on mutuals. In our understanding, most mutual societies have not provided restricted credit covered by regular premium PPI, but many have provided non-restricted credit covered by regular premium PPI, particularly mortgages.

6. We have not identified any likely significantly different impact on mutuals. But, *in principle*, there could be *if*, for example, mutual mortgage lenders have a higher proportion than non-mutuals of regular premium PPI complaints that are in scope of s140A but not already being upheld as mis-sold or in light of *Plevin*.

7. Mutual lenders will benefit like other firms from the certainty our proposed guidance will bring around handling relevant PPI complaints.

Legislative and Regulatory Reform Act 2006

8. We have had regard to the principles in the Legislative and Regulatory Reform Act 2006 and the Regulator's Compliance Code. We have not engaged with firms or other stakeholders in formulating our proposed guidance, as we considered that it was potentially market sensitive information. However, we consider that the proposed guidance is proportionate and will result in an appropriate level of consumer protection, when balanced with impacts on firms and on competition.

Q7: **Do you have any comments on our compatibility statement? Are there any issues relating to mutual societies that you believe would arise from our guidance?**

Annex 4
Abbreviations used in this paper

CBA	cost benefit analysis
CCA	Consumer Credit Act 1974
CMC	claims management company
DISP	Dispute resolution: Complaints sourcebook
EIA	equality impact assessment
FCA	Financial Conduct Authority
FSMA	Financial Services and Markets Act 2000
Plevin	Supreme Court judgment in *Plevin* v Paragon Personal Finance Ltd [2014] UKSC 61
PPI	payment protection insurance
RND	recurring non-disclosure(s) of the existence of, or level of, commission and/or profit share
s.140A	section 140A of the CCA, which came into force in 2007

Appendix 1
Draft Handbook text

DISPUTE RESOLUTION: COMPLAINTS (PAYMENT PROTECTION INSURANCE) (AMENDMENT No 3) INSTRUMENT 2018

Powers exercised

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

Commencement

B. This instrument comes into force on [*date*].

Amendments to the Handbook

C. The Dispute Resolution: Complaints sourcebook (DISP) is amended in accordance with the Annex to this instrument.

Citation

D. This instrument may be cited as the Dispute Resolution: Complaints (Payment Protection Insurance) (Amendment No 3) Instrument 2018.

By order of the Board
[*date*]

Annex

Amendments to the Dispute Resolution: Complaints sourcebook (DISP)

In this Annex, underlining indicates new text and striking through indicates deleted text.

Appendix 3 Handling Payment Protection Insurance complaints

App 3.1 Introduction

Application

3.1.1G (1) …

(2) …

(3) It does not ~~require firms to~~ set out how a *firm* which has received a *complaint* referred to in (1)(a) should assess:

(a) whether the *firm*'s conduct of the sale was in breach of a fiduciary duty where there has been a failure to disclose either the existence of, or the level of, any commission and/or profit share paid;

(b) whether any omission (other than the omission referred to in *DISP* App 3.3A.2E) to disclose either the existence of, or level of, commission and/or profit share made the relationship unfair under section 140A of the *CCA*;

(c) any other issue not dealt with in step 1 or step 2 set out in this appendix.

Complaints concerning such issues should be dealt with under *DISP* 1.4.1R.

(4) …

…

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