2007 Update Consumer Complaints and Compensation: A Guide for the Financial Services Market

Chapter 1

1.1.2 line 1 “have” not “has”.

1.2.1 para. 3 line 3 “an organisation” should read “organisations”.

1.2.2.1 para 2 line 3 replace “difficult”with “hard”. Last line replace “it” with “that this”.

1.2.2.2 para 2 line 2 replace “the” with “its”.

Para. 6. Add “Both Legal & General and the Royal Bank of Scotland subsequently changed their mind about time-barring endowment complaints.”

1.3.1 para 2 after “complaints” insert references to Final Notices to Idris Nagaty, 14 September 2005 at para. 15and to Loans.co.uk Limited, 25 October 2006 at paras 2.5(f) & 5.29. Line 5 insert “the fact that” before “this”.

1.3.2.1 para 7. The following Final Notices relate to complaint handling: Steven Zimmer, 7 February 2003, Friends Provident Life and Pensions Limited, 15 December 2003, John Edward Nixon and Bowland Group Limited (BGL), 19 January 2004, Allied Dunbar Assurance plc, 18 March 2004, Capita Trust Company Limited, 20 October 2004 at para. 9.3, Abbey National plc, 25 May 2005, Idris Nagaty, 14 September 2005 at paras 14-15, Guardian Assurance plc and Guardian Linked Life Assurance Limited, 9 January 2006, Rainbow Homeloans Limited, 26 June 2006 at paras. 4.17-18, Langtons IFA Ltd, 21 September 2006, Best Advice Mortgage Network Ltd, 23 October 2006, Loans.co.uk Ltd, 25 October 2006, Home & County Mortgages Ltd, 6 December 2006, Redcats (Brands) Ltd, 20 December 2006, GE Capital Bank Ltd 30 January 2007, Cathedral Motor Company Limited 26 February 2007, Sesame Limited, 19 April 2007, Kilminster Financial Management, 11 June 2007, Eric Stevens, 1 October 2007, Homebuyer Securities Ltd, 16 November 2007, Next Generation Mortgages Limited, 19 November 2007 and Jonathan Hardie, 28 January 2008.

The Financial Services and Markets Tribunal had dealt with complaints in Sodha, 16 May 2006, Agarwala, 20 December 2006 & 5 February 2007, Haworth, 27 March 2007.

1.3.2.3 line 4 after “information” insert fn “Final Notice to Jonathan Hardie, 28 January 2008.

1.4.1.1 Fn DISP 1.5.11 is now DISP 1.10.9R.

1.4.1.2 para. 2 Corporate meddling to restrict the numbers of complaints upheld played a prominent role in Final Notices to Abbey National plc, 25 May 2005, Guardian Assurance plc and Guardian Linked Life Assurance Limited, 9 January 2006, Sesame Limited, 19 April 2007 and one can surmise other Final Notices.

1.4.1.4 line 10 should read “that regularly form”.

1.4.1.6 last para. line 4 should read “if the latter is prepared to listen”.

1.4.2.1 para 7 line 8 should read: “situation concerned. It is vital, though,

1.5 line 4 should read “with the latter’s”. Line 6 add to the sentence “and lack the resources to do so.”

1.6.2.3 para. 1 line 5, insert after “IOB” “, the Banking and Building Societies Ombudsman Schemes”.

Para 4 line 5 “to which”

Add to the end of the paragraph. In the year 2006-2007, 4,366 cases, 4.5% of the total number at FOS concerned mortgages although some would have fallen within its jurisdiction before October 31st 2004.

1.6.2.4 line 4 insert “had” after “had”. Line 8 insert after “IFAs” which rarely signed up for the voluntary jurisdiction”.

1.6.2.5 Since then, we have had significant fines for Abbey National plc, 25 May 2005, Guardian Assurance plc and Guardian Linked Life Assurance Limited, 9 January 2006 for mortgage endowment complaint handling and Sesame Limited, 19 April 2007 in connection with precipice bonds.

1.7 para 3 line 6 should read “reflected in”. Para 5 last sentence should read “These waivers have since been removed”.

Fn 58 Howard Davies revealed in a speech in September 2005 that a reason for not launching a mortgage endowment review was a fear that it would bankrupt a number of large insurers: “Policy probe would have seen collapses”, Money Marketing 29 September 2005. See also “Folger says endowment probe would have cost £5.5 billion”, Money Marketing, 6 October 2005. That estimate already looks on the low side.

Chapter 2

2.1 para 1 line 2 should read: “DISP 1.4.1R(2) requires firms to assess complaints “fairly”. DISP 1.4.2G suggests that relevant factors should include

similarities with other complaints received by the firm, relevant guidance issued by the FSA, other relevant regulators, FOS or a former scheme and an "appropriate analysis" of FOS decisions concerning similar complaints. Finally, DISP 1.4.5G reminds firms that in dealing with mortgage endowment cases, they must calculate the compensation in accordance with DISP App. 2." Paragraphs 2-4 should be deleted.

Add to fn 1. More recently, FOS has dispensed with the Decision Trees and adopted the Tiner Letter and FSA approach to mortgage risk.

2.2.2 para 1 line 4 should read "for a breach of any provisions…" Para. 5, line 6 insert "all"before "this".

2.2.4 para. 1 line 7 replace "two" with "twenty one of which six have important things to say on decisions about the substance of the complaint."

Fn 16 Steven Zimmer, 7 February 2003, Friends Provident Life and Pensions Limited, 15 December 2003, John Edward Nixon and Bowland Group Limited (BGL), 19 January 2004, Allied Dunbar Assurance plc, 18 March 2004, Capita Trust Company Limited, 20 October 2004 at para. 9.3, Abbey National plc, 25 May 2005, Idris Nagaty, 14 September 2005 at paras 14-15, Guardian Assurance plc and Guardian Linked Life Assurance Limited, 9 January 2006, Rainbow Homeloans Limited, 26 June 2006 at paras. 4.17-18, Langtons IFA Ltd, 21 September 2006, Eric Stevens, 1 October 2007, Best Advice Mortgage Network Ltd, 23 October 2006, Loans.co.uk Ltd, 25 October 2006, Home & County Mortgages Ltd, 6 December 2006, Redcats (Brands) Ltd, 20 December 2006, GE Capital Bank Ltd 30 January 2007, Cathedral Motor Company Limited 26 February 2007, Sesame Limited, 19 April 2007, Kilminster Financial Management, 11 June 2007, 16 November 2007, Homebuyer Securities Ltd, 16 November 2007, Next Generation Mortgages Limited, 19 November 2007. Friends Provident, Allied Dunbar, Abbey National, Guardian, Sesame and Rainbow are probably the most important from that point of view.

Line 10 add "after 2004 and the FSA's 2005 Review of firms' approach to time barring mortgage endowment complaints (MECs)."

Para 2 line 1 replace "FOS's Endowment Mortgage Complaints Guide" with "the FOS's technical papers on endowments". Insert a footnote listing them:

mortgage endowments – complaints about pre-"A Day" sales
mortgage endowments – complaints about post-"A Day" sales
mortgage endowment redress in more complicated cases
treatment of windfalls
complaints about guaranteed investment performance

Para. 2 line 7 delete “have”. In the last line of the para. move the bracket to the end of the sentence.

Fn 18 ICOBS 5.1.4G(2) & 8.1.2R and COBS 17.1.3R.

Para 5 line 12 delete “recent”.

2.2.5 para 4 line 7 delete the second “criteria”.

Chapter 3

3.1 Add to the end.

The same analysis essentially applies to mortgage and general insurance sales. The difference is that the equivalent of “A” day for mortgages was 31 October 2004 and General Insurance 14 January 2005. Before those dates, firms who had joined the Mortgage Compliance Code Board and the General Insurance Standards Council had to observe the rules of those organizations. The legal status of these rules in a dispute involving a consumer is not easy to know. A court could well find that the rules were incorporated in any contract between the firm and a customer if they were part of what the firm was offering when doing business. Either way, FOS would be entitled to rely on a Mortgage Code or GISC rule in reaching a conclusion as to what was good practice at the time and is fair and reasonable now.

3.2.1.1 para 1 line 6 replace “common” with “case”.

3.2.1.2 para 8 insert “law of” before “agency”.

Fn 36 ICOB should read “ICOBS”. Add to the sentence “with regard to post N(GI) and N(M) sales.”

3.3.3 Para 3 Insert a footnote in the second sentence

Seymour v. Ockwell [2005] PNLR 758 at 784 & Shore v. Sedgwick Financial Services Ltd [2007] EWHC 2509 at paras161-168.

Para 4 line 7 should read “are all couched…. and assume a”.
Para 5 add “S” to “COB” and “ICOB”.
Para 8 “seven” should read “eight”.

3.4.1 para 7 replace “current” with “original”. Replace from “Finally” to the start of the last paragraph with the following:

“COBS 9.2, heavily influenced by MiFID, provides far more detail on the subject: It says:

“9.2.1R(2) When making the personal recommendation or managing his investments, the firm must obtain the necessary information regarding the client's:
(a) knowledge and experience in the investment field relevant to the specific type of designated investment or service;
(b) financial situation; and
(c) investment objectives;
so as to enable the firm to make the recommendation, or take the decision, which is suitable for him.

COBS 9.2.2R
(1) A firm must obtain from the client such information as is necessary for the firm to understand the essential facts about him and have a reasonable basis for believing, giving due consideration to the nature and extent of the service provided, that the specific transaction to be recommended, or entered into in the course of managing:
(a) meets his investment objectives;
(b) is such that he is able financially to bear any related investment risks consistent with his investment objectives; and
(c) is such that he has the necessary experience and knowledge in order to understand the risks involved in the transaction or in the management of his portfolio.
(2) The information regarding the investment objectives of a client must include, where relevant, information on the length of time for which he wishes to hold the investment, his preferences regarding risk taking, his risk profile, and the purposes of the investment.
(3) The information regarding the financial situation of a client must include, where relevant, information on the source and extent of his regular income, his assets, including liquid assets, investments and real property, and his regular financial commitments.

COBS 9.2.3
The information regarding a client's knowledge and experience in the investment field includes, to the extent appropriate to the nature of the client, the nature and extent of the service to be provided and the type of product or transaction envisaged, including their complexity and the risks involved, information on:
(1) the types of service, transaction and designated investment with which the client is familiar;
(2) the nature, volume, frequency of the client's transactions in designated investments and the period over which they have been carried out;
(3) the level of education, profession or relevant former profession of the client.

COBS 9.2.4R

A firm must not encourage a client not to provide information for the purposes of its assessment of suitability.

COBS 9.2.5R Reliance on information
A firm is entitled to rely on the information provided by its clients unless it is aware that the information is manifestly out of date, inaccurate or incomplete.

COBS 9.2.6R Insufficient information
If a firm does not obtain the necessary Information to assess suitability, it must not make a personal recommendation to the client or take a decision to trade for him….

COBS 9.2.8R Professional clients (MiFID and equivalent third country business)
(1) If a firm makes a personal recommendation or manages investments for a professional client in the course of MiFID or equivalent third country business, it is entitled to assume that, in relation to the products, transactions and services for which the professional client is so classified, the client has the necessary level of experience and knowledge for the purposes of COBS 9.2.2R (1)(c).
(2) If the service consists of making a personal recommendation to a per se professional client, the firm is entitled to assume that the client is able financially to bear any related investment risks consistent with his investment objectives for the purposes of COBS 9.2.2R (1)(b).

COBS 9.2.9R Friendly society life policies
(1) When recommending a small friendly society life policy, a firm, for the purpose of assessing suitability, need only obtain details of the net income and expenditure of the client and his dependants.
(2) A friendly society life policy is small if the premium:
(a) does not exceed £50 a year; or
(b) if payable weekly, £1 a week.
(3) The firm must keep for five years a record of the reasons why the recommendation is considered suitable."

MCOB is similarly detailed in 4.7.2-11 following the trend towards merging the know your customer rules with those relating to suitability. The most recent provision on this subject is in ICOBS 5.3.2R which is far briefer than the others on this subject:

"In taking reasonable care to ensure the suitability of advice on a payment protection contract or a pure protection contract a firm should:
(1) establish the customer's demands and needs. It should do this using information readily available and accessible to the firm and by obtaining

further relevant information from the customer, including details of existing insurance cover".

3.4.3 para 6 line 3 replace "letter" with "report".

3.4.4 Para 3 Insert at the end of this paragraph a fresh paragraph

This approach of making the adviser responsible for errors in the fact-find can be found in Shore v. Sedgwick Financial Services Ltd [2007] EWHC 2509 at 123-124 where the fact-find referred to investments that did not exist. The adviser was found to be responsible for this.

para 4 replace the first six words with

"MCOB, COBS and ICOBS all allow firms now to rely on information from third parties so long as it is reasonable to do so. COBS 9.2.5R says:

"A firm is entitled to rely on the information provided by its clients unless it is aware that the information is manifestly out of date, inaccurate or incomplete."

ICOBS 2.5.3G, though, is more subtle. Sub-paragraph (1) only allows firms to rely on third parties when to do so would be compatible with Principles 1 to 3. Reasonable reliance then seems to be limited under (2) to information provided to the firm in writing by an unconnected authorised person or professional firm."

Delete the first sentence and replace "As we have seen" from para. 5 line 1 with "Under ICOBS,".Delete the last sentence of para 5 and para 6 which are no longer correct in the light of ICOBS 5.3.1R.

Add to para 9 instead

"In that situation, COBS 9.2.6R is clear:

"If a firm does not obtain the necessary information to assess suitability, it must not make a personal recommendation to the client or take a decision to trade for him."

3.4.5 Line 10 replace "that…. level" with " with a premium in excess of the maximum allowed without any net relevant earnings"

3.5.1 para 5 replace "current" with "original". At the end of that paragraph insert a new series of paragraphs:

The new COBS rules are more fragmented. They start with the key provision 9.2.9R(1):

> (1) A firm must take reasonable steps to ensure that a personal recommendation, or a decision to trade, is suitable for its client."

There is then a great deal of detail, as we have seen on "know your customer". COBS 9.3 then offers a modest amount of guidance on suitability.

ICOBS uses a similar formula to COBS 9.2.9R In 5.3.1 one finds:

> "A firm must take reasonable care to ensure the suitability of its advice for any customer who is entitled to rely upon its judgement."

For protection and PPI policies, ICOBS 5.3.2G(2) suggests that an adviser should

> "take reasonable care to ensure that a policy is suitable for the customer's demands and needs, taking into account its level of cover and cost, and relevant exclusions, excesses, limitations and conditions."

MCOB 4.7 has the most convoluted set of suitability rules. MCOB 4.7.2R begins with a basic suitability rule:

> "A firm must take reasonable steps to ensure that it does not make a personal recommendation to a customer to enter into a regulated mortgage contract, or to vary an existing regulated mortgage contract, unless the regulated mortgage contract is, or after the variation will be, suitable for that customer".

MCOB 4.7.4R elaborates

> "(1) a regulated mortgage contract will be suitable if, having regard to the facts disclosed by the customer and other relevant facts about the customer of which the firm is or should reasonably be aware, the firm has reasonable grounds to conclude that:
> (a) the customer can afford to enter into the regulated mortgage contract;
> (b) the regulated mortgage contract is appropriate to the needs and circumstances of the customer; and
> (c) the regulated mortgage contract is the most suitable of those that the firm has available to it within the scope of the service provided to the customer;
> (2) no recommendation must be made if there is no regulated mortgage contract from within the scope of the service provided to the customer which is appropriate to his needs and circumstances; and

(3) if a firm is dealing with an existing customer in arrears and has concluded that there is no suitable regulated mortgage contract for the purposes of MCOB 4.7.2 R, the firm must nonetheless have regard to MCOB 13.3.2 E(1)(a), (e) and (f) (see also MCOB 13.3.4 G(1)(a) and (b)).”

In assessing affordability, MCOB 4.7.7E suggests that

> “a firm should give due regard to the following:
> (a) information that the customer provides about his income and expenditure, and any other resources that he has available;
> (b) any likely change to the customer's income, expenditure or resources; and
> (c) the costs that the customer will be required to meet once any discount period in relation to the regulated mortgage contract comes to an end (on the assumption that interest rates remain unchanged).”

On needs and circumstances, MCOB 4.7.11E operates on similar lines requiring the adviser to consider

> “(a) whether the customer's requirements meet the eligibility criteria for the regulated mortgage contract (for example, the amount that the customer wishes to borrow, or the loan-to-value ratio);
> (b) whether the customer should have an interest-only mortgage, a repayment mortgage, or a combination of the two;
> (c) whether the customer has a preference for a particular term;
> (d) whether the customer has a preference or need for stability in the amount of required payments, especially having regard to the impact on the customer of significant interest rate changes in the future;
> (e) whether the customer has a preference or need for payments to be reduced at the outset (for example, a loan with an initial discount rate period);
> (f) whether the customer intends to make early repayments; and
> (g) whether the customer has a preference or need for any other features of a regulated mortgage contract (for example, payment holidays).”

As to the loan itself, there is a presumption in favour of the cheapest option contained in MCOB 4.7.13E(1) However, MCOB 4.7.14G(1) softens that by pointing out that

> “different customers are likely to identify different pricing elements as being of most importance. For example, it may be the overall cost, the cost over the first five years, or the absence of early repayment charges that a customer considers most important.”

Sub-paragraph (2) indicates that a recommendation can be made on other grounds such as

> “the speed or quality of service of different mortgage lenders, the policies of mortgage lenders on further lending or capital repayments, the underwriting stance of mortgage lenders or the customer's wish for a regulated mortgage contract that is compliant with Islamic law.”

A firm does not need to consider

> “whether it would be preferable for the customer to:
> (1) purchase a property by using his own resources, rather than by borrowing under a regulated mortgage contract;
> (2) rent a property, rather than purchase one; or
> (3) delay entering into a regulated mortgage contract until a later date (on the grounds that property prices would have fallen in the intervening period, or that the interest rate in relation to the regulated mortgage contract would be lower, or both).”

There is a specific rule for consolidating debts: MCOB 4.7.6R. The adviser

> “must also take account of the following, where relevant, in assessing whether the regulated mortgage contract is suitable for the customer:
> (1) the costs associated with increasing the period over which a debt is to be repaid;
> (2) whether it is appropriate for the customer to secure a previously unsecured loan; and
> (3) where the customer is known to have payment difficulties, whether it would be more appropriate for the customer to negotiate an arrangement with his creditors than to take out a regulated mortgage contract.”

MCOB 4.7.9G also offers guidance on advising a customer in arrears.

Delete the current para 8.

3.5.2 Para 5 replace the start of the first sentence with

“The original version of ICOB may have represented…” ICOB 4.3.1(3) read:”

Insert after para 6. “In any event, in a return to the traditional approach, ICOBS has deleted this provision in favour of a more conventional suitability approach in ICOB 5.3.1 and 5.3.2 described above.”

Para 9 delete “being phased” and replace “will be” with “is”.

3.5.3 para 2 after “suitability letter” insert “now a suitability report”. Replace the next sentence and the quote with

“COBS 9.4.7R summarises the requirements for such a document by saying:

“The suitability report must, at least:
(1) specify the client's demands and needs;
(2) explain why the firm has concluded that the recommended transaction is suitable for the client having regard to the information provided by the client; and
(3) explain any possible disadvantages of the transaction for the client.”

Intriguingly, the old 5.3.16R only required the letter to contain a summary of the disadvantages of the transaction.

Fn 98 replace the reference with “ICOBS 5.2.2R”.

3.6.1 para 11. Replace “current” with “initial” and “have” with “had.

Paras 12 and 13, replace “is” was “was”

Insert after the last paragraph

“COBS now has a series of different provisions which perform a similar function. The key rule is COBS 2.2.1R(1):

> “A firm must provide appropriate information in a comprehensible form to a client about:
> (a) the firm and its services;
> (b) designated investments and proposed investment strategies; including appropriate guidance on and warnings of the risks associated with investments in those designated investments or in respect of particular investment strategies;
> (c) execution venues; and
> (d) costs and associated charges;
> so that the client is reasonably able to understand the nature and risks of the service and of the specific type of designated investment that is being offered and, consequently, to take investment decisions on an informed basis.”

Awkwardly, under (4), this only applies in non-MiFID cases in relation derivatives, warrants or stock lending for retail customers.

COBS 6.1 then supplements COBS 2.2 with lengthy disclosure requirements. COBS 6.1.9R deals with costs and charges:

> “A firm must provide a retail client with information on costs and associated charges including, if applicable:
> (1) the total price to be paid by the client in connection with the designated investment or the designated investment business or ancillary

services, including all related fees, commissions, charges and expenses, and all taxes payable via the firm or, if an exact price cannot be indicated, the basis for the calculation of the total price so that the client can verify it. The commissions charged by the firm must be itemised separately in every case;
(2) if any part of the total price referred to (1) is to be paid in or represents an amount of foreign currency, an indication of the currency involved and the applicable currency conversion rates and costs;
(3) notice of the possibility that other costs, including taxes, related to transactions in connection with the designated investment or the designated investment business may arise for the client that are not paid via the firm or imposed by it; and
(4) the arrangements for payment or other performance."

COBS 6.1.4 deals with information about the firm and its services. However, only sub-paragraph (7) is relevant to complaints:

> "COBS 6.1.4R Information about a firm and its services
> A firm must provide a retail client with … if relevant:
> (7) the nature, frequency and timing of the reports on the performance of the service to be provided by the firm to the client in accordance with the rules on reporting to clients on the provision of services (COBS 16)".

Portfolio managers must observe COBS 6.1.6R

> (1) A firm that manages investments for a client must establish an appropriate method of evaluation and comparison such as a meaningful benchmark, based on the investment objectives of the client and the types of designated investments included in the client portfolio, so as to enable the client to assess the firm's performance.
>
> (2) If a firm proposes to manage investments for a retail client, the firm must provide the client with such of the following information as is applicable:
> (a) information on the method and frequency of valuation of the designated investments in the client portfolio;
> (b) details of any delegation of the discretionary management of all or part of the designated investments or funds in the client portfolio;
> (c) a specification of any benchmark against which the performance of the client portfolio will be compared;
> (d) the types of designated investments that may be included in the client portfolio and types of transaction that may be carried out in those designated investments, including any limits; and
> (e) the management objectives, the level of risk to be reflected in the manager's exercise of discretion, and any specific constraints on that discretion."

COBS 14 lays down the key features regime for packaged products.

> COBS 14.2.1
> A firm that sells:
> (1) a packaged product to a retail client, must provide a key features document and a key features illustration to that client (unless the packaged product is a unit in a simplified prospectus scheme or an EEA simplified prospectus scheme);
> (2) a life policy that is not a reinsurance contract to a client, must provide the Consolidated Life Directive information to that client;
> (3) the variation of a life policy or personal pension scheme to a retail client, must provide that client with sufficient information about the variation for the client to be able to understand the consequences of the variation (unless the policy or scheme is a SIPP);
> (4) a cash-deposit ISA or cash-deposit CTF to a retail client, must provide a key features document to that client;
> (5) a unit in a simplified prospectus scheme to a client, must offer the scheme's current simplified prospectus to that client. In addition, if the client is a retail client present in the EEA, the firm must provide the simplified prospectus to the client together with:
> (a) enough information for the client to be able to make an informed decision about whether to hold the units in a wrapper (if the units will, or may, be held in that way); and
> (b) information about the three types of CTF that are generally available (stakeholder CTFs, cash-deposit CTFs and, security-based CTFs), and the type of CTF the firm is offering (if the units will, or may, be held in a CTF);
> (6) a unit in an EEA simplified prospectus scheme to a client, must offer an up-to-date copy of the scheme's EEA simplified prospectus to that client.
>
> COBS 14.2.3R (1) A firm that personally recommends that a retail client holds a particular asset in a SIPP must provide that client with sufficient information for the client to be able to make an informed decision about whether to buy or invest.
> (2) This rule does not apply if the asset is described in COBS 14.2.1 R."

There are then a series of exceptions to these requirements.

Ultimately, the crucial disclosure rules can be found in the rules on suitability reports discussed earlier.

> "COBS 9.4.1R A firm must provide a suitability report to a retail client if the firm makes a personal recommendation to the client and the client:

(1) acquires a holding in, or sells all or part of a holding in:

(a) a regulated collective investment scheme;

(b) an investment trust where the relevant shares have been or are to be acquired through an investment trust savings scheme;

(c) an investment trust where the relevant shares are to be held within an ISA or PEP which has been promoted as the means for investing in one or more specific investment trusts; or

(2) buys, sells, surrenders, converts or cancels rights under, or suspends contributions to, a personal pension scheme or a stakeholder pension scheme; or

(3) elects to make income withdrawals or purchase a short-term annuity; or

(4) enters into a pension transfer or pension opt-out.

COBS 9.4.2R If a firm makes a personal recommendation in relation to a life policy, it must provide the client with a suitability report.

COBS 9.4.3R The obligation to provide a suitability report does not apply:

(1) if the firm, acting as an investment manager for a retail client, makes a personal recommendation relating to a regulated collective investment scheme;

(2) if the client is habitually resident outside the EEA and the client is not present in the United Kingdom at the time of acknowledging consent to the proposal form to which the personal recommendation relates;

(3) to any personal recommendation by a friendly society for a small life policy sold by it with a premium not exceeding £50 a year or, if payable weekly, £1 a week;

(4) if the personal recommendation is to increase a regular premium to an existing contract;

(5) if the personal recommendation is to invest additional single premiums or single contributions to an existing packaged product to which a single premium or single contribution has previously been paid.”

COBS 9.4.7R then stipulates the level of disclosure:

> "The suitability report must, at least:
> (1) specify the client's demands and needs;
> (2) explain why the firm has concluded that the recommended transaction is suitable for the client having regard to the information provided by the client; and
> (3) explain any possible disadvantages of the transaction for the client."

3.6.3 para 2 The reference to "FSA COB 5.7.3" should read "FSA's original COB 5.7.3R and now COBS 6.1.9R state…"

Para. 4 Delete the sentence beginning "Actually". Add to fn 116 "Investment: market value adjustments", Ombudsman News, July 2005 at pp. 7-10.

Fn 117 Replace with COBS 15.4.3R.

Fn 119 Replace the COB reference with "COBS 19.1.2-5".

3.6.4 para 4 first line should read: "The original FSA COB 5.4.3R backed …"

Insert after the quotation

The new COBS 2.2.1R which only covers MiFID business, derivatives, warrants and stocklending merely requires that the "client is reasonably able to understand the nature and risks of the service and of the specific type of designated investment that is being offered and, consequently, to take investment decisions on an informed basis."

COBS 9.4 closes the gap.

> "COBS 9.4.4R Timing
> A firm must provide the suitability report to the client:
> (1) in the case of a life policy, before the contract is concluded unless the necessary information is provided orally or immediate cover is necessary; or
> (2) in the case of a personal pension scheme or stakeholder pension scheme, where the rules on cancellation (COBS 15) require notification of the right to cancel, no later than the fourteenth day after the contract is concluded; or
> (3) in any other case, when or as soon as possible after the transaction is effected or executed.
>
> COBS 9.4.5R If, in respect of a life policy, the firm gives necessary information orally or gives immediate cover, it must provide a suitability

report to the client in a durable medium immediately after the contract is concluded.

COBS 9.4.6R In the case of telephone selling of a life policy, when the only contact between a firm and its client before conclusion of a contract is by telephone, the suitability report must:
(1) comply with the distance marketing disclosure rules (COBS 5.1);
(2) be provided immediately after the conclusion of the contract; and
(3) be in a durable medium."

This receives further support from COBS 14. COBS 14.3.2R insists:

"A firm must provide a client with a general description of the nature and risks of designated investments, taking into account, in particular, the client's categorisation as a retail client or a professional client. That description must:
(1) explain the nature of the specific type of designated investment concerned, as well as the risks particular to that specific type of designated investment, in sufficient detail to enable the client to take investment decisions on an informed basis; and
(2) include, where relevant to the specific type of designated investment concerned and the status and level of knowledge of the client, the following elements:
(a) the risks associated with that type of designated investment including an explanation of leverage and its effects and the risk of losing the entire investment;
(b) the volatility of the price of designated investments and any limitations on the available market for such investments;
(c) the fact that an investor might assume, as a result of transactions in such designated investments, financial commitments and other additional obligations, including contingent liabilities, additional to the cost of acquiring the designated investments; and
(d) any margin requirements or similar obligations, applicable to designated investments of that type."

On timing, COBS 14.3.9 takes us back to the original 1988 conduct of business rules:

(1) The information to be provided in accordance with the rules in this section must be provided in good time before a firm carries on designated investment business or ancillary services with or for a retail client.
(2) A firm may provide that information immediately after it begins to carry on that business if:
(a) the firm was unable to comply with (1) because, at the request of the client, the agreement was concluded using a means of distance

communication which prevented the firm from complying with that rule; and

(b) in any case where the rule on voice telephony communications (COBS 5.1.12 R) does not otherwise apply, the firm complies with that rule as if the client was a consumer".

3.6.4.1 Para 7. The reference to "suitability letter" should now be "suitability report".

Para 8 The first sentence should read: "The wording of the original FSA COB 5.4.3R supported the view expressed here, at least for sales between N2 and 1st November 2007."

Paragraph 8. The suitability letter is now a report.
Insert after paragraph 8

"For MiFID business, COBS 2.2.1 essentially retains the same rule without being as precise. The key there is that the customer should be able to make decisions on an informed basis. Non-MiFID business is typically insurance which is covered by Article 12(1). Consequently, COBS 9.4.4R(1) requires the suitability letter to be delivered in the case of a life policy before the contract is concluded unless the transaction is concluded on the telephone. The only exception to the pre-contract conclusion disclosure concerns personal and stakeholder pensions for which the suitability report only needs to be delivered within 14 days of the contract's conclusion."

3.6.4.2 para 4 lines 3 & 5, para 5, line 8, para. 6, lines 2 & 3, para. 7 lines 2 & 3. Replace "letter" with "report".

3.7.1 para 2 line 1. Replace "is arguably" with "may be". Line 4. Insert after "advertising" "and the marketing of general insurance".

Para 4 Replace the first sentence with: "Much of the material concerning the clear, fair and not misleading test can be found in the rules on customer communication and financial promotions found in COBS 4 and MCOB 3 for mortgages. ICOBS 2.2 just contains some guidance on pricing claims for general insurance."

3.7.2 needs to be replaced in its entirety.

COBS 4.2.4G offers guidance on the meaning of Principle 7 saying:

"A firm should ensure that a financial promotion:

(1) for a product or service that places a client's capital at risk makes this clear;

(2) that quotes a yield figure gives a balanced impression of both the short and long term prospects for the investment;

(3) that promotes an investment or service whose charging structure is complex, or in relation to which the firm will receive more than one element of remuneration, includes the information necessary to ensure that it is fair, clear and not misleading and contains sufficient information taking into account the needs of the recipients;".

For retail clients, COBS 4.5.2R goes further pointing out:

"A firm must ensure that information:
…(2) is accurate and in particular does not emphasise any potential benefits of relevant business or a relevant investment without also giving a fair and prominent indication of any relevant risks;
(3) is sufficient for, and presented in a way that is likely to be understood by, the average member of the group to whom it is directed, or by whom it is likely to be received; and
(4) does not disguise, diminish or obscure important items, statements or warnings.

MCOB 3 has considerable detail on acceptable promotions, most taken from the original version of COB. The difficulty is identifying which rules will prove to be relevant from a complaint handling perspective since there is an absence of any reported cases here. A sample will contain some of the possible pitfalls.

"MCOB 3.6.4E
(1) A firm should take reasonable steps to ensure that, for a non-real time financial promotion:
(b) if it describes a feature of any qualifying credit, it gives no less prominence to the possible disadvantages than to the benefits associated with that feature;
(c) it uses plain and intelligible language, and is easily legible (or, in the case of oral promotions, clearly audible);
(d) the accuracy of all statements of fact in it can be substantiated;
(e) its promotional purpose is not in any way disguised or misrepresented;
(f) any statement of fact, promise or prediction is clear, fair and not misleading and any relevant assumptions are clearly and prominently disclosed …
(g) any statement of opinion is honestly held and, unless consent is impracticable, given with the written consent of the person concerned;
(h) the facts on which any comparison or contrast is made are verified, or, alternatively, that relevant assumptions are prominently disclosed and that the comparison or contrast is presented in a fair and balanced way, which is not misleading and includes all factors which are relevant to the comparison or contrast;

(i) it does not contain any false indications, in particular as to:
… (iii) the scarcity of any qualifying credit;
(j) the design, content or format does not in any way disguise, obscure or diminish the significance of any statement, warning or other matter which the financial promotion of qualifying credit is required by this chapter to contain;

MCOB 3.6.5G
(1)… firms should avoid the use of small print to qualify prominent claims;
(2) if a non-real time financial promotion includes information on the performance of the firm, on conditions in the market, interest rates, APRs or other price information this information should be relevant and recent. Firms should therefore avoid including this information in financial promotions which have a long shelf-life without a clear and prominent warning that the information can become outdated; and
(3) firms must ensure that an adequate description of mortgage products is given. For example, firms should take care to ensure that where a rate is variable at any time during the term of the mortgage, the content of the financial promotion does not imply the rate may be fixed.

MCOB 3.6.11R
A non-real time financial promotion that features qualifying credit which is conditional upon the customer obtaining one or more further products from a specific firm (or its agents or associates) must prominently state the compulsory nature of these purchases.

MCOB 3.6.14G
(1) Prominence of relevant information can play a key role in ensuring that a communication is clear, fair and not misleading. As a consequence, a number of requirements in MCOB relate to prominence. Where this is the case, the FSA will assess prominence in the context of the promotion as a whole. Use can be made of the positioning of text, background and text colour and typesize to ensure that prescribed information meets the requirements of MCOB. The surrounding of required statements with other information should be avoided where this might detract from the prominence
If a1 financial promotion1 contains price information for more than one qualifying credit product, MCOB 3.6.17 R requires an APR to be provided for each product. Where more than one APR is required to be given, each APR will need to be no less prominent than:
(1) any price information relating to the particular product;
(2) any reference (either explicitly or implicitly) to the availability of credit for customers who might otherwise consider their access to credit restricted; and
(3) any other APR in the1 financial promotion.

> MCOB 3.6.23 For the purposes of MCOB 3.6.22 R, an APR is not representative of business unless it is an APR at or below which at least 66% of customers responding to the promotion and who enter into a qualifying credit agreement which is the subject of the promotion would be charged.
>
> MCOB 3.6.24G …(2) In MCOB 3.6.22 R, when determining the representative APR, account should be taken of the business that has arisen from similar qualifying credit promotion in the previous 12 months. Where the financial promotion is for a new product or business, reference should instead be had to the relevant business plans.
>
> MCOB 3.6.25 If the non-real time financial promotion of qualifying credit concerns a contract where the APR varies depending upon the circumstances of the customer, the following further statement must be included with due prominence: 'The actual rate available will depend upon your circumstances. Ask for a personalised illustration.'"

By contrast, ICOBS 2.2-2.4 contains almost nothing on financial promotions, just a restatement of Principle 7 and guidance in 2.2.4 about pricing claims, promotions that indicate or imply that a firm can reduce the premium, provide the cheapest premium or reduce a customer's costs.

These must

> "(a) be consistent with the result reasonably expected to be achieved by the majority of customers who respond, unless the proportion of those customers who are likely to achieve the pricing claims is stated prominently;
> (b) state prominently the basis for any claimed benefits and any significant limitations;".

COBS and MCOB both have rules on unfair comparisons. COBS 4.5.6R says:

> "(1) If information compares relevant business, relevant investments, or persons who carry on relevant business, a firm must ensure that:
> (a) the comparison is meaningful and presented in a fair and balanced way".

MCOB 3.6.3R is more detailed, being based on the original version of COB.

> (2) A non-real time financial promotion1 which includes a comparison or contrast must:
> (a) compare credit meeting the same needs or which is intended for the same purpose;

(b) objectively compare one or more material, relevant, verifiable and representative features of that credit, which may include price;
(c) not create confusion in the market place between the firm itself (or the person whose qualifying credit promotion it approves) and a competitor or between the firm's trademarks, trade names, other distinguishing marks, qualifying credit (or those of the person whose qualifying credit promotion it approves) and those of a competitor; ..
(g) indicate in a clear and unequivocal way in any comparison referring to a special offer the date on which the offer ends or, where appropriate, that the special offer is subject to the availability of the qualifying credit, and, where the special offer has not yet begun, the date of the start of the period during which the special price or other specific conditions will apply."

COBS 19 contain some special provisions on promoting pensions. In memory of the FSAVC review, COBS 19.2.1G says:

> "A financial promotion for a FSAVC should contain a prominent warning that, as an alternative an AVC arrangement exists, and that details can be obtained from the scheme administrator (if that is the case)."

Of greater practical concern, COBS 19.2.3R provides:

> "When a firm promotes a personal pension scheme, including a group personal pension scheme, to a group of employees it must:
> (1) be satisfied on reasonable grounds that the scheme is likely to be at least as suitable for the majority of the employees as a stakeholder pension scheme".

Direct offers are the most likely form of promotion to be the subject of a complaint. COBS has specific rules for them. For MiFID business, Articles 30-33 list the compulsory disclosures required. In non-MiFID cases, the rules COBS 4.7(1)(b) insists on

> "additional appropriate information about the relevant business and relevant investments so that the client is reasonably able to understand the nature and risks of the relevant business and relevant investments and consequently to take investment decisions on an informed basis."

In practice, the firm has to attach to the offer a key features or prospectus document to comply with this. The key to understanding the direct offer rules in this context is to remember that the customer will not see anything else before making their purchasing decision. So, the material must make up for the absence of competent advice and disclosure."

3.7.3.1 2nd and 3rd sentences should read:

“COB 3.9.20R used to have specific rules ….”

After para. 3 insert:

“The old rule is now contained in COBS 4.7.4G which suggests that a direct offer should contain:

> “(1) a summary of the taxation of any investment to which it relates and the taxation consequences for the average member of the group to whom it is directed or by whom it is likely to be received”.

3.7.3.2 Insert at the end of para. 1:

“MiFID has produced a more coherent but not less rigorous set of rules in this area. COBS 4.6.2R says:

> “A firm must ensure that information that contains an indication of past performance of relevant business, a relevant investment or a financial index, satisfies the following conditions:
> (1) that indication is not the most prominent feature of the communication;
> (2) the information includes appropriate performance information which covers at least the immediately preceding five years, or the whole period for which the investment has been offered, the financial index has been established, or the service has been provided if less than five years, or such longer period as the firm may decide, and in every case that performance information must be based on and show complete 12-month periods;
> (3) the reference period and the source of information are clearly stated;
> (4) the information contains a prominent warning that the figures refer to the past and that past performance is not a reliable indicator of future results;
> (5) if the indication relies on figures denominated in a currency other than that of the EEA State in which the retail client is resident, the currency is clearly stated, together with a warning that the return may increase or decrease as a result of currency fluctuations;
> (6) if the indication is based on gross performance, the effect of commissions, fees or other charges is disclosed.”

Para 2 line 3 insert after “information” “for packaged products”.

Delete “currently” from fn 148

Insert into the start of fn 150 “Introduced in”

Fn 151. Add “This is preserved in COBS 4.6.4G.”

Fn 152 Replace with “COBS 13 Annex 2.

Fn 169 See also Financial Promotions Bulletin, April 2007, Financial promotions mortgage and general insurance bulletins (Issues 1-5), Financial Promotions: Progress update and future direction, August 2006 & Financial Promotions: Taking Stock and Moving Forward, February 2005, Press releases, “FSA calls for all firms to ensure their promotional websites are fair, clear and not misleading”, 28 November 2007, “FSA finds significant improvement in home and motor insurance press advertising”, 22 May 2007, “'Savings claim' in insurance advertising can mislead consumers warns FSA”, 16 January 2007, “Poor financial advertising in sub-prime market a sign of wider problems, says FSA”, 28 November 2006 & “FSA warns industry to address VCT promotions failings”, 22 November 2005.

Insert a new section 3.7.4.1 General Insurance

Problems with the original ICOB rules in 2005, notably in relation to payment protection insurance (PPI) led the FSA to develop Principle 7 into a general disclosure doctrine. Essentially, the regulator said that any positive comment about a policy had to be matched by disclosure of significant or onerous exclusions, limitations or restrictions concerning the policy. This seems to have begun in the FSA’s November 2005 paper “The sale of payment protection insurance – results of thematic work”, November 2005

> “5.3 For face-to-face sales, our rules do not require customers to be given information on exclusions orally. Instead, they must be given a copy of the Policy Summary that sets these out in good time before they decide to buy the policy. The firm must also tell the customer about the importance of reading the exclusions section of the Policy Summary. Although firms are not required to disclose exclusions orally in face-to-face sales, it is important that the customer gets balanced information on the coverage of the policy in order for firms to comply with the ‘clear, fair and not misleading’ rule. So, if sales staff explain the benefits of the policy, they should counterbalance this with some explanation of the significant or unusual exclusions. We were concerned that nearly half of the firms we visited that were selling on a face-to-face basis were not providing the customer with balanced information on the exclusions as well as the benefits.”

In its Dear CEO Letter of November 2005, the FSA continued this theme:

> “12. PPI policies are relatively complex insurance products and so firms need to have particular regard to the customer's information needs in line with Principle 7. It is not sufficient just to review the documentation given to customers. You also need to consider whether the oral description of

> the policy balances the benefits against the limitations and exclusions sufficiently to meet the requirements of Principle 7".

In its October 2006 Paper, "The sale of payment protection insurance – results of follow-up thematic work" the FSA said:

> "Where the insurance is discussed over the telephone, and the firm sends full information to the customer with the loan documentation, the firm should ask itself whether only providing full information at this stage complies with 'in good time before conclusion' and Principles 6 & 7. This is especially important where a decision not to take out insurance at this stage might mean a delay in the customer receiving the loan. "

ICOBS has effectively enshrined these views in its general disclosure requirement of 6.1.5R and its rules for protection and PPI policies at 6.4.2R."

3.9 Add to the last sentence "All positive remarks must be balanced by a statement of any disadvantages, exclusions or restrictions to ensure balance and fairness."

Chapter 4

4.1.1 para 4 46,134 in 2006-2007, 69,159 in 2005-2006, 69,737 in 2004-2005.

4.1.2 Para 12 line 4 replace "two" with "several (Friends Provident, Allied Dunbar, Guardian and Abbey National)".

Para 15 line 1 replace "two" with several". Delete "and" and add to the sentence, "Abbey National in May 2005 and Guardian in January 2006"

Add to the end of the paragraph. "In early 2006, without any announcement, the FOS withdrew the Decision Trees, removing them from their website and making it impossible to obtain copies of them. In their place, subsequently emerged two technical papers: "complaints about post-"A Day" sales" and "complaints about pre-"A Day" sales" to join the relatively recent "redress in more complicated cases"

Para 16 replace the first sentence with "The Tiner letter criticised firms who over-emphasised the Decision Trees.

4.2.1.1 para 6 last sentence insert after "policies" "sold by product providers".

4.2.1.1 para 7 Insert after the second sentence "(In Legal & General Assurance Society Ltd (No. 1) Financial Services and Markets Tribunal (Decision 11) para 144, the Tribunal agreed with Counsel for the FSA that his client had simply been too lenient towards the insurer.)"

Fn28 Add to the sentence " and Financial Services Authority, 2007 Survey of the Persistency of Life and Pensions policies, November 2007 shows the numbers of policies lapsing increasing for sales made during the period 1998-2001. For IFA sales, the lapse rate after four years was consistently between 17 and 19% but also deteriorated in the 1998-2001 period."

Para 8 Insert footnote reference to Legal & General Assurance Society Ltd (No. 1), Financial Services and Markets Tribunal (Decision 11) at para 144.

4.2.2.5 para 3 change "luxury" to "option". Para 7 line 7 insert "should" before "extend".

4.2.2.7(b) para 1 line 7 "replace "an approved scheme" with "most approved schemes".

Para 7 line 9 replace "time" with "an opportunity".
4.2.2.11 line 6 replace "prevent" with "prevented".

4.2.2.13 Line 5 should read: "A tied or multi-tied adviser must refrain from giving advice where an existing company of company outside his range… than anything he entitled to advise on. This is one of the problems with the polarisation idea that depolarisation has not resolved."

4.2.2.16 Para 3 line 4 add after "this way" "presumably topping up policies to override the effect of under-charging". Insert footnote Information Commissioner Decision Notice against Financial Services Authority, 7 August 2007. Delete "against product providers from the next sentence.

4.5 Para 3 insert after "Trees" "and now the FOS technical papers".

Chapter 5

5.1 Para 1 second sentence should now read: "Estimates….review had reached £13.8 billion by June 2002 Fn FSA/PN/070/2002. Since then, the FSA has stopped publishing figures although the review still had some years to run for some firms at the time."

Para 6 line 3 replace "sold" with "used to sell".

5.2 para 1 line 5 delete "stakeholder".

Para 2 replace the first two sentences with

"In the past, customers had to show that they had sufficient "net relevant earnings" to make their contributions to an approved personal pension. This

remains the case for pension contributions over a fixed annual amount although the percentage is currently 100% of net relevant earnings whereas in the past, the percentage was much lower and depended on the customer's age. To be relevant…."

Para 4 line 2 replace "pensions" with "pension contributions for which earnings are required."

Para 6 line 6 insert after "they" "used to". Delete "non-stakeholder".

Fn 4 add "and now COBS 19.1.6-19.1.9 which waters down the earlier FSA guidance without changing its meaning.

5.3.3 para 3 first sentence. Delete "has" and replace "current" with "FSA". Second sentence. Replace "has" with "had". Third sentence. Replace "starts" with "started". Add "This is repeated in COBS 19.1.6G."

Para 4 first sentence "Then, the guidance requires…" Insert at the end of the paragraph "The COB guidance goes into this in some detail."

Insert at the end of the section "The guidance in COBS 19.1.7 and 19.1.8 is far less detailed. It almost works on the assumption that the adviser will have mastered the COB material. It does not, though, undermine the messages in the earlier material.

5.3.4 Para 1 Delete the parenthesis and then add to the end of the paragraph

"Now section 253 of the Pensions Act and The Occupational Pension Schemes (Early Leavers: Cash Transfer Sums And Contribution Refunds) Regulations 2006 - Fn SI 2006/33 – entitle an employer after three months to a cash transfer to another scheme or a contribution refund."

Para 2 Replace "However" with "In any event".

Para 3 Insert after "two-year" "or shorter". Sentence 3 Delete "Until… force".

Para 5 Delete the last sentence.

5.3.5.2 Add "S" to the heading

Para 1 Replace quote with

> "When a firm prepares a suitability report it should include:
> (1) a summary of the advantages and disadvantages of its personal recommendation;
> (2) an analysis of the financial implications (if the recommendation is to opt-out); and

(3) a summary of any other material information."

Insert at the start of fn 18 "COBS 19.1.8G formerly".

Replace the first sentence of para 2 with "Under the original COB 5.3.24 guidance, suitability letters also had to contain:"

Insert after the quotation: "The FSA has now dispensed with this guidance in COBS. However, it would seem to fall squarely within the "summary of any other material information" required by COBS 19.1.8G(3).

Original para 3 line 1 insert "review" after "pension"

5.4.1 Para 4 "urges" should be "urged".

Para 6 replace the first line with "The COB list went on:"

Para 8 Replace "The Guidance continues to list" with "the COB guidance insisted that firms take into account further features".

Para 10 Insert at the start:
"The COBS rules contain far less detail on this subject although again, it is difficult to see how it lowers the standard required by COB. 19.1.2-4 read:

"19.1.2R. A firm must:
(1) compare the benefits likely (on reasonable assumptions) to be paid under a defined benefits pension scheme with the benefits afforded by a personal pension scheme or stakeholder pension scheme, before it advises a retail client to transfer out of a defined benefits pension scheme;
(2) ensure that that comparison includes enough information for the client to be able to make an informed decision; …

19.1.3G In particular, the comparison should:
(1) take into account all of the retail client's relevant circumstances;
(2) have regard to the benefits and options available under the ceding scheme and the effect of replacing them with the benefits and options under the proposed scheme; and
(3) explain the assumptions on which it is based and the rates of return that would have to be achieved to replicate the benefits being given up.

19.1.4R When a firm compares the benefits likely to be paid under a defined benefits pension scheme with the benefits afforded by a personal pension scheme or stakeholder pension scheme (COBS 19.1.2R (1)), it must:
(1) assume that:

(a) the annuity interest rate is the intermediate rate of return	

appropriate for a level or fixed rate of increase annuity in (2 COBS 13 Annex 2 3.1R(6))2) or the rate for annuities in payment (if less)	
(b) the retail prices index is	2.5%
(c) the average earnings index and the rate for section 21 orders is	4.0%
(d) the pre-retirement limited price indexation revaluation is	2.5%
(e) the post-retirement limited price increases at	2.5%
(f) the index linked pensions rate is the intermediate rate of return in 2 COBS 13 Annex 2 3.1R(6)2for annuities linked to the retail prices index;	

or use more cautious assumptions;
(2) calculate the interest rate in deferment; and
(3) have regard to benefits which commence at difference times.

Para 10 (original) Replace “an up-to-date account of” with “more information on”.

5.4.2.1 line 8. Replace “current” with “then”.

Fn 32 Delete “and” and add “Interdependence Ltd, 8 June 2004, Read Independent Financial Advisers Ltd, 20 December 2004, Braemar Financial Planning Limited, 4 September 2006

5.4.2.6 para 2 line 9. Replace “with an old-style transfer” with “with a transfer from a front-end loaded personal pension or one with transfer penalties”.

Para 3 line 7 “company” should read “company’s”.

5.4.3 para 2 line 1. Replace “is” with “was”. Line 3 replace “contains” with “contained”.

Para 3 line 2. Replace “requires” with “required”. Line 4 Replace “recommends” with “recommended”. Line 5 “Has” should read “had”

Para 4 Replace “are” with “were” Line 3 Replace “must both” with “both had to”. “Line 4 Replace “is” with “extended”. Replace “must” with “had to”

Para 5 Replace “have” with “had” and “has” with “had”. Replace “must be included” with “were required to be presented”.

Para 6 Replace “lays” with “laid” and “must” with “had to”

Para 7 Replace “must” with “had to”.

Insert at the end of para 7 the following in a new paragraph:

COBS is much less prescriptive without actually lightening the regulatory burden. 19.1.2-8 lays down the regime. It says:

COBS 19.1.2R
The firm must:
(1) compare the benefits likely (on reasonable assumptions) to be paid under a defined benefits pension scheme with the benefits afforded by a personal pension scheme or stakeholder pension scheme, before it advises a retail client to transfer out of a defined benefits pension scheme;
(2) ensure that that comparison includes enough information for the client to be able to make an informed decision;
(3) give the client a copy of the comparison, drawing the client's attention to the factors that do and do not support the firm's advice, no later than when the key features document is provided; and
(4) take reasonable steps to ensure that the client understands the firm's comparison and its advice.

COBS 19.1.3G In particular, the comparison should:
(1) take into account all of the retail client's relevant circumstances;
(2) have regard to the benefits and options available under the ceding scheme and the effect of replacing them with the benefits and options under the proposed scheme; and
(3) explain the assumptions on which it is based and the rates of return that would have to be achieved to replicate the benefits being given up.

COBS 19.1.4R
When a firm compares the benefits likely to be paid under a defined benefits pension scheme with the benefits afforded by a personal pension scheme or stakeholder pension scheme (COBS 19.1.2R (1)), it must: …
(2) calculate the interest rate in deferment; and
(3) have regard to benefits which commence at difference times.

COBS 19.1.8G When a firm prepares a suitability report it should include:
(1) a summary of the advantages and disadvantages of its personal recommendation;
(2) an analysis of the financial implications (if the recommendation is to opt-out); and
(3) a summary of any other material information.”

5.5.1.4 Para 3 Replace “follows” with “followed” and “says” with “said”.

Para 5 replace the start with “Strangely, then, COB 5.3.29 went on…”

Insert after para 5

“This material has all been abandoned in COBS 19.2.2R which contains the only special material on FSAVCs. It says:

> “When a firm prepares a suitability report it must…:
> (2) (in the case of an FSAVC), explain why it considers the FSAVC to be at least as suitable as any stakeholder pension scheme, AVC or facility to make additional contributions to an occupational pension scheme which is available to the retail client.”

Any distinction between providers and intermediaries has happily been rejected in spite of considerable pressure on the FSA to do otherwise.”

Insert after 5.5.1.5 “It might have made more sense to include this in the COBS 19.2.2 required comparisons.”

5.5.2 Para 2 Replace “is” with “was”. Replace second sentence with “This read”

Insert after paragraph 5

“Now that FSAVCs as products have virtually disappeared, subsumed into stakeholder pensions, the FSA has taken a more general view of the disclosure obligations. The suitability report must under COBS 19.2.2R(2) explain why the firm

> “considers the FSAVC to be at least as suitable as any stakeholder pension scheme, AVC or facility to make additional contributions to an occupational pension scheme which is available to the retail client.”

It is hard to say that when allied to the general rules on suitability reports, this lowers the standards from those required by COB. Indeed, the reduction in verbiage may have raised it. The general rule in COBS 9.4.7R is sufficiently general that it can sweep up anything material.

> “The suitability report must, at least:
> (1) specify the client's demands and needs;
> (2) explain why the firm has concluded that the recommended transaction is suitable for the client having regard to the information provided by the client; and
> (3) explain any possible disadvantages of the transaction for the client.”

5.5.3 para 1 line 2 Insert a fn here.

In a fairly outrageous provision, DISP 1.1.11R reads:

> "Where the subject matter of a complaint is subject to a review directly or indirectly under the terms of the policy statement for the review of specific categories of FSAVC business issued by the FSA on 28 February 2000, the complaints resolution rules, the complaints time limit rules, the complaints record rule and the complaints reporting rules will apply only if the complaint is about the outcome of the review."

This makes it impossible to complain about a case within the review unless the complaint concerns whether the review was correctly undertaken. The ambiguity of the first sentence is particularly outrageous.

5.6 Add a sentence to the first paragraph "This was reinforced in August 2005 with the publication of a report by Oxford Actuaries Consulting (OAC) "Contracting out of SERPS/S2P into an appropriate personal pension", commissioned by the FSA. While there were some gainers from contracting out, the overall picture is fairly bleak."

Add to para 3 "The Oxford Actuaries Report shows that in order to gain from contracting out, one had to be contracted out between 1988 and 1992 and be aged 35 or less at the start and then contract back in within five years. Losses grow considerably for investors who contracted out over the age of 45.The problem for any complainant is that the SIB commissioned a similar report from Alexander Clay in 1996 which showed that almost everyone was better off contracting out than staying in SERPS.

Add to para 5 "The last two points are reflected in the LAUTRO Enforcement Bulletins 7 and 18

LAUTRO EB7 para 2.02 says:
"The decision whether to opt out… is a personal one and will take into account many factors such as:

a. Age and Sex
b. Level of earnings
c. Career prospects
d. Existing pension provision or opportunities for a company pension
e. The Individual's tax position
f. Loss of rights to SERPS benefits
g. Availability of 2% incentive.

EB18 continues

"It would… be valuable for Members to provide their … representatives with a clear indication of:

a) based on appropriate actuarial assumptions, the pivotal ages – one for men, one for women – beyond which it will generally be in the best interests of prospective investors to remain in SERPS.

b) the earned income figure below which prospective investors would find it not in their best interests to contract out….

The investors whose policies are most likely to require review are those who are over the pivotal ages for existing investors and those whose earned income is low. The lower paid will find that a large proportion of the Government contribution to their personal pension will disappear. This is because the incentive included a minimum payment of £1 a week regardless of earnings.

The pivotal ages will be different depending upon whether the client is a prospective investor…. Because, in the case of future contributions to existing contracts, many of the expenses will already have been incurred."

"The effect of this and the combination of the OAC report from 2005 and the Alexander Clay paper is that firms seem able to defend sales so long as they were made to individuals within the pivotal ages determined internally. This seems to be confirmed by the FSA's June 2007 "Results of the FSA's thematic work on contracting out of the additional State Pension". It said:

> "14. …Most pension providers published ages – 'pivotal' ages - for males and females, above which it was generally deemed no longer financially advantageous to contract out. They varied from firm to firm but broadly fell around 40 for females and 45 for males when the majority of APP sales took place. The vast majority of sales were made to consumers who fell below the 'pivotal' ages.
>
> There were a number of differences in practices at individual firms, but, generally, there was a considerable degree of similarity in approach within the industry. For example, until 1997 when government rebates were at a flat rate, most firms used age and income criteria as the basis for recommending whether a consumer should be contracted out of SERPS.
>
> As we reported in our February 2006 update, we did not identify widespread mis-selling of APPs based on the generally accepted standards in place at the time. While we did not find any evidence of significant problems, there were some instances of specific firms not following all the compliance procedures they had in place at the time. In assessing the possibility of past mis-selling in these cases and whether it would justify regulatory action, we had to consider whether these failures resulted in consumers being entitled to compensation. Each case would need to be considered on its merits. But we based our work on the assessment that, in general, the FOS or a court would not view a non-

compliant sale as giving rise to a right to compensation if the outcome would probably have been the same if the sale had been compliant.

For example, for those consumers who were below firms' 'pivotal' ages, it was generally accepted at the time to be likely to be financially advantageous to contract out, even where the consumer had a cautious attitude to investment risk. There may be some circumstances where contracting out was still unsuitable (for example, if the consumer earned below a minimum income level or explicitly did not want to take any risk). However, generally, consumers were likely to have made the same decision, even in the event of the sales process not being fully compliant.

We said in our February 2006 update that we had identified a potential area of concern 'where sales were made to consumers who were outside the broadly-accepted age parameters ['pivotal' ages] at the time'. There may have been situations where, despite the presumption that consumers should not contract out above the 'pivotal' age, an individual's risk appetite or other objectives would have meant that contracting out was still suitable despite them being over the 'pivotal' age. However, we had concerns about the quality of controls which firms should have had in place to ensure that such sales were suitable."

Para 7 third sentence should read "The lower earning customer…. This is reflected in the findings of the Alexander Clay 1996 report which found most losses concentrated around those policies which had received £500 or less. This is important…"

Para 9 "contains" should be "contained" and "provides" "provided".

Insert after para. 10 Fn "COB 5.3.29GG" Then add to the text "With the virtual disappearance of contracting-out the FSA has removed the COB guidance which is no longer very relevant.

5.7.2 para 3 delete "new" and replace "provides" with "provided". After the quote insert a paragraph

This is broadly reproduced in COBS 6.3.21R which says:

"A firm must take reasonable steps to ensure that its representatives when making contact with an employee with a view to giving a personal recommendation on his employer's group personal pension scheme or stakeholder pension scheme, inform the employee:
(1) that the firm will be providing a personal recommendation on group personal pension schemes and/or stakeholder pension schemes provided by the employer;
(2) whether the employee will be provided with a personal recommendation that is restricted to the group personal pension scheme

> or stakeholder pension scheme provided by the employer or the recommendation will also cover other products;
> (3) the amount and nature of any payments that the employee will have to pay, directly or indirectly, for the personal recommendation.

COBS 6.3.22G adds:

> "The payments that the employee would have to pay could be:
> (1) fees;
> (2) commission;
> (3) commission equivalent;
> (4) a combination of the above."

This is slightly moderated by COBS 19.2.3R which insists that

> "When a firm promotes a personal pension scheme, including a group personal pension scheme, to a group of employees it must:
> (1) be satisfied on reasonable grounds that the scheme is likely to be at least as suitable for the majority of the employees as a stakeholder pension scheme".

Para 5 insert after "schemes" ",though,".

Replace "seems to require" with "required". After the quote add "This is confirmed by the very similarly worded COBS 19.2.3R quoted above.

5.7.3 Insert after "50" "(55 after 2011)".

Line 9 Replace "recent" with "its" and delete "have".

5.8 para 4 line 4 Replace "shortly" with "in 2011".

5.9.2.3 Replace "lifespans" with "longevity".

Fn 68 Add to the end "See Ombudsman News March/April 2007 at pp. 4 & 6."

5.9.2.5 Insert at the end of the paragraph a new para

"In the March/April 2007 Ombudsman News at p. 9, there is a very uncomfortable case study on this subject where the complaint appears to have been wrongly rejected by FOS. There, the customer had a very modest £25,000 pension fund which he probably should not have touched. Unfortunately, the report does not make it clear whether the product recommended was a drawdown one or a simple straight annuity."

5.9.2.8 para 1 line 3 replace "contains" with "contained and COBS has"

Para 2 “Replace “says” with “said”. Insert after para 3 “This is retained in COBS 9.3.3G.”

Para 4 Replace “same” with “COB”.
Insert at the end of the section

“COBS 9.4.10G is not markedly different. It reads:

> “When a firm is making a personal recommendation to a retail client about income withdrawals or purchase of short-term annuities, explanation of possible disadvantages in the suitability report should include the risk factors involved in entering into an income withdrawal or purchase of a short-term annuity. These may include:
> (1) the capital value of the fund may be eroded;
> (2) the investment returns may be less than those shown in the illustrations;
> (3) annuity or scheme pension rates may be at a worse level in the future;
> (4) when maximum withdrawals are taken or the maximum short-term annuity is purchased, high levels of income may not be sustainable;
> (5) the maximum income that can be withdrawn under an alternatively secured pension after age 75 is significantly less than the maximum that applies before age 75.”

Insert at the end of this section a new 5.9.2.8

5.9.2.8 Shore v. Sedgwick Financial Services Limited [fn [2007 EWHC 2509 QB)]

November 2007 saw the first judicial consideration of income drawdown by Beatson J in Shore v. Sedgwick. The importance of this case is linked to the identity of the judge, previously a distinguished Cambridge University law professor and the fact that the facts were extremely complex. Mr Shore was a wealthy and successful businessman who transferred his preserved pension into a personal pension from which he entered into a drawdown arrangement.

At para 168, the judge summarises the duties owed by the adviser both under the IMRO rules and negligence.

> “1 To advise Mr. Shore as to the options open to him, that is as to the benefits under the Avesta scheme and the potential benefits under a PFW scheme as at November 1997 and at the age of 60 in October 2000;
>
> 2 To compare the benefits under these options, and the risks involved under both options; and, whether by a transfer value analysis or in some other way, to inform Mr. Shore of the rate of growth under the PFW scheme needed to match the benefits under the Avesta scheme. Given

> the proximity of Mr. Shore's intended retirement, a transfer value analysis was, however, less crucial.
>
> 3 To inform Mr. Shore of the risks of taking a high level or the maximum level of income, and of the risks resulting because of the triennial reviews in the GAD rates;
>
> 4 To prepare an adequate personal financial report setting out these comparative benefits and risks fairly and clearly."

He rejected the argument that Sedgwick had a duty to advise him to defer taking his benefits until age 60 and not transfer his pension. Essentially, the expert evidence was that the transfer was a reasonable one for a customer wanting to take his benefits immediately and receive a high level of income.
Beatson J found that the adviser broke the rules by not doing a transfer analysis comparing the scheme with the pension fund withdrawal arrangement. He found a further breach

> "because there was no detailed consideration of the ceding scheme compared with the PFW scheme and because the personal financial report did not fairly and clearly present a comparison between the benefits that would have been retained by staying with the Avesta scheme and those to be had under the PFW. There was neither a written nor an oral consideration of the comparative benefits and risks of the schemes. Such a comparison and analysis would, if it included, as the rules require, the yield required in the personal pension to match the benefits of the occupational pension, have shown that magnitude of the risk required for what was not a substantial advantage in pension terms to what was available under the Avesta scheme. On the January figures the PFW would only match the benefits under the Avesta scheme at the age of 60 if there was growth of 14.5% pa, which Mr. Waddingham described as "a racy objective" and "something for the adventurous"." [fn para 180]

The judge found that the relevant date for considering the reasonableness of the transfer was the date it actually took place. [fn para 184]

Ultimately, he found that the adviser did not revisit his earlier advice in the light of Mr Shore's changed circumstances and in particular his greater need for income. He did not adequately compare an annuity with pension fund withdrawal. He did not adequately warn Shore of the risk of taking maximum income or tell him of Sedgwick's recommendation that income should not exceed 75% of GAD. Ultimately, though, the claim failed because of the Limitation Act.

In the March/April 2007 issue of Ombudsman News at pages 4-9, FOS gives some insight into the issues that it faces in this area. Some of the cases are fairly mundane. One IFA wrongly recommended to a customer that he invest his

pension fund of £52,000 into a five-year annuity and a drawdown fund with a view to buy further annuities using the second amount. The fund and the customer's overall pension assets were much too small. The adviser only used an illustration of a traditional annuity to show how much better the proposed plan was. There was no effective discussion of the annuity as a realistic option.
An IFA failed to defend a complaint on the basis that the client was "annuity-averse" where the customer had a fund of £250,000 but very little other savings. The adviser did not help himself by stating that the customer's capital "would not be eroded" by the arrangement.

A customer with a large fund planned to take income within a year. FOS was unimpressed by a drawdown recommendation to put the money into equity funds.

In a more surreal case, an adviser recommended to a customer that he transfer a £600,000 fund into drawdown and use the income to pay his mortgage. Inevitably, the permissible income fell below the mortgage payments required and predictably FOS was unimpressed by the whole idea. The customer could have made the payments from a conventional annuity.

5.9.3 para 2 line 2 "in to" should read "into".

5.10 para 4 line 4 insert after "eligible" "and suitable".

Chapter 6

6.2.1 second para should start:

"The original FSA Conduct of Business Rules, COB and their successors, COBS…. Howeer, COB did stipulate…"

6.2.3 para 1 replace "provides" with "provided".

Insert after para 2

The FSA COBS rules provide a more sophisticated approach, heavily influenced here by MiFID's focus on investments rather than life insurance and pensions. The relevant rules have this to say:

> "COBS 9.2.1R(2) When making the personal recommendation or managing his investments, the firm must obtain the necessary information regarding the client's:
> (a) knowledge and experience in the investment field relevant to the specific type of designated investment or service;

(b) financial situation; and
(c) investment objectives;
so as to enable the firm to make the recommendation, or take the decision, which is suitable for him.

COBS 9.2.2R (1) A firm must obtain from the client such information as is necessary for the firm to understand the essential facts about him and have a reasonable basis for believing, giving due consideration to the nature and extent of the service provided, that the specific transaction to be recommended, or entered into in the course of managing:
(a) meets his investment objectives;
(b) is such that he is able financially to bear any related investment risks consistent with his investment objectives; and
(c) is such that he has the necessary experience and knowledge in order to understand the risks involved in the transaction or in the management of his portfolio.
(2) The information regarding the investment objectives of a client must include, where relevant, information on the length of time for which he wishes to hold the investment, his preferences regarding risk taking, his risk profile, and the purposes of the investment.
(3) The information regarding the financial situation of a client must include, where relevant, information on the source and extent of his regular income, his assets, including liquid assets, investments and real property, and his regular financial commitments.

COBS 9.2.3R
The information regarding a client's knowledge and experience in the investment field includes, to the extent appropriate to the nature of the client, the nature and extent of the service to be provided and the type of product or transaction envisaged, including their complexity and the risks involved, information on:
(1) the types of service, transaction and designated investment with which the client is familiar;
(2) the nature, volume, frequency of the client's transactions in designated investments and the period over which they have been carried out;
(3) the level of education, profession or relevant former profession of the client."

The one exception concerns small friendly society life policies for which the firm only needs to obtain details of the net income and expenditure of the clients and his dependants under COBS 9.2.9R.

6.2.4 Add to fn 17 S Gilad, An Intra-Organisational Perspective on the Role of Consumer Complaint Handling in the UK Retail Investment Regulatory Regime (1981-2004), PhD thesis, Oxford University 2006 at 320 agrees with the view that the notion of advice was construed very liberally.

Para 4 Replace “refers” with “referred”. Add to the end of the paragraph “COBS assumes this.”

Add to 6.3.1 at the end

“The complaints literature is almost silent on the importance of proper investment allocation. This is odd considering that the investment literature is considerable. The need to use non-correlated asset types to reduce risk is likely to become part of the Ombudsman arsenal is the next decade. As will be seen, there are already concerns that the concentrated use of managed funds in the hands of medium risk customers could be generating out-of-control measures of risk which could have been avoided by greater diversification. At the same time, the identification of non-correlated asset types is a relatively recent phenomenon. In one complaint case (from the author’s consulting practice) a bank tried to use a fund of hedge funds to reduce risk. Unfortunately, the literature suggests that since such funds are not actually asset types as such, they cannot effectively perform the function concerned. Hedging is a form of gambling and so such a fund is merely the accumulation of profits and losses of a type of speculative betting rather than an asset class uncorrelated with more conventional types (such as shares).” Fn Tim Hale of Albion Strategic Consulting whose article is attached as an annex to this opinion. , “Seven Easy Ways to Land Yourself in Trouble with Hedge Funds”, http://www.dizzyinvesting.citymax.com/f/Seven_Easy_Ways_-_Hedge_Funds.pdf

6.3.2 Replace “distribution of funds across a broad spectrum” with “the distribution of non-correlated asset types”.

Fn 32-33 Current proposals will renumber DISP 3.3.1 as 3.3.4 without the addition of DISP 3.3.6. However, there is no suggestion that this will involve a change in meaning.

6.4.1.1 para 1 line 6 change “are” to “were”.

Fn 43 This happened in connection with Eurolife bonds: Incisive Media, Structured Products, “Nvesta to be sold as EAG goes into administration”, 24 October 2006. See also COBS 14.3.5R which recognises the need to disclose the nature of the guarantee properly for this purpose.

6.4.16 Para 1 line 1 Delete “has”. Line 4 delete “should” add “ed” to “suppress”. Line 6 change “says” to “said”.

Para 3 line 1 Replace “contains” with “contained”.

Insert after para 3.

This guidance has not been reproduced in COBS. However, the current rules contain some material relevant to the disclosure of risk. The key rule is 14.3.2R

> "A firm must provide a client with a general description of the nature and risks of designated investments, taking into account, in particular, the client's categorisation as a retail client or a professional client. That description must:
> (1) explain the nature of the specific type of designated investment concerned, as well as the risks particular to that specific type of designated investment, in sufficient detail to enable the client to take investment decisions on an informed basis; and
> (2) include, where relevant to the specific type of designated investment concerned and the status and level of knowledge of the client, the following elements:
> (a) the risks associated with that type of designated investment including an explanation of leverage and its effects and the risk of losing the entire investment;
> (b) the volatility of the price of designated investments and any limitations on the available market for such investments;
> (c) the fact that an investor might assume, as a result of transactions in such designated investments, financial commitments and other additional obligations, including contingent liabilities, additional to the cost of acquiring the designated investments; and
> (d) any margin requirements or similar obligations, applicable to designated investments of that type."

COBS 14.3.4R is novel in recognising the need for firms to disclose the effect of combining different types of risk in one product. It says:

> "Where the risks associated with a designated investment composed of two or more different designated investments or services are likely to be greater than the risks associated with any of the components, a firm must provide an adequate description of the components of that designated investment and the way in which its interaction increases the risks."

COBS 14.3.5R requires that details of any guarantee must be disclosed properly, notably

> "sufficient detail about the guarantor and the guarantee to enable the retail client to make a fair assessment of the guarantee."

The current rules, though, allow all this information to be conveyed in the form of a key features or simplified prospectus. Neither document has a good history of being properly studied by investors.

COBS 14.3.10R is a new rule requiring firms to notify clients in good time about any material changes in the service being provided."

6.4.2.2 Line 4 "did not want no" should read "wanted little or no". Add to the paragraph: "The new COBS 14.3.4R would have made it clear that where customers were linking payment of the principal sum due on maturity to the achievement of another outcome, such as paying school fees, the full nature of that linkage had to be explained."

6.4.2.3 para 3 line 11 Replace "although" with "even though". Replace the last sentence with

"The distance from the client may and probably will protect the broker from liability to the consumer in negligence in a Court although not necessarily at FOS. This, though, will not prevent him from a third party claim made by the IFA. Fn Seymour v. Ockwell [2005] PNLR 758."

Para 4 line 6 insert after "IFA" "probably still". Add to the end of the sentence "although he may be able to persuade the product provider or stockbroker to accept a share of this."

6.4.3.1 para 1 line 1 Replace "Recently" with "In 2004". Para 5 delete "recently".

In it July 2005, FOS revisited the issue in the light of the number of firms selling with profit products while simultaneously making market value reductions (not "adjustments" since they do not go up) saying

> "Firms often take the view that it is irrelevant whether or not an MVA is actually in place on some part of the fund at the time the advice is given. They say that unless the MVA applies to the particular tranche being sold at the time of sale, they are under no obligation to make the investor aware of any current application of an MVA. They argue that applying an MVA is prudent management of the fund, designed to protect the underlying assets, and is just part of the mechanism of a with-profits bond….
>
> In each case we look at the specifics of the complaint and at the circumstances of the individual investor. We consider among other things:
>
> - the investor's attitude – at the time of the sale – towards investment risk;
> - the investment 'horizon' that was originally envisaged; and
> - whether the investment aim was income or capital growth.
>
> There might well be investors, probably more experienced ones with longer-term investment horizons, who will conclude that a fund with an

MVA would be appropriate for them as they will not need access to their money until the end of the policy term, or until any MVA applied to their investment later on has been removed. Such investors appreciate the purpose of MVAs and decide to invest in full knowledge of the fact that – because of market conditions – MVAs are already in place and are applied when investments are cashed in early.

Other investors, however, tell us that if they had understood the reality of MVAs, they would have been deterred from making the investment at all. We accept that, to the average investor, there is a difference between the remote possibility of an MVA at some point in the future and the current presence of one, particularly where the investment horizon is uncertain. Such investors might accept that severe market conditions in the future could affect their investment. However, they may take a very different view if they know that those market conditions are already affecting payouts.

Firms tell us that they are not trying to 'hide' the MVA. But investors may well be left with a different impression if firms fail to make them aware of the MVA when giving advice, leaving them instead to discover it at a later date – probably when they need to make a withdrawal. In such circumstances, investors will feel there was something that they consider relevant to their investment that the firm knew about but had not brought to their attention.

We agree. We consider it only fair that any investor be sufficiently well informed about the fund they are advised to invest in, so that they can be confident it is suitable for them. Our view about whether or not that has happened in the particular circumstances of a case will be an important factor in our overall assessment of the dispute."

6.4.3.2 Add to the last line of para 1 ", a breach of the Unfair Contract Terms in Consumer Contracts Regulations 5(1), (3) & (5), 6 and Schedule 2 (k) & (l)."

6.4.3.3 Para 5 line 6 Delete "newly introduced". Line 8 replace "likely to be" with "will often be".

6.4.3.5 Replace the first two paragraphs with

"In 2005, the FSA introduced the notion of basic advice currently located in COBS 9.6. The adviser had to explain the limited scope of the advice and then follow a process calculated in general to produce suitable recommendations. Take-up was extremely modest. Now, the regulator is talking about bringing in "primary advice", a not dissimilar idea [fn DP 07/01]."

6.5.1.2 Line 4 should read "for these tax liabilities. This…."

6.5.2 para 3 Add to this “At the same time, FOS or the FSA should probably decide that such conditions are invalid under the Unfair Contract Terms in Consumer Contracts Regulations 5(1), (3) & (5), 6 and Schedule 2 (k) & (l).

6.6.2 Add a paragraph to this

“The FSA has become increasingly concerned at premium review provisions. These must now relate to the performance of the underlying fund or another objective criteria set out at the start of the policy or fall foul of the Unfair Contract Terms in Consumer Contracts Regulations 5(1), (3) & (5), 6 and Schedule 2 (k) & (l). [Fn FSA, Fairness of terms in consumer contracts: Statement of Good Practice, October 2005 at pp. 17-18.] The regulator said in 2005:

> “4.17 Premiums may be calculated, in part, on assumptions relating to various contingencies. Where a premium is guaranteed, the risk that assumptions may change is retained by the firm but premiums are often higher to allow for the risk that those assumptions may change during the life of the contract, even though they may not. A reviewable premium generally provides for the risk of assumptions changing to be shared between the firm and the consumer. We recognise that without this sharing of risk, some products may not be commercially viable and consumers could be faced with less choice and less protection. However, care needs to be taken to ensure that premium review clauses are not significantly one-sided or that they may operate only to the benefit of the firm.
>
> 4.18 It may be unfair for a review clause to give the firm the opportunity, but not the obligation, to review premiums because this would allow the firm to only review premiums where the outcome would be to the firm’s advantage. Where a contract contains a obligation for a firm to carry out a review then the firm must ensure that the review is carried out.
>
> (i) Valid reasons
> 4.19 A valid reason may be one that allows firms to review premiums in the light of changes in assumptions about the future, for example, assumptions relating to the expected future number and timing of claims. However, a valid reason is, for example and in our view, unlikely to be one which, in a pure protection contract, allows the firm to recoup its investment losses on the contract incurred up to the date of the review or one which gives it the discretion to increase profitability margins beyond those assumed at the outset of the contract. Similarly, a valid reason is unlikely, in our view, to be one which allows the firm unfairly to target a particular group of policyholders for an increase in premium or one which seeks to cover losses/higher costs incurred elsewhere in the firm’s business.

> 4.20 If a firm does not base its original pricing decisions on a carefully considered estimate of cost variables such as the cost of providing the benefits under the contract and expected investment returns over the long term, then, in our view, it may be unfair for the firm to include a premium review clause.
>
> 4.21 Similarly, if a contract has a low initial price consciously based on overly optimistic assumptions about investment performance it is, in our view, likely to be unfair for the firm to include a premium review clause.
>
> 4.22 In the case of contracts with an investment element, it is important for consumers to understand what they are paying for. The premium should be described in a way that is clear, fair and not misleading. It will be made up of various amounts, for example an amount in respect of the protection afforded by the product (the risk charge) and management and/or investment fund charges. A fair term is unlikely to be one which, for example, allows management and/or fund charges to be increased in order to disguise the fact that the cost of protection has increased but this cost has not actually been reflected in the risk charge."

This applies to all contracts entered into since 1 January 1995 and could invalidate a number of the more pernicious premium review provisions if the FOS chose to apply it."

6.6.5 Para 4 Replace from "COB… involved" with

FSA's COBS 4.2.4G which reads:

> "A firm should ensure that a financial promotion:
> (1) for a product or service that places a client's capital at risk makes this clear; …(3) that promotes an investment or service whose charging structure is complex, includes the information necessary to ensure that it is fair, clear and not misleading and contains sufficient information taking into account the needs of the recipients;"

and COBS 4.5.2R which says:

> "A firm must ensure that information: ..
> (2) is accurate and in particular does not emphasise any potential benefits of relevant business or a relevant investment without also giving a fair and prominent indication of any relevant risks;
> (3) is sufficient for, and presented in a way that is likely to be understood by, the average member of the group to whom it is directed, or by whom it is likely to be received; and
> (4) does not disguise, diminish or obscure important items, statements or warnings."

Line 8 Replace “preyed” with “prey”.

6.8.1 Para 6 Insert a paragraph at the end:

In May 2005, the FSA’s Briefing Note BN005/2005 raised concerns that lifetime mortgages could become almost as hazardous as old-style home income plans. It said:

> ”The FSA is concerned that its mystery shoppers weren't provided with enough information about lifetime mortgages to make an informed decision… The FSA found that advisers are failing to explain the link between the two transactions and has significant concerns about the quality of advice being given to consumers.
>
> The FSA is particularly concerned that advisers are recommending that advisers are recommending that customers borrow money at around 7% and invest in products that yield around 3.5% after charges. The consequences of these linked transactions are not being explained to consumers.
>
> The investment advice given fits into three key areas:
>
> - Investing for growth: the FSA identified that, in some firms, advisers are encouraging customers to release more than they required and advising them to reinvest the surplus cash in products such as investment bonds.
> - Investing for income: There are equity release products on the market that allow the consumer to draw down an income from their lifetime mortgage. Instead of recommending this route, advisers are recommending that consumers release a lump sum and reinvest it in, for example, an investment bond and take 5% withdrawals to provide a regular income stream. As well as being more expensive for the consumer, reinvesting capital in equity-backed investments unnecessarily exposes the consumer to risk.
> - Inheritance tax (IHT) mitigation: Using equity release for IHT mitigation is a very finely balanced arrangement. A number of the cases the FSA reviewed were likely to leave the customer's estate worse off than if they had not taken any action to mitigate their IHT liability.”

Another feature of equal importance with the lifetime mortgage market are the availability of local authority grants for home improvements, particularly for the elderly and state benefits. [Fn MCOB 8.5.4(1)(a) & 8.5.5.] The FSA commented on this:

> “Scenario A (shopper requesting £4,000 lump sum, for essential house repairs, plus income of £50pm to help with household bills) was designed to find out whether firms would refer consumers in this situation to an advice agency (such as their local council/citizens advice bureau) for assistance. It was expected that all shoppers would be referred to an advice agency, or that the adviser would discuss these issues with the assessors. The FSA finds it concerning that only one shopper was referred to an advice agency. In the remainder of cases, the assessors went on to receive information and/or advice relating to equity release from the firm.”

A further complication of these schemes is that the customer is often required to covenant to make repairs, something that he or she may not be financially able to do to the required standard.

Income from a lifetime mortgage can adversely affect state benefits connected to the minimum income guarantee for pensioners. This means that lifetime mortgages will usually be unsuitable for those who are or may in the future qualify for means-tested benefits.

An added complication for lifetime mortgage and home reversion advisers concerns the decision as to which of these options is appropriate. The choice of the latter assumes that over the life of the product, house prices will fall. (The same is true of capital appreciation loans.) Otherwise, the customer will be giving up some or all of the increase in value of the property.[Fn MCOB 8.5.4(1)(b)] At the moment, the long-term expectations strongly favour lifetime mortgages. Even more worrying is the fact that tied advisers of home reversion firms are placed in an automatic conflict of interest situation where the customer’s hopes must be the exact opposite of their principal.

Ultimately, these products work best for customers (often single) with enough money to stay well clear of the poverty trap and nobody to whom they wish to pass their properties or who can help them with extra income. In any event, the adviser must make sure that the product selected is properly tailored to the client’s needs and plans for the future.”

Chapter 7

7.2 Para 7

Add to the para

In R (on the application of IFG) v. Financial Ombudsman Service [fn [2005] EWHC 1153 (Admin)], the Ombudsman rejected an argument based on BBL v. Eagle Star on the basis that where fraud on the part of a fund manager had made a loss caused by bad advice worst, it was more appropriate for the firm

rather than the customer to bear that loss. Burnton J rejected an application for judicial review on the basis that the Ombudsman was entitled to do that as a matter of fairness. Everyone, though, strangely conceded that BBL v. Eagle Star applied when this is far from obvious.

7.3.1 Replace the first sentence with

"COBS contains no provisions specifically relating to insistent customers. 19.1.9G urges firms who advise customers not to proceed with pension transfers to put their advice in writing. This is essentially the same rule as appeared in COB 5.3.25(2).

Delete para 2 and the first sentence of para 3 and "Yet,". Delete "new" at the start of the old para. 4.

Insert at the end of the section:

"In general, though, the trend is away from specific provisions on insistent customers and in favour of requiring firms to make it clear whether they are doing business on an advised or non-advised basis. [Fn ICOBS 4.2.4R(1-3) which controversially only applies to PPI and protection business.] While not outlawed as such, insistent customer transactions are clearly frowned upon by the FSA in MCOB and not exactly given a seal of approval elsewhere."

7.3.2 line 6 Replace "elements" with "features". Para 7 replace "makes" with "made" and delete "recent". Insert after "full compliance test." While COBS is silent on this subject, it can be assumed that these comments still reflect the current position."

Insert after paragraph 9:

FOS joined the queue of those expressing scepticism about claims that a transaction was done on an execution-only basis in its January/February 2006 issue of Ombudsman News. It said:

> "In some of the complaints we receive about the inappropriate sale of investment products, the firm claims – incorrectly – that it acted on an execution-only basis. And some firms say they are not responsible for the suitability of the product because they provided only 'limited' advice. Most of these cases involve sales by independent financial advisers that took place before 1 December 2001, when the current regulatory regime under the Financial Services and Markets Act took effect.
>
> As with any of the complaints we deal with, we refer to the regulations in force at the time of the sale. And in our view there is no 'half-way' house of 'partial' or 'limited' financial advice as far as sales to private clients are

concerned. Unless the sale was clearly carried out on an execution-only basis, then the firm was under a duty to provide suitable advice.

A firm carries out transactions on an execution-only basis if the customer asks it to sell a specific, named investment product, without having been prompted or advised by the firm. In such instances, customers are responsible for their own decision about the product's suitability.

The practice of execution-only sales is long-established. It is covered by current FSA regulations. But it was also covered by the earlier regulatory regime. As long ago as July 1988, the Life Assurance and Unit Trust Regulatory Organisation (LAUTRO), set out guidance for such sales in its Enforcement Bulletin 1.

Guidance was also provided by the PIA (Personal Investment Authority) in May 1997 in its Regulatory Update 33, which refers to the need for firms carrying out execution-only transactions to provide 'clear and credible' evidence of the nature of these sales.

In the disputes referred to us we would normally expect to see some evidence, in writing, that the firm:

- gave no advice; and
- made it clear at the time of the sale that it was not responsible for the product's suitability.

It would have to be entirely credible that the customer entered into the investment on an execution-only basis. And we would have to be satisfied there was no evidence that the customer was misled."

Most of this is fairly classical. The requirement of written evidence of execution-only goes beyond the rules. Equally, the firm was under no obligation to make to clear at the time of the sale it was not responsible for the product's suitability. Perhaps, though, the crucial sentence is the penultimate one. The FSA now investigates that financial competence of customers to decide whether it is likely that they did business without receiving advice. Forensically, there are some problems with that. First, suitability for doing business without advice is a distinct issue from whether a customer would seek to avoid the advice process. Secondly, a customer may have received advice from someone else rather than the firm.

In practice, the best way to run an execution-only defence is to look for flaws in the complainant's version of events, both in terms of general credibility and consistency with the existing paperwork. In those circumstances, FOS can still be persuaded to reject complaints, particularly after a hearing."

Old para 10 replace "Again" with "All".

Fn 30 Replace with “COBS 19.1.5R

7.5.2 para 4 line 7 “COB” should be “COBS”. Replace “must” with “should”.

Fn 33 should be “COBS 4.7.4G(2) formerly…”

7.5.3.1 para 2 line 1 replace COB reference with “COBS 4.7.1R(1)”. Insert “in effect” after “must”.

Replace paras 4-7 with the following:

COBS 4.7.1R requires all direct offers to contain a variety of detail about the product or service. The relevant MiFID material includes information about the firm, the price payable, the investments concerned and the position where the firm offers fund management or holds the client’s money or investments. It need only be provided where it is relevant to the transaction. Much of this is unlikely to be relevant to complaints. What follows appears to represent the key areas.

Pricing material in COBS 6.1.9R covers

- the total price payable by the client including all related fees, commissions, charges and expenses and all taxes payable via the firm or at least the basis of the price. Commissions charged must be itemised separately.
- an indication of any foreign currency involved, applicable conversion rates and costs involved in any part of the price.
- notice of the possibility that other costs including taxes, related to transactions in connection with the investments or investment business can arise that are not paid through or imposed by the firm
- the arrangements for payment or other performance.

Investment information in COBS 14.3.2R covers

- a general description of the nature and risks of designated investments
- risks associated with that type of designated investment including an explanation of leverage and its effects and the risk of losing the entire investment
- volatility of the price of designated investments and any limitations on the available market for such investments
- the components of any investment which consists of more than one investments or services and description of the way in which this interaction increases the risks involved. (COBS 14.3.4R)
- information about any guarantor or guarantee to enable the client to make a fair assessment of it where the investment incorporates a third party guarantee. (COBS 14.3.5R)

- the fact that an investor might assume, as a result of transactions in such designated investments, financial commitments and other additional obligations, including contingent liabilities, additional to the cost of acquiring the designated investments
- any margin requirements or similar obligations, applicable to designated investments of that type

Where a firm manages investments for a client, under COBS 6.1.6R the material must include

- the benchmark selected against which the customer can assess performance where a firm manages investments for the client
- the method and frequency of valuation of the designated investments in the client portfolio,
- details of any delegation of the discretionary management of all or part of the designated investments or funds,
- the types of investments that may be included in the portfolio and types of transaction that may be carried out in those investments including any limits; and
- the management's objectives, level of risk to be reflected in the manager's exercise of discretion and any specific constraints on it."

COBS 4.7.4G suggests that direct offers summarise the taxation of any investment and the fiscal consequences for the average member of the group to which the promotion is directed or its likely recipients.

The key idea is that the recipient must receive full pre-sale disclosure in the promotion or other documents before they respond [fn PS07/6 at para. 26.6] because he will not see any other material before becoming committed to the transaction.

In the Hargreaves Landsdown Final Notice, the FSA expanded on the equivalent requirement of the old rulebook:

"Direct offer sales are non-advised. A firm advertising a product by direct offer must include within the advertisement itself all of the requisite information and warnings necessary to permit a customer to make a decision on the proposal. The firm is not entitled to rely on ancillary marketing material or to infer or impute knowledge or expertise on the part of the customer. The customer responds to the advertisement by returning a coupon or form attached to the advertisement."[fn Final Notice to Hargreaves Landsdown Asset Management Ltd, 2 June 2004, para. 3.11.]

Almost inevitably, the FSA has expressed its annoyance at firms burying the risk warnings in the key features document or accompanying brochure. [fn Financial Promotions Bulletin, April 2007 at p.5.] In its June 2005 paper, it said:

> "A common problem is firms producing unbalanced promotions – for example, where significant risk warnings are only provided in the key features document, rather than explained up front."

In 2007, the FSA criticised the use of tear-off slips containing the relevant risk warnings. Once the customer returns the document, he no longer has the warnings. [fn Financial Promotions Bulletin, April 2007 at p.3.]"

Paras 9-11 needs to be replaced:

Direct offers like any other promotion must comply with a series of rules about unfair comparisons with other asset groups (COBS 4.5.6R) and past, future and simulated performance (COBS 4.6.2-8). The need to disclose commissions, fees and charges and quote performance in 12 month periods over a five year period can affect the accuracy of any past performance information presented."

Move para 8 to follow para 1 of 7.5.3.2 inserting in front of it the following:

"The FSA's original COB rules contained detailed guidance on a variety of products. This is not reproduced in COBS. However, the FSA probably still believes that the earlier material reflects the requirements of "clear, fair and not misleading".

7.5.3.2 para 2 line 1 Replace "contains" with "laid down"

Para 3 line 1 Replace "is" with "was"

Para 5 line 1 "Replace "attract" with "attracted".

Para 6 line 1 Replace "contains" with "laid down"

Para 7 line 1 Insert "Until 1st November 2001" at the start. Replace "have" with "had" and in line 2 "regards" with "regarded".

Insert at the end of 7.5.4 The Appropriateness test

7.5.4.1 Introduction

MiFID requires firms to be satisfied that certain higher risk products and services are in general terms appropriate for clients. The test is

> "whether the client has the necessary knowledge and experience to be able to understand the risks involved in the relevant service or product. There is no need to determine whether the service or product is consistent with the client's investment objectives or whether the client has the financial capability to bear the risks involved." [Fn R Price, "Conduct of Business Standards – Fair Dealing with Clients" in A Practitioner's Guide to MiFID ed M Elderfield, City & Financial 2007, 147 at pp. 175-176.]

The FSA has anyway operated a similar test with regard to derivatives and warrants that appears to be aimed primarily at or operates mainly with spread betting. This will continue. [Fn COB 3.9.5R(2), FSA Dear CEO Letter of 26 July 2004 & Financial Promotions Bulletin April 2007 at p. 5.]

COBS 10 covers not just firms providing investments services in the course of MiFID or equivalent third country business. It also applies to firms who arrange or deal in relation to warrants or derivatives with or for a retail client where the firm is or ought reasonably to be aware that the application or order is being made in response to a direct offer. [Fn 10.1.2R]

7.5.4.2 Excluding the appropriateness test

To reduce the work involved in processing transactions, firms using direct offers want, where possible, to avoid the appropriateness test.

This test does not apply if the service offered

- only consists of the execution and/or reception and transmission of client orders,
- relates to particular financial instruments and
- is provided at the client's initiative.

The client must also have received a clear warning that the firm is not required to assess the suitability of the instrument or service offered and will consequently not benefit from the protection of the suitability rules [Fn COBS 10.4.1R(1)(b)]

The guidance in COBS 10.5.1G regards a service as being provided at the client's initiative unless the customer request comes in response to personalised communication from the firm to the particular client containing an invitation or intending to influence the customer in respect of a specific instrument or transaction. However, a direct offer can generate a transaction on the customer's own initiative if the promotion is made by any means that by its very nature is general and is addressed to the public or a larger group or category of clients.

The generality of the promotion and whether it is addressed to the public or a larger group or category is presumably to be judged from the standpoint of the reasonable recipient, not the firm. A communication is not regarded as personalised just because it contains the name and address of the recipient or is addressed to him. Firms can make clear that they do not intend the communication to be personalised and point out that the customer's situation has not been taken into account.

The financial instruments which must be involved in order for the appropriateness test to be excluded are [fn COBS 10.4.1R(2).]

- Shares admitted to trading on a regulated market or equivalent third country market (on a list published by the Commission)
- Money market instruments, bonds and other forms securitised debts so long they do embed a derivative
- Units in UCITS scheme
- Other non-complex instruments

These "other instruments" have the following characteristics: [fn COBS 10.4.1R(3).]

- They are not a derivative or other security entitling the holder to buy or sell a transferable security or to a cash payment determined by reference to transferable securities, currencies, interest rates or yields, commodities, other indices or measures.
- Frequent opportunities exist to dispose of, redeem or realise the instrument at prices publicly available to market participants so long as they are either market prices or those made available or validated by valuation systems independent of the issuer
- They do not involve any actual or potential liability in excess of acquiring the instrument
- Adequately comprehensive information on its characteristics is publicly available and likely to be readily understood so as to enable the average retail client to make an informed judgement as to whether to enter into a transaction in that instrument.

7.5.4.3The test itself

The firm must ask the client for information regarding his knowledge and experience relevant to specific type of product or service to assess whether it is appropriate for him. [fn COBS 10.2.1R(1)]. This involves deciding whether the customer has the necessary experience and knowledge to understand the risks involved. [fn COBS 10.2.1R(2)(a).]

Relevant factors will usually be

- the types of service, transaction and investment with which the client is familiar,
- the nature, volume, frequency of the clients investment transactions and the period concerned and
- the level of education and actual or former profession. [fn COBS 10.2.2R.]

Knowledge alone can be sufficient although a firm can also infer knowledge from experience. [fn COBS 10.2.2R.]

A firm must not encourage a customer not to provide the necessary information.[fn COBS 10.2.3R] It can rely on material provided by the client unless it is aware that the information is manifestly out of date, inaccurate or incomplete.[fn COBS 10.2.4R .] It can use information it already holds. [fn COBS 10.2.5G.] Where a firm seeks to increase a customer's knowledge level before doing the test, the nature and complexity of information provided and the customer's existing level of understanding are relevant. [fn COBS 10.2.7G]

If the firm decides the client is appropriate for the transaction, investment or service, it does not have to communicate this. It must not accidentally make a personal recommendation when telling the customer of the test result. [fn COBS 10.2.8G.]

Where the firm concludes that the product or service is not appropriate, it must issue a warning to that effect. [fn COBS 10.3.1R.] If it considers that the customer has not provided sufficient (or any) information, the business must also give a warning to the effect that the decision to withhold information will not allow the firm to determine whether the service or product concerned is appropriate for him.[fn COBS 10.3.2R.] If the client decides to go ahead, the firm can do so but is perhaps constrained by its treating customers fairly obligations under Principle 6 to decline.[fn See COBS 10.3.3G.] Perhaps, the constraint only applies where the customer has co-operated fully with the test.

Until November 2007, firms had to have adequate evidence to suggest that a derivative or warrant was suitable for the person to whom a direct offer promotion was communicated – a very similar test. The FSA recommends using a questionnaire built into any website through which such products are marketed. [fn FSA Spread betting review, March 2007.] In connection with spread betting, it suggests that the questionnaire should cover risk to capital and whether the customer can afford to lose more than the initial stake, how different bets work, notably index, individual equity or commodity betting.

The FSA wants the appropriateness test when applied to spread betting to be closely linked to full disclosure of the risks involved in a format that is clear and easy to follow.

The home page of any website must have a prominent risk warning repeated further into the application process. The warning should be personalised and link the customer's circumstances to the risk: "You must be able to afford to lose more than your initial stake" seems to be recommended. Firms need a clear description of spread betting, and in particular the leverage involved and the way in which this can increase losses beyond the original amount invested. The FSA likes the idea of a pop-up risk warning with which the customer must agree before entering the site. The firm should definitely tell the customer to seek independent advice if unsure about the suitability of this type of activity [Fn COBS 4.7.4G(2)."

7.6 para 10 line 1 insert after "PIAOB" "and FOS less formally".
7.7.2 Insert at the end of para 6.

"The former is exactly what happened in Walker v Inter-Alliance Group Plc [2007] EWHC 1858 (Ch). There the judge never reached the issue of whether the advice was bad because he concluded that the illegality of an unauthorised representative of the company giving investment advice to do the relevant pension transfer made the assurer liable for all resulting losses."

Chapter 8

8.1 Line 6 Delete "launched".

8.2 para 2 line 6 insert after "have" "little or no".

Fn 4 Replace text with "COBS 2.3.1R(3) assuming which is doubtful that it applies."

8.7 para 1 line 4 replace "says" with "said". Para 2 line 1 replace "goes" with "went". Para 3 Insert at the start: "In November 1st 2007, the FSA dispensed with this rule being content to rely instead on the Principle 6 obligation to treat customers fairly." Para 9 line 5 replace "excessive" with " a breach of Principle 6 and unfair".

Chapter 9

9.1.1 Replace paras 2-4 and all but the last sentence of para 5 with

DISP 1.4.1R(2)(c) requires firms to assess fairly and consistently what remedial action or redress or both may be appropriate and to offer redress or remedial action when it decides that this is appropriate. DISP 1.4.2G suggests that relevant factors include relevant guidance published by the FSA, other regulators, FOS or former schemes and appropriate analysis of FOS decisions on similar complaints received by the firm. DISP 1.4.5G reminds firms with

mortgage endowment complaints of the need to follow DISP App. 2. It does not actually say that. In practice, FSA means it.

Annual reports and other material issued by the former schemes is patchy at best. Much of the older material has been superceded."

Delete paras 6 & 7 and replace them with

"The removal of the indication that firms need to pay a reasonable rate of interest is designed to stop firms offering customers interest at rates lower than those that FOS would award."

9.1.4 Fn 5 replace "Notice" with "Notices" and add at the end "Sesame Ltd, 19 April 2007 at para 5.33.

9.1.6.2 Add to the end "although the answer to this question may affect the rate of interest and the extent of any tax liability".

9.2.2.1 Add to the end:

The High Court reached this conclusion in R (on the application of Garrison Investment Analysis) v Financial Ombudsman Service [2006] EWHC 2466 finding that such an award did not compensate the customer for the loss that he had suffered. The Ombudsman had concluded that while the product was suitable in isolation, it represented too high a concentration of an investment in one fund. Section 229(2)(a) requires a money award to be "of such amount as the ombudsman considers fair compensation for loss or damage ... suffered by the complainant". A refund of contributions plus interest clearly did not represent an amount that the Ombudsman considered fair compensation for the loss.

Fn 11 Add ": R (on the application of Garrison Investment Analysis) v Financial Ombudsman Service [2006] EWHC 2466".

Fns 58-60 References should be to DISP App. 2…."

9.2.5.5 line 8 should start "he could have generated".

9.3.1 Insert fn after "prediction" in line 4 Royal Mail Pension Trustees Ltd v. Gosling [2007] EWHC 2871 (Ch)

9.6.1 para 6 line 6 Replace "will" with "should".

9.6.2.2 line 3 replace "2004" with "2007".

9.6.2.5 Add to para 2 "This is precisely what the High Court found objectionable in R (on the application of Garrison Investment Analysis) v Financial

Ombudsman Service [2006] EWHC 2466. There are some signs that FOS is now preferring to apply fund indices instead.

9.7.4 Para 8 line 5 replace “payment” with “offer”.

Para 9 line 5 replace DISP reference with “DISP 1.4.1R(2)(c) and Principle 6”

9.9 para 2 line 2 insert “that” after “ensures”.

Insert after para 3 “Beatson J in Shore v. Sedgwick Financial Services Limited [2007] EWHC 2509 at para 193 took a similar view.

9.10.2.2 Insert after line 4 “This is necessary in the light of R (on the application of Garrison Investment Analysis) v Financial Ombudsman Service [2006] EWHC 2466.

Chapter 10

10.1.3.1 Line 7, after “sales” insert “up until 2001”.

Add to fn 5 “2007 Survey of the Persistency of Life and Pensions policies, November 2007 shows the numbers of policies lapsing increasing for sales made during the period 1998-2001. For IFA sales, the lapse rate after four years was consistently between 17 and 19% but also deteriorated in the 1998-2001 period.”

10.1.3.5 line 2 insert after “undesirable” “in many cases”.

Fn 31 add “and FOS, Mortgage endowment redress in more complicated cases - case studies, case study 5”.

10.2.3.2 add to the end “(The firm needs to calculate the cost of the extra payments involved using an actuary.”

Fn 49 delete letter “P at the start.

10.2.4.2 para 5 line 6 replace “is” with “was”. Insert before fn 54 “and now appears as a standalone document on FOS’s collection of online mortgage materials.

10.2.4.3 Line 3 Insert after “DISP” “App”

Fn 83 Add “and FOS, Mortgage endowment redress in more complicated cases - case studies, case study 5”.

10.2.9 para 6 line 5 insert after “one” “or forward the complaint to it under DISP 1.7.1R.

10.4.4.1 para 3 delete first sentence.

10.7 Insert after para 3

“The FSA in its anxiety to stop firms from wrongly seeking to cap their liability wrote to firms on this subject in its Dear CEO Letter of January 2005. It said:

> “Normally a failure to mitigate loss will only arise where a consumer is in full possession of facts which will enable the consumer to understand that they may have suffered damage as a result of some breach of duty and that there are steps which can reasonably be taken to limit or avoid further loss occurring.
>
> We expect firms to take a fair and reasonable approach in determining whether in any case the complainant's recoverable loss should be limited in this way. We do not think it would be reasonable, for example, if a firm were routinely to assume that an absence of mitigation is always sufficient evidence of a failure on the consumer's part to justify redress being reduced or capped.
>
> Reducing or capping a complainant's recoverable loss is only likely to be fair where:
>
> • There is clear evidence that the complainant has been notified of a likely shortfall and told of the need to take action to address the shortfall, i.e. that the endowment is unlikely to pay off the loan, and an alternative means of meeting the liability will have to be found
>
> • The options available to address the shortfall are clearly communicated and are a fair representation of all the options available to that complainant
>
> • The consequences of not taking action are clearly communicated i.e. that any future compensation may be reduced due to the complainant's inaction
>
> • The complainant has been given a reasonable amount of time to seek advice and rearrange his or her affairs. It is not reasonable to expect a complainant to do so on the day they receive such a warning letter, and
>
> • The firm can demonstrate that it is in all the circumstances reasonable to expect the complainant to have taken action which would prevent further losses accruing.

> Routine letters enclosing annual statements of policy benefits or those relating to a contractual review of policy premiums, for example, are unlikely by themselves to be sufficient to trigger a duty on the part of the consumer to mitigate.
>
> The guidance in DISP outlines to firms when it may be appropriate to reduce redress payments, for example, deducting savings. Failure to adhere to this guidance by some firms raises questions about the effectiveness of their systems and controls for ensuring fair complaint handling. To assist consumers in assessing the offers made when complaints are upheld and to avoid unnecessary referrals to FOS, firms should specify clearly in plain language the components of their offer and, in particular, any circumstances which they consider should properly reduce the redress payable."

Bullets 3 and 5 should prevent this argument from succeeding with any regularity.

FOS has adopted the Dear CEO Letter but indicated what looks like a more pro-industry position in Ombudsman News April/May 2007 where it said:

> "When might we accept capping arguments?
>
> Occasionally, in cases where the policy remains linked to the mortgage, we will agree that the business should calculate the consumer's recoverable losses to an earlier date (often six months after the consumer received a 'red' letter, by which time they ought reasonably to have realised they had cause for complaint).
>
> This might happen in cases where:
>
> - the consumer is particularly financially sophisticated (for example, because they work in a relevant part of the industry) or
> - the consumer sought and received professional advice about the options and action they might take to prevent further losses from arising, but then failed to take reasonable steps.
>
> However, as we illustrate in the second of our case studies (61/08), we do not always accept capping arguments simply because the consumer has discussed matters with an adviser."

Considering the time taken by the firm to "correct" its earlier bad advice, six months under any conditions appears far too short a period of time."

10.8 Para 12 Add to the end “There is a proposal to allow FOS to determine the proportions of the compensation that two firms liable for the same loss will have to pay. [fn proposed new DISP 3.6.3G in CP 07/14].

Chapter 11

11.1 Para 6 line 1 insert after “writing” “the first edition of this book”. Line 6 replace “are” with “include”.

11.2.3 Insert “Now, with the increasing demise of traditional final salary schemes, calculating compensation often involves tracing the fate of a customer’s pension through a variety of different arrangements to try to work out where he would have ended up if the firm had acted properly.

11.2.6 line 6 replace “a guarantee” with “equivalent cover”.
11.2.7 line 4 add after “periods” “that exist and have existed in different forms over the years, can cause…”

11.3.3 There should be a space between the paragraphs.

11.4.2 para 3 replace text in brackets with “at least to the extent that the pension protection fund is unable to replace the benefits”.

Para 15 line 5 replace “reinstates” with “reinstated”.

11.4.3 para 5 begin the first sentence with “Now that the Government has set maximum limits…”

11.4.5.1 para 2 line 8 “pension” not “pensions”.

11.4.5.3 para 2 line 6 add “typically” after “access”. Para 6 line 1 delete “actually”.

11.4.5.4 line 4 “follow” should read “fall below”.

11.4.6 para 2 replace the parenthesis with “(limiting the maximum increase required as 2.5% for post-2005 final salary accrued benefits as opposed to 5% for service before that date).

11.5 para 5 line 3 “guarantees” should be in inverted commas.

Chapter 12

12.1.4 para 1 insert “FOS has taken similar steps in at least one unreported case.”

12.2.1.6 para 2 line 5 insert after “practice” “before the introduction of stakeholder pensions”.

12.3.2 para 2 inser at the end of the paragraph. In R (on the application of IFG) v. Financial Ombudsman Service [fn [2005] EWHC 1153 (Admin), FOS had rejected an argument that where a customer has been wrongly advised to invest in a fund which had been depleted by unforeseeable fraud on the part of a fund manager, the loss should ignore the effect of the fraud. It seems wrongly to have accepted that BBL v. Eagle Star (also known as the South Australia case) applied as a matter of law to the situation concerned but taken the view that as a matter of fairness, it felt that the firm should bear the whole loss resulting from the investment. Burnton J concluded that FOS was entitled to take that view. He said:

> “Here there is no clear articulation of the reason for departing from English law. But the ombudsman's decision, sufficiently clearly expressed, was that the result of the application of English law, that is to say, that in the circumstances of the present case there should be no recovery for unforeseeable consequences of fraud, was not a result which was fair and reasonable in all the circumstances.
> That, in my judgment, was a conclusion he was entitled to come to. Indeed, there is no challenge to his decision on grounds of rationality.
>
> So far as the lack of a clear reason for coming to that conclusion, rather than the conclusion required by English law is concerned, it does seem to me that it is sufficient for an ombudsman to make clear that which he considers to be fair and reasonable in the circumstances, at least in a case such as this. What is fair and reasonable will often be a matter of judgment and it may be difficult to articulate why one result is considered to be fair and another to be unfair or insufficiently fair. I am therefore not surprised that the ombudsman did no more than to say that a lack of recovery in the present case would have been neither fair nor reasonable.
>
> I would add that it is, in terms of fairness and reasonableness, not irrational to conclude that there should be recovery in circumstances such as the present, as indeed the fact that the House of Lords in the South Australia case differed from the Court of Appeal itself demonstrates.
>
> In my judgment, on the assumption which I have made, and which is common ground between the parties, that the requirement to take into account the law under the Rules applies to the quantification of compensation, the ombudsman did demonstrate in his provisional final decisions that he took it into account. He was entitled to depart from the result mandated by the law if he considered that another result provided the result that was fair and reasonable in the circumstances. He did, and it

> follows that his decision is binding on the claimant and does not fall to be set aside."

One can see here that FOS is articulating a perfectly sensible rule that where a firm advises a customer to invest in something unsuitable, an unforeseeable act of a third party aggravating the loss will not diminish the damages payable.

12.3.3 para 2 line 14 replace "exactly the same" with "the correct".

12.3.5.2 para 4 line 3 "injuries" should read "injury".

Fn 40 See also Final Notices to Sesame Limited (formerly known as Kestrel Financial Management Limited), 1 October 2004, Read Independent Financial Advisers Ltd, 20 December 2004, Kings 8 November 2005 (particularly at 2.4) & Braemar Financial Planning Ltd, 4 September 2006.

12.4 add to para 5 "and the case falls outside the review" [fn DISP 1.1.11]

Para 6 line 5 delete the sentence "At the …" Line 6 replace "proposed" with "new".

Para 16 line 5 replace "come in" with "generates complaints".

12.6.1 Add to this

"Ombudsman News for March/April 2007 shows this in action. It explains about a case (at page 6)

> "We said the firm should compare the net income Mr J actually received – month by month – with the amount he would have received if he had taken an annuity. The differences – both positive and negative – should then be rolled up, with interest, to the settlement date. This calculation showed that Mr J had received less than he would have had from the annuity. So we said the firm should pay him the difference in the form of a lump sum.
>
> We also said that the firm should add to Mr J's remaining pension fund, bringing it up to the amount he would now need to buy an annuity of the same size and in the same form as if he had taken it at the outset."

Where an annuity has not already been bought, the same issue points out with respect to another case (at p. 7):

> "We thought that if he had been appropriately advised, Mr B would probably have bought a traditional annuity, giving him a pension and a two-thirds pension for his wife, after his death.

> So we said the IFA should calculate the net monthly amount Mr B would have received – to date – from such an annuity. It should compare that with the amount he got from the recommended arrangement. And it should add interest, on a monthly basis.
>
> If the calculation showed that Mr B had received less than he would have had from a traditional annuity, then the IFA should pay Mr B the difference. We said the IFA should also pay the difference between the realisable value of the fund and the amount it would cost him to buy an annuity for the future."

12.6.2 insert before para 4: "In Ombudsman News for March/April 2007, FOS reported a case where it had ignored the higher income taken from the inappropriate product. It said:

> "Mr C had received more from the flexible annuity than he would have done from a traditional annuity. However, we did not think it fair that his future income should be reduced to reflect this. He had limited means, and had spent the 'extra' income on ordinary living expenses.
>
> We said that the IFA should compensate him by buying a traditional annuity for the future. The amount should be based on annuity rates available at the time of the advice. In this instance, we were able to refer to the rates in the illustration the IFA had shown Mr C when first advising him. Had this not been available, we would have provided the IFA with an appropriate historical annuity rate from a library of rates that we maintain."

This is pretty conventional Bowden. Unfortunately, it contradicts a case study in the same issue of Ombudsman News at p. 7 where FOS says:

> If Mr B had received more income than he would have done with a traditional annuity, then the firm could reduce the compensation accordingly."

The greater means of the second customer may have had something to do with it. More likely, this last quote is in the nature of a thoughtless throw-away remark."

12.8.2 para 8 line 6 delete "even".

12.10.1 para 3 line 8 add after "stakeholder" "(or equivalent)".

12.10.3 end of first sentence insert fn [Ombudsman News September/October 2006 at pp. 14-19].

12.12.4 line 3 insert “some” before “Firms”.

Chapter 13

Fn 3 Replace text after DISP with “1.4.1R particularly (2) and (4)”

Para 6 line 2 replace the second sentence and fn 8 with

“DISP1.4.1R requires firms to

> “(1) investigate the complaint competently, diligently and impartially;
> (2) assess fairly, consistently and promptly:
> (a) the subject matter of the complaint;
> (b) whether the complaint should be upheld;
> (c) what remedial action or redress (or both) may be appropriate;…
> (3) offer redress or remedial action when it decides this is appropriate”.”

Delete fn 9.

Fn 10 Replace text with “Glossary definition of “complaint”. “

Fn 11 Replace text with DISP 2.4.3(2)(b) and Glossary definition of “complaint.”

Fn 13 DISP 1.4.1(2)(c).

13.2.2.1 para 1 line 6 delete sentence beginning “this…”.

Fn 15 Add to the text “This is sometimes known as the SAAMCO or South Australia case.”

13.2.4.1. para 3 delete “To recall,”

13.2.7 line 1 replace “Tony” with “Sir Anthony” and “in his capacity as” with “when he was”

13.2.8.4 line 2 replace “1.2.16” with “1.4.1(2)(c) and (3)”.
13.2.9 para 4 line 2 insert a comma after “area”.

13.3.2.3 para 2 line 6 insert “might have” after “that”

13.4.1.3 Add to the end. “The only problem with some of these solutions is that FOS must ensure that its awards are presented as “fair compensation for loss or damage”. [fn FSMA s 229(2)(a) and R (on the application of Garrison Investment Analysis) v Financial Ombudsman Service [2006] EWHC 2466]

13.6 para 6 line 4 replace COB 2.2.3 with “COBS 2.3.1(2)(a)”.

Replace the text in fn 93 with See COBS 2.3.15G.

Fn 94 replace “1.2.22” with “1.3.3-4”.

Chapter 14

Fn 1 Replace the text with “COBS 17 and ICOBS 8. References in this chapter will be made to the ICOBS provisions. The COBS provisions for long-term care are very similar.”

Fn 3 Replace text with “ICOBS 8.1.1R & 8.1.2R; COBS 17.1.3R”

14.2.3.1 para 5 line 1 replace “this report” with “the Ombudsman News report referred to above”.

14.2.3.3 line 4 replace “became” with “were made” and insert after “then” “became”.

14.2.3.5 para 2 line 6 after “up” insert “on the expiry of the date referred to in it”.

Para 4 line replace “had not” with “may not have”.

14.3.2.1 para 2 line 4 add “S” to “ICOB” and “COB”.

14.3.2.2 para 2 line 1 replace the text with ICOBS 8.1.2R and COBS 17.3.2R lay down very similar rules. ICOBS 8.1.2R says:

> “A rejection of a consumer policyholder's claim is unreasonable, except where there is evidence of fraud, if it is for:
> (1) non-disclosure of a fact material to the risk which the policyholder could not reasonably be expected to have disclosed; or
> (2) non-negligent misrepresentation of a fact material to the risk”

COBS 17.3.2R provides:

> “An insurer and a managing agent must not:
> (2) except where there is evidence of fraud, reject a claim for:
> (a) non-disclosure of a fact material to the risk which the policyholder could not reasonably have been expected to disclose; or
> (b) misrepresentation of a fact material to the risk, unless the misrepresentation is negligent.”

Add to the end of the section: “ICOBS 5.1.4G takes a small step forward in this respect. It suggests that

> “A firm should bear in mind the restriction on rejecting claims for non-disclosure (ICOBS 8.1.1R (3)). Ways of ensuring a customer knows what he must disclose include: …
> (2) ensuring that the customer is asked clear questions about any matter material to the insurance undertaking.”

This is not nearly strong enough and should in any event be a rule clearly applicable to insurers and not guidance.”

14.3.2.4 para 5 line 1 replace “make” with “help ensure that”. Para 13 line 2 insert “ and presumably FOS”. Line 6 delete “and the IOB”. Para 9 line 6 replace “paying” with “ordering a firm to pay” Para 14 line 1 replace “invalidates” with “removes the need to disclose for most purposes”

14.3.4 Replace paras 7 and 8 with “Similarly, ICOBS 8.1.2R states:

> “A rejection of a consumer policyholder's claim is unreasonable, except where there is evidence of fraud, if it is for: …
> (3) breach of warranty or condition unless the circumstances of the claim are connected to the breach and unless (for a pure protection contract):
> (a) under a 'life of another' contract, the warranty relates to a statement of fact concerning the life to be assured and, if the statement had been made by the life to be assured under an 'own life' contract, the insurer could have rejected the claim under this rule; or
> (b) the warranty is material to the risk and was drawn to the customer's attention before the conclusion of the contract.”

The Law Commission issued a Consultation Paper in July 2007. In it, [fn The Law Commission Consultation Paper No 182 and The Scottish Law Commission Discussion Paper No 134 INSURANCE CONTRACT LAW: Misrepresentation, Non-Disclosure and
Breach of Warranty by the Insured A Joint Consultation Paper] the Commission proposes the following amendments to the law in this area:

> “WARRANTIES AS TO THE FUTURE AND SIMILAR TERMS
> A written statement
> 12.53 We provisionally propose that a claim should only be refused because the insured has failed to comply with a warranty if the warranty was set out in writing.
> It should be included in the main contract document or in another document supplied either at or before the contract was made, or as soon as possible thereafter. (8.12)

Bringing warranties to the attention of insureds
12.54 In consumer insurance, we provisionally propose that an insurer may only refuse a claim on the grounds that the insured has broken a warranty if it has taken sufficient steps to bring the requirement to the insured's attention. In deciding whether the insurer has taken sufficient steps, the court should have regard to FSA rules or guidance. (8.19)

The causal connection test
12.55 We provisionally propose that in both consumer and business insurance the policyholder should be entitled to be paid a claim if it can prove on the balance of probability that the event or circumstances constituting the breach of warranty did not contribute to the loss. (8.45)
12.56 We provisionally propose, in relation to both consumer and business insurance, that if the insured can prove that a breach contributed only to part of the loss, the insurer may not refuse to pay for the loss that is unrelated to the breach. (8.48)

A mandatory rule for consumers
12.57 We provisionally propose that the causal connection rules should be mandatory in consumer insurance. (8.50)…

Terminating the contract for the future
12.60 We provisionally propose that a breach of warranty or other term should give the insurer the right to terminate the contract, rather than automatically discharging it from liability, but (unless otherwise agreed) only if the breach has sufficiently serious consequences to justify termination under the general law of contract. (8.89)

12.61 Do consultees agree that if the insurer accepts the insured's breach of warranty, so as to terminate future liability, the insured should cease to be liable for future premiums? (8.96)
12.62 We ask whether an insurer who terminates a policy following the insured's breach of warranty should normally provide a pro-rata refund of the outstanding premium, less any damages or reasonable administrative costs. (8.100)

Waiver and affirmation
12.63 We provisionally propose that loss by waiver of the insurer's right to repudiate the contract should in future be determined in accordance with the general rules of contract. We welcome views on whether it is necessary to include a specific provision on this point in any new legislation. (8.110)"

This is some way from being enacted.

14.3.4.2 para 1 line 1 and 3, replace "ICOB 7.3.6" with "ICOBS 8.1.2".

Add to the end of section:

The Law Commission has proposed a half-way house solution for all business insurance that may be every bit as bad:

> "A default rule for businesses
> 12.58 We provisionally propose that in business insurance the parties should be free to vary the rules on the effect of a breach of warranty by agreement. However, where the insured contracts on the insurer's standard terms, there should be safeguards to ensure that the term does not make the cover substantially different from what the insured reasonably expected. (8.53)
>
> Reasonable expectations approach
> 12.59 We provisionally propose that in business insurance an insurer should not be permitted to rely on warranties, exceptions or definitions of the risk in its written standard terms of business if the term renders the cover substantially different from what the insured reasonably expected in the circumstances. (8.79)"

Much depends on the clarity of the variation required here.

14.4 para 2 add "S" to both "ICOB" and "COB" in lines 1 and 7 and fn 98.

Para 3 Replace "ICOB 7" with "ICOBS 8.1.1R" and "COB 8A" with "COBS 17.1.1R and 17.1.2R". Replace the next sentence with "These have been considerably shortened compared with the original ICOB 7 and COB 8A. ICOBS 8.1.1R reads:

> "An insurer must:
> (1) handle claims promptly and fairly;
> (2) provide reasonable guidance to help a policyholder make a claim and appropriate information on its progress;
> (3) not unreasonably reject a claim (including by terminating or avoiding a policy); and
> (4) settle claims promptly once settlement terms are agreed.

COBS 17.1.1R is a little more detailed but operates on broadly the same lines:

> "When an insurer or managing agent receives a claim under a long-term care insurance contract, it must respond promptly by providing the policyholder, or the person acting on the policyholder's behalf, with:
> (1) a claim form (if it requires one to be completed);
> (2) a summary of its claims handling procedure; and

(3) appropriate information about the medical criteria that must be met, and any waiting periods that apply, under the terms of the policy."

The insurer must provide a reasonable amount of assistance to the policyholder in making the claim, handle it promptly and fairly and settle the claim promptly once terms have been agreed.

COBS 17.1.2R provides more detail on responding to claims. It says:

> "As soon as reasonably practicable after receipt of a claim, the insurer or managing agent must tell the policyholder, or the person acting on the policyholder's behalf:
> (1) (for each part of the claim it accepts), whether the claim will be settled by paying the policyholder, providing goods or services to the policyholder or paying another person to provide those goods or services; and
> (2) (for each part of the claim it rejects), why the claim has been rejected and whether any future rights to claim exist."

To handle claim fairly, a firm does have to give a proper explanation of its decision if it does not accept the policyholder's claim in full or part.

ICOBS 8.3.3G contains important information on the role of the intermediary in claims handling and the conflicts of interest that can arise. It says:

> "(1) Principle 8 requires a firm to manage conflicts of interest fairly.
> (2) Generally, this means that a firm handling a claim should not put itself in a position where its own interest, or its duty to anyone for whom it acts, conflicts with its duty to a customer. If it does so, it should have the customer's prior informed consent.
> (3) If a firm acts for a customer in arranging a policy, it is likely to be the customer's agent (and that of any other policyholders). If the firm intends to be the insurance undertaking's agent in relation to claims, it needs to consider the risk of becoming unable to act without breaching its duty to either the insurance undertaking or the customer making the claim. It should also inform the customer of its intention.
> (4) A firm should consider whether it is possible to manage such a conflict through disclosure and consent. An example where these are unlikely to be sufficient is where the firm knows both that its customer will accept a low settlement to obtain a quick payment, and that the insurance undertaking is willing to settle for a higher amount."

ICOBS 8.3.4G lays down that where a firm without authority to handle the claim for the insurer receives a notification of a claim, it must either pass it to the insurer promptly or tell the customer immediately that it cannot deal with the matter.

14.5 Insert at the end of paragraph 2 “Intriguingly ICOBS 8.2.9 which deals with motor vehicle insurers requires interest to be paid at 4% above the Bank of England base rate from the date when the offer should have been made.”

14.6 Para 3 line 2 add an “S” to “COB” and “ICOB”.

Chapter 15

15.1.3 Para. 1 Replace “Application and Purpose” with “Purpose and Application”. Replace from “1.1.5” to the end of this section with

“1.1.3R(1) which reads:

> “This chapter applies to a firm in respect of complaints from eligible complainants concerning activities carried on from an establishment maintained by it or its appointed representative in the United Kingdom.”

This begs the question as to the meaning of both “complaints” and “eligible complainants”. Sub-paragraph (2) is a little more informative about MiFID business:

> “For complaints relating to the MiFID business of a firm, the complaints handling rules and the complaints record rule:
> (a) apply to complaints from retail clients and do not apply to complaints from eligible complainants who are not retail clients;
> (b) also apply in respect of activities carried on from a branch of a UK firm in another EEA State; and
> (c) do not apply in respect of activities carried on from a branch of an EEA firm in the United Kingdom.”

More confusion is added by DISP 1.1.10R which lays down:

> “In relation to a firm's obligations under this chapter, references to a complaint also include an expression of dissatisfaction which is capable of becoming a relevant new complaint or a relevant transitional complaint.”

The definition of “complaint” and “eligible complainant” have to be sought in the Glossary and elsewhere in DISP. “Complaint” is defined as

> “(in DISP, except DISP 1.1 and the complaints handling rules and the complaints record rule in relation to MiFID business) 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, which:46, 47, 3
> (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, which comes under the jurisdiction of the Financial Ombudsman Service.
(3) (in DISP 1.1 and the complaints handling rules and the complaints record rule only in relation to MiFID business) 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, which alleges that the complainant has suffered (or may suffer) financial loss, material distress or material inconvenience."

The Glossary definition of "eligible complainant" sends the reader to DISP 2.4. It is

> "a person eligible to have a complaint considered under the Financial Ombudsman Service, as defined in DISP 2.4 (Who can refer a complaint to the Financial Ombudsman Service)."

15.2.1 line 1 add "authorised" before "firms". Insert at the end of the section:

Two further types of business are also covered by DISP. First, non-regulated businesses may agree to be subject to the voluntary jurisdiction (VJ) of the Financial Ombudsman Service under DISP 1.1.15R. Secondly, Section 226A of FSMA, introduced by section 59(1) of the Consumer Credit Act 2006, creates a Consumer Credit jurisdiction which deals with complaints against "licensees", defined in the Glossary as entities or persons

> "(a) covered by a standard licence under the Consumer Credit Act 1974 (as amended); or
> (b) authorised to carry on an activity by virtue of section 34(A) of that Act."

To be subject to the Consumer Credit jurisdiction, a business need only have been a licensee when the act or omission complained about occurred [fn s 226A(2)(c)].

15.2.2 replace para 2 with "DISP 1.1.5R excludes a UCITS qualifier, credit union and an authorised professional firm with respect to its non-mainstream activities. Credit unions are subject to remarkably similar regulation under CRED 17.

Fn 11 replace text with "DISP 1.1.7R".
Fn12 replace text with "DISP 1.11.
Fn14 replace text with DISP 1.1.3R(1).

15.2.4 line 2 Insert after the first sentence "For complaints relating to the MiFID business of a firm, the complaint handling and record keeping rules but not the complaint resolution provisions apply to activities carried on from a branch of a

UK firm in another EEA State and ddo not apply to those carried on from a branch of an EEA firm in the UK. [Fn 1.1.3R(2)]".

Fn 15 replace text with "DISP 1.1.12R(1)".
Fn 16 replace text with "DISP 1.1.13G".
Fn 17 replace text with "DISP 1.10 & 2.5.2G".

15.2.5 add to para 1 "Exemption does not exclude the obligation to comply with the complaint handling and recording rules with respect to complaints concerning MiFID business". [Fn DISP 1.1.12R(2)]

15.3.1 Replace "DISP 1.2.22" with "The FSA Glossary".

15.3.2 Add to para 4 "The FSA confirmed its intention to retain this exemption in PS 07/9 saying:

> "One other response expressed concern that authorised intermediaries cannot complain under the rules to the FOS about, for example, professional indemnity insurance.
>
> Our response: The exclusion from the FOS jurisdiction of complaints from small businesses that are authorised firms which relate to matters connected to that authorisation, has been reviewed several times in previous consultations. We continue to believe it is proportionate and appropriate."

A mistake is not usually corrected by repetition!"

Add to the end of 15.3.2 "For the compulsory jurisdiction, eligible complainants must not have been professional clients or eligible counterparties in relation to the firm at the time of the act or omission and in respect of the activity that is the subject of the complaint. [Fn DISP 2.4.3(2)(a)] The one exception to this concerns a trustee of a trust that would otherwise be an eligible complainant.

For the Consumer Credit Jurisdiction, a company, a partnership of more than three people or a partnership or unincorporated association whose members are all companies are excluded from being eligible complainants under DISP 2.4.3(2)(aa) and section 226A(4)(b) of FSMA."

Fn 29 replace text with "DISP 1.11.12G & 13R"

15.3.3.2 Add to para 5. A muddle was created here with respect to EEA residents with claims arising out of motor accidents. The FSA's comment on this subject in CP 07/14 reflects the level of confusion:

"Third party claims against motor insurers

2.22 Questions have arisen around the FOS's jurisdiction to consider disputes between insurers and those claiming against the insurer's policyholder, in relation to motor accidents.
2.23 The FOS can consider complaints from persons who are 'eligible complainants'.
Eligible complainants are customers of the respondent or people who have a specified indirect relationship with the respondent.
2.24 Under the current DISP 2.4.12 R (3), one of the indirect relationships that may entitle a person to complain to the FOS is that the complainant is a person on whom the legal right to benefit from a claim under a contract of insurance has been devolved by contract, statute or subrogation. Guidance in the current DISP 2.4.13 G goes on to say that this does not include complaints about the actions of the insurer of the other driver in a car accident.
2.25 The guidance in DISP 2.4.13 G reflects the FSA's policy since the FOS was established in 2000, and also the prior jurisdiction of the Insurance Ombudsman Bureau.
2.26 Despite the guidance in DISP 2.4.13 G, questions have arisen about the jurisdiction of the FOS to consider such complaints, for example the effect of the European
Community (Rights against Insurers) Regulations 2002 – implementing the Fourth
Motor Insurance Directive – which gives certain rights to EEA residents who have a claim arising from a road accident.
2.27 The interaction between these Regulations and the current DISP 2.4.12 R (3) has been interpreted as making such EEA residents eligible complainants. This effect was not intended by the FSA. So the FSA is proposing to clarify its existing policy position by replacing the exclusion of these claims that is currently set out in guidance with an equivalent exclusion in the form of a rule."

15.4.1.2 Add to this section "Home reversion and purchase plans and self-invested personal pensions became regulated on 6 April 2007 although elements of the latter had been regulated previously, notably the selection of investments to be held."

Insert a new

15.4.1.5 Consumer Credit Activities

Section 226A designates a variety of activities to be covered and then authorises the Secretary of State to pass a statutory instrument indicating which will actually be included within the Consumer Credit jurisdiction. At present, the following taken from the list in sub-section (3) are covered

"(a) a consumer credit business;
(b) a consumer hire business;
(c) a business so far as it comprises or relates to credit brokerage;

(d) a business so far as it comprises or relates to debt-adjusting;
(e) a business so far as it comprises or relates to debt-counselling;
(f) a business so far as it comprises or relates to debt-collecting;
(i) a business so far as it comprises or relates to the operation of a credit reference agency"

and as a result became subject to FOS's Consumer Credit Jurisdiction on 6 April 2007 [fn SI 2007/383 art. 1].

Paragraphs (g) and (h) debt administration and provision of credit information services will become subject to FOS on 6 October 2008."

15.4.2 insert into paragraph 8 line 5 after "rules." "This was confirmed by the new DISP 1.8.1R which, nevertheless, allows the firm to reject the complaint without considering its merits."

15.5.1 paras 2 and 5 replace "retrospectivity" with "retrospection".

15.5.2.2 para 3. Insert a comma after "PIAS" and add to the end a fresh paragraph.

"In R (on the application of Brinsons (a firm)) v Financial Ombudsman Service Ltd [2007] EWHC 2534 (Admin), the firm had left the Personal Investment Authority prior to N2. The advice challenged by the complaint was given while it had been a member of FIMBRA. The Judge rejected the firm's challenge to FOS's award in the following terms:

> "The principal point taken on behalf of the Claimant is as follows. In 1997 it ceased to be a member of PIA. As at the date of its cessation of membership from PIA it ceased to be susceptible to an investigation and determination by the PIA Ombudsman. In consequence submits Mr Virgo on behalf of the Claimant, the Claimant is not a person who was on 19 December 2001 a person who was subject to a former scheme.
>
> It seems to me that in order to determine whether that submission is correct one must interpret the rules of PIA as they were at the time when the Claimant was a member. I deal first with the rules contained in chapter 8 under the heading "Complaints". Rule 8.1.1 provides as follows:-
>
> "The Rules in this part apply to complaints which are received by Members …… on or after 18 July 1994 and which
> (1) (a) are made in connection with, or arise out of, the business of the Member which is regulated by PIA, or
> (b) are made in connection with, or arise out of, the business of the Member prior to that date in respect of which the Member was subject to the rules of the Securities and Investments Board or of any recognised

self-regulating organisation or recognised professional body (where the Member is no longer is regulated by that regulator in respect of that business)…"

Rule 8.5.1 provides: -
"A Member must co-operate with the PIA Ombudsman in any procedure which he may adopt with a view to the conciliation or adjudication of a complaint"

Rule 8.6 specifies that:-
"A Member must comply promptly with any award made against him by the PIA Ombudsman except only where a Member exercises in good faith a right of appeal, or applies for other relief, to the court."
Rule 8.7 is a rule in respect of the payment of fees. Somewhat unusually following rule 8.7 there is a heading "Former Members". No rule is then specified but the following appears under the heading:-

"Guidance – All applicants for membership of PIA are required to give an undertaking to PIA that they will comply with the obligations contained in these Rules in relation to complaints to which the Rules in this Chapter apply and which they may receive after they have ceased to be a Member of PIA. In particular that undertaking acknowledges that PIA may take civil action against a former Member which does not comply with and satisfy an award made by the PIA Ombudsman in respect of any such complaint."

It is to the forefront of the Claimant's argument that no evidence had been adduced which establishes that any such undertaking as is mentioned in that passage was given in this case. Indeed, Mr Brinson in his Witness Statement, says that no such undertaking was given. That being the only evidence, submits Mr Virgo, I should (a) accept it and therefore (b) conclude that as from the date of its resignation from membership the Claimant was no longer susceptible to investigation and determination by the PIA Ombudsman.

I accept, of course, that the language of the passage quoted above does tend to suggest the need for the existence of an undertaking before a former Member of PIA can be under the jurisdiction of the PIA Ombudsman.

In my judgment, however, that passage cannot dispel the effect of the following express rules. Rule 1.9.3 (1) makes it clear that a Member who wishes to resign must apply for permission to do so on the resignation form obtainable from PIA. Rule 1.9.3(2) provides that the membership committee of PIA has discretion as to whether to accept the resignation. That discretion is qualified, however, in that a resignation may only be accepted if the Committee is satisfied that a member has complied with all

requirements specified in the application form, and has otherwise complied with its obligations as a member.

Rule 1.9.4 is headed "Obligations after Resignation or Termination of Membership" and, in my judgment, is crucial to the resolution of this case. It is in the following terms:
(1) A person which is to cease or has ceased to be a Member of PIA whether in consequence of resignation or termination, must continue co-operate fully
(a) in fulfilment of any undertaking given or obligations accepted by the Member in its application for resignation;
(b) with any individual carrying out on behalf of PIA enquiries into the activities of the Member or former Member;
(c) in any investigation into a complaint made by a customer of the Member or former Member,
(d) in any conciliation or adjudication by the PIA Ombudsman of a complaint and with any request or direction of the Ombudsman relating to such conciliation or adjudication".

In my judgment the "Guidance" in the passage quoted in paragraph 20 above has to be read in the light of these two express rules. In my judgment when that is done I am constrained to arrive at the following interpretation of the rules. Upon an application for membership of PIA an applicant has an obligation to give an undertaking in a specified form to the effect that they will comply with the obligations contained in the rules. Regardless of that undertaking, however, the Rules themselves provide obligations which are binding on members who have resigned or had their membership terminated. Those are the Rules which are contained in 1.9.4 and of particular significance in this case are the rules at 1.9.4 (c) and (d). In my judgment the only sensible interpretation of those rules is that even after membership has ceased a former member has an obligation to co-operate fully in the investigation of a complaint and in the adjudication of that complaint by the PIA Ombudsman.

On the basis that this is the correct interpretation of those Rules there is no reason to conclude other than the Claimant remained bound by the rules until 19 December 2001. That being so, of course, there can be no dispute but that the Claimant was "subject to a former scheme" on that date and within the conditions specified in paragraph 3 of the 2001 Order.

It follows that I conclude that the Claimant is subject to the jurisdiction of the Defendant."

This makes it clear that resignation from PIA after joining does not prevent FOS from dealing with complaints against the firm going back to the earliest date in respect of which PIAOB had jurisdiction over the firm, here 29 April 1988."

15.5.2.3 Add to para 4. “The judge in R (on the application of Brinsons (a firm)) v Financial Ombudsman Service Ltd [2007] EWHC 2534 (Admin) hinted at his agreement with the view expressed here. He pointed out:

> “In reaching this conclusion I am conscious, as Mr Virgo points out with some considerable justification, that the basis for confirming jurisdiction accepted by me has not been the only basis upon which the Defendant has claimed jurisdiction. No doubt that is of forensic interest. However, it does not seem to me that I should be deflected … because the Defendant, itself, has vacillated in the way that it has sought to explain its assumption of jurisdiction.”

Para 5 replace “This” with “The FOS’s”

Para 11 lines 1 and 7 delete “will”. Insert in fn 92 “DISP 2.2.2A”.

Chapter 16

16.1.1

Replace the first two sentences with “Article 10 of MiFID, DISP 1.3.1R and CRED 17.2.1R require a firm or branch of a UK firm in another EEA state to have effective and transparent procedures for the reasonable and prompt handling of complaints. In practice, these should be in writing and provide for receiving, forwarding, investigating and responding to complaints and their referral to the Financial Ombudsman Service. [fn CRED 17.2.4G]

16.1.2 para 2 line 2 replace “1.5.11” with “1.10.9R”. Delete fn 4. Replace the text after “record” and replace it with “DISP 1.10.9R(1) refers to a “contact point”. It is unclear whether this has to be a named individual or just an officeholder.”

16.1.4 Replace the text at the start with “Firms need to take…” Add to fn 5 Final Notices to Langtons IFA Ltd, 21 September 2006 particularly at para. 4.36 and Loans.co.uk, 25 October 2006 at paras 3.8(f), 5.29 & 5.30.

Fn 6 should read “DISP 1.3.3-4 & CRED 17.2.13-14.

16.2 Replace para 1 with

“The Consumer Awareness Rules in DISP 1.2 require firms to publish “appropriate summary details of their internal process for dealing with complaints promptly and fairly…[and] refer eligible complainants in writing to the availability of these summary details at, or immediately after the point of sale”. [fn DISP 1.2.1R(1) & (2).] Awkwardly, not all financial services activity involves a sale. So, DISP 1.2.2R indicates that

> “Where the activity does not involve a sale, the obligation in DISP 1.2.1R (2) shall apply at, or immediately after, the point when contact is first made with an eligible complainant.”

This rather misses the point that when contact is first made the firm usually has no idea whether a sale will result.”

Para 2 delete from “it needs” in line 5 to the end of the section and replace with

“The summary details of the complaints procedure needs to cover at least, according to DISP 1.2.3G:

> “(1) how the respondent fulfils its obligation to handle and seek to resolve relevant complaints; and
>
> (2) that, if the complaint is not resolved, the complainant may be entitled to refer it to the Financial Ombudsman Service.”

The can be set out in a leaflet. [Fn DISP 1.2.4G] Firms no longer have to display a notice about FOS in offices to which the public may have access.”

Fn 17 Replace text with “Glossary: Complaint”

16.3.2 para 7 add to the end “or an extra loop added”.

Replace text of fn 18 with “DISP 1.4.1R(2-3)”.

Chapter 17

17.1 para 3 line 1 insert before “complaint” “complainant and”. Line 5 Replace “DISP 1.4 to 1.6” with “ DISP 1.5 “complaints resolved by the close of the next business day” If it does, time limit, reporting, for non-MiFID business recording and forward rules do not apply. [Fn 1.5.1R]

Fn 1 replace “DISP 1.2.1” with “Glossary: complaint”

17.2.1 Replace paras 1-2 with

The Glossary defines “complaint as

“(2) (in DISP, except DISP 1.1 and the complaints handling rules and the complaints record rule in relation to MiFID business) 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, which:

(a) alleges that the complainant has suffered (or may suffer) financial loss, material distress or material inconvenience; and 46, 47
(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, which comes under the jurisdiction of the Financial Ombudsman Service.

(3) (in DISP 1.1 and the complaints handling rules and the complaints record rule only in relation to MiFID business) 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, which alleges that the complainant has suffered (or may suffer) financial loss, material distress or material inconvenience."

The two distinctions come about because MiFID requires firms to record and have procedures for the reasonable handling of all complaints. These are reflected in DISP 1.3 and 1.9. However, the FSA is not interested in this area at all in practice. One can see this from the fact that firms must record but not report complaints about MiFID business.

The key elements one is left with are

- 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,
- which alleges that the complainant has suffered (or may suffer) financial loss, material distress or material inconvenience; and
- 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, which comes under the jurisdiction of the Financial Ombudsman Service."

17.2.2 Replace the text after "else" to the end of the paragraph with

"The new definition of a complaint does not actually require the complaint to be against the respondent as such. It need only relate "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, which comes under the jurisdiction of the Financial Ombudsman Service".

If applied correctly, this could result in an enormous number of unnecessarily recorded and reported complaints. The idea is that a firm can receive a complaint and then forward it if it is not a complaint against it to the business with which the customer is actually dissatisfied. Even in relation to forwarding one has to consider whether the customer has complaint against the recipient."

Para 5 replace “a new rule, DISP 1.2.2” with “DISP 1.7”. Replace “requires” with “permits” and “to have in place a process for the referral of” with “to refer”. Replace the text from “where” to “has” in para 6 line 1 with “it”.

Fn 8 should now read “DISP 1.7.1R(1).

Para 6 line 4 insert “promptly” before “issue”. Insert a fn at the end of the sentence “DISP 1.7.1R(2). Delete the last sentence.

Para 7 replace from “and” to “possible” with “in accordance with the ordinary rules.” Replace fn 10 with “DISP 1.7.1R(3).”

Delete the last paragraph.

17.2.3 para 1 replace “DISP 1.2.1” with “The Glossary definition of “complaint” effectively”

Fn 15 replace “DISP 1.2.1” with “Glossary: Complaint”

17.2.4 delete from “or” to the end of the section.

Insert a new section 17.2.6 with the title of 17.3.1

Insert the text of 17.3 up until fn 20. Line 1 replace the text after “which” with “used the same definition of complaint “an expression of dissatisfaction” that appeared in the original version of DISP, says….”

Continue after fn 20 with the following until “an allegation” currently in 17.3.1 line 1

“In spite of all this, to qualify as a complaint under DISP, an expression of dissatisfaction must involve….”

Continue with the text in 17.3.1 to the end of the section with the following amendments:

Para 3 delete ““hard””

Para 6 line 5 from “from…rules”

Para 8 replace “DISP 1.3.3” with “this extra element of the definition of a complaint”.

At the end of this section insert

“It is very doubtful as to whether the FSA definition of a “complaint” with its need for a particular allegation complies with MiFID. That directive does not define “complaint”. Nevertheless, the qualification of an expression of dissatisfaction in the way chosen by the FSA would seem to offend the normal meaning of the term. It also breaches ISO 10002 which by its definition could be said to constitute a legal minimum standard for defining “complaint”. The big policy objection to the requirement of an allegation of financial loss or material distress or inconvenience is the impossibility of laying down consistent standards for identifying complaints defined in this way. Reputable organizations will simply ignore the extra element and over-report complaints.”

17.3 Resolved by the end of the next business day

Insert text from 17.3.2 as amended.

Fn 25 replace “1.3.3(2)” with “1.5.1R”.

At the end of para 1 add

“MiFID contains no such exception. As a result, the record-keeping rules are not excluded in MiFID cases. The problem is that the likely result of this rules is to encourage firms to handle complaints too quickly and so breach the complaint handling rules in Article 10 of the Directive. This is not a “reasonable” approach to good complaint handling.”

Delete the last sentence of the original para 4.

Fn 26 replace text with “DISP 1.5.3G”.

Replace old paras 5, 6 and all but the last two sentences of 7 with

“DISP 1.5.3G(2) defines “resolved” as being “where the complainant has indicated acceptance of a response from the respondent, with neither the response nor acceptance having to be in writing”.

This is an invitation to firms to badger clients on the telephone into accepting inappropriate responses resulting from inadequate investigations in order to keep the numbers of complaints down. It would have made more sense to exclude any case where a final response issued within the relevant timeframe had not received a reply. Such cases still need to be recorded and reported when they may have just consisted of an apology. Complaint records will now depend on the accessibility by telephone of the complainant and the willingness of the firm to try to resolve the complaint without an investigation.

Already, the FSA has found breaches of this rule by the very banks who lobbied for it. In its Dear CEO Letter "Handling Complaints About Unauthorised Overdraft Charges, July 2007 at p. 8, it reported:

> "The resolution of complaints by the close of the next business day7 must still comply with the wider DISP requirements, including effective complaints handling procedures and fair and consistent responses to complainants.
>
> We are concerned that these complaints are not always actually being resolved by close of the next business day. For example, we saw a number of instances where complainants, whose complaints had apparently been rejected by close of next business day, reiterated their complaint in writing shortly afterwards – clearly implying that their complaint had not in fact been resolved in the first instance.
>
> Firms need to ensure they have effective controls in place to satisfy themselves that complaints handled in this way are dealt with fairly and consistently.""

Old para 8 line 7 delete from after "safely" to the end of the sentence.

Replace the old para 9 with

"The correct way for firms to identify complaints is to include all cases where the customer has expressed dissatisfaction within their records excluding only cases from the FSA record (but their own) where a casehandler can say that the matter was resolved over the telephone typically with an apology.

While leaving the heading, replace the text of 17.3.3 with the following

"The rules about investigating and assessing complaints remain intact even for a case resolved by the end of the next business day. Strangely, a firm cannot forward a complaint when it resolves the case over the telephone by explaining that the complaint has made to the wrong business. The complaint handling rules in DISP 1.3 are not excluded which creates a problem since the reasonable handling of most complaints would not involve seeking to resolve them by the end of the next business day. Equally, it is almost impossible to do the root cause analysis required by that rule for non-MiFID cases without accurate complaint records."

17.4.1

Add to the first para

“The FSA allows firms to exclude complaints which do not allege a financial loss or material distress or inconvenience.”

Move the text from para 2 line 7 to the end to the first para.

Para 2 after line 5 “It can also leave cases out of their FSA returns and records where they have resolved them by the end of the next business day following their receipt.”

Delete the rest of the section.

17.4.2 End of para 1 insert

“It has made matters worse in 2007 by excluding from the definition of complaint cases where there is no allegation of financial loss or material distress or inconvenience. This breaches the ISO on the subject and by implication probably MiFID as well.”

Para 2 line 5 replace from “where” to the end with “cases which they have resolved by end of the business day following receipt.

Chapter 18

18.1.1 Para 1 delete “reportable or recordable”. Insert after “writing” “promptly or by credit unions”.

Para 2 replace “The acknowledgement” with “The acknowledgement needs to indicate that the firm has received the complaint and is dealing with it and must contain summary details of the complaints procedure. An acknowledgement by a credit union needs to comply with the old complaint rules. These insist that the letter gives…”

Para 3 delete from “except” to the end.

Delete para 4.
Fn 1 & 3 replace “1.4.1” with “1.6.1R(1).
Fn 2 Delete the reference to DISP 1.4.2.
Fn 6 “1.4.19-1.4.20” should read “1.7.2”.

Add to the title of 18.1.2 “- Credit Unions”

Para 2 replace with

“In 2007, the FSA replaced the 5 working day time-limit with an obligation just to acknowledge “promptly”. This is a source of considerable concern. The old rule made it clear when a firm had mis-identified a complaint and provided a

maximum acceptable response time. Now, firms will be able to argue about the length of time that “promptly” represents. It would have been better if the FSA had inserted guidance to indicate that 5 working days was the maximum acceptable time-limit. This is particularly the case in the light of recent evidence of banks and at least one firm failing to comply with the old rule. [Fn Dear CEO Letter “Handling Complaints About Unauthorised Overdraft Charges, July 2007 at pp. 7-8 (by misapplying the resolved at the end of the same business day exemption and misidentifying complaints) & Final Notice to Kilminster Financial Management Limited, 11 June 2007 at para. 4.12.]

18.2.2.1 para 1 line 3 replace the second sentence with “DISP 1.4.1 requires firms to assess the subject matter of the complaint.”

Chapter 19

19.2.1 line 1 replace “2.16” with 1.4.1R(1)”. Replace the second sentence by “That rule simply requires that complaints are investigated “impartially”. This is impossible to comply with in the sense that any firm employee is by virtue of his remuneration “partial”. CRED 17.2.11R(1) contains the original FSA rule on this subject.

> A credit union's internal complaint handling procedures must make provision for:
>
> (1) complaints to be investigated by a suitable person (officer, director or member of staff of the credit union) who, where appropriate, was not directly involved in the matter which is the subject of the complaint.”

The Final Notice to Jonathan Hardie criticised the complaint handler for dealing with a complaint about one of his sales. It did not consider the question of whether someone else could have handled the case in the situation.

19.2.22 delete the second sentence.

Fn 17 replace “2.16” with “4.1R(1)”.

Add to para 6 “Langtons IFA Ltd were fined in part for breaching the old independence requirement [Fn Final Notice 21 September 2006 at para 4.37]. The FSA noted

> “In four cases, the complaints files show that an employee who was the subject of the complaints exerted significant influence on the complaints officer and the handling of the complaints by either drafting the response or contacting the complainant directly to discuss the complaint.””

19.2.3 para 1 line 3 replace “both” with “four”. Fn 8 replace “and” with “,” and add “Abbey National 25 May 2005 and Guardian Assurance plc. 9 January 2006 at paras. 4.17-18, 28, 31, 34 & 37.

Para 2 line 2 replace “about” with “between one and half times and”

Fn 9 Add S Gilad, An Intra-Organisational Perspective on the Role of Consumer Complaint Handling in the UK Retail Investment Regulatory Regime (1981-2004), doctorate thesis, University of Oxford at p. 211 whose sample suggested 1.6 times. The fact that FOS does much less detailed work on redress calculations than the IOB may explain this. Dr Gilad concluded “the target and bonus system created an incentive for adjudicators to reject complaints, even regardless of firms’ greater propensity to require an ombudsman’s review.”

19.2.5 line 1 add “or impartiality”.

19.3.1 replace the first sentence with “DISP 1.4.1R(2) requires the firm to “assess fairly… (a) the subject matter of the complaint”. Delete the last sentence. The FSA has fined three firms and issued a prohibition order in another for breaking this straightforward requirement. [Fn Final Notices to Guardian Assurance plc and Guardian Linked Life Assurance Limited, 9 January 2006, Rainbow Homeloans Limited, 26 June 2006 and Allied Dunbar Assurance plc, 18 March 2004, Capita Trust Company Limited, 20 October 2004, Jonathan Hardie, 28 January 2008.

19.3.2 para 1 line 1 replace with “The original DISP 1.2.22 and the current CRED 17.2.11(3) required or require the firm to”

Add to para 2: “The new version of DISP does not reproduce this. Curiously DISP 1.3.5G suggests something similar:

> “A firm should have regard to Principle 6 (Customers' interests) when it identifies problems, root causes or compliance failures and consider whether it ought to act on its own initiative with regard to the position of customers who may have suffered detriment from, or been potentially disadvantaged by such factors, but who have not complained.”

The problem is that this does not apply to customers who have complained but about the wrong thing. Nevertheless, it must follow that the FSA would regard it as a breach of Principles 6 and 8 for a firm to fail to investigate points not raised by a complaint when they become apparent while the case is being handled.

Support for this view can be found in the Allied Dunbar Final Notice in 2004”

Continue after this from para 3 line 3. Line 5 insert “More” before “recently”

Paragraph 8 line 3 insert after “claim,” “it may be able informally to encourage the customer…”. Add to the end of the sentence “However, this is fraught with danger if it could result in the invalidation of the firm’s policy.”

19.3.3.3 para 1 line 2 insert “The old” before “DISP” and replace “requires” with “required”.

19.4.4.1 Add “The FSA issued a prohibition order against Jonathan Hardie [fn Final Notice, 28 January 2008 at para 4.10] in part for not appreciating this.

19.4.4.6 para 2 line 1 replace “exist” with “have existed”.

19.4.4.9 para 3 line 1 replace “recent” with “2004”. Para 4 line 3 replace “2.22” with 1.4.1R which requires firms to assess complaints fairly and consistently.” The FSA reflected these points in its 2007 Dear CEO Letter on Bank Charges Complaints. It said:

> “In complying with the time limits for dealing with complaints, some firms adopt the so called ‘two-stage complaints procedure’ whereby complainants are given the right to refer the matter back to the firm for reconsideration before the firm issues a final response.
>
> We are concerned that some firms' practices over goodwill offers (through written, phone or face to face contact) becomes so protracted, incremental and iterative (we have seen 'seven stages') that they do not comply with the requirement to have in place and operate appropriate and effective complaints handling procedures or to take reasonable steps to ensure that they handle complaints fairly, consistently and promptly..
>
> As the description suggests, the 'two-stage process' allowed in our rules should mean just that. Iterations are likely to be justifiable only in a minority of cases where they amount to a further genuine effort to resolve the complaint satisfactorily, for example, in the wake of further information relevant to the complaint.
>
> The unfairness to the complainant (of, in essence, discouraging, confusing, and wearing them down) is aggravated where responses fail to disclose their status (initial, final, or otherwise) or, in particular, the appropriate information required by DISP.
>
> Initial responses under the two-stage process must refer the complainant to the ultimate availability of the Financial Ombudsman Service – whereas we saw responses which did not contain this disclosure.
>
> Such disclosure is important, because making complainants aware that an impartial alternative arbitrator is available to them at little or no cost helps

> give them the confidence to reject a response they think unfair (rather than reluctantly accepting it, despite having doubts, in the misapprehension that the only alternative is potentially protracted and expensive court proceedings where they are at risk of paying the firm's costs if they lose).""

Fn 41 should read “DISP 1.6.5R.”

Fn 42 should read “DISP 1.6.6R.”

Para 6 replace the text after “stating” by “insisting that the first stage response complies with reasonably strict requirements in DISP 1.6.5R namely that it

> “(1) offers redress or remedial action (whether or not it accepts the complaint) or rejects the complaint and gives reasons for doing so;
> (2) informs the complainant how to pursue his complaint with the respondent if he remains dissatisfied;
> (3) refers to the ultimate availability of the Financial Ombudsman Service if he remains dissatisfied with the respondent's response; and
> (4) indicates it will regard the complaint as closed if it does not receive a reply within eight weeks of the complainant's receipt of the response”

Only then and unless the complainant indicates that he remains dissatisfied with the outcome, can the firm avoid having to continue to comply with the time-limit rules with respect to issuing a final response. If the customer waits more than a week to indicate his dissatisfaction, the time in excess of that is ignored for this purpose.”

Para 7 line 4 delete the text after “consistently” to the end of the sentence.

Replace fn 44 with “DISP 1.4.1R.”

19.5.1 para 1 replace the third sentence with “DISP 1.4.1 requires firms to investigate a complaints competently and diligently and assess it promptly”.

Para 2 delete “For reportable complaints,” and “four and”.

Delete 19.5.2.

19.5.3 para 1 line 1 delete the first sentence. Line 2 replace “it” with “this”.

Fn 48 replace “4.5(2) with “6.2R(2)”.

Para 3 delete “if he is dissatisfied with the delay”

Fn 49 replace “4.5” with “6.2”.

Fn 51 should read “DISP 1.6.6R.”

19.5.4 Line 5 delete “four and”

Fn 52 replace “1.4.9” with “1.6.4R”.

Delete 19.5.5.

19.5.6 para 2 line 2 after “list” replace the text with “in 2004 had announced that ti was conducting…” Line 4 “replace “has” with “had”. Insert before “four” “the old”.

Para 3 line 4 replace “this” with “that”.

Fn 53 replace the first comma with “and”.

19.6 para 2 line 4 insert after “independence” “or impartiality”. Para 4 replace “to them” with “them to it”. Para 5 line 2 insert “has” before “happened”. Line 7 replace “has happened” with “has occurred”. Para 8 line 1 delete “four and”. Line 4 replace “These “deadlines”” with “this “deadline””.

Chapter 20

20.2.1 replace the section with

“DISP 1.4.1 requires a firm to

> “(2) assess fairly, consistently and promptly:
> (a) the subject matter of the complaint;
> (b) whether the complaint should be upheld;
> (c) what remedial action or redress (or both) may be appropriate;
> (d) if appropriate, whether it has reasonable grounds to be satisfied that another respondent may be solely or jointly responsible for the matter alleged in the complaint;…
> (3) offer redress or remedial action when it decides this is appropriate;
> (4) explain to the complainant promptly and, in a way that is fair, clear and not misleading, its assessment of the complaint, its decision on it, and any offer of remedial action or redress”.

In reaching its assessment, DISP 1.4.2G suggests:

> “Factors that may be relevant in the assessment of a complaint under DISP 1.4.1R (2), include the following:
> (1) all the evidence available and the particular circumstances of the complaint;
> (2) similarities with other complaints received by the respondent;

(3) relevant guidance published by the FSA, other relevant regulators, the Financial Ombudsman Service or former schemes; and
(4) appropriate analysis of decisions by the Financial Ombudsman Service concerning similar complaints received by the respondent."

Strangely, the "final response" is only mentioned in DISP 1 in the context of the eight week letter in DISP 1.6. DISP 1.6.4R makes it clear that a firm can issue a non-final response so long as it informs the complainant how to pursue his complaint with the respondent if he remains dissatisfied. This use of initial responses and the closely allied notion of a two-tier process described in DISP 1.6.5 represents an unwelcome departure from PIA rule 8.2.6 which required a final response letter within 14 days of the conclusion of the investigation.

The FSA has already encountered problems with this. It said in its 2007 Dear CEO Letter on Bank Charges Complaints:

"
We are concerned that some firms' practices over goodwill offers (through written, phone or face to face contact) becomes so protracted, incremental and iterative (we have seen 'seven stages') that they do not comply with the requirement to have in place and operate appropriate and effective complaints handling procedures or to take reasonable steps to ensure that they handle complaints fairly, consistently and promptly..

As the description suggests, the 'two-stage process' allowed in our rules should mean just that. Iterations are likely to be justifiable only in a minority of cases where they amount to a further genuine effort to resolve the complaint satisfactorily, for example, in the wake of further information relevant to the complaint.

The unfairness to the complainant (of, in essence, discouraging, confusing, and wearing them down) is aggravated where responses fail to disclose their status (initial, final, or otherwise) or, in particular, the appropriate information required by DISP.

Initial responses under the two-stage process must refer the complainant to the ultimate availability of the Financial Ombudsman Service – whereas we saw responses which did not contain this disclosure.

Such disclosure is important, because making complainants aware that an impartial alternative arbitrator is available to them at little or no cost helps give them the confidence to reject a response they think unfair (rather than reluctantly accepting it, despite having doubts, in the misapprehension that the only alternative is potentially protracted and expensive court proceedings where they are at risk of paying the firm's costs if they lose)."

A “final response” is, though, defined in the FSA Glossary as

> (1) (in CRED) a written response from the firm which:
> (a) accepts the complaint, and, where appropriate, offers redress; or
> (b) offers redress without accepting the complaint; or
> (c) rejects the complaint and gives reasons for doing so;
> and which informs the complainant that, if he remains dissatisfied with the firm's response, he may now refer his complaint to the Financial Ombudsman Service and must do so within six months.
> (2) (in DISP) a written response from a respondent which:
> (a) accepts the complaint and, where appropriate, offers redress or remedial action; or
> (b) offers redress or remedial action without accepting the complaint; or
> (c) rejects the complaint and gives reasons for doing so;
> and which:
> (d) encloses a copy of the Financial Ombudsman Service's standard explanatory leaflet; and
> (e) informs the complainant that if he remains dissatisfied with the respondent's response, he may now refer his complaint to the Financial Ombudsman Service and must do so within six months.”

The only difference between the two definitions appears to be that a DISP final response can offer remedial action as well as redress and must enclose the FOS explanatory leaflet. It is impossible to identify the difference between redress and remedial action. Credit unions have long been well advised to include the leaflet.

The key elements then are

- a fair decision on whether to uphold in full or in part the complaint,
- a fair offer of compensation or redress when upholding the complaint,
- a clear, fair and not misleading explanation of the decision and any offer of compensation
- the FOS leaflet,
- referral of the customer to FOS and
- the six months warning and leaflet.”

20.2.2 para 1 line 4 insert after “English.” “This is a requirement of both Principle 7 (clear, fair and not misleading) and DISP 1.4.1R(4).”

Para 3 line 3 replace “1.2.16(3)” with “1.4.1(2)(c)”

Para 4 line 2 replace “that” with “which”.

20.3.2 para 2 insert at the start “The old” and replace “requires” with “required”. Line 2 insert after “complaint” “This remains best practice and is echoed in DISP

1.4.1(2)(a) which requires the firm to assess fairly the subject matter of the complaint."

Fn 25 replace "DISP 1.2.22" with "DISP 1.4.1R(2), Principles 6 & 8"
Fn 26 replace "DISP 1.2.17" with "DISP 1.4.1R(2)(c)"
Fn 27 replace text with "DISP 1.4.5G".
Fn 28 replace text with "DISP 1.4.2G(3)".
20.5.4.1 para 1 line 3 delete "new" and "will". Line 4 delete "after April 2005".

Fn 39 replace text with "DISP 1.10.2R(3)(a)".

20.4.3 Add to the end

Indeed, a number of fines have been handed out for simply reaching the wrong result.[Final Notices to Capita Trust Company Limited, 20 October 2004, Guardian Assurance plc and Guardian Linked Life Assurance Limited, 9 January 2006, Abbey National plc, 25 May 2005, Rainbow Homeloans Limited, 26 June 2006, Sesame Limited, 19 April 2007] In the Capita case, the FSA found that rejection of the complaint was more or less automatic. Guardian and Abbey National responded to complaints by reference to what the adviser should have done not what he actually did. In view of the compliance problems involved in the endowment sales concerned, the distinction involved rejecting complaints that should have been upheld. Rainbow and Abbey relied on the absence of any file. Rainbow rejected a complaint on the basis that the casehandler had not been present at the sale. In Sesame, the FSA reiterated a view taken by the Tribunal in Legal & General (1) that a cancellation notice has no effect on complaint about suitability. In Guardian, the firm rejected complaints where customers had failed to respond to its questionnaire rather than assessing the case on the basis of the information that they did have.

20.5.2 add to fn 20 "See also Final Notice to Jonathan Hardie, 28 January 2008 at paras. 4.11-12.

20.7.1.1 replace the section with

CRED 17.5.5R lays down what used to be the rule for complaints generally not just credit unions:

> "When a credit union sends a complainant its final response, the final response must:
> (1) inform the complainant that he may refer the complaint to the Financial Ombudsman Service if he is dissatisfied with the final response and that he must do so within six months; and
> (2) enclose a copy of the Financial Ombudsman Service's explanatory leaflet (unless it has already done so)."

Now, DISP 1 is silent on this subject. However, the Glossary definition of a “final response” for the purposes of DISP is almost identical. The letter

> “(d) encloses a copy of the Financial Ombudsman Service's standard explanatory leaflet; and
> (e) informs the complainant that if he remains dissatisfied with the respondent's response, he may now refer his complaint to the Financial Ombudsman Service and must do so within six months.”

Add to 20.7.1.2

“The FSA in its Final Notice to Next Generation Mortgages Limited commented [fn at para 4.19]

> “Based on the file reviews, Enforcement found that NGM was not communicating with customers on complaints in accordance with DISP 1.4.12R. NGM's final responses to complaints did not refer to a six month time limit (from the completion of its investigation into a complaint) for complainants to refer the complaint to the FOS, and no reference was made to the FOS leaflet. NGM was including a complainant's referral right to the FOS in its acknowledgement letter rather than in its final response.”

This actually is not quite accurate because there is no obligation in the rules to refer to the FOS leaflet. The firm only has to include it with the letter.”

Add to fn 59. “There is currently a proposal to merge the Pensions Ombudsman and FOS which will overcome this problem. See The Thornton Report, A Review of Pensions Institutions June 2007 at p. 10.

20.7.1.3 para 4 replace “1.4.12” with “1.6.2(1) and the FSA Glossary definition of “final response”

20.7.2 para 3 insert a fn after “enclosed” “Final Notices to Best Advice Mortgage Network Limited at paras 2.1(2) & 3.4 and Next Generation Mortgages Limited commented at para 4.19.

Add a new heading for 20.7.3 “Inhibiting access to FOS” Then insert

“20.7.3.1 Generally

In its Final Notice to Friends Provident and Abbey National, the FSA laid down a general principle that firms must not do anything which inhibits or deters complainants from referring their case to FOS. In the Friends Provident case, the regulator commented:

> “6.12. Friends Provident's complaints-handling procedures improperly prompted complaint handlers to apply Ombudsman decisions in specific cases generically. In addition, the standard letter template included a paragraph which potentially deterred customers from exercising their right to refer the case to the Ombudsman.”

At paragraph 7.9(d), the FSA went further:

> “In addition, decision letters frequently contained references to the likely views of the Ombudsman that could discourage the customer from taking the complaint further.”

Firms are not allowed to indicate that a reference to FOS would be pointless because the outcome is inevitable. Para 4.25 of the Abbey National notice was if anything more damning:

> “The review also highlighted matters in respect of Abbey's communication with customers which the FSA considers to be serious. In particular, in cases of rejected complaints where there was no point of sale documentation, Abbey's decision letters to customers contained the following wording:
>
> "Our advisors are trained to follow company procedures and I have no reason to believe that our advisors recommendation would not have been appropriate for your circumstances"
>
> "It is a requirement of the Financial Services Act that a fact-find is completed by financial advisors prior to making any recommendation for a life assurance product. This would involve a discussion of your personal circumstances and your future plans. To maintain compliance with the Regulators requirement's advisors are trained to high standards and I therefore have no reason to believe that the recommendation provided in [1989] would not have been appropriate for your circumstances at the time".
>
> "Our advisor would not have recommended an endowment mortgage unless it was agreed that you were prepared to accept a degree of risk in respect of the repayment of your mortgage, in return for the potential of a cash surplus at the end of the mortgage term…".
>
> "As maturity values are not guaranteed, regular reviews of endowment plans are carried out as detailed in the provisions booklet issued to you with your plan schedule. These reviews are designed to ensure that our customers can take any necessary action to keep their plans on track to repay their mortgage. Our advisor would have explained this to you as a

key feature of the plan and this should hopefully have reassured you that any risks involved could be minimised".

"I have referred to the "cooling off" notice as this gives you a further 14 days to reconsider your decision. As I can find no evidence that you exercised this option or queried the plan, I think it is reasonable to assume that you understood the key features of the plan and were happy to proceed".

The FSA considers that the use of such wording may have discouraged customers from pursuing their complaint further, for example by referring their complaint to the FOS."

In both cases, the regulator is referring to misleading comments in final responses generally. Abbey in particular ran into trouble for responding to complaints without a file by indicating that the adviser "would have" done something simply because he "should have" done it. This was particularly unlikely to be reliable in an environment such as mortgage endowment complaints where misselling was rife at the relevant time. One can surmise that the Abbey case inspired the FSA insert an obligation to observe Principle 7 (clear, fair and not misleading) in DISP 1.4.1R(4) when explaining the decision on a complaint.

20.7.3.2 Threatening…."

Insert the text currently under 20.7.3.

Chapter 21

21.2 para 2 line 2 replace "1.2.16-1.2.17" with 1.4.1(2).

Fn 2 delete from "DISP" to "and". Insert at end "See also Final Notice to Loans.co.uk, 25 October 2006 at para. 5.3.2.

21.2.2 para 5 line 3 insert after "individual" "or put them through instead to his line manager". Para 7 line 4 replace the second "with" with "at".

21.3 para 1 line 1 replace "1.5.1" with "1.9.1R". Line 2 insert after "receipt" ", five years where the complaint relates to MiFID business.

Para 2 should read "The record must contain the complaint received and the measures taken for its resolution and, for credit union cases, any correspondence between the parties and the complainant's name."

Fn 6 replace "1.5.2" with "1.9.1R"

21.4.1 para 8 line 4 replace “2004” with “2007”. Para 9 line 5 delete “it”. Para 10 line 3 replace “will be increased from” with “has increased since”.

21.4.2 The current requirements

The current rules, which require firms to file reports for every six month period [fn DISP 1.10.4R] within 30 business days of the end of that time.[fn DISP 1.10.5R] The exception to this is credit unions which only have to report once a year.[fn CRED 17.6.3]. Under DISP 1.10.4R, the reporting periods are the six months before and after the firm’s accounting reference date.

The reports have to list the total number of reportable complaints, broken down by type of case and product.[DISP 1.10.2R & CRED 17.6.3(1).] The firm has to decide what it considers to be the most prominent aspect of the case since many involve more than one. [fn 1.10.3.1G] By declining to use a cumulative reporting approach, the FSA is ensuring that for cases of the latter type, its information about the types of complaints received by firms will be inaccurate.

Closed reportable complaints must be reported under whether they were concluded within four weeks, from four to eight weeks and after eight weeks from the date of their receipt. [fn DISP 1.10.2R(2)] The total number of cases outstanding at the beginning and end of the reporting period then needs to be given. [fn DISP 1.10.2(3)(c) & (d).] A file is closed once either the firm has sent a final response, the customer has indicated in writing his acceptance of an earlier reply or there has been no response within eight weeks to a first response under a two-tier process.[fn DISP 1.10.7R] In the first and third situations, the date of the response is the key one. [fn DISP 1.10.8G]

BS8600 warns against over-reliance on precisely this type of data. It says:

> AObjective measures such as response times may reflect the efficiency of the system but say nothing about the effectiveness in meeting the customers= expectations.@

This involves measuring quantity, rather than quality, something for which the FSA criticised Allied Dunbar when fining it for bad endowment complaint handling. [fn Final Notice to Allied Dunbar Assurance plc, 18 March 2004 at para. 2.4(b).]

Firms must list the total number of reportable complaints upheld [fn DISP 1.10.2R(3)(a)] and the cases that the firm knows have been referred to and accepted by FOS for investigation [fn DISP 1.10.2R(3)(b)] as well as the total amount of compensation paid [fn DISP 1.10.2R(4)] - all during the reporting period.

AUpheld@ includes cases where some compensation is offered even if there is a dispute on the amount.[fn DISP 1.10.3G(2)] It does not include cases where the firm has dismissed the complaint but offered money as a gesture of goodwill.[fn DISP 1.10.3G(2)] For reasons indicated above, this addition to complaints reporting can be helpful in identifying companies that automatically reject cases and in crisis situations, those with low uphold rates.

Redress amounts include any sums paid or costs incurred by the firm (in taking steps rather than paying money or waiving deductions, notably for excesses.[fn DISP 1.10.3G(3)]). Here, one includes goodwill payments made when rejecting the complaint. .[fn DISP 1.10.3G(3)(c)] Curiously, the compensation amounts exclude over-payments taken under direct debits which are returned to the customer, following a complaint. .[fn DISP 1.10.3G(4)]

All complaint reports will have to be sent electronically in the FSA complaints reporting system or the appropriate section of the regulator=s website.[fn DISP 1.10.5R] If a firm cannot submit its report electronically, it must notify the FSA in writing without delay.[fn DISP 1.10.6R]

The grounds for complaining are overcharging, delays, other administration, misleading advice, failure to carry out instructions, poor customer service, misleading advertising, disputes over sums/amounts, churning, breach of contract, arrears handling and Aother@. Bizarrely, unsuitable advice has been left out. It is probably the most common ground for upholding a sales complaint.

21.5 replace para 1 with

DISP 1.3.3R lays down a rule for complaints that do not relate to MiFID business. For such cases,

> “a respondent must put in place appropriate management controls and take reasonable steps to ensure that in handling complaints it identifies and remedies any recurring or systemic problems, for example, by:
> (1) analysing the causes of individual complaints so as to identify root causes common to types of complaint;
> (2) considering whether such root causes may also affect other processes or products, including those not directly complained of; and
> (3) correcting, where reasonable to do so, such root causes.”

The reference to MiFID is a slightly odd one. Essentially Article 4 of the Directive prevents member states from going beyond its requirements without permission from the Commission. So, for MiFID cases, firms must instead apply SYSC 6.1

> “SYSC 6.1.1R
> A common platform firm must establish, implement and maintain adequate policies and procedures sufficient to ensure compliance of the firm

including its managers, employees and appointed representatives (or where applicable, tied agents) with its obligations under the regulatory system and for countering the risk that the firm might be used to further financial crime.

SYSC 6.1.2R
A common platform firm must, taking in to account the nature, scale and complexity of its business, and the nature and range of investment services and activities undertaken in the course of that business, establish, implement and maintain adequate policies and procedures designed to detect any risk of failure by the firm to comply with its obligations under the regulatory system, as well as associated risks, and put in place adequate measures and procedures designed to minimise such risks and to enable the FSA to exercise its powers effectively under the regulatory system and to enable any other competent authority to exercise its powers effectively under MiFID.

SYSC 6.1.3R
A common platform firm must maintain a permanent and effective compliance function which operates independently and which has the following responsibilities:
(1) to monitor and, on a regular basis, to assess the adequacy and effectiveness of the measures and procedures put in place in accordance with SYSC 6.1.2 R, and the actions taken to address any deficiencies in the firm's compliance with its obligations;
(2) to advise and assist the relevant persons responsible for carrying out regulated activities to comply with the firm's obligations under the regulatory system."

As the guidance in DISP 1.3.4G makes clear, this amounts to the same thing in the complaints context as DISP 1.3.3R."

Para 2 replace "recently" with "in 2004".

Insert after paragraph 2 "Ever since the FSA has repeatedly expressed concern at how poorly firms use management information in general and complaints material in particular to improve their businesses.[fnTreating customers fairly – guide to Management information 2007 at p. 10. See also Final Notice to Jonathan Hardie, 28 January 2008 at para 4.15.] In 2007, the FSA was still telling firms:

"Data on refused claims or complaints can also be informative. This will enable a firm to monitor the competence of the adviser and the quality of their sales. This information could also be reflected in the assessment of the competence of the adviser. It may also be useful in reaching a conclusion over the validity of a customer complaint as part of any

investigation where the suitability of the advice is being questioned." [Fn Treating Customers Fairly – Culture, November 2007]

21.6 para 1 line 4 replace "it" with "The record".

Para 3 line 1 should read:

"By October 2006, the FSA calculated that firms had paid over £2.7 billion in mortgage endowment compensation. [Mortgage endowments: delivering higher standards, December 2006. The regulator chose not to publish more recent figures in 2007.]

Chapter 22

22.1 line 5 insert after "organisation". "This had risen to 82% in 2006-7." Insert after "further "11.5% in 2006-7 down from 13.5% in 2003-4. Line 6 delete "would have" Line 7 insert "in both years" and after "only" replace the rest of the sentence with "0.85% in 2006-7, down from 1.3% in 2003-2004, had more than 50." [fn 2006-2007 Annual Review at p. 66 contains the figures for that year.]

22.1.2 Insert after paragraph 1

"In 2006-2007, the Financial Ombudsman Service's caseload mainly driven by mortgage endowment cases in previous years finally started to go down. 94,392 new cases represented a fall from 112,923 the previous year and 110,963 in the year before that. Mortgage endowment cases had fallen to 49% of these down from 61% and 63% the previous two years. 111,673 cases were resolved down from the peak of 119,432 the previous year. The number of cases being decided by Ombudsman went down from 8% in 2003-2004 to 6% in 2006-2007."

Insert into paragraph 2 line 2 "We can see this from the published figures for 2003-2004."

At the end of paragraph 3 insert:

In the 2006-2007 Annual Report, FOS described its complaint outcomes in a completely different way making it possible to work out with the aid of a calculator an exact "uphold rate". A complicating factor is the high number of cases thrown out because of a lack of The figures that follow assume (perhaps wrongly) that complaint withdrawals constitute customers giving up and therefore losing. In mortgage endowment cases, the industry lost 27.5 per cent of adjudicator cases. Elsewhere, the figure rose to 34.4 per cent. However, when an ombudsman had to be used to finish the case, the industry lost in 40 per cent of endowment cases and 44 per cent elsewhere. This may not prove anything because better resourced firms generally are more able than complainants to take a case as far as an ombudsman. FOS, though, fails to provide an overall figure. From its

numbers, it appears that the industry lost 27.8 per cent of endowment cases and 35.4 per cent generally. [See the Financial Ombudsman Service: Annual Review 2006-2007 at pp. 42-43.]

22.2.1 para 7 insert after “fee” if

> “(a) the Ombudsman considers it apparent from the complaint, when it is received, and from any final response which has been issued by the firm or licensee, that the complaint should not proceed because:
> (i) the complainant is not an eligible complainant in accordance with DISP 2; or
> (ii) the complaint does not fall within the jurisdiction of the Financial Ombudsman Service (as described in DISP 2); or
> (iii) the Ombudsman considers that the complaint should be dismissed without consideration of its merits under DISP 3.3 (Dismissal of complaints without consideration of the merits); or
> (b) the Ombudsman considers, at any stage, that the complaint should be dismissed under DISP 3.3.1 R (2) on the grounds that it is frivolous or vexatious.” [fn Glossary definition of “chargeable case” & FEES 5.5.1R.]

22.2.2.2 para 3 line 2 delete the first “of”. Para 4 delete “2000”.

Para 8 replace “1.4.12 requires” with “and the Glossary definition of “final response require”. Add to the end of para 10. “This is anyway the recommendation of the Thornton Report, A Review of Pensions Institutions June 2007 at p. 10.

22.2.3.1 insert at the end of para 1 “if the Ombudsman considers it apparent from the complaint, when it is received, and from any final response” [fn Glossary definition of “chargeable case & FEES 5.5.1R.”

22.2.3.2 para 15 line 7 Replace the last sentence of the para with a new para

“Initially, FOS could only institute a test case by using its general powers to dismiss a case that it preferred not to deal with. Now DISP 3.3.1AR has a specific provision on the subject that is broadly similar to the PIAOB’s Terms of Reference rule on test cases.

> The Ombudsman may dismiss a complaint without considering its merits if:
> (1) before he has made a determination, he has received in writing from the firm or licensee:
> (a) a detailed statement of how and why, in the firm's or licensee's opinion, the complaint raises an important or novel point of law with significant consequences; and

(b) an undertaking in favour of the complainant that, if the complainant or the firm or the licensee commences court proceedings against the other in respect of the complaint in any court in the United Kingdom, within six months of the complaint being dismissed, the firm or licensee1 will: pay the complainant's reasonable costs and disbursements (to be assessed if not agreed on an indemnity basis) in connection with the proceedings at first instance and any subsequent appeal proceedings brought by the firm or licensee1; and make interim payments on account of such costs if and to the extent that it appears reasonable to do so; and
(2) the Ombudsman considers that the complaint:
(a) raises an important or novel point of law, which has important consequences; and
(b) would more suitably be dealt with by a court as a test case."

DISP 3.3.1BG lists the relevant facts

"(1) whether the point of law is central to the outcome of the dispute;
(2) how important or novel the point of law is in the context of the dispute;
(3) the significance of the consequences of the dispute for the business of the firm or licensee or for its customers;
(4) the significance of the consequences of the dispute for the business of firms or licensees in that sector or for their customers;
(5) the amount at stake in the dispute;
(6) the remedies that a court could impose;
(7) any representations made by the firm, licensee or the complainant; and
(8) the stage already reached in consideration of the dispute."

The first factor is the most important. FOS must be in a position where it will decide the case on the basis of the legal position. Yet, it is required to reach decisions on the basis of what is fair and reasonable. In practice, where the fate of a company or a major compensation issue has been raised, the Ombudsman will be more tempted to use the test case procedure than otherwise. Also, FOS must be thinking that there is nothing much to choose as a matter of fairness between the two alternative results."

22.4.2 para 3 insert after "period" "for claims in contract and tort although not under sections 62 of the 1986 Act or 150 of the FSMA." Para 6 line 8 insert after "firms" "and FOS". Para 7 add to the end "or that the firm promised something which it failed to deliver after that time."

22.4.2.3 para 6 line 2 insert after "of" "what was then". Insert after "22" "and what is now DISP 1.4.1R". Para 15 line 6 insert "presumably" before "continue". Para 16 line 1 insert "pensions and" before "FSAVC". Delete the last sentence of the paragraph.

22.4.4 Add to the end of para 5 “This of course does not affect anyone who surrendered their policy before receiving a red letter.” Para 8 line 4 insert after “cover” “or was otherwise unsuitable for an endowment”. Insert at the end of the paragraph “Since CP 158 para 1.2 makes it clear that the DISP 2.3.6 should only apply to cases where the complaint relates to the risk that the policy will not repay the policy at maturity, it seems reasonable to construe DISP 2.3.6 as excluding all other types of complaints.” Insert at the end of para 8

The FSA’s 2005 Review of firms’ approach to time barring mortgage endowment complaints (MECs) made it clear that where the complaint is not clearly linked to the ABI Code letters,

“a firm wishing to time bar these complaints will need to think carefully about when and how, in the circumstances of the case, the policyholder might reasonably have been expected to become aware of their potential cause for complaint.”

This shows clearly that where a complaint does not relate to a matter mentioned in the red letter and is not about the risk that the policy will not pay off the loan on retirement, DISP 2.3.6 does not apply. Three years runs from the date of awareness that the customer was badly advised.”

22.2.4.5 para 4 line 1 replace “have” with “initially”. Insert after “bar” although nobody know takes such an approach.” Para 5 insert at the end of the paragraph: “FOS has wrongly interpreted the transitional rule TP 7A to mean that if a customer could not have brought a complaint under the 2003 version of DISP 2.3.6 on 1 June 2004, it cannot bring one now or rely on the 2004 version of the rules. The relevant transitional provision reads:

> “Nothing in DISP 2.3.6 R affects the position of a complaint which, on 31 May 2004, could not have been considered by the Ombudsman under DISP 2.3.1 R (1)(c); or DISP 2.3.6 R (1)(b) as it then stood.”

If a complaint had not been made to the firm at the time, it could not have been considered under DISP 2.3.1(a) not (1)(c). In fact, it would not have been a complaint at all. If FOS is going to bar complaints, it must do so using clear language which it has not done here. More generally, there is something objectionable about any ambiguity being construed against a policyholder here. The purpose of the FSA’s rule change was to respond to the Treasury Select Committee’s criticism that customers were having their cases barred without being warned of this eventuality. FOS’s interpretation runs directly counter to that. This increases the risk of litigation being brought by dissatisfied customers.”

Para 9 replace para (3) with “(3) He should exclude from DISP 2.3.6 complaints about matters other than purely whether the endowment would pay the target amount on maturity even assuming that they are covered by DISP 2.3.6R.”.

22.2.4.6 line 1 replace “1” with “1.4.1R”

Replace para 3 with “This led Ed Balls, then Economic Secretary to the Treasury, in 2006, to pronounce that the time-bar rules did not exempt firms from investigating and resolving complaints properly. He was correct. However, the FSA who knew this decided to change the rules rather than enforce them. The 2007 re-draft of DISP contained the following addition:

> “1.8.1R If a respondent receives a complaint which is outside the time limits for referral to the Financial Ombudsman Service (see DISP 2.3) it may reject the complaint without considering the merits, but must explain this to the complainant in a final response in accordance with DISP 1.6.2 R and indicate that the Ombudsman may waive the time limits in exceptional circumstances.”

This has the merit of being coherent if not exactly honourable. Essentially, the firm only has to investigate the time-bar or other jurisdiction point.”

Insert a new 22.2.4.8 Timebars and endowments in the Courts

“So far, one Deputy District Judge sitting in the Reigate County Court has ruled that a red letter does not start time running for the purposes of section 14A of the Limitation Act. In another case, the Royal Bank of Scotland settled a case just before the hearing by conceding everything.

In the meantime, the House of Lords in the complex Haward v. Fawcetts case has given further support to the idea that a red letter is insufficient. Lord Nicholls said:

> “time does not begin to run against a claimant until he knows there is a real possibility his damage was caused by the act or omission in question…
>
> in addition to having knowledge of the material facts about the damage, a claimant must know there was a real possibility the damage was caused by ('attributable to') the acts or omissions alleged to constitute negligence.
>
> Stated in simple and broad terms, his claim is that Mr Austreng did not do his job properly. Time did not start to run against Mr Haward until he knew enough for it to be reasonable to embark on preliminary investigations into this possibility.”

Lord Scott reminds us that the Law Reform Committee behind section 14A said that

> "a plaintiff who has no means of knowing that he has suffered damage should not as a general rule be barred from taking proceedings by a limitation period which can expire before he discovers (or could discover) his loss".

Lord Walker concluded that the HF Pension Trustees case was wrongly decided:

> “Until the FMC scheme trustees knew that they had received seriously incorrect advice which overlooked the need for propriety in exercising fiduciary powers, they did not know that the interests of their beneficiaries, the scheme members, were being prejudiced. This lack of knowledge did not mean merely that they were ignorant of having a cause of action in negligence against the solicitors; more fundamentally and more relevantly, they did not know that they (on behalf of the beneficiaries) had suffered any damage at all. They did not know that what had happened was not a more or less technical reorganisation of two pension schemes, but an improper abstraction of funds which might (if the tax was not recovered) deprive their beneficiaries of over £7m. In short, they knew the bare facts, but they were ignorant of their real significance.”

Lord Brown tries to express things more succinctly but in doing so sets the most restrictive test by far:

> “On the facts of this case the question ultimately seems to me to come down to this: to set time running did Mr Haward need to know not only that the investment was made on Fawcetts' advice but also that that advice had not been based on the kind of investigations which must necessarily be undertaken before any such advice can be reliably tendered?... I have finally come to the conclusion that nothing more is needed.”

Lord Mance expresses support for the views expressed here about the need for a financial loss.

> “The seriousness of the damage is relevant because there may be cases where, although it is known that loss has been suffered due to the negligence of another person, the loss may appear for a time so minor that no-one would contemplate instituting proceedings.”

However, what comes next would effectively make most consumer financial services time-bars limited to the 15-year backstop:

> “Similarly, if a financial adviser advises in favour of an investment, one would not describe the making of the investment itself as "damage" until one discovered that it had been a bad or unsound investment from the outset….

A claimant who has received apparently sound and reliable advice may see no reason to challenge it unless and until he discovers that it has not been preceded by or based on the investigation which he instructed or expected. A claimant who has suffered financial loss in a transaction entered into in reliance on such advice may not attribute such loss to the advice unless and until he either makes the like discovery about the inadequacy of the work done, or at least discovers some respect in which the transaction was from the outset unsound giving him (as Hoffmann LJ said) prima facie cause to complain. Such a scenario may well occur where there are other causes of loss which appear to him capable of explaining the whole loss."

These uncomfortable judgements stress the need (when they mention it at all and it was not relevant to the decision) for the customer to appreciate that he had suffered a significant loss before time starts to run. Otherwise, the customer must be aware that the loss is attributable to the advice given to him by the firm. That is a point made clearly by the Deputy District Judge in the Cunningham v. Friends Provident case. Probably, though, the customer does not need to appreciate that the advice was bad although this is now far from clear.

22.4.9 Insert text from 22.4.8

Para 3 line 6 before "decision" insert "initial although subsequently reversed". Line 8 delete from "they" to "at"

Add to the end of the section

"Small IFAs are in a different position. Most find it impossible to retain documents for periods in excess of 15 years. It would make sense to create a rule to protect them from having to defend complaints relating to events that happened many years ago. This should not be based on the Limitation Act. That is in some cases more favourable to the industry than DISP and in others less so. Instead, the time-limit should relate to the ability of firms to defend themselves effectively against unjustified complaints. If 15 years turns out to be that period, that may be reasonable. What is vital is that the current nearly open-ended commitment that IFAs have to face back to 29 April 1988 is now too long."

22.3.1.3 para 1 line 1 replace "a recent" with "2004". Replace para 3 with the following:

> "1. The FSA and FOS have set up a joint website, www.ombudsmanandfsa.org.uk in which it sets out the workings of this procedure. The following are the key provisions:
> Factors the FSA, OFT and ombudsman service are likely to take into account include whether the issue is a new one and whether it affects:
> - a large number of consumers;
> - a large number of businesses;

- the financial integrity of a large business;
- interpretation of FSA rules or guidance from the FSA or OFT; or
- a common practice by businesses.

2. By ‘business’ we mean either:
- a financial services firm regulated by the FSA; or
- a business with a standard consumer credit licence issued by the OFT. …

4. Anyone with a legitimate interest can identify a potential wider-implications issue. In practice, such issues are likely to be identified by:
- a business, through its own systems or as a result of a complaint;
- a trade body, as a result of information received from businesses;
- a consumer body, as a result of information received from consumers;
- the FSA or OFT, as a result of their oversight of businesses;
- the ombudsman service, as a result of considering a case or series of cases; or
- the ombudsman service jointly with either the FSA or OFT, through their regular liaison arrangements.

5. Anyone who wishes to raise a potential wider-implications issue should:
- do so in writing;
- specify clearly the nature and extent of the issue;
- give reasons why the issue has wider implications; and
- provide any supporting documentation.

6. The issue can be raised with the ombudsman service, FSA (for financial services generally) or OFT (for consumer credit or competition-related issues) and should be directed to:
- at the ombudsman service: the wider-implications unit…; or
- at the FSA: the wider-implications unit …or
- at the OFT: the wider-implications contact

When a potential wider-implications issue is raised

8. Depending on the type of issue raised, the ombudsman service will confer with the FSA or OFT (or both of them). They will decide jointly whether:
- the issue is one with wider implications; and
- whether the wider-implications process should be applied, and how.

9. In some cases they may agree that, though an issue has wider implications, it is not suitable for consideration under the wider-implications procedure. For example, where the issue is:

- not new;
- the responsibility of some other body or covered by an industry code;
- about legitimate business competition or judgement;
- one where the impact is too small to justify the use of regulatory resources relative to other priorities.

What might the FSA or OFT do if the wider-implications process is applied?

10. Will the FSA or OFT take action themselves? They will consider if this would be appropriate in the light of their statutory powers, strategic objectives and administrative priorities.

11. In the case of the FSA, action could include:
- taking supervisory action;
- taking enforcement action;
- taking regulatory action under the Unfair Terms in Consumer Contacts Regulations;
- securing redress;
- publishing rules and/or guidance.

12. In the case of the OFT, action could include:
- taking enforcement action under the Competition Act 1998;
- taking enforcement action under consumer protection legislation;
- revoking an organisation's consumer credit licence;
- taking other action under licensing powers or issuing a warning about future conduct;
- undertaking a market study;
- making a market investigation reference to the Competition Commission;
- issuing guidance.

13. Will the FSA or OFT seek industry and consumer input? The FSA or OFT may decide to seek the views of relevant industry and consumer bodies. In order to ensure its independence the ombudsman service may be unable to take part in such discussions unless both industry and consumer interests are represented.

14. Will action by the FSA or OFT deal with past problems? Not always. The FSA or OFT may be able to deal only with future practice, or decide to do so, leaving the ombudsman service to deal with individual complaints about past problems. It is also likely that individual consumers will continue to have access to the ombudsman service if a business (an FSA-regulated firm or an OFT licensee) does not comply with any regulatory action by the FSA or OFT.

15. Will the FSA or OFT provide information to the ombudsman service? The FSA or OFT may decide to offer information to the ombudsman service, for example on interpreting or applying FSA rules or OFT guidance, for it to consider when it decides individual cases.

16. What might the ombudsman service do if the wider-implications process is applied?
Will individual cases be progressed or suspended? It is up to the ombudsman service to decide whether to progress or suspend individual cases while the FSA or OFT considers whether to take action, or while they do take action.

17. What if the FSA or OFT provides information to the ombudsman service? In individual cases it is considering, the ombudsman service:

- will take account of any information provided by the FSA or OFT, especially if it relates to interpreting or applying FSA rules or OFT guidance; and
- before reaching a decision on a case, give the parties to the complaint an opportunity to comment on such information (or a summary) on which it proposes to rely.

18. Will the ombudsman service seek industry and consumer input? Whether or not, and when, the ombudsman service will seek industry and consumer input will depend on a number of factors. The ombudsman service may decide that its decision-making would be assisted by obtaining industry and consumer input if, for example, the FSA or OFT are unable to become involved or decide not to or past cases are unlikely to be the subject of any regulatory action. If the ombudsman service decides that additional industry and consumer input is required additional to that from the parties in the particular cases, it will:

- invite the chairmen of the relevant Financial Ombudsman Service industry liaison group and the Financial Services Consumer Panel to nominate industry and consumer experts who could provide such input; and
- before reaching a decision on a case, give the parties to the complaint an opportunity to comment on any expert material (or a summary) on which it proposes to rely.

19. Can the ombudsman service discuss cases with interested parties, such as financial businesses, trade associations or consumer bodies? The ombudsman service is content to explain its general approach as illustrated by past cases and its procedures. But, like the courts, the ombudsman service is constrained by the rules of natural justice when dealing with individual cases. How and when it can discuss case-related issues with interested parties is explained on its website."

Up until now, limited and ineffectual use has been made of this procedure. The wider implications website contains a number of case studies. In many of them, nothing much seems to have come of them. In other cases, the existing Memorandum of Understanding between the FSA and FOS would have been more than adequate to ensure that information was passed between the two organizations."

22.3.3.1 Add to the end of the section: "Firms, though, have an obligation to co-operate with the adjudicator's investigations. This involves responding promptly to correspondence. Firms should not let deadlines expire before seeking extensions or seeking to delay unreasonably. [fn Final Notice to Kilminster Financial Management Ltd,11 June 2007at para 4.13(1).]

22.3.2.3 Add to the end of line 2 after "case." "The only exception is where a case is deemed not to be chargeable [fn FEES 5.5.1R]. The Glossary defines this as

"any complaint referred to the Financial Ombudsman Service, .. where:
(a) the Ombudsman considers it apparent from the complaint, when it is received, and from any final response which has been issued by the firm or licensee19, that the complaint should not proceed because:
(i) the complainant is not an eligible complainant in accordance with DISP 2; or
(ii) the complaint does not fall within the jurisdiction of the Financial Ombudsman Service (as described in DISP 2); or
(iii) the Ombudsman considers that the complaint should be dismissed without consideration of its merits under DISP 3.3 (Dismissal of complaints without consideration of the merits); or
(b) the Ombudsman considers, at any stage, that the complaint should be dismissed under DISP 3.3.1 R (2) on the grounds that it is frivolous or vexatious."

After fn 128 insert This figure rose to 93.5% in 2006-2007 [fn FOS Annual Review at p. 66.]

Para 6 line 7 insert "usually" after "results" and after "fee" insert "if the Ombudsman does not have to investigate anything before dismissing the case".

22.3.3.2 para 2 line 1 delete "of"

22.3.4.1 para 4 line 3 insert after "not" "need to" Line 4 insert after "view." Increasingly, though, it does".

22.4.1 para 3 replace the sentence after "IFAs." with "In Bunney v Burns Anderson Plc [2007] EWHC 1240 (Ch), Lewison J concluded that an order to pay

a third party a sum of money for the benefit of the complainant was an award caught by the award limit. This decision is being appealed at the time of writing."

22.4.3 line 2 replace "the firm" with "both parties". Add to the end of the paragraph "Where FOS has made a recommendation, acceptance of the award by the complainant bars his right to sue for the amount recommended. This outrageous outcome has been criticised publicly by Sir Michael Barnes, the Independent Assessor but the Government has failed to act to reverse it.

22.4.4 para 1 line 3 replace "entitled" with "likely"

22.4.5 line 10 insert after "predecessors" although a study of 2004 suggests very limited co-ordinated work and trust between the two organizations"

Add to fn 170 S Gilad, An Intra-Organisational Perspective on the Role of Consumer Complaint Handling in the UK Retail Investment Regulatory Regime (1981-2004), PhD thesis, Oxford University 2006 at pp. 330-340.

22.5.1 Add to para 4 "One route that has proved successful concerns section 229(2)(a) of FSMA This states that

> "the determination may include—
> (a) an award against the respondent of such amount as the ombudsman considers fair compensation for loss or damage (of a kind falling within subsection (3)) suffered by the complainant ("a money award");"

In R (on the application of Garrison Investment Analysis) v Financial Ombudsman Service [2006] EWHC 2466, the High Court concluded that an incoherent award of compensation that did not make sense in relation to the findings of liability could be judicially reviewed.

Add to fn 174 See also R (on the application of IFG) v. Financial Ombudsman Service [fn [2005] EWHC 1153 (Admin).

Add to fn 175 "The Garrison case almost certainly cost the PI insurers in unrecoverable legal costs more than they managed to reduce the award by even though they won on the compensation aspects of their application.
22.5.3 Add to the end "In 2006-2007, Sir Michael Barnes continued to be concerned by FOS delays. He also drew attention to the fact that FOS tended to make awards without quantifying them which created hardship for complainants. [fn Financial Ombudsman Service Annual Review 2006-2007 at pp. 74-77] This practice, though, is still going on.

22.5.4 add a further paragraph

"The FSA can sue the firm to enforce a FOS award under section 382 of FSMA. Essentially, the claim is with respect to losses caused to an individual by the fact

that another “person has contravened a relevant requirement, or been knowingly concerned in the contravention of such a requirement,” However, as was shown in Financial Services Authority v Matthews [2004] EWHC 2966 (Ch), sub-sections (2) and (3) enable the Court to reduce or modify the award if it considers it to be an inaccurate estimate of the original complainant’s loss. In the Mathews case, it would have been better if the regulator had funded the complainant’s action rather than brought one of its own. The court would have had no power to reduce the award had the claim been brought by the successful party at FOS.”

22.5.5 add to the text

“The FSA can fine and take other disciplinary action against a firm that fails to honour awards promptly. Typically, this action takes the form of prohibition orders and removals of permission. In Agarwala, [fn 20 December 2006], the Tribunal upheld an interim suspension of all permissions on the basis in part of a dishonoured FOS award. In Haworth [fn 22 March 2007], the Tribunal upheld the removal of permissions on the basis that failing to honour a FOS award rendered the applicant not fit and proper. The FSA has also mentioned failing to honour awards promptly in Final Notices fining firms. [fn Langtons IFA Ltd, 21 September 2006 at para. 4.38 & Kilminster Financial Management Ltd, 11 June 2007at para. 4.5.]

22.5.6 Add to end of para 4 “However, if a firm or individual indicates that it or he can meet the claim, the FSCS will refuse to act, forcing the complainant to seek enforcement of the award through the courts. Here, the FSA should but rarely does intervene to assist with the court proceedings. Otherwise, there is deadlock.

Chapter 23

23.1 para 3 line 5 insert “fully” after “not”. Add to the end of the paragraph. “Currently, CP 07/14 proposes a DISP 3.5.3G which would deal with this question. It reads:

> “Where two or more complaints relate to connected circumstances, the Ombudsman may investigate them together, but will issue separate provisional assessments and determinations in respect of each respondent.”

The precise legality of this is a little open to question. The Ombudsman is only empowered to deal with complaints made by eligible complainants not other firms. Nevertheless, the Ombudsman’s ability to reach fair and reasonable results may enable it to finesse this.”

23.2.1 para 5 replace “used” with “followed”.

23.2.2 para 1 line 7 delete “a”.

23.3.1.1 para 2 line 6 delete “In a recent change to the rules” and “been the given”

Fn 21 should read “DISP 1.7.1R”
Fn 22 should read “DISP 1.7.1R”

23.4 para 6 line 5 replace from “recover” to the end of the para with “an amount recommended by FOS in excess of their maximum award limit.”

Add to para 7 “In practice, this means that a consumer can enforce an arbitration clause against a firm. A firm can agree after a dispute arisen to arbitrate it although it is assumed to be unable to enforce an arbitration clause in a prior contract against a consumer. It can enforce such a clause against a small business.

23.5 para 3 line 2 insert after “compensation” “in intra-industry disputes and joint liability cases in particular”.