BOARD

Board

Subject:	**MANAGING DIRECTOR'S REPORT: CONSUMER, INVESTMENT & INSURANCE**
Date of Meeting:	18 September 2003
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Directorate:	Consumer, Investment & Insurance

FOS – 15 Year rule

1. The issue of a 15 year limitation for complaints to the FOS has been raised by industry and consumer groups reflecting the rising number of endowment complaints, in particular. The Complaints Sourcebook rules (DISP) provide for the FOS to consider cases within 6 years of the act complained of, or 3 years from when the complainant knew (or ought reasonably to have known) that he had cause for complaint. The FOS can consider cases beyond those time limits in "exceptional circumstances". The industry has expressed concern that there is no provision in the DISP rules for a 15 year cut-off for complaints, beyond which the Ombudsman will not consider cases. The FOS can therefore deal with complaints against firms that the courts would dismiss under the Limitation Act 1980 for being out of time.

2. We have considered 3 options:

    a) To make no change to the current rules; or

    b) A new Rule limiting the cases that the FOS can consider after 15 years; or

    c) A new rule imposing a 15 year longstop for all complaints made to firms or the FOS, with effect from 6 months after the rule is made.

3. A summary of the issue and analysis of these options is attached as Annex 1. Our preferred option is to make no change to the current rules. The FOS have confirmed that they only occasionally consider cases beyond 6 years. We feel that to prevent the FOS from considering older cases on an exceptional basis would be detrimental to consumers if they could not reasonably have known within a limited time that they had cause for complaint.

4. This option would not involve any changes to Handbook text; instead we would need to clarify our existing rules to industry and consumer groups. **The Board is asked to confirm they are content with this position.**

Annex 1

Financial Ombudsman Service: 15 Year Rule

Background

1. We did not consult on having a 15 year limitation period when DISP was consulted on. The predecessor complaint schemes before the FOS each had different approaches to time limits for making complaints. Our decision in drafting DISP was not to propose any rules setting an absolute cut-off point because we considered it would be detrimental to consumers not to be able to claim redress if they could not reasonably have known within a limited time that they had cause for complaint. As we did not consult specifically on this issue we have not published reasoning for the current position. Any change to the current policy would require consultation.

2. GCD advises that the way in which Schedule 17, paragraph 13, of the FSMA is framed suggests that Parliament intended the FSA to be able to set time limits which can differ from those in the Limitation Act.

Proposals

3. We have considered 3 options:

a) To make no change to the current rules. **This is our preferred option;** or

b) A new rule limiting the cases that the FOS can consider after 15 years; or

c) A new rule imposing a 15 year longstop for all complaints made to firms or the FOS, with effect from 6 months after the rule is made.

4. a) No change to the current rules

5. DISP 2.3 provides that the FOS cannot consider complaints outside the 3 and 6 year periods other than in exceptional circumstances, or where the firm does not object. The FOS therefore has jurisdiction to deal with 'exceptional circumstance' cases indefinitely, unlike the position under the Limitation Act 1980, which (subject to certain exceptions) provides for a 15 year absolute bar on bringing cases to court. We have discussed further with the FOS the extent to which they currently consider cases outside the 3 and 6 year time limits; the incidence of cases in that category that are over 15 years old; and the situations which they consider to be "exceptional circumstances".

6. The FOS Ombudsmen very rarely exercise their discretion to look at cases beyond the existing 3 and 6 year time limits. The FOS finds that most cases meet the '3 years from date of knowledge/reasonable knowledge' rather than the '6 years from date of the act complained of' test. Historically the FOS has not recorded the ages of the complaints made to them. There is therefore no detailed data (except in the mortgage endowment context – see below) as to the proportion of complaints made to FOS overall that are over 15 years old.

7. The FOS state that in their experience most cases over 15 years old are likely to involve mortgage endowments sold before A-day, which is now 15 years ago. The numbers of endowment complaints to the FOS that are pre-A-day and therefore over 15 years old are increasing: in the last 4 months half of all mortgage endowment complaints the FOS has

received involve pre-A day sales. The FOS have ruled complaints as being outside their jurisdiction where the information given to consumers more than three years ago was in their view sufficient for consumers reasonably to be aware there may have been cause for complaint.

8. In addition to mortgage endowment cases, the FOS have historically always received "a steady trickle" of older cases. These might come to the FOS 15 years after the act complained of but would meet the 3 year test. While no precise figures are available, the FOS describes these cases as rare and estimate that numbers are "unlikely to exceed three figures" every year. To put this in context, the FOS deals with tens of thousands of complaints annually. Some examples of complaints to the FOS, other than mortgage endowments, which might date beyond 15 years are: pensions complaints; long term investment products; claims involving old passbooks for savings accounts; and the conduct of mortgage accounts eg third party security for loans. All these cases typically involve long term contracts where it is not unreasonable that a consumer first becomes aware of a possible problem long after the date of the act complained about (eg coming up to the maturity date of a policy) and could not reasonably have learnt of it sooner.

9. The FOS have given the following examples of circumstances which they consider exceptional, and which would justify them looking at cases beyond the normal time limits: where there has been a delay in bringing the complaint due to illness; and where the consumer has been abroad and as a result has not received information alerting of a possible cause for complaint.

10. This option would involve no change to Handbook text. We would need only to clarify our existing rules to industry and consumer groups, and we have already committed to revert to them on this issue. While the industry is concerned about liabilities arising indefinitely, the mortgage endowment complaint experience supports not imposing any cut-off period for making complaints, as it has enabled consumers to complain where they have only recently become aware of a problem, and could not have discovered this sooner. In addition, firms will continue to have the option to trigger the existing time limits by sending consumers clear information, which would reasonably make consumers aware if they had potential cause for complaint. We could if necessary commit to reviewing the present approach again if the number of non-endowment cases were to increase sharply.

11. b) Limiting complaints over 15 years old

12. This option would involve introducing a new rule extinguishing the right to complain after 15 years from the act giving rise to the complaint. This would apply even where a complaint would be within the 3 year time limit, or where the 3 years had not started to run. The 3 and 6 year time limits would remain intact, but subject to a new rule imposing a 15 year cut off. The new rule would have a 'carve-out' so that the Ombudsman would retain the right to consider "appropriate cases" beyond 15 years.

13. "Appropriate cases" could be identified using the principles in the special provisions in the Limitation Act 1980 for death and personal injury claims. Those provisions give the court discretion to extend the time limit for bringing such claims. Following that approach, the FOS would decide whether it would be equitable to deal with a case over 15 years old, taking into account the extent of any prejudice to the consumer and to the

firm. In reaching this determination, the FOS would have regard to all the circumstances, including the following factors:

a) The length of the delay, and reasons for the consumer having delayed bringing the complaint.

b) The quality of the evidence: is this likely to be less cogent than if the case had been brought within the (new) 15 year time limit?

c) The firm's conduct, eg did it respond reasonably to the consumer's requests for information?

d) Whether the consumer acted promptly and reasonably once he realised he may have cause for complaint.

14. This option would remove the current 'exceptional circumstances' provision under the existing 3 and 6 year time limits. It would also enable the Ombudsman to determine whether to disapply the 15 year time limit on a case by case basis. The FOS are reluctant to have to apply principles to individual cases and would prefer instead to have a blanket rule. They are conscious of the risk of judicial review, particularly as the new rule would be modelled on legal precedent which would provide, in their view, a convenient springboard for legal argument.

15. The Limitation Act does not provide an absolute time bar of 15 years in all cases. The legislation includes special provisions that extend the normal time limits in certain types of actions, for example in claims involving mortgages, and death and personal injury as mentioned above.

16. This option would require consultation on changes to the Handbook. In February 2003 we introduced a new rule extending the time within which consumers can bring mortgage endowment complaints. So introducing a 15 year longstop could be seen as conflicting with the recent rule change intended to benefit consumers.

17. c) 15 year rule with transitional period

18. Under this option, we would introduce a blanket rule preventing the Ombudsman from considering any cases more than 15 years old. There would be no discretion for the Ombudsman in this respect. The rule would be applied on a transitional basis, so that all older complaints already being dealt with by firms or the Ombudsman would continue, and they could continue to receive and deal with such complaints for a short period after the rule is made (eg up to 6 months). This would give a breathing space for consumers to become aware that they have a limited time in which to make complaints about events more than 15 years old.

19. In addition to consultation on the policy change, additional regulatory action would be needed to raise consumer awareness of this issue within a very short time frame. Consumers would need to be alerted that if they have possible cause for complaint for an event that occurred a long time ago, they face losing altogether the right to complain unless they take action in the immediate term. Such a consumer campaign will require a clear strategy for communicating with consumers and has resource implications for us and potentially the FOS. Publicity would also carry a risk of raising consumer

expectations unduly. As with option (b), introducing a 15 year cut off for making a complaint creates a reputational risk for us, in terms of possible consumer detriment.

Next steps

20. We intend to write shortly to industry and consumer bodies advising that we do not see a reason for moving from the existing rules and policy.