

FCA proposes significant increase to the FOS award limit and SME access

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The Financial Conduct Authority has published new proposals to increase the current FOS award limit by 133% from £150,000 to £350,000. At the same time, it has issued a Policy Statement with near-final rules allowing access to the FOS to SMEs with a turnover of less than £6.5m and either a balance sheet total of less than £5m or fewer than 50 employees.

Expanding the scope of companies entitled to make a claim to the FOS

As matters currently stand, the FOS considers complaints from consumers and micro-enterprises with an annual turnover or balance sheet less than €2million and fewer than 10 staff.

Following on from its January 2018 Consultation Paper, the FCA has issued a Policy Statement with near-final rules (view [here](#)) confirming that it intends to extend the remit of eligible complainants to the FOS to include SMEs with:

- a turnover of less than £6.5 million; and
- either a (i) balance sheet total of less than £5 million; or (ii) headcount of fewer than 50 employees

on 1 April 2019.

The proposal, which also extends the scheme to charities and trusts in certain circumstances, will result in an estimated additional 210,000 SMEs having access to the scheme.

There was some opposition to the proposal, including that the FCA's consumer protection objective should not be read as a duty to protect business customers and on the basis that many SMEs of that nature would have legal expenses insurance. The FCA considers it has addressed those concerns by balancing levels of turnover, balance sheet total and headcount between SMEs that would have the financial and management resources to protect their interests in disputes with firms, against those that would not.

The FCA will confirm the implementation date by the end of the year after it has had an opportunity to consider its business plan and budget.

133% increase to the FOS's award limit

An issue which was highlighted during the above consultation process was whether the FOS's award limit of £150,000 should be increased.

The FCA estimates that approximately 2,000 complaints upheld by the FOS recommend compensation levels above the award limit, otherwise known as high value complaints. On the basis of a sample of 2% of the high value complaints, the compensation levels recommended by the FOS ranged from £150,000 to £921,000. While high value complaints represent a small proportion of the overall number of claims which the FOS receives (approximately 1%), because of the high value of the claim the FCA considered there is a much greater risk of harm to the complainant if compensation above the award level of £150,000 is not paid.

The FCA has therefore issued a Consultation Paper (view [here](#)) proposing phased increases in the award limit to:

- £160,000 in respect of acts or omissions which are the subject of the complaint occurring *before* 1 April 2019 and referred to FOS *after* 1 April 2019; and
- £350,000 in respect of acts or omissions which are the subject of the complaint occurring *after* 1 April 2019 and referred to FOS thereafter.

The FCA also proposes to adjust the award limit in line with inflation, as measured by the Consumer Price Index from 1 April 2020.

The extension to the remit of eligible complainants and increase in the award level are motivated by the FCA's desire to further its "consumer protection objective". However, questions have been asked as to whether the FOS has the relevant resources to efficiently and effectively manage the likely increase this will mean for its workload.

The FOS is obliged to decide complaints on the basis of what is fair and reasonable in all the circumstances of the case (FSMA 228(2), DISP 3.6.1R). While it has confirmed that it will take the relevant law and regulations into account in making those decisions, questions will be asked as to whether it is appropriate for it to make awards of up to £350,000, given its obligation to resolve disputes "*quickly and with minimum formality*".

The consultation process in relation to the increase in the award limit closes on 21 December 2018.

Implications for insurers

The FCA estimates that the proposal to increase the number of eligible complainants will not increase the FOS's caseload by more than 0.5% and will only make a small impact on the overall average unit cost of dealing with a complaint. This may provide some indication as to what insurers ought to expect in terms of additional time and cost pressures on their claims handlers as a result of this change, albeit only time will tell.

The FCA recognises that professional indemnity insurance premiums may increase as a result of the proposed increase in the amount of compensation that the FOS can award. It estimates an overall increase of insurance costs of £77 million.

The proposed increase in the award may affect how insurers approach policy coverage decisions in that they may adopt a more risk averse approach in respect of such issues given the greater adverse financial implications of making a decision that is subsequently overturned by the FOS.

This FCA consultation is one of many developments discussed in our annual market conditions and trends report published last month, which can be accessed [here](#).

Authors



Thomas Watkinson

London - Walbrook
+44 (0)20 7894 6812
tawatkinson@dacbeachcroft.com



Susan O'Rourke

London - Walbrook
+44 (0) 207 894 6904
sorourke@dacbeachcroft.com



Dan Preddy

Bristol
+44 (0)117 918 2257
dpreddy@dacbeachcroft.com