

## POSITION STATEMENT

The purpose of this note is to set out the Financial Services Compensation Scheme Limited's ("FSCS") position [as at [1 December 2023](#)] following a request to consider whether FSCS could fund or compensate for an Exit and Administration Charge which the joint administrators ("JAs") of Hartley Pensions Limited's ("Hartley") propose to charge self-invested personal pension ("SIPP") clients. The purpose of the fee is intended to cover costs including those of continuing to administer Hartley until the SIPP book can be transferred to another appropriately regulated company. This is intended to avoid the company being liquidated, which could result in clients incurring a significant tax charge.

Based on our analysis of the available evidence, FSCS' position is that it does not have the power, in the current circumstances, to pre-fund the Exit and Administration Charge. Nor is it satisfied on the information available, that protected claims exist in respect of all Hartley customers which would give rise to recoverable losses including the Exit and Administration Charge. The reasons are set out in more detail below.

### FSCS Background

FSCS is the United Kingdom's statutory fund of last resort for customers of authorised financial services firms. FSCS is governed by a set of rules (the Compensation Sourcebook in the "Redress" section of the FCA's Handbook (the "COMP Rules")) and was established as a "scheme for compensating persons in cases where relevant persons are unable, or likely to be unable, to satisfy claims against them" (section 213(1) of the Financial Services and Markets Act 2000 ("FSMA")). FSCS is accountable to, but operationally independent from, the FCA and the PRA. FSCS is funded by levies on authorised financial services firms.

The COMP Rules set out the requirements which must be satisfied by prospective claimants before FSCS may pay compensation. The COMP Rules are set out in the "Redress" section of the Handbook and can be located through the following link: [<https://www.handbook.fca.org.uk/handbook>]

In summary, FSCS can only pay compensation where the qualifying conditions under the COMP Rules are met. This means that in each case, FSCS must be satisfied that:

- there is an "*eligible claimant*";
- with a "*protected claim*";
- against a "*relevant person*";
- who is "*in default*".

Each of these terms are defined in the COMP rules and / or the Glossary of the FCA handbook.

#### *Eligible Claimant*

In order to qualify for FSCS protection the claim must be brought by an "eligible" claimant. The eligibility position under the COMP Rules for the investment sub-scheme is generally that individuals and small businesses are protected, subject to certain exclusions (set out in COMP 4.2.1R)

It appears that Hartley's customers are likely to be eligible claimants, but this would need to be checked in each case.

#### *Protected claim*

A "protected claim" is "*a claim which is covered by the compensation scheme*" which in the context of claims against SIPP Operators includes "*a claim in connection with protected investment business*". A "*claim*" here is "*a valid claim made in respect of a civil liability*", and "*protected investment business*" is "*designated investment business which is covered by the compensation scheme*" which in the context of claims against SIPP Operators includes "Designated investment business carried on by the relevant person with or, for the benefit of, the claimant (so long as that claimant has a claim), or as agent on the claimant's behalf." Designated investment business is any of the activities specified in Part II of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 ("**RAO**"). Designated investments are defined as a security or contractually based investment and are listed in Part III RAO (i.e. a specified investment) and include (amongst other things) the rights under a stakeholder pension scheme (Article 82 RAO).

FSCS is not satisfied that all of the criteria here are met to show a civil liability exists, as explained further below.

#### *Relevant Person*

A relevant person is "a person who was, at the time the act or omission giving rise to the claim against it took place...*a participant firm*" where "*participant firm*" includes "a person who has a Part 4A permission to carry on one or more regulated activities".

The activities for which Hartley held relevant permissions are:

- Arranging (bringing about) deals in investments;
- Dealing in investments as principal;
- Establishing, operating or winding up a stakeholder pension (Article 52); and
- Making arrangements with a view to transactions in investments.

FSCS is satisfied that Hartley is a "relevant person".

#### *In Default*

In order to be declared in default, the *relevant person* must be unable, or likely to be unable, to pay protected claims against it. A non-exhaustive list of the type of insolvency proceedings to which the firm might be subject and which would allow FSCS to make a declaration of default is set out at COMP 6.3.3R.

Because there must be *protected claims* against the firm before a default is declared, and FSCS is not satisfied that the Exit and Administration Charge gives rise to a protected claim, FSCS is not in a position to declare a default.

However, and as explained further below, that does not necessarily mean that FSCS will not be able to declare Hartley in default in the future.

## Hartley Background

Our understanding based on the information available to us, is that:

- Hartley offered a range of ISAs, Life Assurance and Pension products including SIPPS, SASSs, Qualifying Recognised Overseas Pension Schemes and Qualifying Non-UK Pension Schemes. Hartley acquired by novation a number of failed SIPP operator books (the “**transferred SIPPS**”) to provide continuity of services to clients who faced uncertainty concerning their pensions when those providers entered administration and the firms were declared in default by FSCS.
- Hartley received a number of complaints regarding its operation of the transferred SIPPs. A number of complaints were also made to the Financial Ombudsman Service (“**FOS**”). The FOS upheld the complaints on the basis the Firm was in breach of Principle 6 of the Principles for Business (“**PRIN**”). Namely the requirement on Hartley to act in the customer’s interest by paying due regard to the interest of its customers and treating them fairly. The FOS partially upheld the complaints on the basis that continuing to charge fees which were higher for the transferred SIPPs than their standard charges was in breach of PRIN 6, even though Hartley was contractually entitled to do so. FOS required Hartley to pay a rebate of the difference between the fees charged and those which would have been chargeable under an equivalent Hartley product.
- On 10 February 2022, the FCA issued an information request from Hartley pursuant to section 165 of FSMA regarding the investments made by Hartley, the firm’s capital adequacy and the complaints made against it.
- A number of requirements were subsequently imposed against Hartley’s regulatory permissions, most of which the firm voluntarily imposed and one which the FCA imposed through the use of its own initiative powers. Hartley was required to cease accepting contributions from existing clients and pipeline business, and without prior written consent from the FCA, not to direct Hartley Pension Trustees Limited (the trustee of the SIPP) (“**HPTL**”) to transfer any SIPP or SSAS to any person or deal with any cash or assets held for SIPP or SSAS schemes administered by Hartley.
- Following these restrictions, the directors of Hartley concluded they would be unable to meet their liabilities and resolved to enter into administration.
- On 29 July 2022, Hartley entered into administration and Peter Kubik and Brian Johnson of UHY Hacker Young were appointed as the JAs. FSCS has been in dialogue with the JAs and FCA regarding its role, if any, in Hartley’ insolvency proceedings since this time.
- The JAs have incurred costs in addition to their remuneration and disbursements. In particular, through trading and in administering and reconciling records from the transferred SIPPs, and also anticipate further costs in transferring the SIPPs to a new provider or providers.
- The JAs now intend to make a Part 8 court claim. We understand from the draft witness statement prepared in support of the claim and correspondence we have received from the JAs, that the JAs consider in order to fund the costs of the administration estate that Hartley is entitled to amend the terms which govern the relationship with its customers upon notification to the SIPP holders to enable them to charge certain fees which are payable by the SIPP holders. The JAs say that after Hartley entered administration, the JAs’ costs of carrying out their role and to continue to administer the SIPPs have exceeded the fees that it

is presently entitled to charge. Hartley is seeking (1) a declaration that Hartley is entitled to charge, the Exit and Administration Charge pursuant to the terms and conditions of the SIPPs; or (2) a declaration that the terms and conditions of the SIPPs can be amended to allow Hartley to charge the Exit and Administration Charge.

- Separately, the JAs have asked FSCS whether it is able to fund these costs.

### **FSCS' Position**

FSCS only has the powers provided to it under legislation, the source of which is Part XV of FSMA.

Section 213 of FSMA makes clear that the scope of FSCS is limited to the assessment and payment of compensation and imposing levies to meet associated expenses. There is no general power which could be used to fund the JAs' costs of continuing to administer Hartley until the SIPP books can be transferred. FSMA does envisage specific scenarios in which FSCS can cooperate in respect of or contribute to the cost of different insolvency regimes (for example under section 214 of FSMA where funeral plans are involved), but they do not apply to these circumstances.

Another limited occasion in which FSCS is able to fund insolvency costs is where the firm's insolvency is dealt with under the Investment Bank Special Administration Regime (Special Administration). This is a modified form of insolvency aimed specifically at investment firms holding custody assets and client money under the CASS regime. In Special Administration, the return of CASS client money/assets to the firm's customers is prioritised (Objective 1), and the regime requires the special administrators to cooperate with FSCS to achieve this. In these circumstances FSCS is able to fund objective 1 costs that would otherwise have been deducted from CASS client money/assets of the regulated firm.

These cases are distinguishable, and this approach does not apply to Hartley. Hartley is a SIPP Operator, and unlike an Investment Bank it is performing different regulated activities and in particular it does not hold custody of assets as a trustee. In a SIPP, such as Hartley, pension assets are held by a separate trustee (in this case HPTL), and so cannot be CASS client money/assets of Hartley. There is no modified form of insolvency aimed at SIPP Operators, which would address the particular circumstances relating to Hartley which has entered ordinary administration.

The COMP rules which set out rules to be followed by FSCS when assessing and paying compensation do not include any broader power to cover administration costs and the FEES rules (also set out in the FCA Handbook) do not include provision which would entitle FSCS to levy for the purpose of funding such costs.

There is also no general power which would allow FSCS to compensate clients that have suffered a loss as a result of being required to pay the Exit and Administration Charge.

We consider that the only way in which FSCS can make any payment would be if it is satisfied that the qualifying conditions under COMP are met to enable it to pay compensation to individual customers. As set out above, for FSCS to be satisfied that a *protected claim in connection with protected investment business* exists it needs to be satisfied not only that the claim relates to *designated investment business* but also that a civil liability exists as a result of which the relevant customers suffered a loss.

For claims to arise out of the alleged administrative failings of Hartley giving rise to a civil liability, FSCS would need evidence to show that, in respect of each relevant customer, there was i) breach of its

statutory, tortious or contractual duties; and ii) that such breach caused the actual loss complained of.

FSCS has considered a number of possible bases of claim raised by JAs, including, but not limited to:

- The circumstances giving rise to FOS awards in favour of members of Transferred SIPPs: the test applied by FOS when adjudicating complaints is what it considers to be fair and reasonable in all the circumstances of the case. This is an entirely separate regime and different to the requirements under COMP of which FSCS must be satisfied when determining whether to uphold claims. Since the fees appear to have been contractually chargeable, there does not appear to be a claim for breach of contract in these circumstances. Although FOS found the firm to be in breach of PRIN, a breach of PRIN does not give rise to a civil liability under section 138D of FSMA.
- The possibility of claims for breach of COBS 2.1.1R, or breach of contract or negligence, as a result of various alleged administrative failings of Hartley prior to entering administration. COBS 2.1.1R generally requires a firm to act honestly, fairly and professionally and in the best interests of its clients. Whilst a breach of COBS 2.1.1R could give rise to a civil liability under section 138D of FSMA, we haven't been given enough information to assess how the alleged administrative failings in respect of various aspects of record keeping amount to a breach of COBS 2.1.1R specifically. We also have not been able to conclude from the information provided that any loss was caused to customers as a direct result of the alleged breaches.
- Whether the Exit and Administration Charge (once imposed and/or paid) would amount to a loss which flows from alleged administrative failings generally, such that it would be recoverable in damages: FSCS would first need to be satisfied that there had been an actionable breach of duty (which is not clear), but even if that were established our analysis is that the charge is not sufficiently causally linked to the alleged administrative failings and/or the acts of FOS, FCA and / or Administrators may have broken any chain of causation.

In addition, FSCS<sup>4</sup> considers that it is unlikely that a protected claim exists as a result of the actions of the JAs as they are not *relevant persons* for the purpose of COMP.

Even if such a liability did exist, FSCS considers that any claim would still fail on causation grounds. Any loss to the customers in respect of paying the Exit and Administration Charge does not arise as a result of any civil liability in connection with protected investment business as required under COMP and as such the fee would be too remote to be recoverable.

In the circumstances there is no lawful basis on which FSCS considers it could cover these costs.

#### Liquidation

It is likely that if the court's approval for the JAs to introduce the Exit and Administration charge is not granted, the JAs will be required to put Hartley into liquidation. The consequences this could have on Hartley customers include the deregistering of the SIPP schemes by HMRC, which would trigger tax charges to individual customers. FSCS considers these are not costs that it will be able to compensate customers for, even if a protected claim did exist, any claim would fail on causation grounds as any such loss would be irrecoverable as too remote for the same reasons as set out above.

#### Possible future default

For the reasons above, FSCS does not consider that it can declare Hartley in default and pre-fund such losses for customers *en masse*. However, it may be possible that in the future, individual customers are able to establish a protected claim in respect of different losses (i.e. losses other than the JA's proposed Exit and Administration charge or losses which might arise as a result of Hartley going into liquidation). FSCS will consider any individual claims on a case-by-case basis applying the relevant rules under COMP. If a protected claim can be established and the above criteria are met, FSCS would declare Hartley in default. However, this would not necessarily mean that FSCS would be able to compensate customers for the Exit and Administration charge or for any other costs resulting from liquidation.