Restricting CMC charges for financial products and services claims

Policy Statement
PS21/18

November 2021

This relates to

Consultation Paper21/01
which is available on our website at
www.fca.org.uk/publications

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1 Summary

1.1 This policy statement (PS) sets out new rules for claims management companies (CMCs) following our consultation in CP21/1. The rules restrict the fees charged by CMCs for managing claims about non-PPI financial products and services. They also amend pre-contract disclosure requirements for CMCs and make minor changes to our rules for CMCs in the Claims Management Conduct of Business Sourcebook (CMCOB) and other sections of the FCA Handbook that apply to CMCs. In this PS we summarise the feedback we received on CP21/1, our response, and what we have decided to do.

Who this affects

1.2 Our rules relating to fees and disclosure affect CMCs managing claims about non-PPI financial products and services, and consumers who might wish to use the services of those CMCs. Our minor amendments to CMCOB, and some of our disclosure rules, affect all FCA-regulated CMCs.

The wider context of this policy statement

Our consultation

1.3 When Parliament legislated in 2018 to transfer regulation of CMCs to the FCA, it gave the FCA a statutory duty under the Financial Guidance and Claims Act 2018 to make rules about CMC fees. The duty required us to make rules about the fees charged by CMCs on claims about financial products and services with a view to securing an appropriate degree of protection from excessive fees.

1.4 In January 2021 we published a consultation paper proposing rules to meet our statutory duty (CP21/1). The consultation closed in April 2021.

1.5 As well as consulting publicly, we have liaised with the Solicitors Regulation Authority (SRA) and other legal regulators with a view to minimising the harm that could occur through any differences between regulatory regimes for firms and individuals carrying on claims management activity. The SRA has a duty equivalent to ours, to make rules with a view to securing an appropriate degree of protection from excessive charges. The SRA recently sought views via a discussion paper on whether to consult on rules using the FCA fee cap as a benchmark. The Bar Standards Board and Cilex Regulation were given powers but no duty to make rules, and the Treasury was given the power to make regulations empowering the Law Society of Scotland to make rules.

How it links to our objectives

Consumer protection

1.6 Our new rules restricting fees and requiring enhanced disclosure will strengthen protections for consumers who use CMCs. They aim to bring CMC fees closer to the level of value that CMCs provide to individual customers while also allowing CMCs to continue delivering value to wider society, for example by helping raise awareness of potential claims and acting as a check and balance on the redress system. To allow CMCs to continue providing value to individuals and wider society the rules are designed to ensure that FCA-regulated claims management can remain viable. This recognises the full range of the value that CMCs provide and secures an appropriate degree of protection against excessive CMC charges.

1.7 The new rules also aim to help consumers make more informed decisions about whether to use a CMC service, whether to shop around, or whether to claim directly, without a CMC.

Competition

1.8 We have considered the impact the cap will have on competition and we are satisfied that it promotes effective competition in the interests of consumers consistent with our competition duty (FSMA s1B(4)). One of our stated aims for the CMC market is to see that consumers are empowered to choose a value-for-money service which matches their needs. Our rules aim to allow CMCs to compete using fees that are not excessive while better informing customers about the fee they will have to pay, the value of the service being offered and the options available to them.

What we are changing

1.9 To discharge our statutory duty and protect consumers from harm we are restricting CMC fees through a fee cap. We designed the cap with a view to securing an appropriate degree of protection against excessive charges. The degree of protection it provides allows for CMCs to continue delivering value to both individual customers and wider society while generally preventing fees that are higher than necessary to deliver that value. We are also enhancing the requirements for CMCs to give consumers important information in the pre-contract stage, and making some minor updates and clarifications to other rules for CMCs.

1.10 Specifically, our new rules will:

- cap the fees that CMCs may charge on claims for non-PPI financial products and services where the consumer has been awarded redress and the claim falls within scope of the financial services (FS) redress system (meaning the complaints resolution rules in DISP and/or a statutory ombudsman or statutory compensation scheme, including (but not limited to) the Financial Ombudsman Service (the ombudsman service), the FSCS or the Pensions Ombudsman)
- require fees to be reasonable in cases where fees charged on non-PPI financial products and services claims are outside the scope of the cap

- improve the way CMCs managing claims about all financial products and services disclose key information to consumers at the pre-contract stage, to help consumers make better-informed decisions about using CMC services
- update and clarify existing rules by making minor amendments to CMCOB, the Consumer Redress Schemes Sourcebook (CONRED) and the Perimeter Guidance Manual (PERG)

Outcome we are seeking

1.11 We seek to protect fee-paying CMC customers, who have suffered harm and are owed redress, from paying too much money for claims management services through excessive charges. If they are too large, the fees that CMC charge can prevent redress from effectively achieving its goal of putting consumers back in the position they would have been in had they not suffered any harm. Where consumers do not receive redress, we want any CMC fees they pay to be reasonable in relation to the service provided to them. The cap we have put in place will lower the fees that some consumers would otherwise have paid.

1.12 We aim to achieve this outcome while ensuring the activity of FCA-regulated claims management can remain viable, even if some firms might exit the market. We want CMCs to be available to consumers who choose to use them and to be able to continue delivering benefits to wider society including by helping raise awareness of the opportunity to claim and acting as an additional check and balance on the redress system.

1.13 More generally, we want to see a continuing improvement in the quality of customer service that CMCs provide. The cap can help achieve this by encouraging CMCs to have greater regard to the merits of the claims they take on and encouraging them to compete more on price and quality of customer service.

1.14 Through enhancing the disclosure requirements for CMCs we seek to help consumers be equipped to make better-informed decisions about the value of using a CMC and the alternative options available.

1.15 The other amendments we have made, to CMCOB, CONRED and PERG, are intended to clarify existing rules and ensure the FCA Handbook is aligned with the Financial Services and Markets Act 2000 (FSMA) by updating obsolete references.

Measuring success

1.16 We estimate that the cap will deliver consumer benefits of around £9.6m a year. We will monitor its effects on the CMC market and its consumers. CP21/1 said key indicators of success for the cap and the enhanced disclosure rules will be that:

- CMC customers are paying fees that better reflect the value of the service they receive
- FCA-regulated claims management activity remains viable for all financial services and product claim types so that consumers are able to continue using CMCs services

- CMC customers are able to make better-informed decisions about whether or why to use a CMC.

1.17 We will monitor the effectiveness of the fee cap through regulatory returns and ongoing supervisory work. We will annually monitor whether average fees by product type calculated from regulatory return data and the existing estimates of value from CP21/1 suggest significant excessive charging. If we find evidence of this, we will start a review of the fee cap and disclosure rules after they have been in force for 2 years. We will also review the cap in later years if we find evidence it is not achieving its objective.

1.18 We will monitor the number of CMCs managing claims of different product types (pensions, loans, etc) and whether FCA-regulated claims management remains viable so that firms can continue providing services and consumers can continue using services in all main product categories. We will also consider the impact of the cap on business models, in particular whether firms move to new charging structures and, if they do, whether those charging structures provide fair value to consumers for the fees charged. We will look at whether fees are clustered under the level of the cap and whether, in addition to complying with the cap, CMCs are treating customers fairly under Principle 6 and CMCOB 2.1.1R. We do not expect firms simply to charge the maximum amount allowed on all claims. The cap sets maximum fees, not fixed prices; firms must still consider whether their fees are in line with Principle 6 and CMCOB 2.1.1R. (See new guidance in the instrument in CMCOB 5.2.3G(4).)

1.19 To help enable consumers to make better-informed decisions we are working with the ombudsman service, the FSCS and others to help improve consumer awareness and understanding of the redress system. We will use data from the Financial Lives Survey to monitor consumer awareness of the opportunity to make claims without a representative.

1.20 We are not introducing any new regulatory reporting requirements for the purpose of measuring the success of this policy. If we review the cap, we will gather the following detailed data from a representative sample of CMCs, covering a period of 12 months:

- per-claim data, including the opening date, closing date, end point (eg firm, ombudsman service, FSCS), category of claim (eg pension claim, loan claim) and subcategory of claim (eg self-invested personal pension (SIPP), defined benefit transfer, high-cost short-term credit) redress, revenue and direct costs of managing each claim
- aggregate financial information: for all FS claims management; and by category of claim, such as different categories of revenue, direct costs and overheads
- familiarisation and implementation costs in case we decide to amend the cap

1.21 For the minor amendments we are making to CMCOB, CONRED and PERG we will measure success through feedback received as part of our general work. Where we are adding guidance as part of those minor amendments we expect to see a reduction in queries received.

Summary of feedback and our response

1.22 We received 63 responses to the consultation. Respondents included CMCs, FS firms, solicitors, trade bodies, other regulatory and government bodies and some individuals.

1.23 Responses to the design of the fee cap were mixed. There was a roughly even split between respondents who agreed with it and respondents who said it was too restrictive. A further, smaller group said the cap was not restrictive enough. Having carefully considered the feedback and the basis for our position, we decided to change the following 2 elements of the proposed cap and implement the remainder of the cap as consulted on:

- The cap will not apply to pre-existing contracts except where the contracts are varied to increase fees or add new fees and except where new claims are added to the contract or the customer did not authorise or instruct the firm to act in relation to the claim until after the rules came into force (in which case, the new claims will be subject to the cap). We have not proceeded with our proposal to apply the cap to all claims under contracts that were entered into before the rules come into force.
- In certain specific circumstances the cap will not apply to claims management services provided in relation to court proceedings even if the claim is eligible for the FS redress system (that is, even if it is eligible for referral to a statutory ombudsman or compensation scheme).

1.24 Respondents generally agreed with our proposals for enhancing the requirements for CMCs to disclose information at the pre-contract stage, but some raised concerns about some of the details. We are implementing those proposals with some changes. In particular, we have not proceeded with our proposal to require CMCs to identify and tell consumers which of the cap's redress bands are most likely to apply to their claims. Instead we will simply require CMCs to provide a fee illustration for each of the redress bands.

1.25 Our proposed general amendments to update and clarify various rules in the FCA Handbook were supported. We are implementing those rules as consulted on.

1.26 This PS summarises and responds to the consultation feedback in general terms. It does not specifically address every comment we received. But in deciding what rules to implement we have considered carefully and taken into account all of the information provided in response to CP21/1. We are grateful for the observations and suggestions and, having considered the feedback, we have made some changes to our proposals.

1.27 Some respondents commented on the conduct and regulation of CMCs and FS firms more generally. We have not addressed those comments here because they are outside the scope of the proposals.

Equality and diversity considerations

1.28 In CP21/1 we said we didn't think our proposals would adversely impact on any of the groups with protected characteristics under the Equality Act 2010. We said our proposals might particularly help older people, who are more likely to have pensions claims, and younger people who are more likely to have loans claims. Having considered the feedback on equality and diversity issues that we received in response to CP21/1 (see Chapter 10) our position is the same.

Next steps

What you need to do next

1.29 The legal instrument accompanying this PS contains final rules and guidance. The rules and guidance will come into force on 1 March 2022.

1.30 If your firm is affected by these changes, you need to ensure you are able to comply by that date.

2 Design of the cap

2.1 In this chapter, we summarise the feedback we received on the way we proposed to restrict CMC fees and what we have decided to do.

CP proposals

2.2 To discharge our statutory duty and protect consumers from harm we proposed in CP21/1 to restrict CMC fees through a fee cap. The cap we proposed restricts the amount a CMC may charge for claims management services on non-PPI claims about financial products and services that are within scope of the FS redress system. Claims that are within the scope of the FS redress system are those that come under the complaints resolution rules in DISP and/or the scope of a statutory ombudsman or statutory compensation scheme, including (but not limited to) the ombudsman service, the FSCS or the Pensions Ombudsman.

2.3 We designed the cap with a view to securing an appropriate degree of protection against excessive charges. When we refer to CMC charges we mean any and all fees that CMCs charge to their customers. (See Chapter 4 for more on the scope of the cap.) The degree of protection against excessive charges that the cap provides allows for CMCs to continue delivering value to both individual customers and wider society, while generally preventing fees that are higher than necessary to deliver that value.

2.4 In CP21/1 we said a bespoke consumer survey which we had commissioned suggested that market failures in this market meant CMC customers could not effectively judge the value of services that CMCs provide and so they were vulnerable to excessive charges. The market forces of supply and demand do not necessarily work as they should in this market and, because of this, CMCs do not necessarily operate efficiently. This means we could not assume that CMCs' costs alone were a good measure of what level of charge is excessive. We also found there were no comparable markets that were not affected by market failures that we could use as a benchmark to define excessive fees.

2.5 We considered whether fees were excessive with reference to the value that claims management services give to consumers. We said that value for the individual customer consists of saved time and effort and increased confidence when making claims. And value for wider society includes CMCs acting as a check and balance on the redress system and raising awareness of the opportunity to claim.

2.6 Our view of the value that CMCs provide is based on the ethos, design and operation of the redress system for financial services. The ethos is that consumers should be able to make claims for free and should not need any representation. Being able to make complaints for free is an important part of consumer protection in the UK. The FS redress system is intended to be free and accessible to consumers. Some key features of the ethos, design and operation of the system are that:

- Complaints to FS firms under DISP can be made for free (DISP 1.3.1R). Complaints need be no more than expressions of dissatisfaction (Glossary), so that consumers have easy access to the redress system, and because firms are required to investigate and obtain further information where needed (DISP 1.4.1R).

- When the ombudsman service was set up, Parliament decided that access to a free, independent dispute resolution service was essential for public confidence in financial services, and that businesses, not their customers, should meet the costs of resolving complaints. In line with this FSMA provides that the service will be quick, independent and 'with minimum formality' (s225(1)) and it provides for the service to be funded by FS firms. FSMA also provides for the ombudsman service to be inquisitorial by giving it significant powers to require information (ss231-2) and a duty to determine complaints by reference to what is, in the opinion of the ombudsman, fair and reasonable in all the circumstances of the case (s228).
- The Pensions Ombudsman is also a free service which operates inquisitorially.
- The FSCS claims process is not adversarial because there exists no opposing party to defend the claim. Consumers provide information and the FSCS independently determines the claim. FSMA allows the FSCS to make provision about the procedure for claiming. The FSCS makes clear on its website and has told us that it is strongly committed to having procedures that consumers can use without representation, and that having representation will not affect the outcome of a claim.

2.7 In this context, where consumers can expect fair outcomes on claims without having representation, there is little scope for CMCs to influence outcomes on individual claims irrespective of their expertise. We consider that, in general, the redress system works as it should, and consumers can achieve fair outcomes without representation.

2.8 We defined an excessive charge as one that exceeds the value provided to the individual customer. We estimated value to the individual customer by quantifying the saved time and effort and increased confidence that CMCs provide to their customers. Our methodology for that was set out in detail in the cost benefit analysis to CP21/1. We found that fees were excessive by this measure and that excessiveness was most pronounced where the amounts of redress were highest.

2.9 We did not quantify value to wider society. It is not reasonably practicable to estimate it. In any case, our position is that fee-paying customers should only pay for wider societal value to the extent necessary that the value can continue to be provided. So to allow CMCs to continue providing wider value as well as value to the individual customer we considered that the rules we make should ensure that FCA-regulated claims management can remain viable, even if that means individual fees must be higher than individual value. We took this approach because, where value accrues to wider society, or where it is the result of market failures or problems in the redress system, individual fee-paying customers should only be charged for that value so far as necessary to allow FCA-regulated CMC activity to remain viable and so continue providing the value. If problems occur in the redress system, we and others should seek to address those problems. We should not rely on consumers paying CMCs to help them overcome those problems and so receive fair outcomes. Nevertheless, the check and balance role and the awareness raising role that CMCs play are of value to consumers generally. So we aim to ensure CMCs can continue to play those roles by ensuring the market can remain viable.

2.10 To secure an appropriate degree of protection against the excessive charges we identified, we considered a range of options such as disclosure rules and requiring CMCs to use different charging models. (See paragraph 4.37 in CP21/1.) We decided that imposing a fee cap was the most effective way to discharge our statutory duty. We considered an extensive range of cap options. The cap options included 13 different specifications of cap based on redress bands (both less restrictive and more restrictive than the cap we proposed), and also a number of product-specific caps, as a percentage of redress, as a fixed amount, and as a combination of both. We assessed the impact of the options on consumer fees and the viability of CMCs, looking at how different options would affect CMC costs and revenues and the number of firms likely to remain in the market. Our analysis of CMC viability was described in detail in CP21/1.

2.11 Having considered the range of options, we selected the cap that would:

- provide the greatest net adjusted benefit (where net benefits exclude profits not made because the cap restricts charges); while
- bringing CMC fees closer to the level of the value that CMCs provide to the individual fee-paying customer at different levels of redress (allowing headroom for data quality and uncertainties); and
- allowing FCA-regulated claims management to remain viable as a whole and for the main claim categories of loans, packaged bank accounts, pensions, and savings and investments, so that the CMC market can continue to deliver wider societal value

2.12 The maximum fees allowed under the cap are significantly higher than our estimate of average monetary value to the individual customer. But the cap will still constrain fees on a significant proportion of claims. Figure 6 of the CBA in CP21/1 showed the amount of headroom between our estimate of individual value in each redress band and the level at which we set the cap. We considered that this headroom would be sufficient to account for any data limitations and uncertainties in our methodology, and to ensure the viability of FCA-regulated claims management (which ensures that the value CMCs give to wider society can continue to exist). Except in redress band 1, the lower bound of the fee cap is more than twice the lower bound of estimated value to the individual customer. In all bands, the upper bound of the cap is more than twice the upper bound of the estimated value to the individual consumer. This reflects the fact that we allowed for the wider societal value provided by CMCs, and the importance we have attached to retaining a viable industry.

2.13 We were satisfied that this approach would secure an appropriate degree of protection by bringing fees more in line with the value that CMCs deliver to individuals and still ensuring CMCs can provide wider benefit to society. We expected that some CMCs might exit the market but that FCA-regulated claims management activity for non-PPI financial products and services would remain viable.

2.14 The fee cap we proposed is structured so that the amount of the cap for a particular claim depends on how much redress is awarded on that claim. We set out 5 bands of redress, each of which has a maximum percentage of consumer redress and a maximum total fee. We proposed that the total fee to a customer on a single claim must not exceed **the lower of** the maximum percentage rate and the maximum total fee in the applicable redress band. Table 1 below shows the amounts of the cap we proposed. The maximum percentage that may be charged decreases as the amount of redress increases. When the amount of redress is larger, the average value that a fee-paying customer receives from the CMC represents a smaller percentage of that redress. In absolute monetary terms, the cap still allows higher maximum fees in the upper bands than in the lower bands.

Table 1: Proposed fee cap

Redress band	Consumer redress obtained		Max % rate of charge	Max total fee
	Lower	Upper		
1	£1	£1,499	30%	£420
2	£1,500	£9,999	28%	£2,500
3	£10,000	£24,999	25%	£5,000
4	£25,000	£49,999	20%	£7,500
5	£50,000	NA	15%	£10,000

2.15 We asked:

Q1: ***Do you agree with the design of the proposed cap?***

Feedback and our response

2.16 Feedback on the design of the cap was mixed. There was a roughly even split between respondents who agreed with the cap and respondents who said it was too restrictive. A further, smaller group said the cap was not restrictive enough. Those who agreed with the cap agreed that the market was affected by market failures and said our approach to deciding how to restrict charges was appropriate. Some made suggestions for altering the proposal while agreeing overall that it was reasonable. Those who said the cap was too restrictive raised concerns about market viability and how we estimated the value of CMC services when deciding what level of fee is excessive and what the level of the cap should be. Those who said the cap was not restrictive enough said excessive fees would continue to be charged.

2.17 Some respondents said the fee cap was not justified because CMC fees were not excessive. They said the market failure we described in CP21/1 was either not present, or not unique to the CMC market, or not caused by CMCs. Those who said market failure did not exist said either it was simply market forces and to be expected, or it had already been resolved by requirements in CMCOB, or it was based on the findings of a consumer survey which they said was dated and not representative. Some respondents did not dispute the existence of market failures but said disclosure remedies were a better solution.

2.18 Other reasons given by some for saying that fees are not excessive were that consumers do not think fees are excessive, the case studies we used were considered extreme and thus not proof that fees are excessive, consumers are always better off if they use CMCs who charge on a no-win-no-fee basis because they will only pay a fee if they receive redress so they can never be out-of-pocket, and the 8% interest paid on most redress awards helps consumers pay CMC fees. Some respondents provided results of customer satisfaction surveys and reviews to show that customers were not dissatisfied with fees.

2.19 Some respondents said that in setting the level of the cap we had not allowed for CMCs providing access to justice, particularly for vulnerable consumers, and we had not allowed for CMCs bringing about more favourable decisions on claims than consumers would receive without CMCs. By extension some said the cap would lead to lower redress for some consumers because capped fees would disincentivise CMCs from doing further work after a certain point. Some CMCs provided figures from their own customer surveys which they said showed that consumers would not have claimed without them. They said consumers suffered from lack of awareness, trust, confidence and expertise. Some respondents provided case studies illustrating the services they provide to their customers and some gave examples where they said they had acted to correct poor decisions on claims which increased consumer redress by large amounts. Several said that comparing the rates at which claims were upheld for consumers with and without CMCs would show that CMCs were able to secure better outcomes for consumers on claims than consumers could secure if they claimed without using CMCs.

2.20 In contrast some CMCs said that not all CMCs are able to influence outcomes on claims, and some other respondents said CMCs do not in fact influence outcomes and that consumers can or should be able to receive fair outcomes from the redress system without representation. One respondent cited uphold rates which they said showed that consumers using CMCs were less likely to have their claims upheld than consumers who did not use CMCs.

2.21 Some respondents who thought the cap was too restrictive referred to the list of activities in Table 2.0 of the CBA in CP21/1 and said it had not taken full account of activities such as investigating the claim and advising on its merits, gathering information including submitting subject access requests, identifying the relevant party to claim against, helping clients with debt and probate issues and helping to enforce redress awards. It was also noted that we had not published a table of steps for making a claim to the FSCS. And one respondent said CMCs benefit the redress system by filtering out claims with no merit which would otherwise take up time.

2.22 Some respondents suggested that certain CMC services should be excluded from the cap. These are discussed in Chapter 4.

2.23 In terms of our method for quantifying the elements of value provided to individual customers, a few respondents took issue with the rate of £6.10 per hour which we used to monetise consumer time. One also said we should have done more sensitivity testing. Some respondents expressed concern over our use of estimates, assumptions, averages, and an approach that we acknowledged had limitations. One respondent said we should publish the data used to estimate time spent by CMCs on claims, and evidence of our experience of claims management in the redress system. A few said our estimate of value had not allowed for CMC costs.

2.24 Amongst those who thought the cap was not restrictive enough one respondent said that, by setting the cap above the level of the estimated average value that CMCs give their individual customers, we had inappropriately prioritised CMC viability over fairness to consumers. One said the cap did not effectively protect consumers because the level of the cap is significantly higher than the FCA's own estimate of the value that CMCs provide.

2.25 Respondents who said the cap was not restrictive enough also commented that fees would still be excessive according to various other benchmarks. Those benchmarks included fees charged in other sectors such as the financial advice sector, the PPI cap, and CMC costs. One respondent said that because we said the cap does not fix a price that we think is a fair fee for every claim, we are allowing CMCs to charge unfair fees whereas we require FS firms to observe the principle of treating customers fairly.

2.26 Respondents who said the cap was not restrictive enough were particularly concerned with claims that would fall into the cap's redress band 1, for redress up to £1,500. They said these consumers would not receive value for money, they had the smallest claims but would pay the highest percentage fees, they were more likely to be in vulnerable circumstances and less likely to be able to afford the fees, and they were more likely to have protected characteristics and therefore have no choice but to use CMCs. Some said the cap would have little impact in band 1.

2.27 One respondent said the confidence CMCs give consumers is partly caused by market failures and so we are likely to have made too great an allowance for it if we do not think consumers should have to pay to overcome market failures.

2.28 We also received comments on the structure of the cap. Some said it was confusing because it used 5 bands with 2 cap amounts in each band. Others said it was too simplistic because it did not account for differences between claims that are about different products and services (pensions, loans, etc).

2.29 Several respondents commented on the impact the cap might have on the customer service that CMCs provide. Some possible effects mentioned by respondents were that CMCs might pay less regard to the merits of claims they pursue, cease using third-party services, impose extra fees, refuse to serve some consumers, and cause fewer consumers to claim direct because lower fees make CMCs more attractive.

2.30 A number of respondents said in strong terms that the cap would result in the closing down of the CMC market for non-PPI FS claims. These comments are discussed in Chapter 3.

2.31 Some respondents suggested introducing other measures such as making CMCs liable for ombudsman service case fees, giving FS firms the right to contact a customer direct to explain the free alternatives if approached by a CMC, and applying a long-stop on claims.

Our response

We are implementing the design of the cap (see Table 1) as consulted on. Our response to feedback on key issues relating to the design of the cap is summarised below. We discuss costs and benefits, the scope of the cap, unenforceability, the implementation period, and pre-existing contracts in separate chapters.

Market failures and excessive fees

We set out in CP21/1 the market failures that cause excessive fees in the CMC market, and why we think some fees in the market are excessive. Here we discuss the points raised on this by respondents to the consultation.

The market failures we identified in the CMC market for non-PPI FS claims were information asymmetry and the behavioural bias of consumer myopia. In this market, information asymmetry means consumers have considerably less information than CMCs about claims and the process of making claims, and consumers tend not to understand key factors such as how easy or difficult it would be to claim direct without a CMC, or even that they have the opportunity to claim direct without a CMC. Myopia, in this market, means consumers tend to focus on immediate benefits such as having their claim submitted for them, while giving less consideration to future factors such as the fee they might be obligated to pay at a later date. In the CMC market the impact of these failures includes that the market forces of supply and demand do not work to achieve outcomes that are in the interests of CMC customers. Our analysis of fees compared with value indicated that, in the CMC market, these conditions have resulted in excessive charging.

We have not said that market failures are caused by CMCs or that failures, generally, are unique to the CMC market. It is not uncommon for the FCA to make rules about the conduct of firms we regulate with a view to protecting consumers where market failure exists, whether or not the failure is caused by the firms in question. In the CMC market, we identified that excessive charging occurred when fees were compared with value to the individual customer. We found that the nature and extent of the failures in this particular market meant that remedies other than a cap, such as disclosure remedies on their own, would be insufficient to meet our statutory duty to make rules with a view to securing an appropriate degree of protection against excessive charging.

We are seeking to address the negative outcome of excessive charging directly because to remedy the particular market failures we identified in the CMC market, consumers would need not only to know that it is possible to claim direct, but also to understand both the service they are paying for and the alternative options available. And consumers would need to place the appropriate value on fees (rather than excessively discounting them because they arise late in the process). As we said in CP21/1 evidence from our consumer survey about consumer behaviour suggests that information-based remedies will not be sufficient in this particular case to ensure consumers understand the service sufficiently to be able to judge value. In this case the effectiveness of information-based remedies is likely limited by the fact consumers do not engage with the CMC market on a regular basis; if consumers use CMC services only very infrequently they are unlikely to develop good knowledge of the services on offer. Also, some of the information consumers need to understand in this market is not easily delivered by firms in a way we can readily supervise for customers on a large scale. So it would be difficult to make disclosure rules which could give us confidence that information asymmetry would be resolved. For these reasons if the rules we were to make provided only for enhanced disclosure by firms, we would be unlikely to secure an appropriate degree of protection from excessive charges.

Disclosure remedies and/or consumer education can be useful to help overcome information asymmetry, and we are strengthening the disclosure requirements on CMCs with these rules (see Chapter 8). Lessening information asymmetry by providing information to consumers can help protect consumers against excessive fees by giving them information that helps them judge value. However, given the nature and degree of the asymmetries and the striking lack of consumer engagement in the CMC market, and the resulting excessive nature of the fees in the CMC market, we do not think disclosure remedies and/or consumer education alone are sufficient.

As some respondents noted, the claims that were the subject of our bespoke consumer survey pre-dated the introduction of CMCOB. However, we do not think the introduction of CMCOB has eradicated the market failures indicated by the survey results. In both 2017 and 2020 (pre- and post-CMCOB) the FCA's Financial Lives Survey found that 35% of consumers who used CMCs were not aware they could take forward a claim themselves. Also, the changes to disclosure requirements under CMCOB compared to the previous regulatory regime were minor, relating mainly to how CMCs communicate to consumers that they can claim direct at no charge. The cooling-off period, which one respondent mentioned, gives consumers time to consider their options and whether a CMC is the right option for them. A cooling-off period might help lessen myopia. But CMCs were already required to allow a cooling-off period prior to our consumer survey which identified myopia in the market. And time itself does not ensure consumers will understand the service sufficiently to be able to judge its value.

The bespoke consumer survey was conducted on the usable sample of customers we received from CMCs. While one respondent commented on the size of the sample, we believe it was sufficiently large to be representative. As Table 2.1 of the survey report showed, the survey achieved its target of 100 interviews for each claim category, except for mortgages (21 interviews) and loans (75 interviews). Because of the low number of interviews, we did not rely on results for mortgages as a category. We did rely on the results for loans as a category due to the higher number of interviews. Moreover, many of the estimates which relied on data from the survey used responses from all categories of claim (599 interviews). Another respondent suggested the survey should have been done later and limited to claims of short duration. We did not think it reasonable to begin work on our statutory duty several years after taking on CMC regulation and several years after the duty came into force. And limiting the sample to claims of short duration would mean it was not representative. When we monitor the rules (and if we review them after 2 years) we will look at more recent data from the Financial Lives Survey.

Our proposals do not rely on consumers perceiving fees as excessive. They are based on comparing the fees that CMCs charge with our estimate of the value that CMCs provide. We did not rely on consumer perceptions because the market failures we identified inhibited consumers' ability to judge value. We also did not rely on case studies or the distribution of fee rates amongst CMCs to determine what level of fee was excessive.

Our estimate of value to individual customers was based on data from sample firms and the consumer survey, not individual examples of claims. As one respondent noted, the example we used in CP21/1 of Mrs and Mr M was an egregious case and a combination of two very similar ombudsman decisions. We intended the case study to illustrate the effect that excessive fees can have and how consumers sometimes agree to the fees only to say later that they were excessive. In both cases the redress award was particularly high, as was the CMC fee (40% plus VAT). These cases do occur and they are the cases we have said are the most egregious.

We don't agree that consumers using CMCs on a no-win-no-fee basis will never be worse off by using a CMC and that therefore fees cannot be considered excessive. By claiming redress with a CMC a consumer gives up the opportunity to claim redress without a CMC, or, potentially, with a CMC that charges less. If the fee exceeds the value provided then the consumer will be worse off.

Interest paid on redress does not stop a consumer from potentially being worse off by using a CMC that charges a high fee. Interest on redress compensates the consumer for a loss – the consumer has lost the use of money that should have been theirs for a period of time. It is no more a windfall or bonus than redress generally is a windfall or bonus. While some CMC customers might never claim without the help of a CMC, that is caused by market failures and it is not fair to expect such consumers to pay fees (or higher fees) to overcome that failure.

As some respondents noted, we set the cap at a level that is higher than our estimate of value to the individual customer. This does not mean we are not securing an appropriate degree of protection from excessive fees. As we have said, it is appropriate to allow some headroom above that estimate to allow for any uncertainties or data limitations. But also, when choosing the level of the cap, we had regard to wider societal value as well as the value provided to individual customers. To allow CMCs to continue providing both types of value we took care to set the cap at a level that ensures FCA-regulated claims management can remain viable, in line with our analysis of market viability, even if that means individual fees must be higher than individual value. Rather than failing to protect consumers we think this recognises the full range of the value that CMCs provide and we think it secures an appropriate degree of protection against excessive charges.

Value of CMC services

CP21/1 said that CMCs can help consumers become aware of the opportunity to claim redress, and CMCs help some consumers claim who otherwise would not. We said this was part of the wider societal value that CMCs provide. We disagree with the comment from some respondents that consumers cannot claim without CMCs if they are aware of the opportunity. All consumers including those in vulnerable circumstances have direct access to the redress system. Firms and statutory bodies generally have (or are required to have) procedures in place to help consumers in vulnerable circumstances. Although such consumers can find it difficult to initiate action, having them pay a fee (or a higher fee) to a CMC is not a suitable remedy for that. Since our cap will ensure that FCA-regulated claims management on non-PPI FS products and services will remain viable, consumers in vulnerable circumstances and others will continue to have access to CMCs and they can continue to benefit from CMCs improving their awareness of the opportunity to claim. Where value accrues to non-fee-paying customers, or where it is the result of market failures or problems in the redress system, fee-paying customers should only be charged for it so far as necessary to allow FCA-regulated CMC activity to remain viable.

On the outcomes of claims, we recognise that some CMCs have substantial experience and expertise in FS products and services. We accept the possibility that in a small number of cases CMCs might influence outcomes of claims, for example by noticing a technical point in a particular complex calculation or even where a simple error has been made in the redress system, a CMC could help a consumer avoid an unfair outcome. This does not alter the basis of our approach or our view of the redress system. That is because, as we said earlier, the redress system is designed to operate without the need for consumers to have or pay for expert knowledge. Irrespective of their expertise, there is in the context of the redress system little opportunity for CMCs to influence outcomes on claims if the system works as it should.

Having considered the consultation responses and case studies, as well as the design and purpose of the redress system, and other available evidence, and having discussed this point with the ombudsman service and the FSCS, we do not think there is sufficient evidence to conclude that CMCs influence decisions on claims generally. Nevertheless, in setting the cap we have allowed for the fact that CMCs can play a 'check and balance' role which includes drawing attention when the redress system does not work as it should and helping customers get fair outcomes when that happens. That can include alerting a customer if a decision on their claim is wrong which could, in some circumstances, lead the customer to pursue a better outcome when otherwise they would not have. We regard these instances as exceptions and we note that other checks and balances also exist to help ensure fair outcomes for consumers, including quality assurance processes, regulatory and Parliamentary oversight, and tiered claim systems (whereby a dissatisfied consumer may escalate a claim to the next level such as from the FS firm to the ombudsman service, and from an investigator at the ombudsman service to an ombudsman at the ombudsman service).

Importantly, if widespread failure occurs in the redress system – and some respondents argued that it does – it should be addressed by direct action at the source of the problem rather than assumed to be managed by having consumers pay CMCs to help them get fair outcomes. Complaint handling by FS firms is subject to extensive regulatory requirements which remain under review to ensure they continue to deliver good outcomes for consumers. For example, in recent years we have introduced requirements for communications by FS firms to make consumers aware of the ombudsman service and to stop the use of premium rate phone numbers for complaints and other post-contract calls. Firms are required to provide the FCA with reports concerning complaints received, which are used as part of our supervision of firms. To help FS firms, claims advisors and others resolve claims, the technical desk of the ombudsman service answered more than 17,000 queries from nearly 2,000 separate organisations in 2019/20. The ombudsman service and FSCS themselves are subject to intermittent independent reviews as well as regular scrutiny by Parliament.

We allowed for the benefit provided by the 'check and balance' role played by CMCs under wider societal value, rather than treating it as a component of the value that individuals can expect to receive on their individual claims. To treat influencing outcomes on claims as part of the value CMCs provide on individual claims would run contrary to the intent of the redress system and could result in consumers paying fees that are excessive in a system that is intended to give them free access.

While some respondents said that FS firms routinely and unfairly dismiss claims, the uphold rate for non-PPI claims to FS firms in 2020 was 57% and the complaint numbers in our CMC sample compared with complaints data from FS firms suggest that the large majority of the claims made were by consumers without CMCs. This does not support the view that FS firms generally are dismissing and rejecting claims out of hand. Nevertheless, we take note of the criticisms some respondents made about complaint handling by FS firms. We also note criticisms made of the redress system more widely and will act where appropriate. But we do not regard them as a reason to change our position on how to account in setting the cap for the value that CMCs provide.

While some respondents likened claims management to making arguments in court, the redress system for financial services is, by design, different from a court, mainly by virtue of being inquisitorial (in that the onus is on firms, ombudsmen and the FSCS to investigate claims put before them) and informal, rather than adversarial and more formal. Some respondents said FSCS claims in particular are similar to court proceedings. The FSCS claims process is also different from a court process. There is no opposing party in an FSCS claim and, as shown on its website, and as confirmed to us by the FSCS, the FSCS believes consumers can make claims to the FSCS and receive fair outcomes with or without CMCs. While the onus is on the consumer to provide relevant information to support a claim to the FSCS, the FSCS generally assists the consumer. The FSCS also proactively reviews its service with a view to ensuring that unrepresented consumers are not stopped from claiming by a difficult process. The FSCS also has the power to treat a consumer as having claimed even if the consumer has not submitted a claim.

We do not accept that particular claim examples will show that CMCs generally bring about more favourable decisions on claims than consumers would receive without CMCs. Where a CMC customer, in a particular case, had their claim upheld by the ombudsman service after being rejected by a firm, for example, we cannot assume the consumer would not have taken their claim to the ombudsman service and received the same outcome had they been unrepresented. Many consumers who claim without CMCs do make use of the opportunity to escalate their claim or appeal a decision. The ombudsman service reports that a minority of complaints to it are from consumers who are represented by CMCs and other paid-for services, free advice organisations, and friends and family. 39% and 35% of packaged bank accounts and loans claimants are represented (by CMCs or others), and 5% of all other non-PPI FS claimants are represented. Complaints about the ombudsman service to the Independent Assessor are also more numerous from unrepresented consumers than represented consumers.

We considered whether uphold rates and average redress amounts could be used to show whether CMCs influence outcomes on claims in the general run of cases rather than by exception. We concluded that they could not. Any differences between the rates at which claims are upheld for represented consumers and rates of uphold for unrepresented consumers cannot be attributed to how well submitted claims are presented. Any differences in the amount of redress awarded between represented and unrepresented consumers also cannot be attributed to the way claims are made. The inquisitorial nature of the redress system is such that the consumer's claim will in the general course of events be investigated and a fair decision reached regardless of how well the consumer is able to put the case forward. Any observable differences in uphold rates and average redress amounts are, in our view, mainly attributable to the types of claim CMCs pursue (compared with types of claim submitted by consumers generally) and whether CMCs filter claims so that those without merit are not submitted by them, as required under our rules. Some CMCs acknowledged that uphold rates do not necessarily show that CMCs are influencing outcomes on claims. It follows that we also do not accept the suggestion from one respondent that uphold rates can show that CMCs are causing consumers to receive less favourable outcomes on some claim types than they would receive if they claimed without CMCs.

Estimate of value to the individual customer

Table 2.0 of the cost benefit analysis in CP21/1 shows our estimate of how the amount of time spent on particular tasks is likely to differ between a consumer who uses a CMC and a consumer who does not use a CMC. This exercise was based largely on our judgement drawing on our relevant knowledge and experience of the redress system. This derives from various sources including having responsibility for DISP and COMP rules, frequent regular liaison with the ombudsman service and FSCS, and longstanding oversight of both organisations.

Our estimate in Table 2.0 used ranges of time rather than single figures, to cover different situations. It included the difference in time spent considering responses at various stages of the process. Whilst the number of interactions on a claim is significant for the total time taken on a claim, it does not change what we considered in Table 2.0 which was the ratio of time taken by an unrepresented consumer compared with time taken by a represented consumer. The fact that a small number of claims goes through the FSCS after being considered by the ombudsman service is also unlikely to change our estimate of how much more time a consumer spends if they do not use a CMC. That is because the total time taken on a claim is a different measure from the ratio of time taken by an unrepresented consumer compared with time taken by a represented consumer. Similarly, time spent while a claim waits in a queue, for example waiting to be considered by an ombudsman, does not significantly affect that ratio.

We considered whether specific activities that respondents said were not included in Table 2.0 showed that CMCs save consumers more time than we had estimated. We concluded that they did not. Some of the activities mentioned by respondents (eg investigating claims) had been considered in the steps listed in the table already. The others were activities that are carried out more rarely rather than on a typical claim (eg enforcing redress awards and monitoring investments after the closure of an FSCS claim). They did not suggest that our estimate was wrong or unreasonable. As mentioned elsewhere, there is headroom between our estimate of value provided to the individual customer and the level at which we set the cap. This provides some margin for uncertainties and data limitations.

Time taken by CMCs on the actual claims in our sample was taken into account because we used CMC data from our sample to estimate the total time likely to be spent on a typical claim. That means all steps actually taken by CMCs on claims in the sample year were taken into account for total time on claims whether or not they were listed in Table 2.0. We have not published the data provided by the individual CMCs in our sample because it is subject to confidentiality restrictions under s348 of FSMA and is commercial-in-confidence.

We did not include the value of obtaining redress in our estimate of individual value because consumers can obtain the redress they are owed without using CMCs. The fact that in some cases CMCs can help consumers get redress they otherwise would not have received (whether because of market failures or problems in the redress system) is accounted for as part of wider societal value.

The rate of £6.10 which we used to monetise consumer time is not intended to reflect the nature of the activity being done, but the value of the consumer's leisure time if they were not doing that activity. It is not a costs award that might reflect missed work time, or a rate of remuneration for someone performing tasks in a professional capacity. The rate has previously been used for loss of leisure time by smart meter customers and transport users and for consumer time in previous FCA consultations. Given it relates to loss of spare time rather than to the complexity involved in doing a particular activity, we do not think it is inappropriate in this case. Where a consumer would find a task more difficult than a CMC, that is reflected in the extra hours it would take the consumer, meaning the consumer would lose more hours of leisure time. The rates used in costs awards for legal representation in court, which one respondent mentioned, are for the expense of legal services and not for monetised spare time that is given up to make claims in the FS redress system.

In our methodology generally we used assumptions to produce estimates where precise figures were not available. Because this could give uncertain results, we did sensitivity testing which looked at how our estimates would change if we made different assumptions. For example, we considered how our estimates would differ if consumers managing a claim themselves spent up to 5 times the number of hours they would spend if they used a CMC (instead of 2 times). Our estimate of value using this different assumption was still lower than the cap we proposed (using the value of time of £6.10 per leisure hour). This allows significant headroom in case of disagreement with our estimate of hours and/or the monetary rate at which we valued consumer leisure time. We also tested the impact of using £19 per leisure hour (based on the rate for self-representing litigants in court) instead of £6.10 per hour. See in particular paragraph 34 of the CBA in CP21/1.

The results of our calculations are necessarily estimates because any exact figures would differ year on year due to normal fluctuations in CMC activities and depending on the sample of CMCs used. Our approach to data gathering was reasonable because requesting detailed data for multiple years and from an even larger number of CMCs would have increased the burden on CMCs while providing little extra value. Since a cap on fees necessarily applies across all firms or claims within the scope of the cap, using averages is a reasonable approach. This is particularly so because the cap leaves headroom above our estimate of individual value, and so makes allowance for claims where value above the average is provided (and for data limitations). Using averages, or means (rather than medians), we account for all data, including outliers. It is the nature of an average that it shows the central tendency of the distribution of values for a chosen group (CMCs, categories of claims, etc), and not the value of any particular case. If we set the cap with respect to the level of the upper bound of value provided, rather than the average, we would not secure appropriate protection from excessive fees.

The structure of the cap is appropriate because under the charging model used by CMCs excessive charging is more pronounced when redress amounts are higher. For this reason, a single-percentage cap or a product-based cap would not target excessive charging as effectively as the cap we proposed. We included an absolute cap as well as a percentage cap to avoid 'cliff-edges' between bands. Including an absolute cap amount in band 5 is appropriate because value to the individual as we have defined it does not continue to increase ad infinitum with the amount of redress received.

It is possible CMCs might pay less attention to merits of claims if in response to the cap they seek to reduce costs. But the cap can also act as an incentive for CMCs to work only on claims that are likely to be upheld and not to submit claims that are without merit. And in any case CMCs have a regulatory requirement to assess the merits of claims and not pursue claims without merit. We acknowledge the risk that the absolute maximum fee might reduce the commercial incentive for CMCs to pursue claims in a way that is in the best interests of consumers, for example by not seeking to increase a redress award if they think the award is unfair. But we have said that the redress system is designed to provide fair outcomes irrespective of representation. And CMCs have a regulatory requirement to act honestly, fairly and professionally in line with the best interests of their customers. So we would not expect a CMC to tell a customer that an award is fair if the CMC does not think the award is fair. And we would expect a CMC to pursue the claim in a way which is in the consumer's best interests. Also, it will remain in the commercial interests of a CMC to challenge an error on a claim in the redress system if the error could affect the fees the CMC earns on other claims. We do not think this risk means we should discard the absolute maximum fee because that would fail to protect consumers with large redress amounts. Because we think the redress system works as it should in the general run of cases, we allowed for instances of the redress system not working as it should under the 'check and balance' role which we accounted for under wider societal value. Where firms do not recover value on some claims that is likely to be offset by other claims where they achieve good margins.

In response to feedback that the cap should be more restrictive in the lower bands we have decided not to make any change. We understand concerns that the level of the cap in band 1 does not appear very restrictive when compared with the percentages with which we have capped the higher bands. But the cap for CMC customers who claim redress in band 1 is not higher in absolute terms than the cap for CMC customers who claim redress in the higher bands. We note that in band 1 relatively few claims in our sample (49%) were charged excessively according to our estimate of individual value, compared with the higher bands (84-96%). (See Table 4 of the CBA in CP21/1.)

The scope of the cap makes clear that additional charges are not possible for claims management services that relate to a single claim. This is to prevent CMCs from imposing separate charges under one or more agreements in relation to the same claim in order to circumvent the cap. Where claims are within the scope of the redress system consumers do not need to pay for third party services to get fair outcomes.

Our analysis suggests that claims management activity will remain viable in all product categories in the market. And if lower fees cause more customers to choose to use CMCs, that will not cause consumers harm. Consumers will be appropriately protected from paying fees that are excessive.

Further consideration of alternatives

In considering the feedback we contemplated further whether alternative caps would secure an appropriate degree of protection from excessive charges. We considered what the effect would be of pooling the upper bands or raising the limits within those bands. We concluded that there was no strong basis for pursuing those alternatives. And we considered that the alternatives were less likely than the cap we proposed to secure an appropriate degree of protection from excessive charges.

Other suggestions

We considered the other measures suggested by some respondents to complement our rules for securing appropriate protection against excessive charges. We are not applying a long-stop on claims as part of these rules. Financial products often last a very long time. Problems relating to those products might only become apparent years later - and the consumer might not have had any reason to realise any sooner that something had gone wrong. Already, Consumers generally need to make a complaint within certain time limits set out in DISP and COMP.

Charging CMCs for referring claims to the ombudsman service that are subsequently not upheld is a suggestion that has been made in response to other consultations. The ombudsman service said in its 2021/22 plan and budget that any funding arrangement that involved fees being charged or potentially created barriers to consumers bringing complaints to its service would conflict with its principles. We are not implementing this suggestion.

We do not think that making rules to facilitate contact from FS firms to CMC customers for the purpose of explaining the options to make claims is an appropriate response to lack of awareness amongst consumers. FS firms must make their customers aware of the routes to claim in the first instance, whether or not those customers have chosen to or might in future choose to use a CMC. And Having FS firms intervene in the relationship between a customer who is making a claim and the customer's representative will not necessarily serve the interests of the consumer.

3 Costs and benefits

3.1 In this chapter, we summarise the feedback we received on our analysis of costs and benefits, and our response to the feedback. This includes feedback on our viability analysis.

CP analysis

3.2 In CP21/1 we estimated that the proposals, and the fee cap in particular, would save consumers £9.6m in fees annually. The costs and benefits are largely comprised of protection for consumers against excessive fees and corresponding reduced revenue for CMCs. We asked:

Q2: ***Do you agree with our estimate of the costs and benefits of our proposed interventions?***

Feedback and our response

3.3 Most respondents did not say specifically whether they agreed with our analysis of the proposed cap's costs and benefits. Of those who did, roughly equal numbers agreed and disagreed. Respondents generally commented on the costs and benefits of the fee cap rather than the costs and benefits of the enhanced disclosure proposals or the minor amendments to existing rules for CMCs (which together made up a very small proportion of the quantified costs and benefits). Comments focused on whether we had accurately and sufficiently estimated the likely effect of the cap on market viability and consumers.

3.4 Several respondents said the restrictiveness of the cap would drive CMCs out of the market. These respondents showed particular concern over pensions and investment claims which they said required more complex and costly work than other claim types, and which generally include claims in the higher redress bands where the cap is most restrictive in percentage terms. In support of comments about likely market exit, 1 respondent said that discussions across the industry suggested widescale exit would occur. Other comments included that the CMC market had already contracted rapidly in recent years, and some firms had considered or tried charging lower fees but found it unviable. One CMC said its segment of the market would close if it exited because it was responsible for a very large share of the marketing budget in its segment.

3.5 A few respondents said our viability analysis was based on inadequate data and our focus on value meant we hadn't given sufficient attention to costs. Others said variously that costs for volume claims are lower than for other claims, the data should cover more than 12 months and allow for investments made, and the sample year was a particularly profitable period for at least 1 CMC because it was the fruition of several years' work. Some questioned whether we took account of how, under the no-win-no-fee charging model which is used by the vast majority of CMCs, costs are recovered on claims that were not submitted or did not yield redress.

3.6 One said that fewer CMCs in the market, or segments of it, and reduced advertising budget, would reduce the number of claims made to the extent that the net effect on consumers would be harm rather than benefit. The respondent disagreed with our statement in CP21/1 that we could not estimate that potential effect.

3.7 Some said competition between CMCs would be reduced because the market is small and the cap is set at the lower end of prices, with insufficient space for competition, and that FCA-regulated firms will be at a disadvantage in the wider claims management market if other regulators do not intervene similarly.

Our response

We considered the risks and potential consequences of market exit that respondents raised. Our analysis indicates that viability will not be affected in the ways suggested by respondents. Similarly, we do not agree that consumers will be negatively affected in the way some respondents suggested.

We recognise that some firms might exit the market as a result of the cap. If firms choose to exit, it will not mean FCA-regulated claims management is not a viable business. Where firms have a large market share in particular categories and may exit, we expect that managing claims in those categories will remain a viable activity for other CMCs. We took a cautious approach that would not underestimate the likely exit of firms, and assumed that firms would not increase marketing budgets. However, in practice firms might choose to adjust their business models and/or marketing budgets and, if some choose to exit, others will not be prevented from entering or remaining.

We also took a cautious approach to account for the data limitations that we described in CP21/1 and because CMCs might exit even if they can make a small positive margin under the cap, we considered 2 different thresholds for the point at which CMCs might exit the market. (Data limitations included the poor quality of many regulatory returns and of data provided by some sample CMCs. For more information see the CBA in CP21/1, particularly from paragraph 40, key assumptions at paragraph 53, and sensitivity analysis at paragraph 112.) The market exit thresholds we considered were: not breaking even; and making a margin of less than 10%. This approach is in line with standard practice. For example the market investigation guidelines from the Competition and Markets Authority note in Annex A that alternative measures such as the margin we used may be used if the capital employed by firms cannot be reasonably valued (as is the case for CMCs). The threshold of 10% is used as a rule of thumb for an 'average' margin in financial analysis, for example as suggested by the Corporate Finance Institute (CFI). The data we used for our viability analysis was the result of considerable communications with firms in our sample, and we consider it a sufficiently robust basis for our analysis. We requested information from CMCs of different size (by revenue), covering different categories of FS claim. The sample of CMCs which provided usable information includes CMCs of different sizes for each category of claim. Some CMCs in the sample specialised in claims about a certain product type while others managed claims about several product types. We asked for data on all claims either closed or ongoing during 2018/19. These claims could have spanned any time period, including more than 12 months. The data included information from 33 of about 223 CMCs managing non-PPI FS claims, and covered more than 50% of revenue made on non-PPI FS claims.

Costs we considered included costs of work done on claims not submitted and costs relating to claims that do not yield redress. This means we took into account the no-win-no-fee charging model and the fact that some claims do not yield redress, although our proposals don't prevent CMCs from using different charging methods either. As well as assessing the viability of FCA-regulated claims management as a whole, our viability analysis used the data by category of claim to consider the ongoing viability of important categories of claim. So differences in the costs of managing different categories of claim (some more complex than others) are taken into account.

It is to be expected that in any given year some firms will have had a particularly profitable year while others will have had a particularly unprofitable year. We are not aware of any reason to believe that all CMCs were particularly profitable in the year we sampled. Similarly, it is expected that some firms will have made investments for future business (such as exploring new claim types). We have no reason to believe that investments having been made will undermine the representativeness of the sample or the conclusions of our analyses. We asked firms in our sample to provide cost data for a different year if 2018/19 was not particularly representative. No firms chose to do that. Data we publish on complaints to FS firms shows the 2018/19 year had slightly more claims to FS firms than adjacent years. We do not think the difference is significant.

As mentioned in the consultation responses, we considered some effects which we said were not quantifiable. These effects were listed in Table 9 of the CBA in CP21/1. They included greater access to justice if consumers make more claims due to lower fees or improved reputation, lower awareness of potential claims if there is reduced marketing because of firm exit, lower access to justice if CMCs introduce or increase minimum redress thresholds for accepting claims, and higher profits if they attract more claims due to lower fees or improved reputation. Except for the effect of changes to marketing practices, there appears to be only limited scope for any negative impact from these effects occurring. If we were able to quantify them, they would be unlikely to shift the balance of costs and benefits in a way that would show consumers being worse off.

While we have not quantified the potential reduction in claims made due to CMC exit or CMCs increasing thresholds for accepting claims, we have made the conservative assumption that claims managed by CMCs who exit will not be made. In practice, however, at least some of the claims are likely still to be made, whether directly by the consumer, or by using another CMC. On the potential for and likely impact of reduced marketing we still believe the effects are too uncertain to be quantified, not merely in terms of scale but also in terms of the direction of the effect. It is important to note for both effects that, for claims in scope of the cap, access to redress is available to consumers with or without CMCs. If consumers are not aware of that or not confident to make claims without CMCs this is a result of market failures. As we have said elsewhere, consumers paying fees (or higher fees) is not an appropriate solution to market failures.

For competition, we are aware of a wide range of fees currently being charged. And we note that firms charging lower fees will be less likely to exit than firms charging higher fees; the low-charging CMCs will continue to exert competitive pressure on each other and the remaining CMCs, and discourage firms from increasing their fees to the level of the cap. We estimate that a large number of CMCs will remain viable and most of these will make a long-term margin above 10%, showing that the cap is sufficiently above costs. At least 16 firms for pension claims and savings and investment claims are expected to remain and make a margin of 10% or more. (See table 12 of the CBA in CP21/1.) Ultimately, we must balance promoting competition with protecting consumers. We have considered the impact the cap will have on competition and we are satisfied that it promotes effective competition in the interests of consumers consistent with our competition duty (FSMA s1B(4)).

Comments about claims management activity that is not FCA-regulated are addressed in Chapter 4.

4 Scope of the cap

4.1 In this chapter, we summarise the feedback we received on our proposals on the scope of the cap, and what we have decided to do.

CP proposals

4.2 We said the cap would apply to FCA-regulated claims management activity on claims about non-PPI financial products and services where the subject matter of the claim is in scope of the statutory redress system, if those claims result in an award of monetary redress. The statutory redress system includes DISP, the ombudsman service, the FSCS, and other statutory redress schemes such as the Pensions Ombudsman. CP21/1 said that fees for claims which could be taken through the statutory redress system but (for any reason) were pursued in some other way would still be subject to the cap. For example, if a claim is pursued through a court when the claim was in the scope of the statutory redress system, fees charged for that claim will be subject to the cap.

4.3 We specified that the cap would apply to:

- fees under pre-existing contracts as well as fees under contracts entered into after the rules come into force
- the total cost of claims management services to the consumer for a single claim, meaning that where multiple claims management services are provided and/or multiple firms provide claims management services, the total charge for all those services combined will not exceed the cap
- lead generation activities as well as investigating and advising on claims and representing consumers making claims, where those services result in fees being charged to consumers
- contracts with individuals or businesses, if their claim is in scope of the statutory redress system

4.4 We said that the cap would not apply to the following fees:

- Fees for PPI claims – these are already covered by a cap introduced by Parliament
- Fees for non-PPI claims about financial products and services which do not yield redress – where redress is not awarded, the cap cannot apply because the cap is calculated as a percentage of redress
- Fees for claims that are not about financial products or services, such as claims about personal injury, employment, housing disrepair, etc.
- Fees for claims outside the statutory redress system for financial services

4.5 For claims about non-PPI financial products and services which do not yield redress (and which therefore cannot be subject to a cap that is calculated as a percentage of redress), we said fees must be reasonable in the circumstances and must reflect work undertaken by the CMC.

4.6 Where CMCs use a different charging model (rather than the percentage-based no-win-no-fee model which most CMCs currently use), the cap will still apply whenever redress is awarded.

4.7 We asked:

Q3: ***Do you agree with the scope of the proposed cap?***

Feedback and our response

4.8 Most respondents who answered this question agreed with the scope of the cap as set out in CP21/1.

4.9 Some agreed it would be wrong to intervene currently in the personal injury market due to the significant changes the sector has been undergoing, and that we should review fully the impact of our intervention on the FS market before implementing further fee caps in other CMC sectors. Others said it is unfair to target CMCs managing financial products and services. Several raised concerns about regulatory arbitrage, saying CMCs would use legislative exclusions to avoid FCA regulation if other regulators did not make equivalent rules to restrict the fees their firms may charge.

4.10 Some said disbursements should be included under the cap or CMCs will outsource and charge the customer as does a law firm that undertakes similar work and charges up to 33% plus disbursements, using conditional fee arrangements, after the event insurance and a disbursements funding loan. Others said disbursements should be excluded from the cap because, they said, some claims – particularly pension and investment claims – require a report from a forensic accountant or actuary or advice from counsel any of which 1 respondent said can cost £5,000.

4.11 Some respondents who agreed with the proposed scope of the cap commented on how to ensure the rules are effective. Suggestions included: an equivalent restriction for claims management activity under the remit of non-FCA regulators; close supervision of fees that will not be capped but will be required to be reasonable; clarity on what is a single claim so firms cannot circumvent the cap by 'splitting' claims; guidance about how customers and CMCs can ascertain the amount that has been charged to ensure the total fee for a single claim remains under the cap. In addition to general concerns about regulatory arbitrage, 1 respondent raised the concern that CMCs might increase lead generation activity and work with solicitors to direct claims through litigation rather than the redress system to charge higher fees.

4.12 Two respondents suggested the proposals should address situations where monetary redress results in a balance write-off, or balance reduction, meaning that the consumer does not receive the redress as a cash pay-out because the redress is used to pay a debt. They said we could use this opportunity to say what the FCA expects of CMCs and we should make clear whether the cap applies only to the cash element of redress or the full amount whether offset against debt or not.

4.13 One CMC respondent said fees charged to business customers should be excluded. The respondent, who deals with claims by business customers for unusually large amounts of redress, said businesses customers do not fit the definition of consumers and business customers are more sophisticated which means they better appreciate the implications of the contracts they enter and the level of fee they will be charged. The respondent said businesses do not need protection from excessive fees because they are commercially aware and responsible for their actions.

Our response

We are implementing this proposal with some changes.

As we said in CP21/1 we have chosen to focus on restricting charges for CMCs managing FS claims before considering other CMC sectors because we have a duty to make rules in this sector and because of significant change in the personal injury claims market. We understand the concerns several respondents raised about claims management by firms and individuals not regulated by the FCA. We do not have the power to make rules for those firms and individuals but we have liaised with other regulators and discussed the risk of regulatory arbitrage. The SRA has sought views from the public on whether to consult using FCA rules as a benchmark. The SRA will decide in due course what is appropriate for the firms and individuals it regulates.

In CP21/1 we proposed to apply the cap to claims management activity on claims that fall within the redress system even if those claims were pursued via litigation (or some other means) instead. We are now clarifying that the cap will not apply to activity that relates to litigation if the claim has already been determined or dismissed by the redress system. Also, having considered the feedback we note that there are some instances in which it will be appropriate for litigation to begin on a claim even if the redress system is available for that claim, in particular if there are reasonable grounds to believe that: the limitation period for action may be breached; or the amount of redress sought may be higher than the award limits of the redress system. There might also be instances where there are reasonable grounds to believe that the claim may be out of time for and not accepted by the ombudsman service. In such cases, we would not want to limit the ability of CMCs to charge for advising or otherwise helping consumers to pursue litigation, including where court proceedings are issued and then stayed to protect the right to pursue litigation in future. For this reason we are making a change to the scope of the cap so that it excludes activity relating to litigation in certain specific circumstances. We think this is both fair to CMCs and appropriate for consumer protection. If CMCs encounter exceptional circumstances other than those we have specified where they believe it would be reasonably necessary and proportionate to pursue litigation without first engaging with the redress system, and they think the cap should be disapplied, they can talk to us about those circumstances.

Where there is a possibility that CMCs will provide services which fall outside the scope of the cap because of the circumstances above, we are requiring CMCs to tell the consumer with a clear and prominent explanation that they might be charged fees outside the cap.

This change to the scope of the cap does not affect our analysis of costs and benefits. The data we gathered from CMCs did not include any court cases. That suggests that a very small minority of claims are likely to be affected by the exclusion. So the additional disclosure will not cause any significant costs for CMCs.

Excluding disbursements from the cap would not provide an appropriate degree of protection against excessive fees. As we said in our discussion of the value that CMCs provide, we do not accept that a consumer must (or should have to) pay a representative to receive a fair decision on their claim in the FS redress system. Third-party services are not necessary for consumers to successfully make claims. In any case, our financial analysis showed claims management would remain viable based on current costs (which, for some CMCs, have included the use of third parties). We are satisfied that we have considered all of the types of value provided by CMCs in relation to the various activities and services mentioned by respondents, and that we should not exclude further activities or services from the cap.

We have clarified in the rules which activities the cap applies to, and that activities which do not relate to a claim are not intended to be caught by the cap. We have also clarified in the rules that claims for which fees are capped are only those in scope of the DISP complaints resolution rules or a statutory ombudsman or compensation scheme (and not those only within the broader DISP complaints handling rules).

We will supervise fees that are subject to the requirement to be reasonable in our usual way according to our Approach to Supervision. Because CMCs almost exclusively use the no-win-no-fee charging model very few fees will be subject to this rule. The rule largely relates to claims where redress is not awarded but fees are still charged (as well as claims for which the cap does not apply for other reasons). Under current charging models most fees will be subject to the cap. But we will watch for changes to charging models.

Our rules are drafted to make clear that all charges in relation to a claim, including under a connected agreement, are subject to the cap.

The cap applies to fees charged to businesses as well as individuals if their claims fall within the redress system. It is generally smaller businesses that are eligible to bring claims in the redress system. Where claims are deemed suitable for protection under the statutory redress system, they are also suitable for protection from excessive fees.

It will be up to CMCs to determine how to ascertain the amount that has been charged to a consumer on a claim to ensure the total fee for a single claim remains under the cap. Where the consumer has been referred by another firm we do not expect this to be difficult.

Sometimes the redress awarded to a consumer is not paid out in cash, but is used by the FS firm to reduce debt that the consumer owes to the FS firm. When that happens the consumer does not receive the full amount of the redress in cash. In some cases the consumer does not receive any redress in cash because the full amount is set off against their debt to the FS firm. In line with our estimate of the value CMCs provide to individual consumers, the fee cap is calculated against the full amount of the redress, not merely the amount paid in cash. This is also the case for pensions claims if redress is paid into a pension scheme and the consumer does not yet have access to the pension.

To protect consumers who do not receive cash redress, CMCOB requires CMCs at the pre-contract stage to find out whether a customer has any debt that might mean the redress will be set off rather than paid out in cash, and to inform the customer where applicable that they might be required to find other funds from which to pay the CMC fee.

It is important to note that the fee cap does not set a price for CMC fees; it is a maximum price. We expect CMCs to consider what is fair for customers in their circumstances and to be guided by the requirements under Principle 6 to treat customers fairly and CMCOB 2.1.1R to act in line with the best interests of the customer. We are aware that a number of CMCs waive fees for consumers who receive less redress in cash than the fee due to the CMC. Some others do not take on customers whose redress will be offset against debt rather than paid out. Where CMCs turn consumers away, we expect them to ensure the consumer is not misled into believing the CMC has decided their claim has no merit. Part of treating customers fairly could include, for example, signposting consumers to the option for claiming direct so they can decide whether to pursue their claims without the CMC, and signposting them to a source of free help such as Citizens Advice. It is also consistent with Principle 7 (to communicate in a way that is not misleading) to ensure consumers who are turned away are not wrongly led to believe that the CMC's decision to turn them away was based on a view that their claim had no merit and should not be pursued.

Where a consumer cannot pay a CMC fee, CMCOB 6.2.4R requires CMCs to show forbearance, signpost customers to free debt advice where appropriate, and not to impose fees on a customer who is unable to pay when the fees fall due unless the fees are no higher than necessary to cover reasonable costs.

5 Unenforceability of contracts

5.1 In this chapter, we summarise the feedback we received on our proposals on unenforceability, and what we have decided to do.

CP proposals

5.2 We proposed that if any agreements breach the cap they will be unenforceable to the extent of the breach. We said CMCs will be required to promptly reimburse a customer once any breach is identified and proposed that 8% simple interest be added from the date the excess payment was made. We asked:

> **Q4:** ***Do you agree that agreements which breach the cap should be unenforceable to the extent of the breach and that simple interest at 8% should apply?***

Feedback and our response

5.3 Most respondents who answered this question agreed with the proposal. Several commented that monitoring and enforcement would be important. Some said we should make clear how any breaches will be enforced, say what we expect of FS firms in this respect, and consider cases where a breach of the cap puts a customer in a vulnerable situation. Some suggested the following changes to the proposal:

- Require the 8% simple interest to accrue from the date of receipt by the CMC rather than the date of payment by the consumer, to account for cases where the CMC deducts the fee payable from the amount of redress received
- Do not specify 8% simple interest; leave that to the discretion of an independent arbiter such as the ombudsman service
- Ensure the interest rate remains correct relative to base rates by revisiting it and reviewing triennially
- Consider whether the whole fee should be refunded or not charged (rather than being unenforceable to the extent of the breach)
- Have tougher sanctions for CMCs who deliberately breach the cap
- Publicly name CMCs who breach the cap

5.4 Respondents who disagreed with this proposal made the following comments:

- The fact that the FCA deemed it necessary to make this provision is insulting to CMCs and the FCA, and shows the FCA considers CMCs untrustworthy
- 8% interest will be irrelevant because CMCs will abide by the cap even if they disagree with it
- The proposal is draconian and could lead to mis-selling claims with legal firms looking to take advantage of miscalculations/innocent mistakes by CMCs
- It should be left to the ombudsman service to determine case-by-case what the appropriate sanction is

Our response

We are making this rule as consulted on. In the Financial Guidance and Claims Act 2018 (s137FD(5) of FSMA) Parliament gave us an express power to make contracts unenforceable, to provide for the recovery of amounts paid under the contract, and to provide for the payment of compensation for any losses incurred as a result of paying amounts under the agreement or obligation. The same provision was made by Parliament for the PPI cap and in FSMA for the cap on high-cost short-term credit. We think it will be beneficial and not harmful to use this power.

In making this rule we do not intend to insult CMCs or comment on their trustworthiness. We envisage that the unenforceability provision gives both consumers and CMCs certainty. Consumers will not necessarily need recourse to an independent arbiter to know and enforce their rights, and CMCs will know the appropriate remedy to apply if the cap is breached. The rate of 8% simple interest per annum is consistent with the rate used in the redress system to put things right for consumers who are reimbursed for a financial loss. So we do not think the ombudsman service would be likely to provide a different outcome in most cases and we do not think the 8% should accrue daily. As suggested by 1 respondent, we will need to ensure the rate remains appropriate over time. Where there is a dispute, consumers will still be able to complain and the matter will still be within the remit of the ombudsman service.

We did not propose disapplying the right to bring an action for damages for a rule breach (under s138D of FSMA). So consumers will have the right to claim damages if they suffer losses because CMCs breach the cap. This is consistent with most other parts of CMCOB.

We think it unlikely that legal firms or others will target CMC customers to make claims for breaches of the cap unless there is widespread non-compliance by CMCs. That prospect, whether likely or not, does not give us reason to omit the proposed unenforceability provision.

For sanctions for any breaches of the cap, the unenforceability provision does not prevent us taking action in the usual way where firms we regulate do not meet their obligations. We decide such action on the facts of the particular case. It is not always appropriate to publicly name firms who have breached rules. We will deal with particular cases in line with our Approaches to Supervision and Enforcement.

6 Implementation period

6.1 In this chapter, we summarise the feedback we received on our proposals on the implementation period, and what we have decided to do.

CP proposals

6.2 We proposed that the rules consulted on in CP21/1 would come into force 3 months after they were made. We asked:

Q5: ***Do you agree with a 3-month implementation period for the cap?***

Feedback and our response

6.3 Most respondents who answered this question agreed with the proposal. One said 3 months is proven to be an effective timeframe to successfully implement a cap because it is a similar timeframe to the one that was used for the PPI cap.

6.4 Some respondents said a 3-month implementation period would encourage bad behaviours by CMCs. They said CMCs might:

- Attempt to conclude cases as soon as possible in order to receive the maximum fee without due regard to the best outcomes for customers
- Abandon consumers mid-claim or pass claims to a law firm which will not be subject to the same restriction on fees
- Pressure customers to sign before the 3-month implementation period ends without due regard to the best outcomes for consumers

6.5 Six respondents said 3 months is too short. Some mentioned the need to evaluate their business models and their viability under the proposed cap and felt that this would take longer than 3 months.

Our response

We understand some firms would find a longer implementation period beneficial. We think the shortness of the period is justified because of the excessive fees that could be charged or agreed during the implementation period and because our decision to apply the cap to new contracts only (see Chapter 7) means CMCs will already experience a gradual transition to the capping of their fees.

Because we are not proceeding with our proposal to apply the cap to contracts entered before the rules are in force (see Chapter 7), the cap will not encourage CMCs to rush to conclude cases or to abandon customers mid-claim.

We understand the risk that a 3-month delay between making the rules and the rules taking effect could incentivise CMCs to pressure consumers into contracts during that period. However, we must balance that concern with the fact that it would be unfair and impractical to expect CMCs to implement these rules immediately on the day they are made. We considered a shorter implementation period, but given the work entailed in implementing the changes and the significant effect the rules will have on some business models, we think on balance that 3 months allows adequate time for CMCs to prepare and is generally reasonable in light of the risk.

During the implementation period, as always, CMCs should keep in mind the requirement to treat customers fairly and comply with the rules and principles of the FCA Handbook.

7 Pre-existing contracts

7.1 In this chapter, we summarise the feedback we received on our proposals on pre-existing contracts, and what we have decided to do.

CP proposals

7.2 We proposed in CP21/1 that the fee cap would apply to all contracts entered into between CMCs and customers and all fees imposed by CMCs on customers after the rules came into force. We said it would apply to fees imposed under contracts (including connected agreements) that had been entered into prior to the rules coming into force, as well as new contracts which were entered after the rules came into force. We asked:

Q6: ***Do you agree that applying the proposed cap to pre-existing contracts provides an appropriate degree of protection for consumers against excessive charges?***

Feedback and our response

7.3 Most of the respondents who answered this question disagreed with the proposal to apply the cap to contracts that were entered before the rules come into force. They said the proposal would cause CMCs financial difficulty and unfairly interfere with their rights under contracts that they had entered into before they had knowledge of the cap.

7.4 Those who agreed with the proposal said it would help protect consumers. One said not applying the cap to pre-existing contracts would effectively sanction the over-charging of consumers for many months or years to come, particularly for pensions and savings and investment claims, which often take longest and give rise to the greatest degree of over-charging.

Our response

We have decided not to proceed with our proposal to apply the cap to pre-existing contracts except in certain limited circumstances where contracts are changed after the cap has come into force.

Parliament gave us a duty to make rules prohibiting CMCs from entering contracts that would provide for excessive fees to be charged, and to prohibit CMCs from imposing fees that are excessive. Having listened to the feedback we received on our fee capping proposals generally, we have decided to discharge our duty by applying the cap to new contracts only, except in certain circumstances. The cap will still apply to fees under pre-existing contracts if:

- the contract is varied after the rules come into force to increase the fee; or
- the fee is added to the contract after the rules come into force; or
- the fee relates to a new claim that is added, after the rules come into force, to a pre-existing contract; or
- the customer's authorisation or instruction for the CMC to act occurs after the rules are in force

Apart from in the very limited specific circumstances listed above, the cap will only apply to fees imposed under contracts that are entered after the rules come into force.

We indicated in CP21/1 that intervening in pre-existing contracts is justified by the objective of securing protection against excessive fees. But we do recognise that preventing firms from charging fees where the fees have been agreed and where the firms have already invested resources has a different impact compared with restricting fees on agreements that will be entered in the future. Applying the cap to new contracts only and certain variations to pre-existing contracts will compromise the achievement of our objective to a degree. It means the benefit of the fee cap which we estimate at £9.6m per year will not be fully felt in the first 2 years. 90% of claims in redress bands 1 to 5 are completed within 1 year, but some can take 2 years or even longer in exceptional cases. But applying the cap to new contracts only and to pre-existing contracts that are varied in certain ways will benefit firms and consumers in other ways. CMCs will be better able to manage and adjust for the impact on revenue, which will mean their pre-existing business arrangements are not interfered with, which in turn could help them remain viable. Consumers will experience appropriate protection for the long term, with less short-term disruption. So we think our final position strikes a fair balance. This does not change the analysis in CP21/1 of costs and benefits because the analysis presents effects for a typical year when all claims in scope are subject to the cap.

During the implementation period we will be particularly mindful of the existing duty for regulated firms to treat customers fairly and will intervene if we see poor conduct that warrants action.

8 Enhanced disclosure requirements

8.1 In this chapter, we summarise the feedback we received on our proposals to enhance the requirements for CMCs to disclose information, and what we have decided to do.

CP proposals

8.2 We proposed the following 2 new requirements for information that CMCs must disclose to their customers:

- To help consumers better understand the fees they will be expected to pay, we proposed that the illustrative fee calculations firms are already required to provide under CMCOB 4.2.5R will show illustrative fees for the 3 redress bands that the consumer's claim is most likely to fall under, instead of showing illustrative fees for the set amounts of £1,000, £3,000 and £10,000. We also proposed to require firms to indicate which of the 3 illustrative fee calculations most closely reflects the consumer's claim.
- To help consumers better understand the available routes to redress we proposed to enhance existing requirements by adding that firms must seek confirmation from customers that they do not wish to progress their claim direct themselves without using a CMC. We proposed that the statement and information about the direct route to redress must be isolated in the pre-contractual disclosure, and that the consumer must confirm, by way of a separate declaration, that they would like to engage the CMC despite knowing they have the option to make their claim for free, by themselves.

8.3 We asked the following questions:

> **Q7:** ***Do you agree that requiring the proposed further disclosures will improve consumer awareness of the cost of using a CMC?***
>
> **Q8:** ***Do you agree that isolating the statement about claiming direct, and requiring a separate declaration from the consumer will help to improve customer awareness of the option to claim without a CMC?***
>
> **Q9:** ***Do you agree with the 3-month implementation period for our proposed enhanced disclosure requirements?***

Feedback and our response

Fee illustrations

8.4 Most respondents who directly answered our question about fee illustrations agreed with the proposal. Broadly the responses from CMCs were not in favour of these proposals whereas FS firms and consumer groups were generally supportive. 16 respondents agreed that the proposed fee illustrations would help consumers make informed decisions.

8.5 One CMC said it had been including additional figures in its disclosure already because the figures of £1,000, £3,000 and £10,000 weren't realistic for many of its customers.

8.6 Some CMC respondents pointed out that the amount of redress a consumer might receive can be difficult to predict at the time the firm enters a contract with the consumer. One said further that predicting how much redress a consumer might receive could raise false hopes which could in turn lead to complaints about CMCs when CMCs had simply complied with FCA rules. Feedback also included that the proposed fee illustration would not benefit consumers and would only cause confusion.

8.7 Seven respondents including some CMCs suggested we should go further and standardise the disclosure that CMCs provide to consumers. This view was held by many respondents, including some CMCs, for both the fee illustration and the customer declaration about routes to redress. Respondents held this view for a variety of reasons. The most commonly cited reasons were the need to remove the guess work from complying with the rules and the need to ensure unscrupulous competitors made adequate disclosures to consumers.

8.8 One respondent suggested CMCs should provide an illustration of the total cost payable in the event that any part of the claim is settled by way of a balance reduction and that CMCs could provide an illustration of the fee that would be due if the balance were reduced by 100%, 50% and 0%.

8.9 Two respondents to our equality impact assessment said we should test the effectiveness of our disclosure proposals, including for protected groups.

Our response

We are implementing this proposal with some changes.

We can see that predicting the level of redress a consumer might receive could be difficult. Having listened to the feedback on this point, we are implementing a modified disclosure requirement. Rather than provide fee illustrations for the bands most likely to apply to the consumer's claim, we will require firms to provide illustrations for all 5 bands. We will not require firms to tell the consumer which band is most likely to apply to their claim. This change does not require an update to the cost benefit analysis in CP21/1 because the estimated effects do not depend on details of the fee illustration.

For similar reasons we will not require CMCs to show how much a consumer might pay if some or all redress is offset against debt rather than paid out to the consumer. Our rules require CMCs to make clear to consumers where relevant that consumers might need to pay a CMC fee out of other funds.

CMCs will still be required by existing rules (CMCOB 6.1.7) to promptly give customers an estimate of the fee they will pay at the point the CMC has sufficient information to reasonably estimate the fee, and, if applicable, to tell customers why the fee payable will differ from the illustration.

In relation to a standardised disclosure we understand the variety of reasons this has been suggested and we can see there is merit in providing a standardised disclosure. In our most recent portfolio letter to firms we raised the issue of poor disclosure. Standardising the disclosure would help firms prepare all materials in the 3-month implementation period and supervision of firm disclosure would be made more straightforward. However, we would be unable to provide a single standardised fee illustration that would suit the charging models and fees charged by all CMCs. Also, any standardised disclosure we issue would be untested for the target markets of particular firms. Firms can potentially provide more effective communication if they take into account the likely recipients of the communication, with particular care given to communicating with consumers in vulnerable circumstances, and where appropriate, testing and adapting communications to show that they have taken reasonable steps to ensure communications are reasonably likely to be understood and facilitate customers' decision-making. Also, the disclosure rules we are making here are not complex enough to suggest that any non-compliance would be due to CMCs misunderstanding their purpose.

Within each band we encourage CMCs to provide illustrations they think are applicable to their customers and to test and adapt communications. Also, where a CMC's customers are likely to have redress that is not paid out to them in cash, it is good practice to help customers understand the fees they will pay in those circumstances.

Customer declaration

8.10 Most respondents who directly answered our question about the customer declaration agreed with the proposal.

8.11 A commonly held view among CMC respondents was that consumer education was not the responsibility of CMCs. They said expecting them to inform consumers about the direct route to redress was unreasonable, and the FCA does not require firms in other markets to make equivalent disclosures to new customers. Some respondents said signed confirmation would not benefit consumers.

8.12 Many respondents said the FCA and others should do more to improve consumers' awareness and understanding of the redress system.

8.13 CMCs also said our bespoke consumer survey was not conducted recently enough to provide insight into conditions under the new regulatory framework for CMCs which began when the FCA took over CMC regulation, and survey results were not a fair reflection of current consumer experience or awareness.

8.14 One respondent said the disclosure made by CMCs to consumers should include reference to the Pension Ombudsman where appropriate and another said the proposals should address the tendency for consumers to over-estimate the value that CMCs provide.

Our response

We think it is important to improve consumer awareness and understanding of the redress system given the market failures we have identified. We are working with regulatory partners to help clarify and define our respective roles and how best to help consumers understand them and protections available to them.

CMCs might not have a commercial interest in raising consumer awareness of the direct route to redress, but the FCA has a duty to help consumers make well-informed decisions. In our view, a good place in the consumer journey to raise awareness of the direct route to redress is the point at which the consumer enters a contract with a CMC. We can, and do, make rules across various sectors we regulate that require firms to help consumers understand the decisions they are making.

We note that CMCOB already requires disclosures by CMCs to make specific reference to the Pension Ombudsman where relevant.

We agree that raising consumer awareness of the redress system and how to use it is important. Having considered the option of an educational campaign, we do not see this as an alternative to restricting CMC fees, or as an alternative to requiring CMCs to help their customers understand their options and the service they are purchasing. However, we do think there is more that we and others can do to help consumers and, as we said above, we are working with regulatory partners to help improve consumer awareness and understanding of the redress system.

We addressed comments about timing of the bespoke consumer survey in Chapter 2. As we said there, we do not believe changes to disclosure requirements for CMCs introduced by CMCOB have resolved market failures.

We believe the requirement to have consumers acknowledge the direct route to redress goes some way to helping equip consumers to judge the value of the services CMCs provide. That is because, if they are made aware that they can claim direct, without a CMC, consumers will be less likely to think the CMC provides them with access to justice that they do not otherwise have. So they will be better able to judge what the CMC service will do for them. We recognise that this intervention will not be sufficient to enable all consumers to make fully-informed decisions about making claims and using CMCs, for the same reasons that the provisions of CMCOB have not already eradicated market failures. However, we think it will provide a benefit at very little cost.

9 Minor amendments

9.1 In this chapter, we summarise the feedback we received on our proposals to make minor amendments, updates and clarifications to CMCOB, and what we have decided to do.

CP proposals

9.2 We proposed minor amendments to the Claims Management Conduct of Business Sourcebook (CMCOB), Consumer Redress Schemes Sourcebook (CONRED) and the Perimeter Guidance Manual (PERG) to help provide clarification in areas where we identified it would be helpful to do so. The changes in this chapter will apply to all sectors of regulated claims management activity.

9.3 We asked the following questions:

Q10: ***Do you agree with the proposed minor amendments to CMCOB and PERG?***

Q11: ***Do you agree with the proposed updates to CONRED to bring the relevant provisions in line with the Financial Services and Markets Act 2000 (Claims Management Activity) Order?***

Q12: ***Do you agree with the proposal to modify the rule, which clarifies the obligation for CMCs to also ask customers about historic bankruptcies, IVAs, debt relief orders or similar arrangements?***

Q13: ***Do you agree with the proposal which places an expectation on CMCs to tell their customers when they are undertaking 'unregulated' claims management activities for which customers cannot expect access to any statutory ombudsman or statutory compensation scheme?***

Feedback and our response

Minor amendments to CMCOB, PERG and CONRED

9.4 Respondents to these questions agreed with our proposals.

Our response

We are making the rules as consulted on.

Asking about debt problems

9.5 Respondents to this question agreed with our proposals to modify the rule.

Our response

We are making the rules as consulted on.

Telling customers about unregulated claims management

9.6 Respondents generally agreed with our proposals. Some felt that the proposal which places an expectation on CMCs to tell their customers when they are undertaking 'unregulated' claims management activities should be an obligation. Others made the point that the explanation should be made very clear to enable the customer to fully understand it.

9.7 One respondent did not agree as many consumers do not appreciate the difference between regulated and unregulated. They felt CMCs should be required to have proper insurance to protect consumers in the event of negligence in relation to the unregulated activity.

9.8 One respondent questioned at what stage CMCs should make the disclosure.

Our response

The FCA perimeter is set by Parliament and determines which activities require FCA-authorisation and what level of protection consumers can expect.

If CMCs enter an agreement with a customer that relates to a regulated claims management activity we are introducing a rule that that a CMC must, before entering into an agreement, give the customer information on any relevant statutory compensation scheme to which the firm is subject. We are adding guidance that when providing information concerning any statutory ombudsman or statutory compensation scheme the CMC should specify whether the schemes to which it is subject cover all the activities and/or services which it proposes to undertake for the customer and specify which activities (if any) are not within the jurisdiction of the schemes. We would expect firms to communicate in a way that is clear, fair and not misleading.

We are implementing the rules as consulted on.

10 Equality and diversity

10.1 In CP 21/1 we published our assessment of equality and diversity issues which may arise from our proposed rules.

10.2 We noted that certain groups with protected characteristics were either more likely to use a CMC to process a claim, or were less likely to know that they could make a claim without using a CMC.

10.3 We said that consumers who might feel they have to depend more heavily on CMCs to make a claim will likely benefit from our proposals as they feel they are charged will be capped so they will not pay excessively. While it is possible that if CMCs cease to manage claims, some of these customers might not make claims at all, our proposals are designed to avoid making FCA-regulated claims management activity unviable so anyone wanting to use a CMC to make a claim will continue to be able to do so.

10.4 We asked the following question:

> **Q14:** ***Do you agree with our assessment of the impacts of our proposals on the protected groups? Are there any others we should consider?***

Feedback and our response

10.5 Most respondents to this question agreed with our assessment. There were suggestions that we should include people for whom English is not their first language; people with neuro-diversity; people with various health and mental wellbeing conditions and that we should test the effectiveness of our disclosure proposals, including for protected groups. One respondent was keen to make the point that age does not simply make one vulnerable.

10.6 One respondent was of the view that protected groups in particular would suffer if CMCs stopped marketing to those people.

10.7 Another respondent said that as they do not agree that the proposals are based on the correct data but on assumptions, we cannot agree with our assessment as it would follow that it too is incorrect.

Our response

We welcome the feedback to this question. Assessing equality and diversity issues is a key consideration in our development of regulatory standards, and feedback can help ensure we have fully considered impacts on groups with protected characteristics

We have considered the groups mentioned in the responses to our consultation and we are satisfied that consumers will likely benefit from our rules as the fee they are charged will be capped so that they will not pay excessively.

Our proposals are designed to avoid making FCA-regulated claims management activity unviable so anyone wanting to use a CMC to make a claim will continue to be able to do so. Although one respondent was concerned about CMCs stopping marketing to those with protected characteristics, we expect that the CMC market will still be viable and consumers will still be able to realise the benefits of the CMC market. More detail on market viability can be found in Chapter 2.

Our response to the comments that relate to our disclosure proposals can be found in Chapter 7.

Annex 1
List of non-confidential respondents

Consumer Savings Network Group Limited

Etico Group Limited

Fair Return Legal Services Limited

Grove Pension Solutions Ltd

It Is Your Money

Josephine Barker

Money and Me Claims

Personal Investment Management & Financial Advice Association (PIMFA)

Annex 2
Abbreviations used in this paper

Abbreviation	Description
CMC	Claims management company
CMCOB	Claims Management Conduct of Business Sourcebook
COMP	Compensation Sourcebook
CONRED	Consumer Redress Schemes Sourcebook
DISP	Dispute Resolution Sourcebook
FS	Financial services
FSCS	Financial Services Compensation Scheme
FSMA	Financial Services and Markets Act 2000
PERG	Perimeter Guidance Manual
SRA	Solicitors Regulation Authority

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Appendix 1
Made rules (legal instrument)

CLAIMS MANAGEMENT (FEES RULES) INSTRUMENT 2021

Powers exercised

A. The Financial Conduct Authority ("the FCA") makes this instrument in the exercise of the following powers and related provisions in the Financial Services and Markets Act 2000 ("the Act"):

(1) section 137A (The FCA's general rules);
(2) section 137FD (FCA general rules: charges for claims management services);
(3) section 137R (Financial promotion rules);
(4) section 137T (General supplementary powers); and
(5) section 139A (Power of the FCA to give guidance).

B. The rule-making powers listed above are specified for the purpose of section 138G(2) (Rule-making instruments) of the Act.

Commencement

C. This instrument comes into force on 1 March 2022.

Amendments to the Handbook

D. The Glossary of definitions is amended in accordance with Annex A to this instrument.

E. The Claims Management: Conduct of Business sourcebook (CMCOB) is amended in accordance with Annex B to this instrument.

Citation

F. This instrument may be cited as the Claims Management (Fees Rules) Instrument 2021.

By order of the Board
25 November 2021

Annex A

Amendments to the Glossary of definitions

In this Annex, underlining indicates new text.

Insert the following new definitions in the appropriate alphabetical position. The text is not underlined.

FS claims management activity	one or more of any of the following activities: (1) *advice, investigation or representation in relation to a financial services or financial product claim*; and (2) *seeking out, referrals and identification of claims or potential claims* in relation to a financial services or financial product *claim*, except to the extent that the activity is subject to the *PPI claims management fee cap*.
FS claims management agreement	a *regulated claims management agreement* for: (1) *advice, investigation or representation in relation to a financial services or financial product claim*; or (2) *seeking out, referrals and identification of claims or potential claims* in relation to a financial services or financial product *claim*, or any combination of these activities, except to the extent that the activity is subject to the *PPI claims management fee cap*.
FS claims management fee cap	has the meaning in *CMCOB* 5.2.9R.
regulated claims management agreement	an agreement, the entering into or performing of which by either party is a *regulated claims management activity* (see section 137FD(7)(a) of the *Act*).

Amend the following definition as shown. Underlining indicates new text and striking through indicates deleted text.

PPI claims management fee cap	the provisions in sections 29 and 31of the Financial Guidance and Claims Act 2018 (see *CMCOB* ~~5~~ 5.1).

Annex B

Amendments to the Claims Management: Conduct of Business sourcebook (CMCOB)

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

1 Application and purpose

…

1.2 Who? What? Where?

1.2.1 R (1) *CMCOB* applies to a *firm* (including to a Gibraltar-based firm or a *TP firm*) with respect to carrying on *regulated claims management activities* and *ancillary activities*, unless otherwise stated in, or in relation to, a *rule*.

(2) In (1) "Gibraltar-based firm" has the same meaning as in the *Gibraltar Order*.

…

2 Conduct of business

…

2.2 Generating, obtaining and passing on leads

…

Disclosure to other firms by lead generators

2.2.10 R Where a *lead generator* passes *customers*, or details of a *customer* or a *claim*, to a third party, the *lead generator* must disclose to the third party any charges imposed or to be imposed on the *customer* concerned in relation to the *customer's claim*.

2.2.11 G Where more than one *lead generator* is involved, *lead generators* should disclose charges imposed or to be imposed by the preceding *lead generators*. *Firms* receiving *claims* from *lead generators* should take reasonable steps to ascertain the entirety of the charges payable or paid in relation to a *claim*.

…

4 Pre-contractual requirements

…

4.2 Pre-contract information and advice

Summary document

…

4.2.5 R (1) The *firm* must explain the basis on which it would calculate its fee, and provide an illustration or estimate of that fee.

(2) ~~Where the fee would be payable by reference to the amount recovered for the *customer*, the *firm* must provide an illustration of what its fee would be by reference to each of the following amounts recovered for the *customer*:~~

~~(a) £1,000;~~

~~(b) £3,000; and~~

~~(c) £10,000.~~ [deleted]

(2A) Where the amount of the fee, or any part of it, would be determined by reference to the amount recovered for the *customer*, the *firm* must provide its fee illustration or estimate showing the level of fee by reference to each of the five redress bands in the table in *CMCOB* 5.2.9R (irrespective of whether the *claim* is a financial services or financial product *claim*).

(3) For the purposes of ~~(2)~~ (2A), the "amount recovered for the *customer*" means the amount paid or payable by the *person* against or about whom the *claim* would be made, ignoring any set-off or netting against any sum owed or payable by the *customer* to that *person*.

(4) Where the *firm's* fee is not ascertainable as in ~~(2)~~ (2A), but is instead dependent on factors which cannot be known in advance (for example, where the *firm* charges an hourly rate), the *firm* must explain its fee structure, and provide an estimate calculated by reference to:

(a) the ~~fact~~ facts and circumstances of the *claim*, to the extent that the *firm* has knowledge of them; and

(b) (if the *firm* charges on an hourly basis) the typical number of hours the *firm* would expect to spend on a *claim* of that type.

(5) The illustration or estimate must be accompanied:

(a) where ~~(2) applies, by~~ the amount of the fee, or any part of it, would be determined by reference to the amount recovered for the *customer*, by a statement that the fee illustration is not to be taken as an estimate of the amount likely to be recovered for the *customer*;

(b) where ~~(4) applies~~ that is not the case, by an explanation of how the estimate has been calculated; and

(c) by a statement to the effect that the fee that the *customer* will have to pay may be more than or less than the illustration or estimate.

(6) Where the fee is a fixed amount, the *firm* may indicate that the fee is a fixed amount and not an estimate.

(7) Where the fee is provided for in or imposed under an *FS claims management agreement* and there is a possibility that services which fall outside the scope of the *FS claims management fee cap* will be provided under the agreement or under a connected agreement (as defined in *CMCOB* 5.2.19R(2)), the *firm* must provide the *customer* with a clear and prominent:

(a) explanation that those services will not be covered by the *FS claims management fee cap*;

(b) explanation that the overall fees may exceed the cap; and

(c) estimate of the likely fees for those services.

…

4.3 Pre-contract requirements

…

4.3.1 R Before entering into an agreement with the *customer* that relates to *regulated claims management activity*, the *firm* must:

(1) …

(1A) where the information provided under *CMCOB* 4.2.2R(2)(g) or (h) is relevant to the *claim*, obtain a "standalone" signed statement in a durable medium from the *customer*, dealing only with this issue, confirming that the *customer*:

(a) is aware of the matters in *CMCOB* 4.2.2R(2)(g) or (h) (or both (g) and (h) where both are relevant); and

(b) wishes to use the services of the *firm* to make the *claim*.

…

…

5 Fee ~~cap~~ caps for regulated claims management activities

5.1 Fee cap for payment protection insurance claims

5.1.1 G (1) Under section 29(3) of the Financial Guidance and Claims Act 2018, the fee cap applicable to *regulated claims management activity* in connection with a PPI claim is 20% of the amount recovered. The cap applies by reference to a sum comprising all amounts charged for such services in connection with the claim (whether or not charged under a single agreement), exclusive of VAT.

(2) Section 31 of that Act (PPI claims: interim restriction on charges imposed by authorised persons after transfer of regulation to FCA) prohibits a *firm* from:

(a) charging an amount which exceeds the <u>*PPI*</u> *claims management fee cap* ~~in connection with a PPI claim~~; and

(b) entering into an agreement which provides for the payment by a *customer* of charges which would breach or are capable of breaching the <u>*PPI*</u> *claims management fee cap* ~~in connection with a PPI claim~~.

(3) Any payment in excess of the <u>*PPI*</u> *claims management fee cap* is recoverable by the *customer*. The *FCA* would expect the *firm* to reimburse the *customer* promptly, irrespective of whether the *customer* has asserted that the *firm* has breached the fee cap.

(4) Any agreement which provides for the payment by a *customer* of charges which would breach or are capable of breaching the <u>*PPI*</u> *claims management fee cap* ~~are~~ <u>is</u> not enforceable to the extent that ~~they provide~~ <u>it provides</u> for such a payment.

(5) A *firm* that breaches the <u>*PPI*</u> *claims management fee cap* is subject to the *FCA's* disciplinary powers in the same way as if the *firm* had breached a *rule*.

Insert the following new section, CMCOB 5.2, after CMCOB 5.1 (Fee cap for payment protection insurance claims). The text is not underlined.

5.2 Fee restrictions for financial services and financial product claims other than payment protection insurance claims

Application

5.2.1 R This section applies to *firms* in relation to:

(1) *FS claims management agreements* entered into by a *customer*; and

(2) charges provided for in or imposed on a *customer* under such an agreement or a **connected agreement**.

5.2.2 G (1) This section applies to financial services or financial product *claims*. However, as a result of the definition of *FS claims management agreement*, this section does not apply to a *claim* to the extent that the *PPI claims management fee cap* applies to it (for PPI *claims* see *CMCOB* 5.1).

(2) The terms in bold in this section (other than in headings or in titles) are defined in *CMCOB* 5.2.19R.

Statutory context and purpose

5.2.3 G (1) Section 137FD of the *Act* (FCA general rules: charges for claims management services) places a duty on the *FCA* to make *rules* in relation to all *regulated claims management agreements* and all *regulated claims management activities*, which concern *claims* in relation to financial products or services.

(2) The *rules* must be made with a view to securing an appropriate degree of protection against excessive charges for the provision of a service which is, or which is provided in connection with, a *regulated claims management activity*.

(3) In accordance with that duty, the purpose of this section is:

(a) to restrict the charges for *claims* in relation to financial products or services; and

(b) to secure an appropriate degree of protection against excessive charges.

(4) *Firms* are reminded of their obligations to treat *customers* fairly under *PRIN* 2.1.1R(6) (Customers' interests) and *CMCOB* 2.1.1R (*client's best interests rule*) which also apply where this section applies. Accordingly, as well as complying with the *rules* in this section, *firms* should ensure that their fees comply with *PRIN* 2.1.1R(6) and the *client's best interests rule*.

Fee cap for financial services and financial product claims within scope of complaints resolution rules or statutory ombudsman or statutory compensation scheme, where customer is awarded redress

Application of the FS claims management fee cap

5.2.4 R (1) Subject to (4), the *FS claims management fee cap* applies to charges for any of the activities in (2) which are payable by *customers* who are awarded financial redress for their *claim*, provided the *claim*, if made, would fall:

(a) **within the scope of complaints resolution rules**; or

(b) within the scope of any statutory ombudsman scheme or any statutory compensation scheme.

(2) Subject to (3), the activities referred to in (1) are as follows:

(a) *FS claims management activities* carried on in relation to the *claim* which is the subject of the relevant *FS claims management agreement*; and

(b) services provided in connection with the activities in (a).

(3) Where the charge is provided for in or imposed under a **connected agreement**, the reference to *FS claims management activities* in paragraph (2)(a) includes activities which would be *FS claims management activities* but for the exclusions in articles 89N to 89W of the *Regulated Activities Order*.

(4) Where:

(a) the *FS claims management activities* carried on under an *FS claims management agreement* or a **connected agreement** are carried on for the purposes of actual or potential court proceedings; and

(b) one or more of the conditions in (5) is met,

the *FS claims management fee cap* does not apply to the extent that the charges are for activities carried on for the purposes of those proceedings.

(5) The conditions in this paragraph are:

(a) there are reasonable grounds to believe that the limitation period for issuing court proceedings may be about to expire and that it is therefore necessary to issue court proceedings;

(b) the *customer* is unable to pursue the *claim* through any statutory ombudsman scheme or any statutory compensation scheme because:

(i) the *claim* has already been determined under the relevant scheme; or

(ii) the operator of the relevant scheme has determined that the *claim* cannot or should not be considered under the scheme;

(c) there are reasonable grounds to consider that the value of the *claim* may exceed the maximum redress which can be awarded by:

(i) the *Financial Ombudsman Service* or by the *FSCS* (where the *claim* falls within the scope of those schemes); or

(ii) (where the *claim* does not fall within the scope of the schemes in (i)), other statutory compensation or statutory ombudsman schemes; or

(d) the time limit for referring the complaint to the *Financial Ombudsman Service* has already elapsed and:

(i) there are reasonable grounds to believe that the *Ombudsman* may not conclude that the failure to comply with the time limits was the result of exceptional circumstances in accordance with *DISP* 2.8.2R(3); and

(ii) where relevant, the *respondent* has not consented to the *Ombudsman* considering the complaint in accordance with *DISP* 2.8.2R(5).

5.2.5 G (1) **Within the scope of complaints resolution rules** is defined in *CMCOB* 5.2.19R.

(2) The statutory schemes in *CMCOB* 5.2.4R(1)(b) include the *Financial Ombudsman Service*, the *Pensions Ombudsman*, and the *compensation scheme* (see *CMCOB* 3.2.8G).

(3) The *FS claims management fee cap* applies to *FS claims management activities* (and related services) carried on in relation to a *claim*. The cap applies to the entire *claim* even where the where the *claim* is based on various different grounds.

Guidance on the application of the FS claims management fee cap: activities which are covered by the cap

5.2.6 G (1) The *FS claims management fee cap*:

(a) restricts charges provided for in or imposed under an *FS claims management agreement* or a **connected agreement** (see *CMCOB* 5.2.11R and *CMCOB* 5.2.12R); and

(b) applies to charges for any of the activities specified in *CMCOB* 5.2.4R(2), namely, *FS claims management activities* carried on in relation to the *claim* which is the subject of the relevant *FS claims management agreement* and services provided in connection with those activities.

(2) When assessing whether the fee cap has been exceeded, a *firm* must therefore include all charges, for *FS claims management*

activities and related services carried on in relation to the *claim*, which are provided for in or imposed under:

(a) the *FS claims management agreement*; and

(b) any **connected agreement**.

(3) A *firm* to which this section applies must therefore consider not only its own charges when assessing whether the cap has been exceeded, but also the charges imposed by other *persons* under a **connected agreement** (where the conditions above are met).

(4) Where charges are imposed under a **connected agreement**, the exclusions in articles 89N to 89W of the *Regulated Activities Order* should be disregarded when determining whether an activity is an *FS claims management activity* (see *CMCOB* 5.2.4R(3)).

(5) Accordingly, the cap applies to charges for *FS claims management activities* (and related services) carried on in relation to a *claim* by an unauthorised person relying on an exclusion under the *Regulated Activities Order* (such as services provided by legal professionals).

(6) Hence, while this section does not impose obligations on *unauthorised persons* themselves, any charges for the activities above which are imposed under a **connected agreement** must be included by *firms* when assessing whether the fee cap has been exceeded.

Guidance on the application of the FS claims management fee cap: activities which are not covered by the cap

5.2.7 G (1) The *FS claims management fee cap* only applies to charges which are for the activities specified in *CMCOB* 5.2.4R(2), namely:

(a) *FS claims management activities* carried on in relation to the *claim* which is the subject of the relevant *FS claims management agreement*; and

(b) services provided in connection with those activities.

(2) This is explained in the examples below.

(a) A *firm* performs *FS claims management activities* under an *FS claims management agreement* but also provides debt or probate advice under the same agreement and that advice does not relate to the *claim*. For instance, the advice is general advice about how the *customer* could reduce their debts, as opposed to specific advice about how that *customer's* debt would affect the level of redress which the customer could obtain under the *claim*. In that scenario, the cap does not apply to the debt or probate advice. That is because the advice does not relate to the *claim* and it is therefore not:

(i) *advice in relation to a financial services or financial product claim* (see the definition of *FS claims management activity*) carried on in relation to the *claim*; or

(ii) a service provided in connection with the above activities.

(b) However, if the debt advice was about how the *customer's* debts would affect the *claim* which was being handled by the *firm*, then the cap would apply to that advice. That is because the advice would be advice in relation to a financial services or financial product *claim* and it would therefore be either an *FS claims management activity* carried on in relation to the *claim* or a service provided in connection with that activity.

(c) Where a *firm* provides or obtains accountancy or actuarial advice for a *customer* in relation to a *claim*, the cap would apply to that advice because it would be advice in relation to a financial services or financial product *claim* and it would therefore be either an *FS claims management activity* carried on in relation to the *claim* or a service provided in connection with that activity.

(3) *Firms* are reminded of their obligations under:

(a) *CMCOB* 4.2.5R(7) (obligation to explain to customer where charges will fall outside the cap);

(b) *CMCOB* 6.2.1R(4) (obligation to explain and include charges outside the cap in the itemised bill);

(c) *CMCOB* 6.2.4R(2) (a *firm* must not impose charges on a *customer* who is unable to pay fees and charges to the *firm* when they fall due unless the charges are no higher than necessary to cover the reasonable costs of the *firm*); and

(d) *PRIN* 2.1.1R(6) (Customers' interests) and *CMCOB* 2.1.1R (*client's best interests rule*).

(4) In particular, where a *firm* provides some services under an *FS claims management agreement* which fall outside the cap, it would not be in the best interests of the *customer* for the *firm* to increase the charges for those services in order to recoup revenue lost as a result of the cap.

Guidance on the application of the FS claims management fee cap: court proceedings

5.2.8 G (1) *CMCOB* 5.2.4R(4) provides that, in certain circumstances, the *FS claims management fee cap* does not apply to steps taken by the *firm* to enable the *customer* to pursue the *claim* through court proceedings.

(2) The exclusion above is limited to the circumstances specified in *CMCOB* 5.2.4R(4)(a) and (b) and only applies to the extent that the charges are for activities which are carried on for the purposes of actual or potential court proceedings.

(3) Hence, the exclusion will not apply to charges for activities which are carried on for the purposes of:

(a) making a *complaint* to a *firm* in accordance with the *complaints resolution rules* or *DISP* 1.1A.20R to 1.1A.22R; or

(b) submitting a *claim* to any statutory ombudsman scheme or any statutory compensation scheme.

(4) *Firm*s are still able to provide advice to *customers* about the merits of issuing court proceedings in circumstances which are not covered by *CMCOB* 5.2.4R(4)(a) and (b) (but the cap will apply in those circumstances).

(5) *CMCOB* 5.2.4R(5)(b)(ii) refers to circumstances in which the operator of the relevant scheme has determined that the *claim* cannot or should not be considered under the scheme. Examples of where this might occur are:

(a) the claim has been referred to the *Financial Ombudsman Service* after the time limit for referring it has elapsed and none of the exceptions in *DISP* 2.8.2R(3) or (5) apply;

(b) the *Ombudsman* has determined that the *complaint* should be dismissed without consideration of the merits in accordance with *DISP* 3.3.4A; and

(c) where the *claim* has been referred to the *Financial Ombudsman Service* and the *Ombudsman* proposes to cease to consider its merits so that it may be referred to a court to consider as a test case in accordance with *DISP* 3.4.2R.

(6) When providing advice about commencing court proceedings, *firms* should consider their obligations under *the client's best interests rule* and under *CMCOB* 2.1.7R (obligation not to make or pursue a *claim* on behalf of a *customer* or advise a *customer* to pursue a *claim* if the *firm* knows or has reasonable grounds to suspect that the *claim* does not have a good arguable base or is fraudulent, frivolous or vexatious).

FS claims management fee cap: level of the cap

5.2.9 R The *FS claims management fee cap* for a *claim* is the lower of:

(1) the maximum percentage rate of charge, or

(2) the maximum total charge,

in the table below applicable to the redress awarded for that *claim*.

Band	**Redress awarded for a claim** **(£)**	**The maximum percentage rate of charge**	**The maximum total charge** **(£)**
1	1-1,499	30%	420
2	1,500-9,999	28%	2,500
3	10,000-24,999	25%	5,000
4	25,000-49,999	20%	7,500
5	50,000 or above	15%	10,000

5.2.10 R The *FS claims management fee cap* for a *claim*:

(1) includes expenses and any other charge provided for in or imposed under the *FS claims management agreement* or **connected agreement**; but

(2) excludes VAT.

FS claims management fee cap: prohibition on entering into agreements

5.2.11 R A *firm* must not enter into an *FS claims management agreement* that provides for the payment of one or more charges that, alone or in combination with any other charge under that agreement or a **connected agreement**, exceed or are capable of exceeding the *FS claims management fee cap*.

FS claims management fee cap: prohibition on imposition of charges

5.2.12 R (1) A *firm* must not impose one or more charges on a *customer* under an *FS claims management agreement* for a *claim* that, alone or in combination with any other charge in relation that *claim*, under that agreement or a **connected agreement**, exceed or are capable of exceeding the *FS claims management fee cap*.

(2) The prohibitions in (1) do not apply to charges imposed under a provision in an *FS claims management agreement* or **connected**

agreement where the agreement was entered into before this section came into force except where:

(a) the provision was varied, after this section came into force, to increase the charge;

(b) the provision was added to the agreement after this section came into force;

(c) the charge relates to a *claim* which was added to the agreement after this section came into force; or

(d) the *customer's* first authorisation or instructions to the *firm* to act in relation to *claim* to which the charge relates were given after this section came into force.

5.2.13 G A charge is provided for or imposed for the purposes of *CMCOB* 5.2.11R and 5.2.12R, respectively, regardless of how payment of a *firm's* charge is made, including where a *firm*:

(1) deducts payment from redress received by it on behalf of the *customer*;

(2) arranges for or instructs another *person* to impose a charge on its behalf; or

(3) (in relation to *CMCOB* 5.2.12R) varies the *FS claims management agreement* to provide for the payment of one or more charges that, alone or in combination with any other charge under that agreement or a **connected agreement**, exceed or are capable of exceeding the *FS claims management fee cap*.

5.2.14 G (1) The *FS claims management fee cap* applies to charges paid or payable by a *customer* who is awarded financial redress. Such charges must not exceed the lower of the maximum percentage rate of charge or the maximum total charge.

(2) For example, a *customer* who is awarded financial redress falling in band 1 must not be charged more than the lower of:

(a) 30% (plus VAT) of the redress (the maximum percentage rate of charge in band 1); or

(b) £420 (plus VAT) (the maximum total charge in band 1).

(3) Therefore, a *customer* who is awarded redress of £1,000 must not be charged more than £300 (plus VAT). This is the lower figure out of:

(a) 30% of the redress awarded (30% of £1,000 = £300); and

(b) £420.

(4) However, a *customer* who is awarded redress of £1,450 must not be charged more than £420 (plus VAT). This is the lower figure out of:

(a) 30% of the redress awarded (30% of £1,450 = £435); and

(b) £420.

(5) The fee cap applies where a *customer* is awarded financial redress, irrespective of whether charges are imposed on a ‘no-win-no-fee’ basis, hourly basis, or other basis.

Consequences of breaching FS claims management fee cap

5.2.15 R (1) An *FS claims management agreement* is unenforceable against the *customer* to the extent that it provides for a charge that breaches or is capable of breaching the *FS claims management fee cap*.

(2) If a *firm* imposes a charge in breach of the *FS claims management fee cap*, the *firm* must:

(a) reimburse the amount of any overpayment promptly, irrespective of whether the *customer* has asserted the *firm* has breached the fee cap; and

(b) pay interest to the *customer*, at a rate of 8% per annum simple interest, from the date of overpayment by the *customer*.

5.2.16 G *Firms* are reminded of the need to take reasonable care to establish and maintain effective systems and controls for compliance with applicable requirements and standards (see *SYSC* 3.2.6R).

Charges for financial products and services claims not within scope of complaints rules, or ombudsman or compensation schemes, or where customer is not awarded redress

5.2.17 R (1) This rule applies to charges in relation to a *claim*:

(a) for which the *customer* is not awarded financial redress;

(b) where the *claim*, if made, would not fall:

(i) **within the scope of complaints resolution rules**; or

(ii) within the scope of any statutory ombudsman scheme or any statutory compensation scheme; or

(c) which are excluded from the *FS claims management fee cap* as a result of *CMCOB* 5.2.4R(4).

(2) A *firm* must not enter into an *FS claims management agreement* that provides for the payment of one or more charges in relation to a *claim* that, alone or in combination with any other charge in relation to the *claim* under that agreement or a **connected agreement**, exceed, or are capable of exceeding, an amount that is reasonable in the circumstances, in light of the work to be undertaken by the *firm*.

(3) A *firm* must not impose one or more charges on a *customer* in relation to a *claim* under an *FS claims management agreement* or **connected agreement** that exceed, or are capable of exceeding, an amount that is reasonable in the circumstances, in light of the work undertaken or to be undertaken by the *firm*.

(4) The prohibition in (3) does not apply to charges imposed under a provision in an *FS claims management agreement* or **connected agreement** where the agreement was entered into before this section came into force except in the circumstances described in *CMCOB* 5.2.12R(2)(a)-(d).

5.2.18 G (1) The *FS claims management fee cap* applies to charges for the activities in *CMCOB* 5.2.4R(2) payable or paid by a *customer* who is awarded financial redress for a *claim*, in circumstances where the *claim*, if made, would fall **within the scope of complaints resolution rules**, any statutory ombudsman or any statutory compensation scheme.

(2) In practice, the *FS claims management fee cap* is applicable to most cases where a *customer* is charged for a financial services or financial product *claim*. That is because such claims usually fall **within the scope of complaints resolution rules**, or a statutory ombudsman or statutory compensation scheme. Further, most *firms* which carry out *regulated claims management activities* do not charge *customers* who are not awarded financial redress.

(3) The purpose of *CMCOB* 5.2.17R is to ensure that charges not subject to the fee cap are nevertheless reasonable.

(4) A *firm* is expected to be able to demonstrate what services it has provided, how charges are calculated, and why the charges are reasonable. In assessing whether charges are reasonable, *firms* are expected to take into account, where possible, the applicable level of the *FS claims management fee cap* if the fee cap had applied.

(5) *Firms* are also required to take into account charges imposed under a **connected agreement** including charges imposed for *regulated claims management activity* which are carried on in reliance on an exclusion under the *Regulated Activities Order*, such as services provided by legal professionals.

Interpretation

5.2.19 R (1) The terms in bold in this section (other than in headings or in titles) have the meaning below.

(2) An agreement (agreement A) is a **connected agreement** in relation to an *FS claims management agreement* (agreement B) if:

(a) (i) agreement A enables a charge to be imposed on a *customer* in connection with a *claim*, and

(ii) agreement B provides for *regulated claims management activities* in relation to that *claim*; or

(b) agreement A provides for services in connection with the *regulated claims management activities* provided for in agreement B;

(c) agreement A varies, supplements, novates or replaces agreement B (or vice versa); or

(d) agreement A requires the *customer* to pay a fee to a *lead generator* in respect of the activities performed or to be performed under agreement B.

(3) A *claim* is **within the scope of complaints resolution rules** where:

(a) if received by the *respondent*, it would constitute a *complaint* subject to the *complaints resolution rules*; or

(b) if received by the *MiFID investment firm* or *third country investment firm*, it would constitute a *MiFID complaint* subject to the provisions in *DISP* 1.1A.20R to 1.1A.22R.

5.2.20 G *Firms* are reminded that *complaint* in the *complaints resolution rules* means any oral or written expression of dissatisfaction, whether justified or not, from or on behalf of, a *person* about the provision of, or failure to provide, a financial service, *claims management service* or a *redress determination*, which:

(a) alleges that the complainant has suffered (or may suffer) financial loss, material distress or material inconvenience; and

(b) relates to an activity of that *respondent*, or of any other *respondent* with whom that *respondent* has some connection in marketing or providing financial services or products or *claims management services*, which comes under the jurisdiction of the *Financial Ombudsman Service*.

Amend the following as shown.

6 Post-contractual requirements

…

6.2 Fees and fee collection

Explanation of fees and charges

6.2.1 R (1) …

…

(4) Where the *FS claims management fee cap* applies to any of the services to which the itemised bill relates, the bill must:

(a) explain whether any of the services to which the bill relates fall outside the scope of the *FS claims management fee cap*; and

(b) clearly identify the charges for those services.

Appendix 2
Made rules (legal instrument)

CLAIMS MANAGEMENT INSTRUMENT 2021

Powers exercised

A. The Financial Conduct Authority (“the FCA”) makes this instrument in the exercise of the following powers and related provisions in or under the Financial Services and Markets Act 2000 (“the Act”):

(1) section 137A (The FCA’s general rules);
(2) section 137B (FCA general rules: clients’ money, right to rescind etc);
(3) section 137R (Financial promotion rules);
(4) section 137T (General supplementary powers);
(5) section 138D (Actions for damages);
(6) section 139A (The FCA’s power to give guidance);
(7) section 226 (Compulsory jurisdiction); and
(8) paragraph 13 (FCA’s rules) of Schedule 17.

B. The rule-making powers listed above are specified for the purpose of section 138G(2) (Rule-making instruments) of the Act.

Commencement

C. This instrument comes into force on 1 March 2022.

Amendments to the FCA Handbook

D. The Claims Management: Conduct of Business sourcebook (CMCOB) is amended in accordance with Annex A to this instrument.

E. The Consumer Redress Schemes sourcebook (CONRED) is amended in accordance with Annex B to this instrument.

Amendments to material outside the Handbook

F. The Perimeter Guidance manual (PERG) is amended in accordance with Annex C to this instrument.

Citation

G. This instrument may be cited as the Claims Management Instrument 2021.

By order of the Board
25 November 2021

Annex A

Amendments to the Claims Management: Conduct of Business sourcebook (CMCOB)

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

2 Conduct of business

2.1 General principles

…

2.1.14 R (1) A *firm* must not charge a fee to a *customer* in relation to a *claim* in respect of a *payment protection contract* prior to the later of:

(a) the *customer* withdrawing or deciding not to pursue the *claim*; ~~and~~ or

(b) the settlement of the *claim*.

…

…

4 Pre-contractual requirements

…

4.2 Pre-contract information and advice

…

Provision of information and advice

…

4.2.8 R …

(13) the nature and frequency of updates that the *firm* will give the *customer* on the progress of the *claim*; ~~and~~

(14) the *Financial Ombudsman Scheme* or any other Ombudsman scheme to which the *firm* is subject~~.~~; and

(15) any relevant statutory compensation scheme to which the *firm* is subject.

…

4.2.14 G When providing information concerning any ombudsman or the statutory compensation scheme as required by *CMCOB* 4.2.8R(14) or

CMCOB 4.2.8R(15) or otherwise in *CMCOB* 4.2.8R, a *firm's* communications with a *customer* should:

(a) comply with the *fair, clear and not misleading rule* and the *client's best interests rule*; and

(b) specify whether the scheme or schemes to which the *firm* is subject cover all the activities and/or services which the *firm* proposes to undertake for the *customer*, and specify which activities (if any) are not within the jurisdiction of the scheme or schemes.

4.3 Pre-contract requirements

4.3.1 R …

(6) ask the *customer* if they, whether in *Great Britain* or in another jurisdiction:

(a) have ever been declared bankrupt;

(b) are subject to a bankruptcy petition;

(c) are subject to, or have ever been subject to, an individual voluntary arrangement;

(d) have proposed an individual voluntary arrangement which is yet to be approved or rejected by creditors;

(e) are currently subject to, or have ever been subject to, a debt relief order; or

(f) are or have ever been subject to any other ~~similar~~ process or arrangement which is similar to those listed in (a) to (e) including but not limited to sequestration; and

if so, explain that any damages, compensation or settlement monies might, in certain circumstances be off-set against the *customer's* outstanding debts; and that the *customer* will, where necessary, need to pay the *firm's* fees from funds that are not subject to the processes or arrangements listed above at (a) to (f).

…

…

7 Prudential requirements and professional indemnity insurance

7.1 Purpose

7.1.1 G …

(3) The chapter also includes requirements for *firms* to have professional indemnity insurance if they carry on *advice, investigation or representation in relation to a ~~criminal~~ personal injury claim*.

…

7.3 Calculation of prudential resources

Eligible prudential resources

…

7.3.2 R Table: Items which are eligible to contribute to the prudential resources of a firm

	Item	**Additional explanation**	
…			
3	Reserves (Note 1)	These are, subject to Note 1, the audited accumulated profits retained by the *firm* (after deduction of tax, dividends and proprietors' or *partners'* drawings) and other reserves created by appropriations of share premiums and similar realised appropriations. Reserves also include gifts of capital, for example, from a *parent undertaking*.	
		For the purposes of calculating capital resources, a *firm* must make the following adjustments to its reserves, where appropriate:	
		(1)	a *firm* must deduct any ~~realised~~ unrealised gains or, where applicable, add back in any unrealised losses on debt instruments held, or formerly held, in the available-for-sale financial assets category;
		…	
…			

…

Annex B

Amendments to the Consumer Redress Schemes sourcebook (CONRED)

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

1 General

…

1.4 Scope of a consumer redress scheme

The ~~financial~~ services that a consumer redress scheme can apply to

1.4.1 G In accordance with section 404E(2) of the *Act*, a *consumer redress scheme* can secure redress for consumers of services provided by:

(1) …

…

(3) *authorised persons* in communicating, or approving the communications by others of, invitations or inducements<u>:</u> ~~to engage in investment activity;~~

<u>(a) to engage in investment activity; or</u>

<u>(b) to enter into or offer to enter into an agreement the making or performance of which by either party constitutes a *controlled claims management activity*.</u>

…

…

1.4.4 G Where the ~~financial~~ services to which a scheme applies are those provided by *authorised persons* in carrying on *regulated activities*, the limitation to '*regulated activities*' means that a *consumer redress scheme* cannot apply to services that were provided before the activity in question first became regulated by the *FSA* or *FCA* (e.g. the start date of a scheme applying to general insurance mediation could not be earlier than 14 January 2005, which was the commencement of regulation of general insurance mediation).

1.4.5 G That said, it would be possible for the Treasury by order to widen the type of ~~financial~~ services that a *consumer redress scheme* can cover in order to encompass pre-regulation activities (see section 404G of the *Act*).

Consumers that can be covered by a consumer redress scheme

1.4.6 G (1) For the purposes of a scheme, a consumer can be any person:

(a) who has used, or may have contemplated using, any of the ~~financial~~ services listed in section 404E(2) of the *Act* (see *CONRED* 1.4.1G)~~, or~~;

(b) who has relevant rights or interests in relation to any of those services; or

(c) in respect of whom a person carries on the *regulated activity* of *seeking out, referrals and identification of claims or potential claims* whether that activity, as carried on by that person, is a *regulated activity* or is, by reason of an exclusion provided for under the *Regulated Activities Order* or the *Act*, not a *regulated activity*.

(2) As such, the section 404 power is not limited to retail customers only.

…

1.4.10 G The fact that a consumer "who may have contemplated using" a relevant ~~financial~~ service can be covered by a *consumer redress scheme* is unlikely to catch many cases in practice. One example of a case where it might be used is where there has been widespread discrimination: the section 404 power could be used to ensure redress for consumers who were unlawfully denied access to a ~~financial~~ service contrary to any relevant equality legislation. All the restrictions and evidence requirements explained in *CONRED* 1 would apply equally to any scheme developed in this sort of area.

…

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

…

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

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

Annex C

Amendments to the Perimeter Guidance manual (PERG)

In this Annex, underlining indicates new text.

8 Financial promotion and related activities

…

8.4 Invitation or inducement

Promotional element

…

8.4.4 G The *FCA* considers that it is appropriate to apply an objective test to decide whether a communication is an invitation or an inducement. In the *FCA's* view, the essential elements of an invitation or an inducement under section 21 are that it must both have the purpose or intent of leading a *person* to *engage in investment activity* or to *engage in claims management activity*, and be promotional in nature. So it must seek, on its face, to persuade or incite the recipient to *engage in investment activity* or to *engage in claims management activity*. The objective test may be summarised as follows. Would a reasonable observer, taking account of all the circumstances at the time the communication was made:

(1) consider that the communicator intended the communication to persuade or incite the recipient to *engage in investment activity* or to *engage in claims management activity*, or that that was its purpose; and

(2) regard the communication as seeking to persuade or incite the recipient to *engage in investment activity* <u>or to *engage in claims management activity*</u>.

…

…

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