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## **THE FUTURES AND OPTIONS ASSOCIATION**

**"CONSUMER COMPLAINTS"**

**FOA Response to FSA Consultative Paper 4**

**FEBRUARY 1998**

## CONSUMER COMPLAINTS

### 1. Introduction

- 1.1. The Futures and Options Association ("FOA") is an industry association representing some 200 institutions, brokerage houses, fund managers and exchanges engaged in the futures and options business (see Appendix 1)
- 1.2. In commenting upon FSA CP4, the FOA would make the following preliminary points:
  - We except that "the mechanism should place the onus on the firm itself to attempt to resolve the complaint in the first instance, within the specified period of time" (para 23), but believe that, in the interests of balance, it is not just a question of placing the onus on the firm to resolve the complaint. It is also to provide the firm with a fair opportunity to consider the complaint and the customer should be required (as is currently the case) therefore to refer that complaint to the firm in the first instance.
  - The FOA supports the criteria for the arrangements set out in para 25 of CP4, but regrets the omission of cost-effectiveness as one of the desirable criteria. It is assumed that this is an oversight, bearing in mind FSA's oft-expressed recognition of the need for cost-effectiveness.
  - While the FOA supports "in principle" the concept of a "single, compulsory financial services Ombudsman scheme", as FSA rightly surmise, its viability is dependent upon the establishment of an effective and focused structure. The FOA feels that the FSA should remain open to the interim step of rationalising the number of schemes in existence down to, say, 3 schemes, if the move to a single scheme becomes too complex or unwieldy and/or becomes driven solely by "harmonization for harmonization's sake". In this context, the FOA does not accept the argument that such a process would have been "ultimately" a matter for decision by the individual schemes (para 37). If ministers can decide on a single scheme, they can decide on 3 schemes. At the same time, while it is true that it would not have achieved the same degree of harmonization and simplicity as a single scheme, it would have been a more evolutionary approach to harmonization. The FOA does not accept that the establishment of 3 schemes would be, to use the words of para 40 "a multiplicity of schemes"! The FOA hopes therefore that the FSA will be pragmatic in its approach to merger.
  - In relation to the question of whether the Ombudsman approach is preferable to that of arbitration, the FOA supports the greater flexibility and informality of the Ombudsman approach, although it does not support the inherent imbalance between the rights of the complainant and the complaine to the extent that it is only the complaine who is required to submit to the use of the Ombudsman and it only the complaine that is bound by the Ombudsman's decision.

### 2. FOA Response to Specific Questions

Q1 Yes

- Q2 The FOA supports FSA's proposal as set out in para 63, providing the extra scope is clear to all participants and, bearing in mind the compulsory nature of the Ombudsman approach, the proposed range of additional activities is subject to separate consultation and is not duplicated elsewhere. For this reason, the FOA believes that clarity and certainty are best achieved by defining those activities which are to be covered.
- Q3/4 The FOA agrees with FSA's recommendations, although questions whether companies close to the maximum criteria set out in footnote 22 can properly be described as those who are "least able to sustain financial loss". Moreover, the fact that private individuals are not subject to any forms of means test means that there will be a large number of private individuals who will be eligible to refer their complaint to an Ombudsman, who are quite able "to sustain financial loss" and who do have the resources to pursue their claims before the courts. On the other hand, it is recognised that, in the context of private individuals, public policy may demand that no form of means test should be applied.
- Q5 The FOA understands the value of building in the proposed safeguards into the Ombudsman's internal procedures, but is concerned that the whole thrust of the scheme is to deny a right of appeal. This is an issue which the FOA wishes to consider separately.
- Q6 Yes
- Q7 The FOA supports the proposal set out by the FSA, but if there is to be a proper blending of industry experience with consumer perspectives, the Board must reflect the spread of retail<sup>1</sup> activities, service suppliers and customers that will be covered by the single Ombudsman and this may point to the need for focused management committees/panels to support the appointment of sectoral Ombudsmen.
- Q8 The FOA agrees with FSA's approach, but would emphasise the need for ensuring that information passing from the FSA to the Ombudsman is relevant, necessary and does not breach the overriding importance of preserving firms' commercial confidentiality.
- Q9/10 The FOA shares FSA's view that the preferred route would be a mix of a standing charge on all FSA firms and case fees, but would make the following additional observations:
- FSA has emphasised its awareness of the need "to avoid" cross-subsidy and to avoid penalising "those firms whose customers would not be eligible to make a complaint to the Ombudsman". For this reason, while we believe that it is right that there should be a standing charge, this view should be given proper effect in setting the balance between the standing charge and case fees.
  - It is recognised that FSA does not intend to introduce a charge for complainants, but there should be a mechanism for deterring vexatious claims by imposing a form of financial penalty on such complainants, particularly since the cost of firms in defending such claims and of the Ombudsman in addressing them can be considerable and time consuming. For this reason, we think it is wrong that complainants should not be at risk of facing a charge in such circumstances.
  - The question of levying case fees should be considered against the background of the fact that it is intended that they should be borne by the firm even where a complaint is decided in favour of the firm (which, in the case of a vexatious claim is particularly unfair). As stated in para 115, this could be disproportionate for small-size firms. Unfortunately, this is equally true of the cost burden placed

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<sup>1</sup> The inclusion of corporate complainants will widen the remit, and may include wholesale business. That experience should be reflected therefore on the Board, particularly if the rules governing wholesale and retail business are significantly different.

on the standing charge, if there are a significant number of unsuccessful complainants being subsidised through the charge. Clearly, past experience will demonstrate whether this is or is not the case. The FOA believes that there are good grounds for arguing that, in certain circumstances, complainants should bear some costs:

- some complainants may be significantly financially stronger than a defendant firm and those that can afford to pay their own costs or make a contribution to their costs, should be expected to do so;
- complainants should be deterred from bringing vexatious, irresponsible or groundless claims on the basis that, if an Ombudsman found a particular claim to fall into that category, he is able to require such a complainant to make a contribution to costs;
- some complainants may have, in effect, brought the cause of the complaint upon themselves by their own negligence and, once again, the Ombudsman should be also able to require such a complainant to make a contribution to costs where, for example, that negligence was grossly on the irresponsibility, dishonesty or deception of the complainant.

This will help to bring a greater element of justice and evenhandedness into the process for individual firms as well as reducing the overall cost of the scheme for firms in general.

Q11 The FOA supports the view that the work carried out by an Ombudsman investigating the claim should be available to the compensation scheme; but believes that an award made by an Ombudsman is no different to a firm's other liabilities to investors (whether or not supported by a judgement) and does not merit therefore preferential ranking over the claims of those other investors. As a result, all the firm's liabilities that are eligible for a claim for compensation should be subject to the same limit and no more.

Q12 In relation to the proposed powers of the Ombudsman, the FOA believes that the following additional powers should be granted, namely:

- the power to reject a frivolous or vexatious case (supported in para 134).
- the power to order a complainant to make a contribution to costs in any of the circumstances referred to in Q10 above.

**APPENDIX ONE**

**LIST OF MEMBERS**