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Attention: Ned Beale, Simon Bishop and Rachael Baillie
Hausfeld
12 Gough Square
London
EC4A3DW

Our ref: AMBL/RC/016731.00000
Your ref: L5082.0001

22 February 2022

Dear Hausfeld

Review of John Swift QC and the Financial Conduct Authority's Response
Response to Letter before Claim under the Pre-Action Protocol for Judicial Review

1 We act for the Financial Conduct Authority (**FCA**). We write in response to your Letter of Claim dated 8 February 2022 sent on behalf of the All-Party Parliamentary Group on Fair Business Banking (**the APPG**).

1.1 Please note that we refer to the FCA throughout this letter but all references to the FCA should be read as a reference to its predecessor, the FSA, in respect of events prior to 1 April 2013.

2 Introduction

2.1 On 30 September 2021 the FCA decided not to seek to use its powers to require any further redress to be paid to interest rate hedging products (**IRHP**) customers (**the Decision**). This Decision was made public on 14 December 2021 (at the same time as Mr Swift QC's report (**the Report**) was published) in section 4 of the FCA's public response to the Report published on 14 December (**the Response**).[1]

2.2 In taking the Decision, the FCA weighed up the relevant matters (including the findings in the draft Report) and exercised its regulatory judgement and discretion, as it is entitled to do. The Decision was a reasonable and rational one, supported by compelling reasons, and was reached fairly and lawfully.

2.3 The FCA considered that the steps taken in 2012 and 2013 to address the concerns about the mis-selling of IRHPs during the period 2001 to 2011 (**the Relevant Period**), which must be seen in the

[1] We note that your letter on occasion wrongly asserts that the Decision is the said Response dated 14 December 2021. The Response summarises the reasons behind the Decision but, as explained in paragraph 6.27, was prepared following the taking of the Decision and approved by the CEO and the Chair.

context of the wider regulatory framework for making complaints and claims, secured an appropriate degree of protection for customers who were mis-sold IRHP products. Customers who fell outside the Scheme (as defined in paragraph 2 of your letter) retained their existing rights and many such customers pursued litigation or complaints, some successfully.

2.4 The FCA has already given careful consideration to the points that Mr Hollinrake MP raised in his letter dated 14 January 2022 and addressed those points in its reply dated 31 January 2022. It concluded that Mr Hollinrake MP had not raised any material points that had not been previously considered by the Board when it made the Decision. It has given the same consideration to your more detailed letter and sees no proper reasons for changing its Decision.

2.5 We respectfully suggest that the APPG's intimated grounds, though presented as a challenge to a Decision taken on 30 September 2021, are in substance a challenge to decisions taken by the FCA in 2012 and 2013. In short, the APPG seeks impermissibly to challenge the FCA's judgement on a matter which falls within the FCA's remit as regulator, and in respect of which the time for bringing a judicial review claim expired many years ago. It is now far too late to revisit, by way of judicial review, the legality of those decisions. To do so now would be detrimental to sound financial regulation and, we suggest, would be a matter of particular concern to the court. We note that the APPG has been in existence since 2012. The members of the APPG would therefore have been in a position to make a timely challenge to the decisions taken by the FCA in 2012 and 2013 if they thought there were grounds for doing so.

2.6 Bearing in mind these points and for the reasons expanded upon below, any judicial review claim will be firmly resisted.

3 The claimant

3.1 As an industry levy-funded public body, the FCA is rightly concerned to ensure that should your client opt to pursue a judicial review challenge unsuccessfully, its legal costs in defending that claim are recoverable. We note that the proposed claimant (the APPG) is not a legal person.

3.2 Therefore, whilst we do not currently propose to take a point regarding the standing of the APPG to pursue judicial review per se (although we cannot by consent confer a jurisdiction on the court which it lacks), we would ask that you clarify how the APPG's claim is being funded and how our client's costs would be met in the event that legal action is unsuccessful so that we can properly advise our client. In the meantime, we assume that you are being instructed on behalf of all of the individuals listed in paragraph 8 of your letter.

3.3 Any reply should be sent by post to:

Mr Christopher Brennan and Ms Katharine Harle
Dentons UK and Middle East LLP
1 Fleet Place
London EC4M 7WS

or by email to Christopher.Brennan@dentons.com and Katharine.Harle@dentons.com.

3.4 Counsel instructed is Richard Coleman QC of Fountain Court Chambers, Fountain Court, Temple, London EC4Y 9DH.

4 From

4.1 The defendant is the Financial Conduct Authority, which has its Head Office at 12 Endeavour Square, London E20 1JN.

5 Reference details

5.1 The relevant reference number within the FCA is C220128A.

6 The details of the matter challenged

6.1 As noted above, the Decision which we understand your client to be challenging is that not to seek to use the FCA's powers to require any further redress to be paid to IRHP customers. The Decision flows from the findings in the Report and the FCA's decision to consider pro-actively whether to seek to take action in respect of customers outside the scope of the Scheme. The Report did not recommend that the FCA considers taking steps with a view to requiring the banks, if possible, to provide redress for the Excluded Transactions (as defined in paragraph 14 of your letter). Indeed, the Report was specifically never intended to be a route to re-open the Scheme[2] and nor did the Report suggest that this should happen. The FCA was therefore not required to revisit this question. However, it did so because it considered that it should do so in the light of the Report's findings and because it was very aware that sophisticated customers[3] did not receive redress through the Scheme.

6.2 Some of the factors that were relevant to the Decision had been the subject of earlier reviews within the FCA in the period leading up to the Decision. For example, at its July 2021 meeting the Board considered a draft Response which set out the view that the scope of the Scheme had been reasonable and appropriate.

6.3 In advance of the meeting on 30 September 2021, the FCA's Board was provided with a detailed paper setting out the matters which were relevant to the Decision (**the Board Paper**).[4] The Board Paper was authored by a Technical Specialist in the FCA's Retail Banking and Payments department and sponsored by the Director of Retail Banking and Payments.[5] A version of the Board Paper was also considered by a sub-group of the FCA's ExCo in advance. The relevant issues were also discussed by a sub-committee of the FCA's Board on 15 September 2021. Both referred the matter to the Board for decision.

6.4 The principal matters covered by the Board Paper are set out below.

FCA's legal powers to require redress

6.5 In making the Decision, the FCA's Board proceeded on the basis that, in principle, the powers under s55L and s384 Financial Services and Markets Act 2000 (**FSMA**) could be available to seek to compel some or all of the banks to review the sales of the Excluded Transactions and to pay redress where the relevant sales standards had not been met, if the required evidence could be obtained in

[2] Terms of Reference at paragraph 4.
[3] By 'sophisticated customers' we mean those customers who were excluded from the scope of the Scheme under the sophisticated customer criteria applied in the Scheme.
[4] There are parts of the Board Paper which contain privileged legal advice. By referring to the Board Paper in this letter the FCA does not waive privilege over this advice either in relation to the APPG or more widely.
[5] In addition to the author and sponsor, the presenters to the Board at its meeting included those from teams who contributed to the paper, namely a Director and Head of Department from the Risk and Compliance department; and a Head of Department from the General Counsel's Division.

respect of each bank and if the FCA thought it was appropriate to exercise them. Whether such powers could be successfully deployed was also considered by the FCA's Board (see below under 'Material Considerations').

6.6 As regards the available legal powers, you have suggested that either s404 FSMA or s382 FSMA were available to the FCA. We do not agree that the power to establish consumer redress schemes under s404 FSMA was available. Contrary to what you say in paragraph 42 of your letter, such schemes are restricted to actionable claims that would be enforceable in the courts: see s404(1)(b). They cannot provide redress in respect of time-barred claims, or in respect of claims that are not actionable in the courts for any other reason. We note the limitation periods for consumers bringing claims or complaints in respect of alleged mis-selling of IRHPs during the Relevant Period have long expired and that the Principles for Businesses which you quote in paragraph 27 are not actionable in the courts by private persons.[6] You appear to recognise the obstacles to a s404 scheme at paragraph 105 of your letter.

6.7 In addition, the expiry of the limitation period is likely to prevent any application to the court for a restitution order under s382 FSMA.

6.8 Further, the unavailability of the s404 FSMA power has a limiting effect on the powers that would otherwise remain available to the FCA (s55L and s384 FSMA). The FCA cannot use its remaining powers to impose a s404 scheme 'by the back door', in circumstances where the time-barred nature of the underlying claims means that the FCA could not establish a consumer redress scheme under s404 FSMA. As a result, even if the Board considered use of s55L or s384 was appropriate, the manner of its exercise would have to be carefully considered.

6.9 In any event, most of the material considerations discussed below would have been relevant to the powers under s382 and s404 as well, had they been available.

Material considerations

6.10 The potential availability of legal powers is clearly not determinative of whether the FCA should seek to exercise such powers. It is necessary to consider all relevant matters before deciding whether to seek to use such powers to achieve a particular outcome, including potential legal challenges to the use of the relevant powers and whether such challenges might be meritorious. The Board Paper listed set out the material considerations which are summarised below.

A. The FCA disagrees with the Report's adverse findings about the scope of the Scheme

6.11 While the FCA accepted nearly all of the recommendations of the Report, the FCA did not, and does not, agree with the opinion of Mr Swift that the FCA was wrong to confine the scope of the Scheme to 'non-sophisticated' customers in the way that it did in 2012 and 2013.

6.12 Your letter seeks to use this disagreement as a basis for challenge. However, the FCA is not required to agree with the opinions of Mr Swift and it is entirely reasonable for the FCA to take a different view. This is particularly the case where the issue is a matter of regulatory policy or judgement falling within the domain of the regulator.

6.13 The FCA has considered, from time to time during 2021, the question of how it should respond to the Report's findings that the scope of the Scheme was 'wrong'. This consideration was given in the context of formulating its representations to Mr Swift before the Report was finalised, preparing its

[6] See s138D FSMA and PRIN 3.4.4R.

public response to the Report, and determining whether it should seek to exercise its statutory powers now to require the banks to provide redress to customers in respect of the Excluded Transactions. The FCA has consistently held the view that its approach to determining the scope of the Scheme was reasonable, appropriate and not wrong. As mentioned above, this view was expressed by ExCo and a Board sub-committee prior to the Decision, but both groups referred the final decision on this to the full Board.

6.14 The explanations for the FCA's view that the scope of the Scheme was reasonable, appropriate and not wrong are set out in the FCA's letter to your client dated 31 January 2022. For the sake of completeness we summarise them again here:

(a) In March 2012, the FCA was facing considerable pressure to act. Many small businesses were struggling and immediate action was required. The FCA was not in a position to impose a redress scheme without conducting what would inevitably have been a lengthy investigation. The delay in completing that investigation would have caused further harm to those vulnerable customers. By taking what the Report refers to as a 'bird in the hand' approach, the FCA secured over £2bn in compensation on an expedited basis.

(b) Given the advantages of a voluntary arrangement, if the FCA had insisted on the inclusion of all Private Customers / Retail Clients, the Scheme may not have been agreed and thousands of vulnerable customers would not have received redress on such an accelerated timeframe.

(c) As noted in further detail at paragraph 6.15 and 7.6 below, the FCA was not required to treat all customers in the same way. Rather, it was obliged to assess what was the 'appropriate' degree of protection,[7] taking account of its judgement as to whether or not anything more would be achieved if it sought to compel redress using its statutory powers. It went about this assessment reasonably, especially having regard to the need to achieve a swift outcome for vulnerable customers. In particular, it was entirely reasonable for the FCA to approach the issue from the perspective that some customers would be more sophisticated than others, even though they came within the same broad regulatory class.

(d) The sophisticated customers were in no worse position than if the FCA had not acted at all. They had the same options for pursuing any claims that they had been mis-sold IRHPs, including complaints to the banks and access to the courts. Many of these customers did complain or pursue legal action against the banks, some successfully.

6.15 We note that the question of whether the FCA was right to limit the scope of the Scheme was the subject of an application to seek permission for judicial review, which was brought against the FCA in 2013.[8] Mr Swift concluded that this decision of the High Court was not relevant to his findings because, among other reasons, the issue before the Court in that case was the high threshold of establishing illegality on rationality grounds and, by contrast, the terms of reference for Mr Swift's report were much broader and related to what was appropriate, not just rational. That decision is nonetheless relevant to the present claim because, in that case, Silber J was clear that the FCA had the discretion to apply a different treatment to members of the same regulatory class. Silber J considered that the arguments made as to irrationality on this issue did not even arguably reach the judicial review threshold.

[7] Section 1C(1) FSMA.
[8] *R (Jenkinson and ors.) v FCA* (unreported; CO/5140/2013).

6.16 The FCA therefore remained of the view that the steps taken in 2012 and 2013, taking account of the regulatory and legal context to which we have referred in paragraphs 2.2 – 2.3 and 6.5 – 6.9 above, secured the appropriate degree of protection for consumers in relation to the sale of IRHPs. Nevertheless, the Board Paper made clear that it was open to the Board to take a contrary view as ultimately this was a matter for it to decide. Notwithstanding any previous views on the relevant issues, the FCA's Board was not bound to agree with those views in reaching the Decision and this was noted in the Board Paper. The Board Paper also pointed out that, even if the Board did consider that the steps taken in 2012 and 2013 did not secure an appropriate degree of protection for consumers, there were other considerations which the Board needed to take into account in deciding whether or not to now seek to require the banks to provide redress to sophisticated customers – considerations which were set out in the Board Paper and to which we now turn.

B. Potential challenges to the use of FCA's powers and wider implications

6.17 When deciding whether it was appropriate to seek to use the powers it has available, the Board Paper noted that there were a number of challenges which the FCA might face were it to seek to require redress for sophisticated customers, as well as potential implications for its future effectiveness as a regulator. In particular, whilst sophisticated customers can have no expectation based on anything that the FCA has said or done that the FCA will take action now to secure redress on their behalf, on the other hand, the banks have a strong argument that they could reasonably consider the matter of redress in respect of the Excluded Transactions as closed. The reasons for this include the following:

(a) the terms of the voluntary agreements;

(b) repeated and consistent statements by the FCA that the Scheme's scope excluded sophisticated customers;[9]

(c) the relevant dealings between the FCA and the banks in relation to the provision of redress for customers mis-sold IRHPs during the Relevant Period, including that resolution proceeded on the basis set out in the agreements between the FCA and the banks, and that the FCA took no action to change the approach to sophisticated customers;

(d) the fact that claims and complaints in respect of the mis-selling of the IRHPs are time-barred;

(e) more generally the time that had elapsed since sales were conducted in 2001 – 2011 and since the Scheme was set up in 2012 and 2013; and

(f) the Terms of Reference for Mr Swift's review which made it clear that "*The Review is not intended to be a route by which the redress scheme or individual cases can be re-opened*".[10]

6.18 The FCA must abide by the rule of law. It cannot be expected to seek to exercise its powers in a way that it reasonably judges is likely to be unlawful. Moreover, insofar as the FCA has powers available to it that it could lawfully have exercised, in the view of the Board Paper the matters summarised above told strongly against the FCA taking action to seek to compel the banks to provide redress in respect of the Excluded Transactions.

[9] By way of (non-exhaustive) examples, in June 2012, January 2013 and March 2013.
[10] Terms of Reference at paragraph 4.

6.19 The Board Paper also set out broader but related policy considerations regarding the FCA's ability to arrange compensation on a voluntary basis in future. While the FCA has extensive formal legal powers, it is often able to achieve swifter and more effective outcomes by engaging with the firms it regulates to achieve voluntary action, as it did in relation to the mis-selling of IRHPs. The FCA's ability to achieve such beneficial voluntary outcomes would be greatly inhibited if, many years later, it was seen to be changing its position in a way that was contrary to an earlier agreement with regulated firms, without compelling justification. Further, it is in the public interest that there is regulatory certainty and that the FCA is seen to operate in a way that is consistent, fair and predictable. This would be undermined if the FCA sought to change its position in relation to agreements concluded many years ago on the basis of which the banks had voluntarily provided substantial redress totalling £2.2bn between them and, having done so, would legitimately regard the matter as closed.

C. Difficulty and complexity of any redress action and evidential problems

6.20 The Board Paper also noted as a material consideration that the difficulties and complexities faced by the FCA in 2012 and 2013 in seeking to impose a redress scheme on the banks, which had formed part of the reasons for the FCA pursuing and achieving the voluntary agreements, would still need to be addressed. If the FCA was to seek to impose a new scheme now, it is likely that the FCA would have to establish that the relevant banks had breached a relevant requirement and to establish the losses caused by such breaches. It would not simply be a case of the FCA deciding that it wants to take action and immediately implementing a redress scheme. The FCA would need to gather the evidence necessary to support the imposition of any such scheme. Given the passage of time and the complexity of the issues involved, this would likely be a long and complex process. The Board Paper noted that it was still not clear that sufficient evidence could be obtained to support seeking to exercise powers.

6.21 You refer at paragraph 93(c) of your letter to the FCA knowing that IRHPs were "*mis-sold […] in over 90% of cases*". We do not know the source of these figures and the FCA does not agree that this is accurate or that the FCA has or had such knowledge. This claimed rate of mis-selling is presumably derived from data relating to sales to unsophisticated customers. The FCA has no concrete data regarding the incidence of mis-selling to sophisticated customers. The Board Paper did include information about litigation through which sophisticated customers received redress, but in relation to other sophisticated customers the FCA had to use assumptions to produce broad estimates about possible redress figures based on such information as was available to it. The assumption made was that, based on the available data, the level of mis-sales to sophisticated customers was likely much lower than the level of mis-sales to unsophisticated customers, but that nonetheless a sizeable aggregate loss could have been experienced across some sophisticated customers. In making the Decision the Board therefore proceeded on the basis that a sizeable aggregate loss across some sophisticated customers was likely and unaddressed by the voluntary scheme, although as noted above such customers had other avenues of recourse (which some pursued successfully).

D. Burden on FCA resources

6.22 The FCA is entitled to have regard to the efficiency principle in s3B(1)(a) of FSMA when exercising its statutory powers. While the Board Paper noted that the burden on the FCA's resources should carry little weight if the balance of the other factors had supported taking action, it was nonetheless a relevant consideration in circumstances where there were strong grounds for not acting. As noted above, even if there were grounds for the FCA to seek to compel further redress, the process of

endeavouring to achieve this outcome would consume considerable resource, with no guarantee it would be successful.[11]

6.23 The Board Paper noted that, whilst it might ultimately be possible to establish grounds for securing redress (which as noted at paragraph 6.20 is by no means certain), getting to such an outcome would inevitably consume a very significant amount of the FCA's resources over a number of years (even without the very substantial challenges referred to at paragraphs 6.20 above). As explained above, the Board Paper noted the expectation that there would then follow a number of legal challenges, including potentially successful challenges, which would consume yet further valuable resource and reduce the likelihood of achieving the aim of delivering redress. As a responsible regulator with finite resource available, the Board had to consider whether diverting significant resources away from the FCA's other consumer protection work was justified. In doing so the FCA had to be mindful of the current growing vulnerability among many consumers and the number of other pressing risks which the FCA needed to address.

E. Factors in favour of the FCA taking action

6.24 The FCA Board Paper weighed the above factors against the reasons in favour of seeking redress for sophisticated customers.

6.25 As noted in the FCA's 31 January 2022 letter, the FCA recognises and regrets that some small business customers suffered financial loss and anxiety as a result of the banks' mis-selling of IRHPs in 2001 – 2011. The reasons in favour of the FCA taking action and which the Board took into account in reaching its Decision are as follows. Acting now would show the FCA was prepared to act to protect those that (so the reasoning in favour would say) the FCA should protect, even if it took a while to do so. It would show that any banks that have mis-sold to customers could expect the FCA to make sure that they paid full redress. As noted earlier, the FCA estimated that there could have been potentially significant aggregate losses to some of those customers as a result of banks' mis-selling, some of which may not have been redressed through other complaints channels and legal claims; and there was no realistic alternative, other than the banks, to pay such high levels of compensation.

6.26 If the reasons in favour were sufficiently compelling, the Board Paper noted that they could have provided justification for the FCA to make further inquiries of the banks. Those inquiries would have been made with a view to establishing sufficient evidence of misconduct by the banks causing customer loss in respect of the Excluded Transactions and (if after the lapse of time any evidence was found) might potentially have provided the necessary basis, and a starting point, for any use by the FCA of its powers against the banks.

6.27 Having given careful consideration to the issues contained in the Board Paper, the FCA's Board concluded that "*the reasons not to seek to compel redress from the banks for sophisticated customers outweighed the reasons in favour*".[12] The Board agreed that its Decision should be made clear in the Response. The wording of that Response was ultimately approved by the CEO and the Chair.

[11] Even gathering further information on the incidence of mis-sales to sophisticated customers to inform action after so many years have elapsed would divert and consume substantial resources, with no assurance that sufficient or accurate information could be gathered.
[12] See paragraph 5.5 of the minute of the FCA Board meeting on 30 September 2021.

7 The Grounds

7.1 Your letter refers to three grounds of challenge to the Decision. We deal with each ground as set out below.

7.2 The grounds refer to and define the Retrospective Reasons, Prospective Reason and Additional Reasons. However, the reasons you describe as Retrospective and Prospective Reasons were not in fact the reasons for the Decision, but were points set out in the Response, in response to the Report's Recommendation A2.[13] The Response summarised the reasons for the Decision at paragraphs 4.1 to 4.4, not in its response to Recommendation A2. The Additional Reasons in the FCA's letter to you dated 31 January 2022 also summarised the reasons for the Decision taken on 30 September 2021. The FCA has consistently explained the reasons for the Decision, which are further elaborated on at paragraphs 6.11 – 6.27 above (**the Actual Reasons**).

Grounds 1 and 2: The Decision was illegal / irrational

7.3 In substance, many of the challenges under Ground 1 relate to the reasonableness and rationality of decisions made by the FCA in 2012 and 2013 as evidenced by your information requests at paragraph 109 of your letter. These decisions cannot be reviewed some 10 years later. The fact that the proposed judicial review purports to challenge the FCA's assessment in September 2021 of the appropriateness of a decision taken nine years previously does not change the reality that what is sought to be challenged are really decisions taken a decade earlier.

7.4 It is unclear to us exactly which decisions of the FCA taken in 2012 and 2013 are alleged to have been unreasonable. The FCA entered into the voluntary agreements with the banks. It is the nature of such agreements that their terms cannot be imposed unilaterally by the FCA. Those agreements improved the position of consumers whose sales fell within the scope of the Scheme and did not in any way detract from the position of consumers whose sales fell outside the Scheme. The reasonableness and rationality of such agreements cannot seriously be challenged (and no such challenge has been articulated).

7.5 If, on the other hand, the APPG's complaint relates to the FCA's judgement that the FCA was not 'wrong' in 2012 and 2013 to exclude the Excluded Transactions from the Scheme, then there are no grounds for impugning the reasonableness or rationality of that judgement. We consider that your letter overlooks the reasons for the Decision given at paragraph 4.4 of the Response. As noted therein and at paragraphs 6.2 and 6.13 above, the FCA maintains that the approach taken to determining the scope of the Scheme was reasonable, appropriate and not wrong. Instead, the Report concluded that the FCA should have made a different decision from the one that it did. The FCA does not agree; and it was reasonable for the FCA to disagree and to maintain the view that the FCA's decisions on eligibility were within a range of conclusions reasonably open to it.[14]

7.6 As regards paragraph 93(e) of your letter, the FCA does have the discretion to differentiate as between members of the same group. Nothing in s5 FSMA prevented it from doing so. On the

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[13] "*The FCA should aim to ensure that persons within the same category are treated consistently: where rules exist for the protection of all within a defined class, regulatory intervention should not be restricted to benefit only a subset of that class unless there is an objective justification founded on strong evidence and tested through consultation.*"

[14] See the comments of Silber J at paragraph 2(b) of *R (Jenkinson and ors.) v FCA*, above n 8, including that "*It cannot be irrational of the Defendants to limit the exercise of its supervisory powers to matters which are within its regulatory ambit*".

contrary, the considerations set out in s5(2) of FSMA quoted at paragraph 17 of your letter support the FCA's approach. The Report also acknowledges the existence of this discretion.[15]

7.7 In your letter, you seek to impugn the FCA's view that the FCA's decisions in 2012 and 2013 were reasonable and rational. Even if you are correct on that point (and we disagree that you are, as explained above), the other considerations identified above told strongly against seeking to require the banks to provide redress in respect of the Excluded Transactions now.

7.8 As outlined at paragraph 6.21 above, the FCA did not and does not know the number of mis-sold Excluded Transactions and the associated losses, but the FCA has estimated there could potentially have been a sizeable aggregate loss across some sophisticated customers, as a result of banks' mis-selling. The FCA also took into account the fact that these customers were not left without any remedy, as set out in paragraph 6.14(d) above. In any event, however, the scale of potential losses is not itself determinative of whether the FCA should intervene; but, as noted at paragraph 6.21 above, this was a factor to which the FCA had regard in reaching the Decision.

Ground 3: The Decision was procedurally unfair

7.9 In part, this is a challenge alleging a failure to consult in 2012 and 2013. The FCA does not agree that it was obliged to consult but it is irrelevant; it is far too late to reopen these points now which, even if accepted, would not change the FCA's judgement that it is not appropriate to act now.

7.10 As to the alleged failure to consult on the Decision itself, the Report does not create a new duty to consult (contrary to your assertion in paragraph 101) and a lack of consultation does not render the process by which the Decision was made unfair. The Decision did not change the status quo or affect rights or interests in a way that required consultation; in particular, there could be no legitimate expectation that, in the light of the Report and the Terms of Reference, the FCA would act to seek to require further redress in respect of sales made between 2001 and 2011. The FCA could reasonably have not considered at all the question of seeking to require the banks to provide further redress. The fact that it opted to do so did not generate an obligation to consult. Furthermore, the FCA has received and carefully considered representations over many years to the effect that banks should be required to provide redress to sophisticated customers. It also carefully considered whether it should change its decision in the light of Mr Hollinrake MP's letter of 14 January 2022.

8 Details of any other Interested Parties

8.1 Paragraph 17 of the Pre-Action Protocol for Judicial Review (**the Pre-Action Protocol**) states that the letter before claim "*should normally contain the details of any person known to the claimant who is an Interested Party".* We assume you have already given consideration to whether there is a group or groups representing customers whose transactions were Excluded Transactions. It would seem any such group (or indeed the individual customers themselves) would be directly affected by the claim and an interested party. However, in the absence of an existing consumer group we consider it impractical to seek to identify individual affected customers. Given that any claim would be publicised widely, we anticipate that if any such customer wished to intervene as an interested party they will become aware of the claim through the media and be able to do so.

8.2 It is also not clear to us why you have not included details of the banks that were part of the Scheme. It seems to us that the banks would be interested parties for the same reason as the customers or

[15] See for example Chapter 1, paragraph 42; and Chapter 8, paragraph 7.

consumer groups. We would welcome your views on this point but it seems that if the claim were to be made, the banks would be interested parties.

9 Alternative Dispute Resolution (ADR) proposals

9.1 The FCA has considered whether it would be appropriate to engage in ADR on the terms proposed by the APPG. As we understand it, the APPG's proposal is essentially that it would only be willing to engage in ADR on the basis that the FCA accepts that the Decision was unlawful and, therefore, would agree to provide redress to the Excluded Customers. Of course, what is proposed by the APPG runs completely contrary to the FCA's decision and the reasons behind it.

9.2 We do not therefore consider that the APPG's ADR proposals have been seriously made. In the circumstances, the FCA considers that seeking to engage in ADR would be highly unlikely to advance the resolution of this dispute and the FCA is mindful of avoiding unnecessary time and cost expenditure where this is the case. However, the FCA would consider the opportunity of entering into ADR, if the APPG were willing to do so without making clearly unacceptable demands as a precondition.

10 Response to requests for information and documents

10.1 As you will be aware, there is no general duty of disclosure in judicial review proceedings, the usual position being that judicial review does not necessarily require disclosure. We recognise the FCA's obligations in respect of the duty of candour, which requires the disclosure of all relevant facts and information that are needed for a fair determination of the issues, and this duty extends to documents and information which would assist your client's case and/or give rise to additional (and otherwise unknown) grounds of challenge. However, at this stage we are considering the FCA's obligation at the pre-action stage. The guidance under the Pre-Action Protocol is:

Requests for information and documents made at the pre-action stage should be proportionate and should be limited to what is properly necessary for the claimant to understand why the challenged decision has been taken and/or to present the claim in a manner that will properly identify the issues. The defendant should comply with any request which meets these requirements unless there is good reason for it not to do so. Where the court considers that a public body should have provided relevant documents and/or information, particularly where this failure is a breach of a statutory or common law requirement, it may impose costs sanctions.

10.2 We have enclosed the following document, which you requested at paragraph 109(a): FCA Board minutes for the meeting of 30 September 2021 (extract of IRHP section only).

10.3 In respect of the other documents requested, our client considers that the breadth of documents being sought is not proportionate and falls short of the guidance in the Pre-Action Protocol. In the substance of this letter we have provided sufficient information regarding our client's decision to allow you to advise your client, including on pleadings. We also note that there is a large volume of materials already in the public domain on the issues raised by this claim.

(a) The documents requested at paragraph 109(c) and (d) go far beyond what is required to be disclosed at this stage. Our client does not consider, in the absence of a pleaded case, that they are relevant to the Decision and therefore need to be disclosed. The Decision being challenged is that of the FCA Board on 30 September 2021, published on 14 December 2021, not any of the FCA's decisions at the time of negotiating the Scheme in 2012 and 2013. All the documents requested appear to be relevant to decisions made in 2012 and 2013 which, as covered earlier in this letter, are barred by way of limitation. The fact that

you are requesting these documents well illustrates the point made in paragraph 2.5 above that it is those decisions, taken nearly a decade ago, that you are in reality seeking to challenge.

(b) In relation to the remainder of the documents requested at paragraph 109(a), (b) and (e), the above points stand. Our client has considered these requests and does not consider that it holds any documents that would likely have the effect of raising a new ground of review or be of relevance. We note that your letter and document requests could be read as suggesting that the FCA may have been unduly influenced in its decision-making either in respect of the Decision or in 2012 and 2013 by HM Treasury. Our client rejects this assertion; it is without foundation, and Mr Swift considered the role of HM Treasury as part of his review and found that the creation and development of the Scheme remained under the control of the FCA and that its decisions were those of an independent body.[16] The same applies to any similar allegation in relation to the banks covered by the Scheme.

10.4 The FCA will continue to comply with its duty of candour. If a judicial review is brought our client will consider whether any of the requested documents, or other documents, should be searched for and, in so far as they are within the FCA's possession or control, disclosed.

11 Address for further correspondence and service of court documents

11.1 The address for any future correspondence on this matter is as set out in paragraph 3.3 above.

12 Costs / funding

12.1 As noted above, our client has followed a thorough and fair process to reach the Decision and is confident that its conclusion is lawful and rational. The FCA will robustly defend any claim for judicial review should your client decide to proceed with a claim, including any application to seek permission. It will also seek its costs in defending any claim, and (once we have clarity on the matters raised at paragraphs 3.1 – 3.2 above) will most likely seek an order for security for costs. Please confirm that your client is in a position to cover the FCA's costs.

13 Conclusion

13.1 As set out in our letter of 31 January 2021 the FCA is sympathetic to the position of small business customers who suffered financial loss and anxiety as a result of the mis-selling of IRHPs during the Relevant Period. However, the question of whether and when to seek redress and for which consumers is a question of regulatory judgement. The FCA cannot reasonably be expected to achieve redress for every loss suffered by every type of customer as a result of every misconduct in connection with regulated activities. The FCA secured very considerable redress for a very large number of small businesses in relation to IRHPs. It has since chosen to use the publication of the Report as an opportunity to again consider whether it was necessary or appropriate for it to use its powers to seek redress for sophisticated customers. It decided not to do so. In reaching the Decision, the FCA had regard to all relevant factors (as set out above) and acted reasonably. The reasons for not seeking to exercise its statutory powers to require the banks to provide redress in respect of the Excluded Transactions are, in the FCA's view, compelling. There is no basis for seeking to challenge the Decision by judicial review and, in the circumstances, we would invite your client to reconsider whether it is appropriate to incur the costs of pursuing this further.

[16] Chapter 8, paragraph 60.

13.2 Please note that the FCA is publishing this response today.

Yours faithfully

Dentons UK and Middle East LLP

Enc. FCA Board minutes for the meeting of 30 September 2021 (extract of IRHP section only)