Solicitors Regulation Authority

Discussion papers

Restricting fees for some claims management services

7 July 2021

We have asked those firms we think may be involved in this area to complete a survey and inform our thinking. If your firm did not receive a link to our survey, you can take part here. This survey also includes the questions included in the discussion paper. We only need one submission per firm, so check with your COLP before completing it.

About this discussion paper

The purpose of this paper is to engage stakeholders and gather information we need to inform our proposals to meet the statutory duty placed on us in the Financial Guidance and Claims Act 2018 ('the Act'). The duty on us to make rules which prevent excessive fees being charged by law firms for all claims management agreements and claims management activities relating to financial products or services.

We particularly welcome views from the firms that we regulate, consumers, other regulators and those who work with law firms in progressing claims for consumers.

Through this discussion paper, we want to explore:

- whether there is anything different about the profile of case types undertaken by law firms as compared to claims management companies that may result in significantly different impacts from fee restrictions.
- how law firms, and different segments of law firms, operate which may impact on their sustainability as a result of fee restrictions and therefore the ability of consumers to access claims management services from law firms.

We will need law firms and other stakeholders to provide evidence supporting their response if they identify any detrimental or beneficial impacts or unintended consequences.

We are seeking views from 7 July 2021 until 1 October 2021.

We will then collate and analyse all the responses and information received to help inform our subsequent public consultation.

We will consider our options for consultation in discussion with the Financial Conduct Authority (FCA) and HM Treasury.

Open all [#]

The duty placed on us

1. Consumers can make claims for redress directly to businesses that might have mis-sold them financial products and services. Free-to-use statutory ombudsman and compensation schemes also exist for claims against certain financial businesses. These claims do not involve a legal process and are designed to be to directly accessible by claimants.
2. However, a market also exists for claims management activities. These activities can involve seeking out and identifying potential claims for redress and then advising, investigating or representing a consumer in relation to that claim. Firms in the market includes claims management companies (CMCs) authorised by the FCA as well as law firms that we regulate.
3. In addition to the transfer of regulation of CMCs to the FCA, the Financial Guidance and Claims Act 2018 ("the Act") introduced among other changes to the regulation of claims management activities:

- from 1 July 2018, an interim prohibition on CMCs, SRA authorised firms and regulated individuals from charging fees of more than 20 percent (exclusive of VAT) of the amount recovered for the client in satisfaction of their mis-sold payment protection insurance (PPI) claim
- a duty on us to make rules which prevent excessive fees being charged by law firms for all claims management agreements and claims management activities relating to 'financial products or services'
- a power for us to make rules in relation to fees charged for other claims management agreements and activities, for example, personal injury[1] [#n1].

4. This discussion paper focuses on the new duty placed on us to make rules that secure an 'appropriate degree of protection for consumers against excessive charges' and how we might propose to carry out that duty.
5. The Act confirms that the rules we make will not apply to reserved legal activities, for example, where a firm is carrying out conduct of litigation which relates to a claim for a mis-sold mortgage. These activities can only be undertaken by a firm authorised by the SRA or a firm authorised by another legal services regulator.
6. The legislation does not provide a definition of an excessive fee<, nor does it set out indicative guidance on what would be regarded as an excessive fee. This gives us the flexibility to consider different options as to how we take such steps. We could propose to address the potential harm by introducing fee restrictions and there are various forms this might take. We could, for example, cap fees by

introducing a fixed percentage from the amount of compensation recovered (as with the interim fee cap for PPI) or prescribe a fixed fee for all claims. People responding to this paper will have views on how we might restrict fees. Or we could take a less interventionist approach for example, by requiring greater transparency about fees charged and work that would be done to progress a claim and that the fees should reasonable.

7. The FCA is under a similar duty to make rules which will restrict the fees that CMCs regulated by them can charge for claims management agreements and claims management activities relating to 'financial products or services'. The FCA published a consultation paper setting out its proposals which closed on the 21 April 2021[2] [#n2]. They are proposing a banded percentage fee restriction by redress value. We set out details of the FCA's proposal below.
8. Other legal regulators, such as the Bar Standards Board and CILEx Regulation, have the power to make rules but are not under a statutory duty to do so.
9. Putting in place the right measures and getting the level of any restriction on fees right is a complex task. If restrictions are set too high, it might encourage overcharging. If it is set too low, it could inadvertently result in law firms moving into other sectors or leaving the market completely if they are unable to remain profitable. While protecting consumers from harm and arming them with information to help them make informed choices about whether to seek professional help to make a claim, we believe that the restrictions need to allow enough firms to make a reasonable profit from such work to maintain an effective market.
10. We also need to exercise our duty to make rules in a way that is compatible with the regulatory objectives set out in the Legal Services Act 2007. The particular regulatory objectives most relevant in these circumstances are the duty to promote the public interest, improve access to justice, promote and protect the interests of consumers and to promote competition in the provision of services. Therefore, it is important we review our options to make sure that there is parity and equal treatment between providers of claims management services, regardless of their regulator, unless there are reasons why it is not appropriate to do so.

The FCA's proposals

The proposals

11. The FCA proposes to cap the fees that may be charged for non-PPI related financial products and services claims management activities that lead to redress where those claims are within the remit of a statutory ombudsman scheme or compensation scheme. For all other fees on financial product and services claims where the

cap does not apply, it is proposing to require that the charges be 'no more than is reasonable'.

12. The FCA's proposed cap has two parts - a maximum percentage rate of charge and a maximum total fee. The cap on rate of charge ranges from 30 percent for lower value redress below £1,500, to 15 percent for higher value redress of £50,000 and above. The cap on the total fee charged ranges from £420 for lower value redress below £1,500, to £10,000 for higher value redress of £50,000 and above. The FCA says that on any one claim the total fee to the consumer must not exceed the lower of the maximum percentage rate and the maximum total fee.

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

Source: the FCA

3. The FCA is also proposing to introduce disclosure requirements on CMCs to provide consumers with key information, such as giving consumers more information about how the fees they pay will be calculated and better signposting to the free alternative routes to make a claim and, in particular, alerting the consumer to the fact that they can make a claim themselves.
4. We refer you to the FCA's consultation paper for the full details of the fee restrictions and information obligations that it has consulted upon.

FCA's basis and assumptions

5. The FCA, from information that it has gathered, identified significant market failures and drivers of harm stemming predominantly from information asymmetry. The FCA's analysis of the market for CMC services found justifications for a fee cap.
6. The FCA reports that CMC fees are generally calculated as a percentage of the redress paid on a claim. All the CMCs that provided information to the FCA charged on a no win no fee business model. The FCA has stated that some consumers currently pay fees[3] [#n3] of more than 40 percent of the redress they receive. It is concerned that if the fee is too large, it prevents redress from effectively achieving its goal of helping consumers.

7. In a well-functioning market, consumers would be able to understand the value that CMCs can provide and make decisions based on that information. However, the FCA's consumer survey showed that consumers appear unable to judge that value. In particular, they tended to:

- overvalue the services that CMCs provide
- lack information about the services CMCs provide
- misjudge the options available to them in making claims, and
- undervalue the redress and underestimate the fees they will pay.

8. The FCA says that its proposals are based on its view that consumers should be charged fees which reflect the value of the service they receive. Its proposed caps are not designed to set what a fair price is, but an upper limit to prevent excessive fees being charged, with price competition below the upper limit. CMCs should enable consumers to make better-informed decisions about the value of engaging professional help and the alternative options available, some of which are free.
9. The FCA's proposed fee restriction is based on estimated individual value received by a consumer using a CMC, measuring, and monetising the saved time and effort and increased confidence received by CMC users. The FCA has used data on time spent by CMCs managing claims, time spent by a consumer on progressing a claim using a CMCs, and its regulatory judgement about the work required by a consumer to make a claim without help. It also draws on the responses to consumer questionnaires sent to clients of CMCs. The FCA's estimates include several assumptions, but it is confident it has made sufficient allowance for any imperfections in the data.

Adopting the FCA approach for law firms

An appropriate benchmark

20. The process for making a claim is the same regardless of whether it is made by the consumer or a professional representative - whether that is a CMC or law firm. The FCA has more comprehensive data than we do, and has used its data to develop its proposals. We would therefore need a good reason to take a different approach from that which has been proposed by the FCA.
21. Using the FCA's proposal as a benchmark recognises the FCA as the lead regulator for this issue. Given its more complete knowledge about the work that is carried on in this area and the data it is been able to assimilate to enable it to assess the market and identify the relevant harm, this appears to us to be appropriate.
22. We are therefore using the FCA's proposal as a starting point given that the process for making a claim is the same. Bearing in mind that any fee restrictions we make will not apply to reserved legal

activities, we have little evidence to suggest that the work done by solicitors on claims relating to financial products and services is different from that done by CMCs, either in terms of effort, value, cost, or increased confidence. In addition, we have no, or very little, evidence that law firms achieve a different outcome for consumers.

23. By adopting the FCA's proposals our view is that it would remove the possibility of regulatory arbitrage, avoid potential public interest issues, consumer detriment and adverse impact on competition. It also reduces the potential for consumer confusion about pricing between different types of business. These advantages are considerable and without countervailing evidence to suggest that this approach is not appropriate because of the way in which law firms operate or add value, it is our preferred option.
24. We agree with the FCA that consumers should receive value for money if they use regulated professionals to help make a claim and that the fees they pay should reflect the benefits. We currently have no reason to believe, or information to suggest, that the FCA's model used to form its proposals does not apply equally to law firms operating in this market.
25. In addition to any fee restrictions we, similar to the FCA, would want to use our transparency rules [https://indemnity.sra.org.uk/solicitors/standards-regulations/transparency-rules/] as a mechanism for making sure law firms give an upfront description of, and price for, the services that they offer in processing and managing a claim.

Law firms engaged in this work

26. The number of law firms involved in claims management activities relating to financial products or services has not remained static as firms have taken advantage of opportunities to become involved in new claim areas outside of PPI or decided not to carry on offering services because of other issues.
27. We want, through this discussion paper, to gather better information about those law firms that are involved in this work and, therefore, caught by any fee restrictions or other obligations we might impose. It is not currently a requirement for a law firm to tell us if it is involved in this work. We do not have information about the business models that law firms use in doing this type of work and do not routinely collect any data about the fees charged by law firms or how those fees are determined. We are in a different position to the FCA that regulates on an activity basis and therefore can identify firms which carry out activities in this sector and target such firms to collect data and for engagement purposes.
28. We have identified a sample of 2,000 firms that might be carrying on claims management work. We surveyed these law firms to try and obtain information about the claims management work being done in these areas, including their fee models and the work done for their clients. The response was incomplete and we, therefore,

need to take steps to get further relevant information to inform options for consultation.

29. We understand that most law firms will take their fees for helping a consumer with their claim as a percentage of the redress that is awarded to that These take the form of conditional fee or damages-based agreements[4] [#n4] and are similar to the fee models that CMCs have in place. Our PPI thematic review noted that all firms that the review engaged with were working on this basis - commonly referred to as 'no win, no fee' arrangement. We have no information to confirm whether or not this is the case in relation to the wider scope of claims relating to financial products and services or if law firms use a different charging method, for example a fixed fee or fixed hourly rates for processing a claim.
30. In addition, we have little data about why consumers will engage the services of a law firm for claims management activity related to financial products and services where those claims are within the remit of a statutory ombudsman scheme or compensation scheme. Are there different reasons than why they might engage a CMC? Does the law firm offer a service that is significantly different to a CMC? We want to understand whether the benefits of using and behaviours of a law firm are the same, similar, or different to that of a CMC.
31. This discussion paper is an opportunity to check our starting point of the use of the FCA's proposals as a benchmark for law firms. This paper provides stakeholders with the opportunity to provide evidence to us of whether the FCA proposals are appropriate for the legal services market or if there are significant differences to consider.

Question 1: Do you agree that there will be consumer benefit to introducing fee restrictions to protect customers of law firms from paying excessive fees for claims management work related to financial products and services that are within the remit of a statutory ombudsman scheme or compensation scheme? Please provide evidence supporting your view

Question 2: Do you agree with the scope of the FCA's proposed cap (noting it excludes reserved work) can be appropriately applied to law firms? Please provide evidence to support your view

Question 3: Do you agree that the FCA's assumptions and proposals can be appropriately applied to law firms? Please provide evidence supporting your view

Question 4: Are there any other options for preventing excessive fees that we should be considering? Please provide an explanation why you think these would better meet the Regulatory Objectives of the Legal Services Act

Impacts

32. At present we have no data that would suggest that negative impacts for solicitors or consumers in groups with protected characteristics are likely to arise if we adopted the FCA's proposals. We will continue to monitor equality and diversity implications as we engage during our engagement.
33. As stakeholders engage with this discussion paper, we will become familiar with any common issues or risks that arise and how consumers might be affected. This information will also help identify and assess any unintended impacts and how these might be mitigated.
34. The FCA's position is similar in that it does not consider that the proposals adversely impact any of the groups with protected characteristics under the Equality Act 2010. The FCA has said that its proposals will help older people, who are more likely to have pensions claims, and younger people who are more likely to have loans claims.
35. We welcome any views, evidence or information that would help us consider the impacts on consumers, law firms and others, including those with protected characteristics, as we progress work in response to our duty to make rules.

Question 5: Does using the FCA's proposal as a benchmark for law firms bring about any unintended consequences and if yes, what are they and is there any evidence in support?

Timescales and next steps

36. The Act does not a set a firm target date for when we must make rules. We have engaged with both HM Treasury and the Ministry of Justice to make sure that expectations that we are progressing work to implement rules within a reasonable time are being met. The aim of this discussion paper is to allow us to develop a better understanding of the likely impacts of fee restrictions on law firms and their business models to enable us to exercise the duty that has been placed on us appropriately.
37. The following table sets out our provisional timetable:

SRA discussion paper	Summer 2021
FCA policy statement	Autumn 2021
Consultation on our proposals	Winter 2021/Early 2022
Review of responses and confirmation of SRA position	Summer 2022
Implementation	To be confirmed

Footnotes

1. We have no intention currently to exercise this power as we no evidence that there is a systemic problem indicating that there is a

pressing need to take action in these areas of work. Law firms involved in personal injury claims should for example, be mindful of our warning notice which sets out our expectations including the need to act on instructions and being clear about costs. However, we will keep this under review to understand whether consumers are subject to excessive fees in these other areas but does not form the basis of this discussion paper.

2. https://www.fca.org.uk/publications/consultation-papers/cp21-1-restricting-cmc-charges-financial-services-and-products-claims [https://www.fca.org.uk/publications/consultation-papers/cp21-1-restricting-cmc-charges-financial-services-and-products-claims]
3. Communicated as ‘no win-no fee’ agreements (NWNF)/damages-based agreements (DBAs)
4. All CMCs included in the FCA’ s sample charged on a no-win, no-fee basis though it was acknowledged that some CMCs may charge a fixed fee or hourly rates. The FCA in its consultation set out the average revenue that CMCs, included in its sample, make in respect of certain financial products or services.