

Mesothelioma compensation: amending the Financial Services Compensation Scheme

Summary of responses

November 2006



HM TREASURY





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amending the Financial Services
Compensation Scheme
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CONTENTS

		Page
Chapter 1	Introduction	3
Chapter 2	Summary of responses	5
Chapter 3	Conclusions and next steps	9
Annex A	Responses to the consultation	11
Annex B	Statutory Instrument	13
Annex C	FSA Rules	17

1

INTRODUCTION

1.1 This document summarises the responses to the joint HM Treasury and Financial Services Authority (FSA) consultation on Mesothelioma Compensation: amending the Financial Services Compensation Scheme (FSCS). This consultation was launched on 8 September and closed on 6 October 2006.

1.2 HM Treasury and the FSA are very grateful to all those who responded to the consultation document and commented on the partial Regulatory Impact Assessment (RIA).

QUESTIONS ASKED BY THE CONSULTATION AND RIA

1.3 The consultation document and partial RIA outlined proposals to change the FSCS to broaden the circumstances in which responsible persons (eg employers) and/or insurers can claim a contribution directly against the scheme in mesothelioma cases.

Consultation document

1.4 The questions raised in the consultation document were:

- Do you have any comments on a) HM Treasury's Statutory Instrument or b) the proposed changes to FSA rules and guidance?
- Do you have any comments on the partial Regulatory Impact Assessment (RIA) in Chapter 4 [of the consultation document]?

Partial RIA

1.5 The questions raised in the partial Regulatory Impact Assessment were:

- Do you agree with the analysis of costs and benefits for the different implementation options, as well as the impact on competition and small firms?
- Are there any alternative ways of amending the FSCS that could be considered?

1.6 Chapter 2 summarises the responses received to these questions and on other issues raised during the consultation period. Chapter 3 summarises the conclusions and sets out the next steps.

2

SUMMARY OF RESPONSES

CONSULTATION

2.1 The consultation sought views on proposals to change the FSCS to broaden the circumstances in which responsible persons (eg employers) and/or insurers can claim a contribution directly against the scheme in mesothelioma cases. It specifically asked whether respondents had any comments on a) HM Treasury's Statutory Instrument or b) the proposed changes to FSA rules and guidance

2.2 14 responses were received to the consultation from individuals, firms or representative bodies from the insurer, employer and legal communities. A list of those responding to the consultation who did not ask for their response to be kept confidential is attached at Annex A.

2.3 Respondents were, in general terms, supportive of the proposals to amend the FSCS and most thought that the draft Statutory Instrument and FSA rules met the policy intention set out in the consultation document.

2.4 A number of respondents thought that there might be some ambiguity, caused by the interaction of the Compensation Act 2006 and the draft Statutory Instrument. The question raised was whether an insurer of a responsible person would be able to recover a contribution from the FSCS where the FSCS is involved because there is an insolvent insurer, even if that insurer insured the same responsible person. This situation was likely to arise in single employer cases. The policy intention is that this case should be covered. The Statutory Instrument will be amended for the avoidance of any doubt. This will be achieved by making clear that except in specified cases "responsible person" includes an insurer of a responsible person. It has also been made clear by referring to a "claimant" in article 9A(1)(a) and regulation 3(1)(a) that a responsible person would be eligible to apply for compensation where he (rather than solely a victim) is currently eligible to apply to the FSCS.

2.5 Questions were also raised concerning the case where the insurance estates protected by the FSCS would account for the greater part of any claim and whether the FSCS would meet the claim in full and then pursue recovery of payments from other responsible persons or insurers. As noted in the consultation document, the FSCS is a statutory fund of last resort for consumers of authorised financial services firms, including persons affected by the default of such firms. It is not proposed to change this through this consultation.

2.6 It was also asked whether these proposals have any effect on limitation periods for making claims. The Statutory Instrument and FSA Rules in themselves do not make any specific limitation provision. Therefore the existing rules on limitation relating to claims and the recovery of contributions still apply.

2.7 One respondent noted that the changes should be strictly limited to mesothelioma cases and this should be made clearer in the SI. HM Treasury considers that the drafting of the Statutory Instrument in this regard clearly meets this policy intention given that claims can only be entertained where section 3(1) of the Compensation Act relating specifically to mesothelioma cases applies.

2.8 Comments were received from one respondent regarding other clarifications surrounding the drafting of the Statutory Instrument. These have been considered, and where necessary, have been incorporated in the revised Statutory Instrument.

2.9 One respondent noted that the FSA should consider its definition of mesothelioma victim to ensure the words “as a result of exposure” does not require there to be a causal link to the responsible person. The Compensation Act 2006 sets out a causal element in section 3(1)(b). The FSA’s definition is expressed to be in accordance with section 3(1) as a whole. The FSA’s definition does not seek to alter the provisions in the Act.

2.10 The changes that have been made to the COMP rules (since the draft was consulted on) are either immaterial, clarificatory or reflect the changes that have been made to the Statutory Instrument.

2.11 Other comments received went wider than the specific issues being consulted on and are addressed below.

REGULATORY IMPACT ASSESSMENT

2.12 Respondents were also asked to comment on the partial Regulatory Impact Assessment (RIA). The RIA specifically asked whether respondents a) agreed with the analysis of costs and benefits for the different implementation options, as well as the impact on competition and small firms and b) whether there were alternative ways of amending the FSCS that could be considered?

2.13 Most respondents who commented on the RIA were content that it dealt adequately with the expected regulatory impact. Respondents made the following additional points:

- The option of doing nothing would be unjust to Responsible Persons;
- In future there may be a tendency for victims and their advisors to concentrate claims on a few large companies/insurers. It was argued this could lead to a reduced pool for Responsible Persons and insurers to pay damages;
- The proposals should speed up the paying of claims;
- There may be a short term increase in claims on the FSCS due to the fact that it was now easier to claim (it should be noted that this would not change FSCS liability);
- The option of pay and reclaim may put a strain on companies in run off, meaning the responsiveness of the FSCS to requests for claims will be important.

2.14 No alternative proposals for amending the FSCS were put forward, although, as noted above, respondents did raise other issues concerning the FSCS and mesothelioma consultation that are addressed below.

OTHER ISSUES RAISED DURING THE CONSULTATION

2.15 The consultation sought views on the specific changes that were being made to the FSCS to broaden the circumstances in which responsible persons (eg employers) and/or insurers can claim a contribution directly against the scheme in mesothelioma cases. It was thought inappropriate to seek views on wider issues concerning the FSCS and mesothelioma compensation given that a) the proposal was for a technical change arising as a direct result from the Compensation Act 2006, b) the urgency with which these changes need to be made and the shorter period for consultation mean that it would not be fair to introduce wider issues for consideration, and c) other work, being led by the Department for Work and Pensions (DWP), was already being undertaken on improving claims handling in mesothelioma cases.

2.16 However, HM Treasury and the FSA are grateful to respondents for putting forward their wider views on mesothelioma compensation and the FSCS. A high level summary of the most commonly expressed views follows. Responses to the consultation that included wider issues concerning mesothelioma claims handling will be fed into the wider DWP work on improving claims handling for mesothelioma cases which is being consulted on at present.

Tracing old policies **2.17** Some respondents highlighted problems where no insurance policy can be traced and, in the event that the employer is insolvent, could mean that the victim does not receive any compensation from the negligent party. This point will be considered by the DWP consultation on mesothelioma.

Compensation Act 2006 **2.18** Comments were received relating to changes made in the Compensation Act 2006 itself. These comments have been passed to the Department for Constitutional Affairs.

Validation of claims by FSCS **2.19** A number of respondents raised the issue of validation of a claim by the FSCS. Respondents suggested that, currently, the system requires the claimant to wait for the FSCS to conclude its validation enquiries before payment can be made. It was noted that this process can be detailed and take some time. One proposal was for the FSCS to make a payment before it concludes its validation enquiries and then, if it later transpires that funds were available from other parties the FSCS could obtain an appropriate refund. However, in order for the FSCS to pay compensation, there must be a liability against the negligent party, and under a policy of the failed insurer. In some cases, it can be difficult to establish the identity of the liable parties

90% rule **2.20** A number of respondents raised issues surrounding the so-called 90% rule, where, broadly, the FSCS will pay out 90% of any claim in relation to an employers' liability policy prior to 1972 (ie when the policy was non-compulsory). These provisions stem from the Policyholders Protection Act 1975. Some respondents argued that this was unjust, added to the complexity of the system, and increased the length of time it takes for mesothelioma victims to receive compensation. It was argued that to increase compensation from 90% to 100% would only involve modest cost, would simplify over-complex FSCS rules and would speed up victim's access to compensation. The current limits for compensation under FSCS rules reflect the results of two public consultation exercises. There are no plans to change the 90% rule as a result of this consultation.

Complaints against FSCS **2.21** Some respondents noted that it is difficult for a dissatisfied claimant to take any action against the FSCS and asked for a more robust mechanism that allowed a claimant to intervene in the FSCS process. In this regard it should be noted that the FSCS has duty to deal with complaints as set out in COMP 2.2.8R of the FSA Handbook:

“The FSCS must put in place and publish procedures which satisfy the minimum requirements of procedural fairness and comply with the European Convention on Human Rights for the handling of any complaints of maladministration relating to any aspect of the operation of the compensation scheme”. Details of the FSCS complaints procedure can be found on the FSCS website¹.

¹ http://www.fscs.org.uk/consumer/How_to_Claim/What_to_do_if_you_are_not_happy/Complaints/

3

CONCLUSIONS AND NEXT STEPS

CONCLUSIONS

3.1 HM Treasury and the Financial Services Authority have decided to make the proposed changes to the FSCS. As explained in Chapter 2, small changes have been made both to HM Treasury's Statutory Instrument and the FSA's rules. The revised version of the Statutory Instrument that will be laid before Parliament is at Annex B. The revised version of near final FSA rules is at Annex C.

NEXT STEPS

3.2 Secondary legislation will be laid before Parliament to make the proposed changes to the FSCS and the FSA is in the process of changing its Rules. The Statutory Instrument will be accompanied by a full Regulatory Impact Assessment. Subject to Parliamentary approval of the Statutory Instrument, it is intended that the revised arrangements for the scheme will apply as soon as possible.

3.3 Please direct any enquiries to:

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A

RESPONSES TO THE CONSULTATION

Association of British Insurers
Association of Personal Injury Lawyers
Association of Run-off Companies
AXA
Beachcroft LLP
Berryman's Luce Mawer
Corus
Field Fisher Waterhouse LLP
International Underwriting Association
John Pickering and Partners LLP
Personal Injury Bar Association
Ports of London Authority
Price Waterhouse Coopers

One respondent requested that their response remained confidential.

- (2) In article 9(1)(a) (article 9 defaults occurring before commencement) after “subject to article” insert “9A or”.
- (3) After article 9 insert—

“Contributions in relation to mesothelioma claims

9A.—(1) This article applies where—

- (a) a claimant, if he had not received payment from a responsible person, could claim by virtue of this Order (other than this article) from the scheme manager in circumstances where section 3(1) of the Compensation Act 2006 applies; and
- (b) the circumstances in paragraph (2) apply.

(2) Compensation may be paid to a responsible person (“A”) by the scheme manager only where and to the extent that—

- (a) A could claim a contribution from another responsible person in accordance with section 3(3)(a) of the Compensation Act 2006, but
- (b) A is unable or likely to be unable to obtain a contribution, because an authorised insurance company of the other responsible person is unable or likely to be unable to satisfy the claim for a contribution.

(3) The Authority may make rules modifying the new scheme to enable the scheme manager to receive, assess, determine and make payments in respect of applications for compensation from responsible persons and give guidance in relation to those rules.

(4) Such rules may, in particular, permit—

- (a) payment of compensation to a responsible person notwithstanding that he has made a payment to the victim;
- (b) payment of compensation to a responsible person not exceeding the amount a claimant would, if he had not received payment in full or of a contribution from such a person, have been able to recover from the scheme manager directly in respect of the contribution;
- (c) payment to a claimant in respect of an application for compensation made on or after 25 July 2006, including an application which relates to a victim’s claim which is settled on or after 3 May 2006 or in relation to which there are legal proceedings which are determined on or after 3 May 2006.

(5) Where payment is made to a victim by a responsible person by virtue of rules made under this article, articles 9, 10 and 12 do not apply.

(6) In this article—

“claimant” means a victim or a responsible person;

“victim” has the same meaning as in section 3 of the Compensation Act 2006 (mesothelioma: damages).

(7) In this article, “responsible person” has the same meaning as in section 3 of the Compensation Act 2006 and, except for in paragraph (2)(b) and in the definition of “claimant”, includes an insurer of a responsible person.

(8) The power granted to the Authority in this article is in addition, and without prejudice, to any other power of the Authority.”

(4) At the beginning of article 10(1) (applications in respect of compulsory liability insurance) for “A” substitute “Subject to article 9A, a”.

(5) At the beginning of article 12(1) (applications under the new scheme) for “Notwithstanding” substitute “Subject to article 9A, notwithstanding”.

Further power for Authority to make rules concerning mesothelioma claims

3.—(1) This Regulation applies where—

- (a) a claimant, if he had not received payment from a responsible person, could claim from the scheme manager in circumstances where section 3(1) of the Act applies; and
- (b) the circumstances in paragraph (2) apply.

(2) Compensation may be paid to a responsible person (“A”) by the scheme manager only where and to the extent that—

- (a) A could claim a contribution from another responsible person in accordance with section 3(3)(a) of the Act, but
- (b) A is unable or likely to be unable to obtain a contribution, because an insurer of the other responsible person is unable or likely to be unable to satisfy the claim for a contribution.

(3) The Authority may make rules modifying the new scheme to enable the scheme manager to receive, assess, determine and make payments in respect of applications for compensation from responsible persons and give guidance in relation to those rules.

(4) Such rules may, in particular, permit—

- (a) payment of compensation to a responsible person notwithstanding that he has made a payment to the victim;
- (b) payment of compensation to a responsible person not exceeding the amount a claimant would, if he had not received payment in full or of a contribution from such a person, have been able to recover from the scheme manager directly in respect of the contribution;
- (c) payment to a claimant in respect of an application for compensation made on or after 25 July 2006, including an application which relates to a victim’s claim which is settled on or after 3 May 2006 or in relation to which there are legal proceedings which are determined on or after 3 May 2006.

(5) In paragraph (2)(b) “insurer” means an authorised person who has permission to effect or carry out contracts of insurance, or had permission at the time the act or omission giving rise to the claim against him took place.

(6) In this Regulation “claimant” means a victim or a responsible person.

(7) Except in paragraph (2)(b) and in the definition of “claimant”, in this Regulation “responsible person” includes an insurer of a responsible person.

(8) The power granted to the Authority in this Regulation is in addition, and without prejudice, to any other power of the Authority.

Modification of FSMA in relation to FSA rules for mesothelioma claims

4. On the first occasion on which the Authority proposes to make rules or give any guidance concerning claims of the type referred to in section 3(7) of the Act, sections 155 and 157(3) of FSMA do not apply to the proposed rules or guidance.

	<i>Name</i>
Date	Two of the Lords Commissioners of Her Majesty’s Treasury

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations amend the Financial Services and Markets Act 2000 (Transitional Provisions, Repeals and Savings) (Financial Services Compensation Scheme) Order 2001, S.I. 2001/2967 (“the FSCS Transitional Order”) and provide the Financial Services Authority (“FSA”) with an additional power to make rules for the Financial Services Compensation Scheme (“FSCS”).

Claims are covered by the FSCS where financial services providers cannot, or are not likely to be able to, satisfy claims against them.

The FSCS Transitional Order sets out provisions which allow certain transitional claims for compensation whose facts relate to the period before the commencement of the Financial Services and Markets Act 2000 (“FSMA”) to be made against the scheme manager of the FSCS, set up under section 212 of FSMA. The claims in question would apply to certain insurers subject to insolvency or other defaults which took place before the commencement of FSMA on 1 December 2001.

Regulation 2 makes amendments to the FSCS Transitional Order to enable the FSA which is responsible for making the rules of the FSCS and for giving guidance on those rules, to modify the FSCS. The modifications enable a person who is liable in tort (or an insurer of such a person) for having exposed a person to asbestos who goes on to develop mesothelioma to recover a contribution from the FSCS. The Regulations set out the circumstances where a contribution can be paid to such a person by the FSCS.

Regulation 3 provides a power for the FSA to make rules, and to give guidance on those rules, having similar effect in relation to claims other than those dealt with in the FSCS Transitional Order.

When the FSA makes rules or gives guidance under FSMA, sections 155 and 157(3) apply consultation obligations. Regulation 4 relieves the FSA of its specific statutory duty to consult on the first occasion on which it makes rules or guidance in relation to mesothelioma claims under these Regulations. Similar provision was made in relation to rules and guidance concerning general insurance and mortgage complaints.

A joint consultation was undertaken by HM Treasury and the FSA on the provisions of this instrument and the rules made under it. A copy of the consultation document is available on HM Treasury's web-site (www.hm-treasury.gov.uk).

A regulatory impact assessment of the effect of the instrument on costs to business has been prepared and may be obtained from Financial Stability and Risk Team, HM Treasury, 1 Horse Guards Road, London SW1A 2HQ. It is also available on HM Treasury's web-site and a copy has been placed in the libraries of both Houses of Parliament.

C

FSA RULES

Below are near-final drafts of FSA rules on proposals consulted on in the 8 September consultation document. Near-final draft rules are rules which have been through the required processes on the way to being made (and accordingly are not published for further consultation) but which have not yet been made by the FSA board. The necessary power to make rules will be given by HM Treasury's Statutory Instrument and so the FSA Board cannot make the rules until this has been made. These rules will be presented to the FSA board for their consideration at the earliest available opportunity, once the FSA is given the power to make them. Subject to the FSA Board's discretion it is not proposed any changes will be made to these near-final drafts other than:

- technical changes to improve clarity;
- to reflect more clearly the policy intention; or
- properly to reflect any other intervening matter (if any) which has legal effect.

COMPENSATION SOURCEBOOK (CONTRIBUTION FOR MESOTHELIOMA CLAIMS) INSTRUMENT 2006

Powers exercised

- A. The Financial Services Authority makes this instrument in the exercise of the powers and related provisions in or under
- (1) article 9A of the Financial Services and Markets Act 2000 (Transitional Provisions, Repeals and Savings) (Financial Services Compensation Scheme) Order 2001; and
 - (2) regulations 3 and 4 of the Compensation Act (2006) (Contribution for Mesothelioma Claims) Regulations 2006.
- B. The rule-making powers listed above are specified for the purpose of section 153(2) (Rule-making instruments) of the Act.

Commencement

- C. This instrument comes into force on [] 2006.

Amendments to the Handbook

- D. The Glossary is amended in accordance with Annex A to this instrument.
- E. The Compensation sourcebook (COMP) is amended in accordance with Annex B to this instrument.

Citation

- F. This instrument may be cited as the Compensation Sourcebook (Contribution for Mesothelioma Claims) Instrument 2006.

By order of the Board

[] 2006

Annex A**Amendments to the Glossary of definitions**

<u>authorised insurance company</u>	<u>(In COMP) (in accordance with the compensation transitionals order) a person who was, at any time before commencement, authorised under section 3 or 4 of the Insurance Companies Act 1982 to carry on insurance business of any class in the United Kingdom.</u>
<u>mesothelioma regulations</u>	<u>The Compensation Act 2006 (Contribution for Mesothelioma Claims) Regulations 2006 (SI 2006/[]).</u>
<u>mesothelioma victim</u>	<u>(in accordance with section 3 (1) of the Compensation Act 2006) a person who has contracted mesothelioma as a result of exposure to asbestos by a responsible person.</u>
<u>responsible person</u>	<u>(in accordance with section 3 (1) of the Compensation Act 2006) a person who has negligently or in breach of statutory duty caused or permitted another person to be exposed to asbestos (including an insurer of such a person).</u>

Annex B

Amendments to the Compensation sourcebook (COMP)

In the following paragraph, underlining indicates new text and striking through indicates deleted text.

- 4.2.1 R Unless *COMP* 4.2.3 R applies, an *eligible claimant* is any *person* who at any material time:
 ...
 (2) did come within *COMP* 4.2.2 R, but satisfied the relevant exception in *COMP* 4.3 or
COMP 4.4.
- 4.4 ... Exceptions: Relevant general insurance contracts: mesothelioma claims
Application
- 4.4.1 R This section applies in respect of any claim for a contribution by a *responsible person* made on or after 25 July 2006 in relation to a *mesothelioma victim*'s claim which is determined by agreement in writing, a court or an arbitrator on or after 3 May 2006.
- 4.4.2 R Claims for contribution by responsible persons
The *rules* in this sourcebook shall have effect as modified to the extent necessary to enable the *FSCS* to receive, assess, determine and make payments in respect of applications for compensation from *responsible persons* in accordance with article 9A of the *compensation transitionals order* and regulation 3 of the *mesothelioma regulations*.
- 4.4.3 R In particular:
 (1) a *responsible person* is eligible to claim in accordance with the provisions of this section;
 (2) the *FSCS* may pay compensation to a *responsible person* where it is satisfied that an *eligible claimant* has a claim under a *protected contract of insurance* issued by an *insurer in default*, which, but for satisfaction of that claim by the *responsible person*, the *FSCS* would have paid;
 (3) a *responsible person* in (2) may claim compensation only if, having satisfied a claim in relation to a *mesothelioma victim*, he could claim contribution from an *insurer in default*;
 (4) the *FSCS* may pay compensation in respect of any contribution for which an *insurer in default* is liable by agreement in writing, or by a determination of a court or arbitrator; and
 (5) and in relation to this section, references to an *insurer* include an *authorised insurance company*, and references to *in default* include an *article 9 default*.
- 4.4.4 G The provisions in this section establish a scheme for contribution claims by *responsible persons*. The requirement in *COMP* 12.2.7R to take into account payments to the claimant do not therefore require the *FSCS*, in paying compensation in respect of such a claim, to take into account any payments referred to in that *rule* made by a *responsible person* in calculating the claimant's overall net *claim*.
- 4.4.5 R Limits to amounts payable for contribution claims
The amount payable by the *FSCS* in respect of a claim in accordance with the provisions of this section may not exceed the amount that it would have paid if the *mesothelioma victim* (or a *responsible person* other than an *insurer* of such a *person*) to whom the contribution claim relates had made that claim directly against *FSCS*.

In the following table, underlining indicates new text and striking through indicates deleted text.

1 Transitional Provisions Table

(1)	(2)	(3)	(4)	(5)	(6)
	Material to which the transitional provision applies		Transitional Provision	Transitional provision: dates in force	Handbook Provisions coming into force
1	COMP 5	R	<i>Protected claims</i>	Indefinitely	<i>Commencement</i>
			...		
		(2)	A <i>claim</i> must be treated as a <i>claim</i> in relation to a <i>protected contract of insurance</i> under COMP 5.4.5 R if the conditions in article <u>9A or 10(1)(a)-(d)</u> of the <i>compensation transitionals order</i> are satisfied.		<i>Commencement but on [date] for <u>article 9A</u></i>
			...		

In *COMP* Schedule 4, Powers Exercised, insert the following new paragraphs in the appropriate numerical positions. The inserted text is not underlined.

- (12A) Article 9A (Contributions in relation to mesothelioma claims) of the *compensation transitionals order*.
- (15) Article 3 (Modification of FSMA 2000 in relation to FSA rules for mesothelioma claims) of the *mesothelioma regulations*.

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