

INDUSTRY PROCESS GUIDE FOR FOS ISSUES WITH WIDER IMPLICATIONS

1. BACKGROUND AND PURPOSE

This industry protocol sets out a framework for the appointment of industry experts who will prepare presentations to better inform the Ombudsman's decision where an issue with wider implications (IWI) arises.

It is important to note that the purpose of the IWI process is not to serve as consultation but an opportunity for the FOS to seek additional input on matters of law, fact and industry impact. It is in the industry's interests to provide the input in a timely fashion, as the FOS may otherwise proceed without it.

An IWI may:-

Impact only on a particular sector of the financial services industry;
Impact on different sectors, all of which are represented on a single industry liaison group;
Impact on different sectors, which are represented on different industry liaison groups.

The IWI process will function most effectively if the procedures effected are pragmatic, promote consistency and engender proper communication channels between members of the same liaison group and across different liaison groups. The protocol will be reviewed regularly.

2. INITIATING A FOS IWI PROCESS

Extract from the FSA and FOS joint statement: FSMA 2 year review: Financial Ombudsman Service, pp 25-26

Where the FSA decides not to become involved

6.29 The procedure would be as follows :-

- *The FOS will invite the industry chairman of the relevant industry liaison group to identify, normally within four weeks, an expert to provide industry input.*
- *The FOS will invite the chairman of the Financial Services Consumer Panel to identify, normally within four weeks, an expert to provide consumer input.*
- *It will be for those chairmen to confer with appropriate industry/consumer sources to identify the relevant experts.*
- *The FOS will seek input from the two experts, generally to be provided in writing within a further eight weeks.*

- *The FOS will seek input on particular factual or technical issues, but the relevant experts will be able to add points they consider relevant.*
- *In particular, the experts should consider (so far as they are appropriate) the matters listed in paragraph 6.27.*
- *If necessary, the FOS will hold a prior or subsequent discussion with both experts, to clarify issues and identify areas of agreement and disagreement.*
- *The industry and consumer input will be focused through the two experts, but that does not prevent them from obtaining wider input from a range of sources.*
- *In so far as the ombudsman proposes to rely on the input in an individual case, the ombudsman will give the parties an opportunity to comment on it (or a summary of it) before reaching a decision.*

6.30 The industry liaison groups will be able to draw on industry experts who can act as part of their normal paid roles. That will not always be the case with consumer experts and these may sometimes need to be funded. Where appropriate, the FOS will arrange for funding from itself or from the FSA.

6.31 The FOS will preserve confidentiality by withholding the parties' names, unless they consent to disclosure. The identity of the complainant is unlikely to be apparent from the circumstances of the case, but the identity of the firm might be. If so the FOS will need to secure the firm's consent before invoking the process.

3. THE ROLE OF THE INDUSTRY LIAISON GROUPS IN APPOINTING INDUSTRY EXPERTS

(a) Where the issue affects sectors represented on a single liaison group

Where the FOS asks the chair of a liaison group to nominate an expert, the chair will:-

- Work with the liaison's group secretariat and members to identify a suitable nominee
- As a matter of courtesy contact the chairs of the other industry liaison groups so that they are aware that a request has been made
- Provide the FOS with the contact details and personal profile of the nominated expert within four weeks of the request being made

(b) Where the issue affects sectors represented on different liaison groups

The FOS will contact the chair of the liaison group which represents the sector(s) which the FOS reasonably believes might be affected most significantly by the IWI. The chair will:-

- Contact the chairs of the other liaison groups to seek to identify a suitable nominee. It may be necessary to hold a roundtable discussion.

- Provide the FOS with the contact details and personal profile of the nominated expert within four weeks of the request being made.

4. TERMS OF REFERENCE FOR NOMINATED EXPERTS

Upon appointment, the industry expert agrees to:-

- Ask the FOS for a written brief setting out the scope and content of the matters for which input is sought, if the FOS has not already done so. The expert may be required to attend an initial meeting with the FOS
- Discuss with the chair of the relevant liaison group arrangements for obtaining wider input from a range of sources. Where the issue cuts across different industry sectors, the chair making the appointment (the appointing chair) must discuss the arrangements for seeking input with the chairs of the other liaison groups
- Prepare a draft written report to be submitted to the appointing chair within [5] weeks. Where there is a range of views within the relevant industry sector(s), ensure that the range is fairly reflected. Where appropriate, the appointing chair will agree with other relevant chairs whether further input to the draft report is required. It may be necessary for the expert to attend a meeting with the appointing chair (or with relevant chairs) or, at the appointing chair's discretion, with the industry liaison group, to discuss the report before it is submitted to the FOS.
- Submit the final report to the FOS within eight weeks
- If required, present their findings to the FOS if it decides to hold a subsequent discussion with both experts, to clarify issues and to identify areas of agreement and disagreement.
- Not make any public comment on the work undertaken as an expert whilst the IWI process is in train and the FOS has still to make its final determination

5. SCOPE, CONTENT AND PRESENTATION OF THE EXPERT'S REPORT

The expert's written report should provide the following content:-

- (i) factual or technical information
- (ii) relevant legal information
- (iii) any other information that enables the FOS to understand the industry consequences of a decision, and as appropriate, by expanding on those considerations contained in paras 6.27 and 6.28 of the joint FOS and FSA statement reproduced for convenience as below.

Para 6.27

- *how widespread and longstanding the commercial practice in question is, and the reasons why the practice was adopted;*
- *the numbers and types of firms and consumers affected by a particular practice, and their legitimate expectations;*
- *the interpretation of relevant codes of practice, and what was generally accepted industry practice, at the material time*
- *the potential consequences for the industry and consumers if the ombudsman were to uphold or reject a particular practice in the individual case;*
- *the potential effect and practicability of different redress options, if the case were upheld.*

Para 6.28

The decision of what is fair and reasonable will be a matter for the Ombudsman alone. But, ombudsmen may be able to reach a better informed decision about process, outcome and (if appropriate) redress if they are able to seek information and receive arguments that would enable them to understand fully the wider implications of the case and the possible consequences of their decision.

More generally speaking, the expert should:

- Separate out those points which are contentious from those which are non-contentious, for example, where there are strong views on certain aspects of the expert's proposed submission
- Attend a meeting of, or to provide opportunity, for the industry liaison group to discuss the industry submission before this is sent to the FOS.
- Make the submission to the FOS in writing within 8 weeks from the time they are appointed
- Verbally present their findings to the FOS who may hold a subsequent discussion with both experts, to clarify issues and to identify areas of agreement and disagreement.

Endorsed by¹:-

The Banking and Loans Liaison Group: APACS, BBA, BSA, CML and their members

The Health Liaison Group: ABI and their members

The Insurance Liaison Group: ABI, BIBA, IIB and their members

The Investment Liaison Group: ABI, AIFA, APCIMS, IMA and their members

¹ APACS – the UK Payments Association; British Bankers' Association; Building Societies' Association; Council of Mortgage Lenders; Association of British Insurers; British Insurance Brokers' Association; Institute of Insurance Brokers; Association of Private Client Investment Managers; Investment Management Association