Introduction:

This document contains responses to the questions posed by HM Treasury within the Consultation: Review of the Financial Ombudsman Service. These responses are provided by Enhance Support Solutions Limited ("Enhance"), a specialist consultancy providing regulatory and technical support to administrators of personal pension and small self-administered schemes. Our clients range from 'bespoke' SIPP providers through to Fintech based 'direct-to-consumer, ready-made' SIPP propositions.

A member of the Enhance team also submitted in 2022 a thesis 'The Financial Ombudsman Service: Fair and Reasonable?' as part of a Masters of Laws in the University of Buckingham. This looked at how the Financial Ombudsman Service ("FOS") applied regulations and legislation/case law when arriving at its decisions, based on an analysis of 840 FOS decisions between 2014 and 2020. In short, the research concluded that while the FOS operated in a professional manner, in accordance with its legislative terms of reference, there were areas of concern, including:

- The FOS were often left to place their own interpretation on high-level FCA principles, which ran the risk of these being applied in the way the FOS saw them, rather than the regulator's intended application, leading to uncertainty especially among regulated firms.
- There was misalignment between the FOS and the Pensions Ombudsman which led to inconsistent decisions on pension-related complaints that feasibly fell within the jurisdiction of both ombudsman services. Not only does this lead to uncertainty, but also means that there is a risk of both claimants and respondents gaming the system through choosing the ombudsman which is most likely to be sympathetic to their cause.

Part of our service to our clients is to provide a monthly commentary on interesting or topical FOS decisions, relevant to the pensions sector. We are also sometimes asked to provide input to complaint cases received by pension providers.

As a general observation, this consultation by HM Treasury is long overdue and welcome as it addresses flaws in the FOS, as well as proposing some pragmatic solutions which will bring some much-needed certainty to regulated firms.

This response has been made alongside a response to the FCA's consultation CP25/22.

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Enhance consents to our name being listed in the names of respondents.

Enhance Support Solutions Limited
8 August 2025

Responses:

Question 1: Do you agree that, where conduct complained of is in scope of FCA rules, compliance with those rules will mean that the FOS is required to find a firm has acted fairly and reasonably?

As a general principle, we agree with this question. It seems wrong for a firm who has acted in compliance with the FCA rules to be liable for a complaint brought against them, other than perhaps in situations where, notwithstanding the adherence to the rules, there has been poor service or maladministration. For example, a transaction may have been processed in a manner which does not contravene the FCA's rules, however there may have been errors or delays that resulted in a poor outcome. That said, while HM Treasury's ambitions as stated at para 2.9 of the consultation are sensible, we think the challenge comes when trying to apply some of the 'high-level' FCA rules to the 'fair and reasonable' test.

To explain, some FCA rules are clear and unambiguous insofar they relate to a specific matter. For example, a respondent firm must respond to a complaint within eight weeks of receipt [DISP 1.6.2R]. However, some FCA rules are much higher-level – COBS 2.1.1R(1) is an obvious example:

"A firm must act honestly, fairly and professionally in accordance with the best interests of its client."

This simple rule, which is often cited by the FOS in its determinations, gives rise to all sorts of subjective views on the extent to which the respondent has acted 'fairly' or 'professionally' or 'in the best interests of the client'. [It is generally more a matter of fact as to whether a firm has acted dishonestly or not.] The 'subjectiveness' argument is true of most of the FCA's "Principles' all of which, by their very nature, are high-level rules. Our experience tells us that it is the high-level rules that provide the greatest challenge for respondent firms and the best opportunity for claimants, often via claims management companies ("CMCs"), to advance the merits of their claim.

Consequently, we are unclear as to where the clear blue water is between the current legislation and that which the government proposes. This is because we think it is reasonably easy for the FOS to determine a complaint on a specific rule – using our complaint response rule from earlier, it will be clear whether a complaint response was issued within 8-weeks, or not. However, in relation to an alleged breach of COBS 2.1.1R, it will be less clear. There are examples[1] of the FOS deciding as a whole COBS 2.2.1R has been breached without specifically addressing that the respondent firm acted dishonestly, unfairly or unprofessionally. This broad-brush approach contrasts to the Court held view that COBS 2.2.1R should be more narrowly applied, based on the contractual obligations of the respondent firm to its customer[2].

[1] DRN5370939 and DRN5702536 to name two examples.

[2] Adams v Options SIPP [2020] EWHC 1229 Ch at para 150 (note: other aspects of this case were successfully appealed, however the Court's view on COBS 2.1.1R was left intact).

Given the potential for divergence in interpretation on high-level rules, the proposed government legislation needs to be distinguished from the current through the inclusion of clarity in relation to higher-level rules. We are not sure what this clarity would look like. It may be that HM Treasury needs to mandate that the FCA sets out their intent for some of the higher-level rules. We think this may be easier than it sounds insofar that when looking at FOS determinations, they often work to a template that include:

- COBS 2.1.1(R); and,
- Principles 1-11 [PRIN 2.1].

We have excluded Principle 12 – Consumer Duty from the above, on the basis that the FCA have set out a sub-set of Rules and Guidance linked to Consumer Duty. Time will tell how helpful this is to the FOS, however anecdotally based on early Consumer-Duty based complaints, the expanded FCA rules and guidance have been useful. It is possible therefore that the FCA could be asked to provide similar clarification of intent for the rules stated above.

It would also be helpful for any new government legislation to include the extent to which FCA 'guidance' is included within the 'rules' that FOS should consider. For example, will the FOS be required to consider FCA Handbook Guidance and documents/publications such as Thematic Reviews, Portfolio (Dear CEO) letters or similar?

Our responses to some of the later questions also continue this theme.

Question 2: Will the aligning of the Fair and Reasonable test with FCA rules still allow the FOS to continue to play its relatively quick and simple role resolving complaints between consumers and businesses?
We are not sure this will be the result, for much the same reasons as above. Where the rule is a 'specific' rule, it should be reasonably straightforward as to whether the rule has been followed or not. In these cases, we see the FOS dispute resolution service maintaining a nimble, quick and simple approach to resolving disputes. However, as stated in question 1, we do not see the applicability of FCA Rules as being as straightforward as portrayed by HM Treasury. This is considered more in the responses to some of the following questions.

Question 3: Do you agree with the proposed approach for dealing with law which may be relevant to a complaint before the FOS?
We do agree this approach. As far as we can tell, the proposals reflect what is in play already. In terms of the application of general law, for example contract law or the role of a Trustee, the FOS tend to apply this only where necessary and relevant to the case. In our experience, this is applied judiciously.

Question 4: Do you consider that there are some cases that are not appropriate for the FOS to determine, bearing in mind its purpose as a simple and quick dispute resolution service? How should such cases be dealt with?
Firstly, we think the description of the FOS's purpose of being a "simple and quick dispute resolution service" over-simplifies what the FOS does. It is agreed that for the majority of cases, the description is accurate. Many cases will be resolved swiftly and where upheld, a

modest ‘distress and inconvenience’ redress payment will settle the matter. However, for a service that in Q1 2025/26 handled 68,000 new complaints across a wide range of topics (insurance, banking, CMCs, pensions, investment et al), and with a potential redress limit of up to £430,000, it is obvious that not all complaints are going to be ‘quick and simple’ to resolve. The compulsory jurisdiction provides a broad scope of complaints falling within the FOS’s remit. Given the broad scope, we do think that sometimes there will be individual, or more likely, groups of complaint about a similar theme, where it may be more appropriate for an alternative resolution process.

Such an alternative process could exclude the FOS altogether – for example, by referring the matter to the Courts; or, through the FOS perhaps bringing in outside help to assist in forming an equitable standpoint from which a ‘fair and reasonable’ stance can be taken by the FOS in deciding similar complaints. Applying this methodology to recent examples:

<u>The Court approach:</u>
The principles linked to the current motor finance matter has (it seems) been set by the Courts, from which presumably the FCA will set out a redress scheme. If this works to plan, this should avoid thousands of individual FOS claims.

<u>The ‘outside help’ approach:</u>
Linked to the self-invested personal pension (“SIPP”) sector, over the past few years (probably from 2012/13) there have been claims against SIPP operators about their responsibility where the SIPP wrapper has been used to invest in unregulated investments that have subsequently failed. Without getting into the rights and wrongs of the specifics, these cases were complex and, in some cases, took years to resolve which was in no-one’s interests. We wonder therefore whether the process could have been accelerated through convening a panel of experts/interested parties which could comprise *inter alia* the FCA, other relevant ombudsman services such as the Pensions Ombudsman (given the pensions overlap in this example), consumer representation, specific sector representation and legal opinion (which could result in a Court opinion). Such a panel could consider the broad FCA rules which applied at the time, legal and equitable principles in order to provide a view as to whether in principle such claims had merit and if so, whether respondent firms were wholly or partially liable – this was relevant in this case as often there were multiple parties involved in the chain of events leading to consumer losses. Accepting there will be challenges on balancing parties with conflicting interests, there is a potential benefit of the general arguments of the cases happening once leading to a ‘starting point’ from which claimants, respondents and the FOS can work from; in fact, it would be envisaged that in such cases, where there is held to be a liability with respondent firms, such claims could be settled without recourse to the FOS.

Question 5: Do you agree that there should be a mechanism for the FOS to seek a view from the FCA when it is making an interpretation of what is required by the FCA’s rules?
We do agree there should be such a mechanism. The process should be considered carefully as the fact that clarity is being sought implies ambiguity in the FCA rule being considered. In our experience, some FCA rules are poorly written and/or desperately outdated. Given the profound effect the interpretation of an ambiguous rule can have, we also think that in some

cases the FCA should be able to refer to the Courts for a legal view of the interpretation in how the rule applies to the issues at hand. The whole process should be fully transparent.

Question 6: Do you agree that parties to a complaint should have the ability to request that the FOS seeks a view from the FCA on interpretation of FCA rules where the FCA has not previously given a view?
We do agree. While we applaud the ambition of a default 30-day turnaround, we think this is a high-bar. Our experience in dealings with the FCA is that responses are typically slow and the nature of the beast is that there is typically a 'cast of thousands' involved in any decision. We think it is right to impose a reasonable turnaround time, however we would rather there is a considered response to such requests from the FOS (or other parties) rather than a rushed response.

Question 7: Do you agree that parties to a complaint should have the ability to request that the FCA considers whether the issues raised by a case have wider implications for consumers and firms?
We do agree this, for much the same reasons as set out in our response to Q4 – in fact, this was probably what we had in mind. While we think that situations invoking 'wider implications' will probably be reasonably obvious, it would be helpful if legislation and guidance around policy intent makes clear what in broad terms constitutes 'wider implications'.

Question 8: As part of implementing the proposed referral mechanism, do you think there are any issues which should be considered in order to ensure the mechanism works in the interests of all parties to a complaint?
As the consultation alludes to, the referral mechanism will need to be used judiciously to avoid the process becoming overwhelmed or used for frivolous cases. In very broad terms, we think the referral mechanism should consider matters such as:

- Complaints cohorts of potentially high individual values (possibly in excess of £85,000, this being the current FSCS limit) – what we mean by this is that while the cohort of complaints received by the FOS may not of themselves be a mass redress event ("MRE") the complaints may be of such numbers that if upheld, due to the quantum, there would be serious implications to the viability of the respondent firms meaning there could be claims on the FSCS.
- Possible 'floodgate' complaints where an upheld complaint could give rise to many follow-on complaints of a similar nature (which may or may not become a MRE).
- Where there is genuine uncertainty on how a FCA rule should be applied – for example, this could be where the rule is old and market practice has developed, or the rule is new and this is a test-case.
- Where another government agency has provided a contradictory interpretation – HRMC's recent stance on pension benefit crystallisation cancellation rights seemingly being at odds with the FCA rules and market practice is a case in point.
- Where another ombudsman or the court has applied an alternative interpretation to a particular matter.

We are sure there will be other more nuanced circumstances where such a referral should be considered, however the above points are our starter suggestions.

Question 9: Do you agree that the Chief Ombudsman should have overall authority for determinations made by FOS ombudsmen, and through that authority, should be responsible for ensuring consistent FOS determinations?
We do agree that the Chief Ombudsman should have overall authority and responsibility for the consistency of adjudications and determinations, and should be held to account when consistency is diverged from. This is not to say that two similar complaints couldn't be settled in different ways – for example, in relation to a failed investment, the FOS may uphold the complaint if the investor was a novice retail investor who received poor advice, whereas may reject the complaint if the investor had direct/previous experience in the investment. We think the main thing is that the FOS, most likely through the Chief Ombudsman, should be able to justify why different decisions apply to what appear to be similar circumstances; and, that there should be the facility to challenge inconsistent decisions.

Linked to this is communication flowing from the FOS. They are okay at providing some updates and guidance communications to the financial services sector; however, our experience is that they shy away from some of the more contentious matters and controversial decisions. Along with consistency, this needs to improve.

Question 10: What approach to transparency arrangements would provide the most accessible way for consumers and firms to understand what outcomes to expect for particular types of cases that the FOS deals with?
We have a direct vested interest in this question. Currently, as part of a monthly update provided to our clients, we do look at the 'Investment and Pensions' determinations published by the FOS each month – typically this means looking at the decision database for circa 250-350 decisions per month and selecting decisions that are of relevance or of interest to our clients and doing a deeper-dive on these cases. The feedback is that our clients derive benefit from this, hence we would be in favour of maintaining the database of decisions. Furthermore, as part of the FCA's guidance to regulated firms on the implementation of Consumer Duty, one of the FCA's suggestions was for firms to keep across FOS decisions so that this could inform working practices within the firm. We are also aware that when pension providers are undertaking due diligence on potential business introducers (typically financial advisers), many firms will do a "Firm/business name" search of the FOS decision database to see if there are red-flags of numerous upheld complaints against the firm in question. For these reasons, we would prefer to see the publication of individual decisions maintained as we think the benefits outweigh any perceived disadvantages.

As we have said though in Q9, we do think that the FOS communications can be improved and we are supportive of the government's approach, in particular the suggestion of the quarterly thematic guidance as suggested at para 2.45. We do appreciate that the balance is difficult to achieve as by its very nature, the FOS's audience have conflicting interests. Transparency of decision making will be helpful, as will published decisions (and the reasons) where the FCA or other parties have been asked to intervene.

Question 11: Do you think the package of reforms outlined above, taken together, will be sufficient to address the problems identified by the review and ensure the FOS fulfils its original purpose?
Subject to the responses to the first ten questions, we do think that the proposals will help address some of problems identified by the review, while ensuring the FOS's role as a dispute resolution service remains intact.

Question 12: Taking into account the other reforms proposed in this consultation, do you think that the FOS should be made a subsidiary of the FCA? If so, what are your views on the appropriate institutional arrangements?
We are of the view that the FOS should not become a subsidiary of the FCA, mainly along the lines of the first bullet point in para 2.53. The FSA/FCA has been party to some catastrophic regulatory failures over the past few years, normally due to inaction and/or poor decision-making, and has subsequently failed to take any acknowledgement for their part in the failure. Often the result has been to blame a firm or sector; or, has sought to intervene on court cases as an interested party in order to further point the finger as firm or sector failings. This is not for a moment suggesting that a firm or sector is blameless – far from it – however there are times when the regulator's actions could have prevented the car crash that followed.

Therefore, our cynical view is that if the FOS were a subsidiary of the FCA, it would be easy to deflect from any regulatory shortcomings by engineering a mass redress event (or similar) whereby the respondent firms are brought squarely into the line of any claims. In other words, if there was ambiguity over a particular FCA rule, the impartiality would be lost and it would be easy for the FCA to say "of course this rule meant X". It will be like the FCA marking their own homework.

The other suggestion is to make the FOS constitution similar to the Pensions Ombudsman (PO) so that it is completely independent and has a similar function of the Court. We don't think this route is under consideration, however thought we would mention it in passing on the basis that the PO seems a competent and well-functioning ombudsman.

Question 13: Do you agree that 10 years is an appropriate absolute time limit for complainants to bring a complaint to the FOS?
We do agree that 10-years is an appropriate absolute time limit for complaints to be brought to the FOS. Our reasons are pretty much as outlined within the consultation.

Trying to work out whether the 3-year rule applies is an art rather than a science and something which is applied in wholly inconsistent and arbitrary fashion by the FOS. As the consultation identifies, the uncertainty this brings to firms is unacceptable and is inconsistent with how statutory limitation periods are applied elsewhere.

Question 14: Do you agree that the FCA should have the ability to make limited exceptions to this time limit?
Without knowing examples of the circumstances in which exceptions could apply, we do not agree that the FCA should have the ability to make limited exceptions to the time limit. The

time limits are either absolute or they are not. By having an absolute time limit is designed to provide certainty to firms. We do not see in what circumstances an extended time limit would apply. This is because the 6/3/10-year time limits all apply to when the event being complained about occurred. These limits should apply across the board, otherwise we can envisage more and more 'exceptions' being made by the FCA, so as to render the absolute time limit meaningless.

Question 15: Do you agree that the FCA should have more flexibility, when investigating a potential MRE, to take steps that are designed to avoid disruption and uncertainty for consumers and firms? In addition to the proposals made above, do you think there are other tools for the FCA which should be considered?
While we have limited experience of MREs, what is being proposed sounds sensible. A well-functioning regulator should mean that MREs are rare. Where a potential MRE has been identified, we do think that some of tools mentioned previously, such as the panel of experts and legal opinions, can be used to assess whether a particular matter stands as a MRE. We also suspect that a legal pathway such as that seen with the recent motor finance issue, may often be the pathway to a MRE. It may often be the case that a MRE hinges on the interpretation of a particular FCA rule (as already explored in previous questions) in which case it is suggested that some form of non-partisan legal input is taken, otherwise we come back to the concept of the FCA marking their own homework. We also are of the view that any MRE should be subject to the formal consultation process (very much along the lines of the process being deployed for the current motor finance redress scheme).

Question 16: Do you agree that there should be a simpler legal test for the FCA to satisfy in deciding that a section 404 redress scheme is needed to respond quickly and effectively to an MRE?
As with Q15, as we have limited experience in this area, we don't have anything sensible to add. The principle of simplicity sounds agreeable. Our only slight concern is whether a simplified system means that more MREs are directed by the FCA, almost as a shortcut to pseudo enforcement action – in other words, rather than go down the long-winded and probably legalistic route of enforcement, it may become easier to simply mandate a MRE on a sector the FCA has concerns about on the basis that the redress acts as pseudo fine and the MRE will change for the better the firms' behaviour. In other words, the MRE becomes a quasi-enforcement tool.

Question 17: Do you agree that the FCA should be able to direct the FOS to handle complaints consistently with relevant redress schemes, or to direct the FOS to pass related complaints back to firms, to be dealt with by those redress schemes?
We think in the first instance, the firms should handle the redress schemes. We also think that CMCs should either be banned from handling complaints under a redress scheme (on the basis that if the firms are automatically applying these, there should be no need for a CMC) or, if a CMC is involved, their share of the redress is capped at a modest amount – say 10%. Only where a firm is dragging its heels or refusing to pay under a redress scheme, should the FOS become involved.