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FCA sets 29 August 2019 as final cut-off date for PPI complaints

Financial Conduct Authority Policy Statement PS 17/3 'Payment protection insurance complaints: feedback on CP16/20 and final rules and guidance' 2 March 2017

Article by David Bowden

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Executive speed read summary
The FCA has published its Policy Statement on handling PPI complaints in the light of the Supreme Court decision in Plevin. The FCA has now made 32 pages of new DISP rules to bring this about. This follows 2 earlier consultations from the FCA. The new rules come into force in August 2017 when the FCA will start an advertising campaign. There will be a long stop cutoff date for PPI complaints of 29 August 2019. Larger firms will have to pay for this advertising campaign. Firms which sold PPI will have to write to previously rejected mis-selling complainants who are eligible to complain again in the light of *Plevin* to explain this to them. The FCA estimates there are 1.2million customers in this cohort. The FCA is going to treat undisclosed profit share in exactly the same way as undisclosed commission. Where the aggregate of these sums received by a lender represents 50% or more of the cost of the PPI policy, then it will be within the scope of the remediation exercise. Firms will have to refund to customers the top slice over 50% of combined profit share and commission as well as both contractual interest and 8% statutory interest. The FCA is refusing to be drawn as to what the advertising campaign will look like saying only there will be a helpline and website to support it. Firms will not have to conduct a full past business review. The FCA provides 5 worked examples of compensation calculations. The FCA says it is taking these steps to bring about an orderly end to claims relating to PPI.

Policy Statement PS 17/3 '*Payment protection insurance complaints: feedback on CP16/20 and final rules and guidance*'
https://www.fca.org.uk/publication/policy/ps17-03.pdf 2 March *2017*
Financial Conduct Authority

What is the background to this policy statement?
The Supreme Court handed down its judgment **[2014] UKSC 61** in the case of *Plevin v. Paragon Financial Services Limited* on 12 November 2014. Lord Sumption JSC ruled that the 71.8% commission on a PPI policy was beyond a '*tipping point'*. One year later on 26 November 2015, the FCA issued a consultation paper (**CP15/39**) on '*Rules and guidance on payment protection insurance complaints'* that it was proposing to make consequent on the *Plevin* ruling and setting its tipping point at 50%. Following consultation with regulated firms and claims management companies, the FCA refined its approach slightly and on 2 August 2016 it issued a further consultation paper (**CP16/20**). This contained feedback on its 2015 consultation along with draft rules that the FCA was proposing to make to add to the DISP section of its handbook. After further consultation the FCA has now issued this Policy Statement setting out its response to the submissions it has received in the consultation and a final version of the new DISP rules.

Are there any headline findings from the policy statement?
These are the 6 main points:

- a new rule that sets a 29 August 2019 deadline by which consumers will need to make their PPI complaints or lose their right to have them assessed by firms or by the Financial Ombudsman Service ('FOS'),
- an FCA led advertising designed to inform consumers of the 29 August 2019 deadline,
- a new fee rule on 18 larger firms to fund these advertisements. The first half of the fee will be collect on 30 April 2017,
- new DISP rules and guidance on the handling of PPI complaints in light of *Plevin* which come into force on 29 August 2017,
- A new requirement that firms which sold PPI to write to previously rejected mis-selling complainants who are eligible to complain again in light of *Plevin* to explain this to them, and
- A new requirement that firms are not to apply the deadline to future complaints which concern a rejected claim on a live PPI policy, if the claim was rejected for reasons connected to the sale such as in eligibility or policy exclusions.

Did the EU Insurance Mediation Directive require commission disclosure?
No. The Insurance Mediation Directive **2002/92/EC** made on 9 December 2002 was a minimum harmonization measure. It did not require commission to be disclosed by firms to consumers on the sale of any general insurance product.

What did the FSA say in ICOB and ICOBS about commission disclosure?
The FSA did not require commission to be disclosed.

In December 2002 the FSA issued Consultation Paper **CP/160** and dealt with this at paragraphs 11.6–11.9. The FSA said it had '*considered whether we should reinforce this legal requirement by including it in our rules or whether we should require all firms to disclose commission regardless of whether they are acting as an agent of the customer or whether the customer asks for it'* and concluded that '*given these risks, we are minded not to introduce rules on commission disclosure for transactions involving private customers beyond that already required'*.

Again in January 2004 the FSA re-iterated this in its Policy Statement **PS 04/01** saying that it continued to: '*believe that requiring disclosure of commission to retail customers would not add to consumer protection. This is because it will not necessarily help customers make a better choice of product and the disclosure of further information … could result in information overload*.' On this basis the FSA introduced the final version of its Insurance Conduct of Business Rules ('ICOB') which did not require commission to be disclosed.

The FSA revised its rules on general insurance and issued its Insurance Conduct of Business Sourcebook ('ICOBS') in 2008. Prior to this, the FSA produced Consultation Paper **CP 07/11** in which it nevertheless still concluded that commission disclosure was '*not necessary for informed decisions'*.

Did either the FSA or the FOS make any submissions about commission disclosure in the 2011 judicial review?
No. Whether or not commission was disclosed on PPI sales to retail customers only featured once in the judgment of Mr Justice Ouseley in Regina (British Bankers' Association) v. FSA and FOS **[2011] EWHC 999 (Admin).** Ouseley J ruled on that '*to require disclosure of the fact that the cost of the policy exceeded any recoverable benefit would turn a non-advised sale into an advised sale, and would now require commission disclosure that was only required by the rules on an advised sale'*.

Additionally by that point HHJ Waksman QC had handed down his judgement in *Harrison v. Black Horse Limited* **[2010] EWHC 3152 (QB)** in which he found there had been no breach by the firm of ICOB rule 2.3 which dealt with '*taking of commission'* by the firm having received commission on the sale of the PPI from the insurer. Ouseley J said that Judge Waksman's decision was '*however obviously right for the reasons which he then gives*'.

What remediation programme is the FCA requiring from firms?
Consumers who have previously made PPI complaints but were judged by firms or FOS not to have been mis-sold PPI, are to receive by the end of 2017, where their PPI policy is in the scope of the new DISP rules, '*a letter from the firm that sold them PPI explaining they can make a further complaint, in light of* Plevin*, about undisclosed commission'*.

How does the FCA propose that its remedies be implemented?
There will be an advertising campaign that the FCA will run and that firms will pay for supported by a helpline service. The FCA estimates that there is a cohort of 1.2million customers who need to be compensated. Firms need to write to customers and to conduct a limited review of past sales to identify this cohort.

What were the facts in *Plevin*?
A broker (Loan Line) put an unsolicited leaflet through a customer's letter box. The broker offered to arrange refinancing at competitive rates. The broker assessed the customer's '*demands and needs'* for PPI under ICOB. The broker was one of 11 brokers that a lender (Paragon) dealt with. Paragon accepted the business and conducted money laundering checks (in a '*speak with'* telephone call) but did not conduct any assessment of the suitability of the insurance itself.

The loan was for £34,000 at a highly competitive APR of 7.3% with loan payments spread over 10 years. The loan agreement was on the lender's standard documentation. It was regulated by the Consumer Credit Act 1974 and secured by a 2nd legal charge over her home. Single premium PPI was arranged – this was for 5 years and not the full 10 year period of the loan. The PPI cost £5780 of which 71.8% was retained as commission. The insurance was provided by Norwich Union. The broker received £1870 commission (32%), the lender £2280 (39%) and the balance went to the insurer.

Proceedings were brought in 2009 by the customer's solicitors against both the lender and the broker alleging initially that there were breaches of fiduciary duty and then subsequently that the PPI had been mis-sold in some way. The broker went into insolvent liquidation. The claim against the broker was

settled for £3000. This was paid by the Financial Services Compensation Fund. This left the claim against the lender.

The trial judge in Manchester County Court (Recorder Yip QC) dismissed all claims after a 4 day trial. The judge found there was not an '*unfair relationship'* and made an indemnity costs order in the lender's favour. The customer appealed and in December 2013 the Court of Appeal allowed that appeal. It found that the insolvent broker had acted on the lender's behalf, there was an '*unfair relationship'* and remitted it all back to the county court to determine compensation and costs. The lender appealed to the Supreme Court.

What did the Supreme Court decided in *Plevin*? What was the 'tipping point'?
There were 2 issues for the Supreme Court to decide. The first was whether receipt of commission (here 72%) by a lender could render a relationship unfair even though the FSA's ICOB rules did not require disclosure. The Supreme Court over-ruled the 2011 Court of Appeal decision in *Harrison v. Black Horse Limited* and said that non disclosure of commission could render a lending relationship unfair – especially where the amount paid to the insurance company was less than one-third of the price paid by the end user consumer. Lord Sumption JSC said that the commission was beyond a 'tipping point' but declined to delineate any further the limit or start of any such tipping point. He also ruled that under the ICOB rules the obligation to assess suitability of the insurance product was with the intermediary who was in direct contact with the customer. As this was the broker – the lender had no responsibility to assess this suitability.

What has the FCA to say about *Plevin*? What is the 'tipping point' for the FCA?
In Policy Statement **PS 17/3** the FCA cannot say enough about *Plevin* – in fact it mentions it no less than 187 times. The FCA reiterates its positions in its 2 previous consultation papers that for the purposes of the new DISP rule in proposes for the FCA Handbook the '*tipping point'* should be set at 50%. The FCA says 50% is only a '*presumptive*' tipping point[1]. As to why the 50% figure has been plucked out of thin air by the FCA, its limp explanation is that '*the 50% tipping point in our approach gives significant headroom above the 16% identified by the Competition Commission as reasonable costs and profit for PPI distribution*'[2].

What is the difference between commission and profit share?
The views of economists, accountants or sales directors may differ on this. However in the FCA's '*La La Land*' world it says that '*based on information we received during the consultation on **CP15/39**, that, typically, commission accounted for around three quarters of distributors' revenue from PPI, and profit share around a quarter. That is, many firms on average received around £1 of profit share per £3 of commission*'[3].

Recognizing the artificiality of what it proposes the FCA specifies that '*firms must in general seek to make reasonable estimates of the profit share (actual or anticipated, as relevant) from a book of policies in a year that can be notionally attributed to the policy in the complaint, with such allocation to be made in proportion to that policy's (actual or anticipated) contribution to that book's total premiums in the year*'[4].

There is yet more gibberish from the FCA with it saying that its '*view is that (for national scale lenders at least) PPI profit share was largely the return of the unused buffer which the distributor had provided to the insurer (by forgoing higher commission) in respect of more or less "*black swan" *events that were too rare or unpredictable for the insurer to price into its net premium rate. It is unsurprising, therefore, that in most years such buffers were not drawn on by the insurer and significant profit share was returned*[5].'

There is yet more unreality with the FCA claiming that lenders have '*the option (at least for regular premium policies) to ask the insurer in due course to increase the premium (and thus price) to consumers if the lender feels it is not getting enough in profit share income'*[6].

[1] Footnote 84, page 43
[2] Paragraph 4.21, page 49
[3] Footnote 83 page 43
[4] Paragraph 4.7 page 45
[5] FCA's response section to paragraph 4.19, page 48
[6] FCA's response section to paragraph 4.19, page 48

How is the FCA proposing that profit share be treated?
Very broadly the FCA is proposing that undisclosed profit share arrangements be treated in the same manner as undisclosed commission arrangements and that the 2 elements should be combined. This means that if profit share when added to commission is more than 50% of the PPI premium, the 'tipping point' will have been reached. If there was no disclosure to the customer of this before the sale, then the firm will have to remediate the customer the excess over 50% using its redress formula.

What redress formula is the FCA proposing?
This is set out in paragraph 4.87[7] of the Policy Statement.

The FCA states that where a firm concludes that an unfair relationship under section 140A of the Consumer Credit Act 1974 has arisen by virtue of undisclosed high commission, the firm should pay redress consisting of these **3** elements:

- the difference between the commission the customer actually paid and the proposed tipping point of 50% of the premium paid, **plus**
- the historic interest the customer has paid on that portion of the premium (where relevant), **plus**
- annual simple interest at 8% on both these sums.

When is the cut-off date for PPI claims?
The FCA proposes a long stop date for PPI claims of 29 August 2019.

What sort of publicity campaign does the FCA envisage?
The FCA is remarkably vague about this. It is clear however that firms will have to pay for it and that the FCA will organize it. The FCA says it '*will provide further information about the campaign, to allow firms time to make operational preparations, ahead of the campaign launch in August 2017'*[8].

We then get a smattering of buzzwords such as '*messaging*' and the like but nothing concrete. For example, the FCA says that it continues '*to believe that the campaign will be an effective means of achieving our objectives, and we see no convincing reason to change our approach. We will take into account some of the practical suggestions made by industry, consumer groups and CMCs about the campaign's design and execution, particularly in the development of the messaging. We will include messaging about typical complaint handling times, to manage consumers' expectations. Messaging about checking for PPI is already a key feature of the campaign'*[9].

At times reminiscent of something that had leaked out from an iron curtain dictatorship, somewhat ominously the FCA refuses to reveal what is under its cloak saying it has '*not been able to share details of the concept or channel plan. We have had to balance the need to sufficiently prepare a campaign concept with value for money considerations. As such, the concept requires further development and refinement. However, we have thoroughly tested the concept directly with our target audiences, bound by confidentiality agreements. Our testing results so far give us confidence that the advertising will deliver on our objectives. We will continue to refine and test to ensure a wide range of audiences find the campaign meaningful.*'[10]

So that's as clear as mud then.

What will the adverts look like?
Again the FCA won't say. This is not acceptable given that there have been 2 prior consultations and this is meant to be a Policy Statement. All the FCA is committing to is that the adverts will direct customers to use a free phone helpline which it says will be '*a source of information about PPI. The helpline will have core operating hours of 8am-6pm on Monday-Friday and 9am-1pm on Saturdays, with a 24-hour callback service. As we continue to plan and monitor the service, we will assess whether and when we may need to extend its hours. We also intend to offer a webchat function.*'[11]

[7] Page 89
[8] Section 2.16, page 9
[9] FCA's response section to paragraph 3.11 on Page 22
[10] Page 21
[11] Helpline section, page 24

What is the 'two step' approach the FCA is proposing?
In **CP16/20** the FCA set out[12] this two-step approach:

Step 1
A lender does not have to assess a post-*Plevin* PPI complaint against the new DISP rules and guidance if it sold the PPI and concludes that under the prior DISP rules and guidance that the complaint should be upheld because the PPI was mis-sold and it pays full redress

Step 2
A lender should assess a post-*Plevin* PPI if:

- It sold the PPI and decides under Step 1 that it would reject the complaint because the PPI was not mis-sold, or uphold it but pay only '*alternative redress'*, or
- it did not sell the PPI, and so cannot decide whether it was mis-sold under Step 1

A firm that sold the PPI (but which was not the lender under the related credit agreement) does not have to assess the complaint at Step 2. In the Policy Statement the FCA is maintaining this 2 step approach. These rules are set out in Annex C to the policy statement and are reflected in App 3.1.2 to 3.1.5 of the new DISP rules.

Will regulated firms have to do a further past business review of all PPI sales?
Fortunately not.

After swallowing a small hokum of humble pie the FCA says[13] that given that it '*did not require commission disclosure in our ICOB/ICOBS rules, it would be inappropriate to require (e.g. under a s.404 scheme) or otherwise expect firms to proactively review, or take other proactive actions in respect of (e.g. making targeted contact with relevant customers) all past PPI policies and sales which fall within the scope of s.140A-B CCA*'.

The FCA notes that a scheme under section 404 of the Financial Services and Markets Act 2000 '*could not apply to PPI sales made before2005 or to credit agreements from lenders that did not carry out insurance mediation before 1 April 2014, because of the requirement under s.404 for there to have been a regulated activity*'.

The FCA states that it should '*not require (or otherwise expect) firms to proactively review previously rejected PPI complaints about credit agreements falling under sections140A-B of the CCA 1974 against our new rules and guidance*'. The reason it gives for this is that '*the nondisclosure of high commission has not breached our rules, and is unlikely in and of itself to have been a breach of our Principles'*.

What do firms have to do where they have previously rejected a PPI complaint?
However the FCA says that if a customer has 'previously complained explicitly about the nondisclosure of commission on their PPI policy, and the firm considered this but did not uphold the complaint, we think it would be retrospective and wrong for us to require the firm to re-open that complaint.'[14]

What did the Mercantile Court decide in *Brookman*?
There were lots of allegations in the claim including one that the purchase of PPI was compulsory. Before trial, the claimants changed their mind and accepted they had a choice. As there were old or completed agreements there were claims relating to both '*extortionate credit bargains'* (ECB) and *'unfair relationships*'. The case included an allegation that the lender had not disclosed commission but as the PPI was not compulsory its cost is not included in the computation of the APR. The lender submitted that even if a UR was found to exist that the judge should not exercise his discretion in the customers' favour.

HHJ Keyser QC ruled[15] on 6 November 2015 in the Cardiff Mercantile Court that '*Having regard to the benefit to the claimants of cover under a policy for which the premium was paid upfront, I shall order the refund of all payments and the remission of all subsisting liability to the extent that the total of such payments and liability exceeds £1500.*' It should be noted that if commission only had been ordered then the sum would have been £922 but the judge said '*The matter is one of judgment rather than strict arithmetic.*' Although the Court of Appeal was to have heard this case in October 2016 it was settled on confidential terms beforehand.

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[12] CP 16/20 paragraph 5.28, page 69
[13] Paragraph 3.30, pages 36-37
[14] Paragraph 3.30, page 37
[15] Unreported - Case No: B40CF014

What does the FCA say about *Brookman*?
It blows hot and cold about how it proposes to treat Judge Keyser's ruling[16].

The FCA says that it making its proposal that it has '*not relied on the county court decisions in Brookman or Verrin & Winkett as authoritative, but we have taken account of them, and the former did, as we have said, prompt us to conduct further work on the profit share issue following* **CP15/39**.' However the FCA states that it does not '*consider that the somewhat unusual arrangements in Brookman raise significant differences in principle from the more common arrangements, and we said that our proposal should embrace both (and other) types'*. It notes that '*claims-based profit share arrangements generally involve flows of payments that are 'advance' (in the sense of pre-empting the final definitive claims experience on a book) and give scope for claw-back of these (or netting off against subsequent sums due) in light of later experience'*.

The FCA concludes by saying that it considers it is '*reasonable for us to use our regulatory judgement to include profit share in our approach, despite no higher court direction on this point*' and claims that it has '*carefully considered the legal and public policy issues implied by our proposal'* but that '*public policy issues may not necessarily be considered by a higher court in a dispute about the fairness of an individual commercial relationship under s.140A*'

What did the Court of Appeal decide in *McWilliams*?
On 11 March 2015 the Court of Appeal handed down its reserved judgment in *McWilliams v. Norton Finance (UK) Limited (in liquidation)* – **[2015] EWCA Civ 186.** The lender was not represented at the appeal. Lord Justice Tomlinson ruled that a contract of agency was relevant as to whether a fiduciary duty was owed it was not conclusive of the question. He also ruled that the customers had not given their informed consent to the payment of undisclosed commissions.

What are the criticisms of *McWilliams*?
This case started out as a routine case in the Middlesbrough County Court brought against the broker (Norton) and Money Partners Ltd (with the claim against the latter entity being subsequently discontinued). At trial there were only 2 live issues:

- whether the broker had acted in breach of fiduciary duty in selling PPI by not disclosing the amount of commission it had received, and
- whether there had been any actionable breach by the broker under s150 of the Financial Services and Markets Act 2000 and/or the ICOB rules which had been legally causative of any losses by the borrowers.

On 15 February 2012, Norton Finance (UK) Limited appointed administrators to its business. On 24 January 2013, it then moved to a creditor's voluntary liquidation. When Norton became insolvent, a consent order was drawn up on 21 March 2012, agreed and signed. On 12 April 2012 the Court of Appeal sealed this and ordered that the appeal be dismissed by consent. In the ordinary course of events that would have been the end of this matter.

However on 15 May 2014, the Court of Appeal (Lord Justice Maurice Kay and Lord Justice Floyd was persuaded to set aside this consent order under CPR 3.1(7) and to grant permission for the appeal to be re-opened - **[2014] EWCA Civ 818.** The matter was then re-listed for appeal and was heard by the Court of Appeal on 2 December 2014. The lender was not represented or present at this appeal because on 19 September 2014 it had submitted to Companies House a final return in a creditor's voluntary winding up.

At the appeal hearing Lord Justice Tomlinson expressed his concern that the Court of Appeal was being asked to decide an important point of principle (in relation to fiduciary duty) when there was no longer a respondent in existence and no representation to make the contrary argument. It was not made clear to the Court of Appeal in either the written skeleton arguments or oral submissions by the Appellant that the decision in *Hurstanger Limited v. Wilson* **[2007] EWCA Civ 299** was made following a concession. That concession related to the secret commission issue. In *Hurstanger*, the Defendant did not give or call any evidence about it (see para 31) and the Recorder Michael Douglas QC noted in his judgment that he was not invited to make any finding that this was a trade practice but he did find on the assumed facts that '*there was nothing unusual about the circumstances in which the commission was paid in this case or its amount (3%) which he described as conventional.*'

[16] FCA's response section to paragraph 4.27, Page 55

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So although the appeal was allowed, given the dubious circumstances in which the ruling was made, its value is questionable.

What does the FCA say about *McWilliams*?
Fortunately it is not very impressed that *McWilliams* sets any precedent that it should take heed of when framing its new DISP rules. It said in CP 16/20 that[17] '*it would be dangerous to make generic rules based on individual cases, especially those of questionable value as precedent based on their individual facts, quality of argument and quality of reasoning; McWilliams was not fully argued and contested and has not set a clear precedent and decision in the same way as Plevin'*.

What did the Court of Appeal rule in *Green v Wright*?
On 1 March 2017 the Court of Appeal handed down its reserved judgment in *James Green (as Supervisor of Mr Wright's IVA) v. James Patrick Wright* **[2017] EWCA Civ 111.** A debtor had entered into an IVA in 2007 and made all payments due under it for 5 years. His IVA supervisor then issued him with a certificate of completion. Included in the IVA proposal were debts owing to 2 banks – RBS and Barclays. After a past business review, those 2 banks paid the IVA supervisor £24,500 relating to mis-sold PPI. Those payments were made 8 months after the IVA had completed.

The IVA supervisor applied to the court for directions as to what to do with the PPI payments. The county court and High Court said the PPI remediation payments had to be paid to the debtor. The Court of Appeal disagreed and has overturned those rulings. It has said that the trust created by an IVA survives a certificate of completion. The effect of its ruling is that the PPI windfall payment has to be distributed by the IVA supervisor to all the creditors in the proportions set out in the IVA proposal.

What approach does the FCA say should be adopted on insolvency?
The FCA says this[18] about customers who are insolvent. It says it has '*considered the position of those in or discharged from bankruptcy or other forms of personal insolvency, in particular, IVAs and DROs, and concluded that a PPI deadline is unlikely to cause any adverse impact on this group*' It goes on to say it has '*assumed that individuals abide by the rules or requirements of their individual personal insolvency arrangement, which (while varying from case to case) would generally require the disclosure of a potential PPI complaint as a potential asset at the point an individual became aware of it*.'

Is the FCA's approach to IVAs legally correct?
As *Green v. Wright* was handed down the afternoon before this Policy Statement was issued, the FCA has not considered its impact. The FCA publicity campaign may simply encourage false hopes in this cohort of customers. Even if an IVA has ended, any PPI compensation has to be paid to the IVA supervisor for it to distribute to creditors.

What is the structure of the new DISP rules?
The new DISP rules are set out in Annexes to the Policy Statement. They are 32 pages long and considerably shorter than the bloated 147 page policy statement that precede it. There are some amendments to the glossary of definitions. At Annex B is an addition to the Fees Manual setting out the mechanism by which firms will pay for the FCA's publicity campaign. Annex C contains the amendments to DISP itself to reflect the changes laid out in the Policy Statement and the 2 consultation papers that preceded it. Helpful the additions are, as usual, indication by being <u>underlined</u>. The changes are to both the rules as well as the G Guidance sections in DISP.

Does the FCA give any worked examples?
At Appendix 2[19] are 5 worked examples setting out how loan redress is to be calculated for a top-sliced 50%+ non-disclosed commission case. These examples all comprise scenario where there is undisclosed commission and anticipated profit share which the FCA says creates an unfair relationship:

- **Single premium PPI on a loan**
  - the loan and the PPI policy ran the full term,
  - the loan was paid off early and the PPI policy cancelled, and
  - the PPI was cancelled early when the loan was refinanced with a new loan but the PPI was added to the new 2nd loan. (Again there was undisclosed commission and anticipated profit share on the 2nd loan). The 2nd loan was also paid off early.

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[17] pages 111-113
[18] Page 126, paragraph 43
[19] Page 172 onwards

- **Regular premium PPI on a credit card**
  - Commission and profit share are stable whilst the credit card and PPI policy remain live, and
  - Commission and profit share vary whilst the credit card and PPI policy remain live.

What are the commencement dates of these new rules?
The new DISP rules instrument comes into force on 2 March 2017. However the FCA has given firms just under 6 months to comply with these changes. The date for implementation is 29 August 2017.

What will banks need to do to prepare for these changes?
Section 4 of the Policy Statement sets out most of the detail. There will be a large cohort of customers who have already received full or partial redress already. The FCA notes that '*overall since 2011 firms have handled over 18.4million PPI complaints and paid over £26billion in redress*'[20]. Although the FCA says it is not requiring firms to conduct another past business review, in effect this is what it will be entail.

Firms will need to review PPI sales in which customers have either not complained or have not received compensation already. The FCA thinks there are 1.2million consumers[21] in the scope of its proposed mailout. The FCA says that only where customers had complained before about commission non-disclosure and had been rejected, does a firm need to look again at the complaint. In practice, for many firms this exercise may not be effective and it will be simpler to offer redress using the formula and repay the excess over 50% commission received to customers. However that is not what the FCA is saying and individual firms will have to form their own view on this which will vary depending on their own individual business requirements.

Is there anything else worth noting from the policy statement?
The FCA is at pains to stress that what it is seeking to do is to bring an orderly response to *Plevin* as well as overall to bring the PPI issue to an orderly conclusion.

What about consumers who have made a claim on the PPI policy?
This is not addresses as such in the policy statement. Where a customer has made a sickness, injury or disability claim on the policy, it feels odd that a customer can later turn round and say he or she was mis-sold that policy because the firm did not say it was receiving a markup on the wholesale price of the insurance. If a court claim was brought, it would not have a great chance of succeeding. However customers who have made a PPI policy claim are not excluded from the cohort of customers that firms will need to consider if they qualify for post-*Plevin* remediation.

What about PPI policies sold before 15 January 2005?
In theory these policies should be out of scope because the FCA's predecessor only assumed responsibility for regulating general insurance sales at that date. The FSA was mealy mouthed about this and claimed that firms who were already FSA regulated had agreed to comply with the FSA principles. By this device, the FSA sought to weave its regulatory tentacles far further that it was legally permitted to do although no firm has challenged it on this. Nevertheless, where a firm only became FSA regulated in January 2005 to sell general insurance (and there are some brokers in this category), then the FCA cannot force that firm to remediate policies sold before that date whatever impression the FCA tries to give to the contrary in this policy statement.

What about customers who have died?
If they had life cover, then they would be eligible to claim. However the FCA recognizes that the slurry of cases that it is requiring firms to now try to fish out of the well are very old. On this the FCA says[22] that it accepts that '*there may be some customers who cannot be contacted'* but the 2019 deadline will still apply to that cohort '*regardless*'.

What about first charge mortgages?
The FCA deals with this in section 4.63 of its Policy Statement. It says that '*those credit agreements that are excluded under s.140A(5) of the CCA – regulated mortgage contracts and regulated home purchase plans – are excluded from these rules and guidance'*. In relation to first charge mortgages taken out before 31 October 2004, the FCA says that '*the current position following the latest legislative*

[20] Section 1.2 page 5
[21] FCA response at paragraph 3.30 at page 38
[22] FCA response at paragraph 3.30 at page 38

amendments is that these do not generally fall within the exemption from s.140A, and so do generally fall in the scope of s.140A and thus the scope of our rules and guidance'.

Would it not just have been easier to require all firms to refund all PPI premiums when the FSA issued its Policy Statement PS 10/12 in August 2010?
A number of firms will be pondering the answer to this question when they have completed this latest exercise and when in 2019 they tot up the final bill for all the additional resources these remediation programs.

What is the tax position on remediation payments made by firms to customers?
Although the FCA does not deal with this in its Policy Statement, where a firm is making a compensation payment to a customer comprising of interest, it will need to withhold basic rate income tax at 20% and account to HMRC for this. The FCA formula is that customers will receive interest at 8% on compensation. For single premium PPI especially policies sold some years ago, this interest payment could be very large indeed and may often dwarf any PPI refund. Again it is disappointing that the FCA is so vague about its proposed advertising campaign and we do not know if it will spell out the tax implications to customers. Any interest payment will need to be declared by a customer on their tax return and if they are a higher rate tax payer, then there is likely to be additional tax to pay.

Does the FCA have anything good to say about PPI?
Surprisingly yes.

It says that it remains '*of the view that not all PPI was mis-sold and that, property sold, PPI could meet some consumers' genuine credit protection needs*'[23]. It also says that it does not '*agree that mis-selling of PPI generally was equivalent to criminal fraud*'[24].

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