

SRA BOARD

8 June 2021

CLASSIFICATION – PUBLIC*This paper will be published*

Implementing permanent fee rules that restrict charges for claims management activities.

Purpose

- 1 This paper sets out our proposal to issue a discussion paper to gather data to inform our approach to meeting the statutory duty placed on us in the Financial Guidance and Claims Act 2018 ('the Act') to make rules which prevent excessive fees being charged by law firms for all claims management agreements and claims management activities relating to financial products or services.

Recommendations

- 2 The Board is asked to:
- a) agree the approach to gathering more information by issuing a discussion paper
 - b) note our proposed next steps on engaging stakeholders to develop our data sources.

If you have any questions about this paper please contact Tracy Vegro, Executive Director, tracy.vegro@sra.org.uk

Equality, Diversity, and Inclusion considerations

Consideration	Paragraph nos
<p>We will proactively engage with law firms to understand any equality and diversity impacts as we socialise our discussion paper and any further consultations.</p> <p>As stakeholders engage we will become familiar with the persistent/common risks and issues that arise and how consumers might be affected. This information will also help identify and assess any impacts and how they might be mitigated.</p> <p>We will actively explore how consumers might be impacted and engage with consumer organisations to support this work. Overall we expect there to be a positive impact because we are providing protection against excessive fees. We note that the FCA who are under a similar duty have more data than us about the characteristics of people with potential claims have said in its consultation that it does not consider that the proposals adversely impact any of the groups with protected characteristics under the Equality Act 2010. The FCA does say</p>	N/A

SRA BOARD

8 June 2021

CLASSIFICATION – PUBLIC



<p>in its consultation that the proposals will help older people, who are more likely to have pensions claims, and younger people who are more likely to have loans claims. The FCA continue to consider the equality and diversity implications of its proposals and will revisit them when publishing their final rules.</p>	
--	--

SRA BOARD

8 June 2021

CLASSIFICATION – PUBLIC



Implementing permanent fee rules that restrict charges for claims management activities.

Background

- 3 Consumers can make claims for redress directly to businesses that may have mis-sold them financial products and services. Free to use statutory ombudsman and compensation schemes also exist for claims against certain financial businesses. These claims do not involve a legal process and are designed to be directly accessible to claimants.
- 4 However, a market does exist for claims management activities. This can involve seeking out and identifying potential claims for redress and then advising, investigating, or representing a consumer in relation to that claim. The market includes claims management companies (CMC's), as well as law firms regulated by the SRA.
- 5 As the transfer of regulation of claims management companies transferred to the Financial Conduct Authority (FCA), HM Treasury and the Ministry of Justice (MoJ) decided to maintain the statutory exemption which would allow solicitors and law firms authorised by us to carry on claims management activities under our regulation.
- 6 The Act, amongst other things, confirmed:
 - A duty on us and the FCA to make rules which prevent excessive fees being charged by law firms for all claims management agreements and claims management activities relating to 'financial products or services'.
 - A discretionary power for us to make rules in relation to fees charged in other claims management sectors, for example, personal injury.
 - An interim flat rate fee cap of 20% on all Payment Protection Insurance (PPI) claims unless and until rules are made displacing that cap.
- 7 A discussion paper setting out how we might comply with the duty, rather than consulting on firm proposals, allows us to engage directly with stakeholders and reduces any potential risk of legal challenge caused by making proposals without good quality information about potential impacts.
- 8 The Act does not set a firm target date for when we must make rules. We have engaged with both HM Treasury and the MoJ to make sure that expectations that we are progressing work to implement rules within a reasonable time are being met¹. So, a discussion paper rather than full consultation paper on firm proposals also allows us time to develop an understanding of the scope of the duty that has been placed on us.

¹ The duty imposed on us came into effect in March 2019.

SRA BOARD

8 June 2021

CLASSIFICATION – PUBLIC



- 9 The legislation does not set out strict boundaries or set fixed criteria around how we should approach making rules to prevent excessive fees. That is left to regulators².
- 10 We have been working closely with the FCA to explore how we both might best comply with the duty to make rules. The FCA published a consultation which closed in April 2021 on its proposals to introduce fee caps and information requirements on CMCs it regulates³.

Our proposed approach

- 11 Issuing a discussion paper will allow us to build knowledge and gather information about how law firms that we regulate operate in the claims management market and how fee restrictions might impact on them.
- 12 We understand that only a small number of the c.10,500 firms that we regulate carry out this work. However, we do not routinely collect information about this and our efforts to collect robust information by surveying a sample of firms has not been as useful as we had hoped.
- 13 Our preferred approach is to test the FCA's assumptions and proposals to restrict fees through a discussion paper. We will invite views about whether the FCA's assumptions and proposals can appropriately be applied to the law firms we regulate that carry on claims management activities relating to financial products or services and the impacts that this might have.
- 14 The FCA proposes to cap the fees that may be charged for non-PPI related claims management activities that lead to redress, in all cases where those claims are within the remit of a statutory ombudsman scheme or compensation scheme designed to be accessed directly by members of the public. For all other fees on financial product and services claims where the cap does not apply, it is proposing to require that the charges be "no more than is reasonable". The caps will be on a sliding scale with a proportionally smaller fee allowed, the higher the redress received.
- 15 Through the discussion paper, we will be seeking views on whether the FCA's proposals are likely to meet the legislative objective of making sure that consumers seeking professional help to make a claim in relation to financial products or services do not pay disproportionate or excessive fees. Additionally, the following objectives will be considered:
 - Claims management activities remain viable as an area of work, even if there is a change in how the market operates, so that consumers can continue to have the choice to access services of a law firm.

² We have discretion over how we prevent excessive fees being charged and this gives us the flexibility to consider different options as to how to achieve this. The restrictions will, however, not apply to reserved legal activities, for example, where a firm is conducting litigation which relates to a claim for a mis-sold mortgage.

³ The FCA published its consultation on 21st January 2021: [CP21/1: Restricting CMC charges for financial products and services claims \(fca.org.uk\)](https://www.fca.org.uk/publications/consultations/CP21/1)

SRA BOARD

8 June 2021

CLASSIFICATION – PUBLIC



- Consumers have access to information to be able to make better-informed decisions about why they might want to use a law firm to process their claim and the cost of those services.
- 16 We think that these additional considerations will help meet our regulatory objectives of protecting and promoting the interests of consumers, improving access to justice, and promoting competition, as well as the better regulation principles of being proportionate and targeted.
- 17 Through the discussion paper, we want to explore:
- Whether there is anything different about the profile of case types undertaken by law firms as compared to CMCs that may result in significantly different impacts.
 - How law firms, and different segments of law firms, operate which may impact on their sustainability and therefore the ability of different types of consumers to access services.
- 18 Not all consumers understand that they can make a claim themselves or the fees they might have pay if they engage a professional to help. To mitigate this information asymmetry, we will set out that we would want to use our Transparency Rules as a mechanism for making sure firms give an upfront description of, and price for, the services that they offer in processing and managing a claim for mis-sold financial products or services.
- 19 There are other options as to how fees could be restricted which we will set out in the discussion paper. If respondents think that we should be considering these options, or any other options we have not mentioned, we will seek information and evidence that supports their views.
- 20 We consider that this approach of benchmarking against the FCA proposals is appropriate because:
- The FCA is the primary regulator of claims management activity.
 - The FCA has access to significant amounts of quantitative and qualitative data upon which it has developed its proposals for how fees might be restricted in this market.
 - Lessons from FCA survey work, and our survey work, indicates that we may get better data if firms are responding to the impacts of a model rather than trying to provide cost data in the abstract.
 - Our initial analysis of the FCA consultation is that on its face many of the assumptions underpinning and the rationale for its proposals would apply equally whether a law firm or a CMC was supporting the applicant in making a claim.

SRA BOARD

8 June 2021

CLASSIFICATION – PUBLIC



- 21 As we consider our approach to meeting the duty, we also need to take be mindful of the issue of potential regulatory arbitrage. This was a major concern of HM Treasury in continuing the exemption for law firms to carry on claims management activities without being dual regulated. The risk of regulatory arbitrage is managed if we can align ourselves to the FCA. We would need to however, consider how this risk is managed if we proposed and introduced radically different measures to the FCA.
- 22 At this stage we do not intend to invoke our powers to make rules that would restrict fees in other claims management areas for example, personal injury. We do not have any evidence which suggests that consumers are subject to excessive fees in these other areas and that we need to intervene. We will, of course, keep this under review. The FCA does not intend to exercise its powers in respect of other areas and also intend to keep this under review.

Recommendation: The Board is asked to agree the approach to gathering more information by issuing a discussion paper.

Next steps

- 23 We will look to publish our discussion paper at the end of June/beginning of July. The paper will be open for a 12-week period until the end of September 2021. We will look to support the discussion paper with targeted survey work with firms we have identified as likely to be undertaking this work to seek information about the fee arrangements that firms have in place and how they specifically support consumers through the claims process.
- 24 We will also consider carrying out a consumer survey and engaging with consumer groups to help understand the factors that they consider relevant in deciding to seek professional help to make a claim and what benefits they think they will achieve.
- 25 We will also continue to work with the FCA to make sure that:
- We take advantage of any joint engagement opportunities.
 - It shares the analysis of responses to its consultation and plans going forward.
 - We develop and share communication and implementation plans so that we are closely aligned to manage the risk of regulatory arbitrage
- 26 The responses to the discussion paper and other information that we gather will inform our next steps, including the FCA's final policy position⁴. We will consider our options in discussion with the FCA and HM Treasury. We are likely to engage wider stakeholders further, including through a formal consultation, on proposals to inform the Board's final decisions.

Recommendation: The Board is asked to note our proposed next steps on engaging stakeholders to develop our data sources.

⁴ The FCA are hoping to confirm its next steps/final position in Autumn 2021.

SRA BOARD

8 June 2021

CLASSIFICATION – PUBLIC



Supporting information

Links to the Corporate Strategy and/or Business Plan

- 27 Our work in response to the duty to make rules which restrict fees charged for claims relating to financial products or services is linked to our strategic objective one and objective three :

"...set and maintain high professional standards for solicitors and law firms as the public would expect and ensure we provide an equally high level of operational service..." and objective three to:

"...work with regulators and agencies across multiple sectors to make sure that people using key services are protected and can trust both solicitors and regulation...".

How the issues support the regulatory objectives and best regulatory practice

- 28 Any options that we consider must be proportionate and targeted. The main objective of meeting a legislative obligation designed to reduce the risk of excessive fees is in the consumer interest. Our position needs to be properly informed to help make sure that our final regulatory arrangements are clear and do not, for example, reduce access to justice or competition in the market.
- 29 Information that we receive during the engagement period will help inform our impact assessment and whether we can meet the regulatory objectives and principles of better regulation.
- 30 As we look to manage the risk of regulatory arbitrage, we also need to be sure that our arrangements do not conflict the arrangements of another regulator. The Bar Standards Board (BSB) and CILEx Regulation (CILEx) have been given the power to make rules if they wish, but do not have a duty to make rules. Both regulators have indicated that they will wait to consult on any proposals until after we have consulted.
- 31 There is no statutory provision for other legal regulators such as Council for Licensed Conveyancers or the Institute of Chartered Accountants of England and Wales to introduce equivalent fee limitations. This potentially increases the risk of regulatory arbitrage as firms could choose to be authorised by a regulator that does not have any fee restrictions in place. We have flagged this issue to HM Treasury which is monitoring what we, and the FCA, are doing.

Public/Consumer impact

- 32 When the government consulted in 2016, it felt that consumers are at risk if paying excessive fees for certain claims management work. In addition, there was a general lack of consumer understanding about whether they needed professional help to make claims, the options they had and the right to challenge fees being charged. This could lead to consumers being charged

SRA BOARD

8 June 2021

CLASSIFICATION – PUBLIC



significant upfront fees for a claim to be taken forward and as identified in our PPI thematic review many consumers could see a large percentage of any final compensation awarded taken by a law firm⁵.

- 33 Our cautious approach to issuing a discussion document to gather evidence and understand impacts will help make sure that the approach we take will meet the above objectives. As well as mitigate risks of any adverse impacts on access to justice and effective competition in the market.

What other engagement approach has been used to inform the work and what further communication and engagement is needed?

- 34 Our engagement has been with the FCA, HM Treasury, the FOS, the Financial Services Compensation Scheme, and the Legal Ombudsman to help for example, improve information about the law firms that operate in the claims management sector. We will continue to work with these organisations.
- 35 The discussion paper will be published on the SRA website and shared using our social media channels. We will also consider how to make sure it comes to the attention of all firms involved in claims management activities by for example, contacting all Compliance Officers for Legal Practice highlighting the importance of this project and need to respond if they are engaged in this work.
- 36 We are planning to host webinars and roundtables during the 12-week period to help gather views and increase submission of formal responses to the discussion paper. We are exploring options for carrying out consumer and firm surveys.

What equality and diversity considerations relate to this issue?

- 37 Although we have no information or data that would suggest that specific negative impacts for solicitors or consumers in groups with protected characteristics are likely to arise, we need to keep in mind that law firms and consumers that have protected characteristics will be engaged in claims for financial products or services.
- 38 Information and data gathered from the discussion exercise will be used to inform and impact assess future proposals.

How the work will be evaluated

- 39 We will continue to work with our stakeholders to inform the effectiveness of policy development in this area.

⁵ Key findings from our PPI thematic review included:

- Fees were the major issue we encountered. Only three firms were unaware of our warning notice.
- Only two firms charged 15 percent or less, as set out in our 2017 warning notice.
- Fees ranged from 10 percent plus VAT to 50 percent plus VAT. Often the fees could be higher than firms' standard rates.

SRA BOARD

8 June 2021

CLASSIFICATION – PUBLIC



Author Jatinderpal Loyal, Policy Associate

Contact Details Jatinderpal.loyal@sra.org.uk

Date 27 May 2021

Annexes
Annex 1 **FCA basis and assumptions**