

# Regulatory failure: who pays?



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# What are the options?

- Four candidates:
    - Perpetrators/enablers
    - Industry -> consumers
      - FSCS
      - FCA
    - Society
    - Victims
  - Perps/enablers - two problems:
    - Money may be gone
    - FCA may let them off
  - Negative externality inevitable:
    - Which is least bad?
    - What's the legal position?
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# Financial Services Act 2012

- FCA exempt from civil liability:
  - Litigation costs, diversion
  - S348, LPP concerns
- Exceptions:
  - ‘Bad faith’
  - Human rights breaches
- But intention that regulator pays:
  - Complain direct
  - Appeal to ‘investigator’
  - Unlimited power to recommend compensation
- Cost met via levy
- Benefits:
  - Transparency: measures effectiveness of the FCA
  - ○ Alignment of interests

# FCA has already moved the goalposts

- Existing scheme limits right to recommend redress for regulatory failure:
    - ‘Firm is underlying cause of loss’
    - Yet firms often let off, money gone
    - ‘Industry, so ultimately consumers, would have to fund any payouts’
  - ‘Common-sense analysis’ undertaken, vs ‘investigation’
  - Result: costs borne mostly by victims (or industry via FSCS)
  - Complaints Commissioner highlighting gap vs Act
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# Regulatory failure becomes endemic

- FCA subject to three external reviews into regulatory failure:
  - Connaught Income Fund Series 1
  - London Capital & Finance
  - IRHP redress scheme
- Many more warranted:
  - Lendy
  - Funding Secure
  - Blackmore Bond
  - Collateral
  - Park First
  - RBS GRG
  - HBoS Reading (independent)
  - Woodford - the biggie!
- Victims hope for redress

# Issue comes to a head

- Reviews completed Q3/4:
    - FCA has limited scope/protocols
    - Extensive, asymmetric  
‘Maxwellisation’ rights
    - Still likely to be very damning
  - Busy Autumn:
    - 24 Sept: Annual Public Meeting
    - 5 Oct: Nikhil Rathi starts as CEO
    - 30 Oct: Complaints Commissioner  
Antony Townsend steps down
    - IRHP, Connaught reviews finalised  
September, LCF late Oct/Nov?
    - Will FCA publish simultaneously?
    - Connaught Enforcement action  
must conclude before publication?
    - Points to late Oct onward
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# FCA attempting further land-grab

- Truncated consultation on revised complaints scheme:
  - Two months vs three/four/more - despite summer break, Covid-19
  - Contrast with Duty of Care (four years and counting)
  - Deadline 14 Sept. Coincidence?
- Formalises current position re costs of regulatory failure
- FCA would gain right to ignore complaints it dislikes
- User-friendly language conceals deterrents to complainants:
  - £ limits on payouts
  - Right to ignore complaints

# Unite industry and consumers

- Record FSCS levy rise
  - More cases getting compensation
  - Better that FCA pays:
    - Highlights causation
    - Incentivises charging guilty firms
  - Connaught: sue FCA/officers?
  - Don't just resist FCA proposals:
    - Demand scheme compliant with Act
    - Remove civil liability exemption?
  - Need to revisit legacy cases:
    - Royal Commission?
    - Socialise costs?
  - Transparency about FCA flaws  
will help cut future costs
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# Mixed political environment

- Is corporatism in retreat?
    - 'F\*\*k business' - Boris on Brexit
    - ... but truce with corporatist wing, Labour's ascendant
    - Govt needs tax receipts, more debt
  - Covid-19 highlighted flaws in administrative state:
    - Whitehall, PHE, OFQUAL
    - 'A hard rain is coming' - Cummings
  - Opportunity: position FCA as lackey of City, against the people
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# Effective response essential

- Call out FCA opportunism
- Demand 2012 rights, don't just resist proposed deterioration
- Need justice for legacy cases
- Put pressure on Treasury via media, Treasury Committee
- Consider judicial review?

Overriding principle: cutting cost of regulatory failure requires transparency about its causes

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Questions?