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Head of Department
Advisers, Wealth and Pensions – Consumer Investments
Supervision, Policy & Competition – Markets
Financial Conduct Authority
12 Endeavour Square
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By email only

Dear Financial Conduct Authority

Calculating redress for British Steel Pension Scheme (“BSPS”) members: issues of concern, required action and potential judicial review

EXECUTIVE SUMMARY

1. This letter to the Financial Conduct Authority (“**FCA**”), which is also copied to the Financial Services Compensation Scheme (“**FSCS**”) and Financial Ombudsman Service (“**FOS**”), is sent in the interests of the 324 steelworkers listed in Appendix 1 to letter. Although we are not, at least presently, retained by these individuals, we are authorised to provide their names on a private and confidential basis and they have each confirmed that they agree with the objectives that this letter contains. Our direct client is Mr Alastair Rush, who is already known to the FCA, FOS and FSCS, having raised related issues with them on a number of occasions.
2. The letter is being sent because of deep concerns that the mis-selling suffered by BSPS members is being compounded because redress is being awarded by the FCA (via the FSCS/FOS) in an arbitrary and/or unfair manner. These concerns are not only those of our client and stakeholders: they have also been raised recently by the Public Accounts Committee and were acknowledged recently by the FCA itself.
3. We set out below three specific issues, relating to: (i) financial advisor charges; (ii) early drawdown; and (iii) inflation; together with an over-arching issue (iv), relating to the FCA’s use of a ‘point in time’ redress calculation. Individually and cumulatively, these issues are causing grave disquiet within a close-knit community of steelworkers, already vulnerable given the original mis-selling already suffered. As noted below, these issues have been raised previously, both in correspondence and at meetings, most recently on 5 September 2022. However, given their seriousness, we have been instructed to set them out in writing.
4. The purpose of this letter is threefold: (i) to request that the FCA addresses these issues in the proposed BSPS consumer redress scheme; (ii) to request that the FCA/FSCS/FOS resolves issues regarding the redress awarded to BSPS members to date, notwithstanding that such members are currently outside the scope of the BSPS consumer redress scheme – based on the National Audit Office report

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of 18 March 2022, that may affect well over 1,000 steelworkers; and (iii) to respond to the FCA's consultation regarding calculating redress for non-compliant pension transfer advice. Appendix 2 sets out our client's further comments regarding redress awarded to BPS members. Appendix 2 provides further context to this letter and should also be treated as a response to the FCA's consultation.

5. If the FCA decides not to address the issues set out in this letter in the proposed BPS consumer redress scheme, then we are likely to be instructed to take legal action, including but not limited to issuing judicial review proceedings. This letter is not intended to be a Letter Before Claim for the purposes of the Pre-Action Protocol for Judicial Review (the "**Protocol**"). If a claim for judicial review is issued, we will provide a Letter Before Claim under the Protocol. We reserve the right to bring this letter to the attention of the Court in connection with any such judicial review.
6. The remainder of this letter sets out the background to this letter, its scope, the issues of concern and our client's requested next steps.

BACKGROUND

7. The background to the BPS mis-selling scandal has been explored at length in a number of reports including:
 - 7.1. The report by the Work and Pensions Select Committee published in February 2018, which reported on the choices faced by members during the BPS restructure in 2017;¹
 - 7.2. An independent review by Caroline Rookes published in January 2019, which examined the communications and support provided to BPS members at the time of the restructure;²
 - 7.3. The National Audit Office report published in March 2022, focusing on how defined benefit ("**DB**") pension transfer advisors were regulated in the BPS case and the extent to which compensation is being delivered to members who were affected;³ and
 - 7.4. The Public Accounts Committee report into the BPS published on 21 July 2022.⁴ Among the report's conclusions was the way that compensation has been provided in the BPS case has been slow and unfair. The report recommends that:

"...in considering the implementation of a consumer redress scheme for BPS members the FCA should consider how further redress mechanisms can be implemented more quickly and provide fair compensation. It should also consider how to resolve differences in the levels of compensation received by BPS members to date, and how this compares to the amount that

¹ Full report available at: <https://publications.parliament.uk/pa/cm201719/cmselect/cmworpen/828/82802.htm>

² *Independent review of communications and support given to British Steel Pension Scheme members*, Caroline Rookes, January 2019

³ *Investigation into the British Steel Pension Scheme*, National Audit Office, 18 March 2022

⁴ *Investigation into the British Steel Pension Scheme*, House of Commons Committee of Public Accounts, 21 July 2022

other members will receive from the proposed FCA redress scheme".⁵

8. In March 2022, the FCA launched a consultation on a consumer redress scheme for BPS members.⁶ The consultation closed in June 2022. The proposed consumer redress scheme (the "**New Scheme**") will require firms who advised BPS members to transfer to review the advice they gave, identify if it was unsuitable, and calculate and pay redress to consumers where required.⁷ We understand that the FCA is due to publish its final plans for the redress scheme in Autumn/Winter 2022. The FCA expects any BPS redress scheme to come into force in early 2023, with most members who are eligible receiving compensation later in 2023 or in early 2024.
9. Separately, the FCA are currently carrying out a periodic review into its guidance for firms on how to calculate redress for unsuitable DB pension transfers (the "**FG/17 Guidance**"). In August 2022, the FCA opened a consultation in relation to calculating redress for consumers who have suffered financial loss because a firm's non-compliant advice caused them to transfer from a DB pension scheme to a defined contribution ("**DC**") pension scheme, which includes proposals for improvements to the FG/17 Guidance ("**Consultation CP22/15**").⁸ The FCA are using the findings and recommendations of the periodic review to inform the rules for calculating redress for consumers who were given unsuitable advice to transfer out of the BPS.⁹ Consultation CP22/15 will close on 27 September 2022.
10. Meanwhile, on 15 September 2022, the FCA issued guidance concerning DB pension transfers redress calculations.¹⁰

SCOPE OF THIS LETTER

11. Where a firm or advisor has failed to give compliant advice or has committed some other breach of the relevant requirements, and the consumer has transferred out their DB scheme as a result, the basic objective of redress is to put the consumer, so far as possible, into the position they would have been in if they had been given compliant advice and decided to remain in their DB scheme.¹¹ The FG/17 Guidance calculates the potential value of a DB pension scheme had a complainant not transferred out. These calculations use complex financial assumptions, which are updated every three months according to the performance of financial markets.¹²
12. However, we consider that the FOS/FSCS/FCA have failed to fulfil the basic objective of redress. In our view, the FOS/FSCS/FCA have treated BPS members unlawfully and/or irrationally when calculating redress and this has produced unfair and arbitrary results. Although this letter is limited only to redress

⁵ Ibid, p6

⁶ *Consumer redress scheme for unsuitable advice to transfer out of the British Steel Pension Scheme Consultation Paper* (CP22/6), FCA, March 2022

⁷ Ibid, Paragraph 1.2

⁸ *Calculating redress for non-compliant pension transfer advice Consultation Paper* (CP22/15), FCA, August 2022

⁹ Ibid, paragraph 1.10

¹⁰ <https://www.fca.org.uk/consumers/pension-transfer-defined-benefit/redress-calculations>

¹¹ Paragraph 1.19 *Calculating redress for non-compliant pension transfer advice Consultation Paper* (CP22/15), FCA, August 2022

¹² Paragraph 3.14, p40, *Investigation into the British Steel Pension Scheme*, National Audit Office, 18 March 2022

regarding unsuitable advice to transfer out of the BSPS, its conclusions apply equally to redress for unsuitable advice to transfer out of other DB pension schemes.

13. The purpose of this letter is to draw four issues and related case studies to the FOS/FSCS/FCA's attention regarding the calculation of redress to BSPS members, set out below. We request that:
 - 13.1. The FCA takes into account the points that we have raised as it finalises its plans for the BSPS consumer redress scheme, including any proposed calculator for firms to use when calculating redress under the proposed BSPS scheme. We note that the consultation formally closed on 30 June 2022; however, the FCA have still not published their final plans for the New Scheme and the problems we have identified in this letter are ongoing.
 - 13.2. The FCA considers changing the scope of the proposed consumer redress scheme, so it (and any new redress calculator) also applies retrospectively to redress received by BSPS members to date. Under current proposals, all BSPS members who were given advice during the relevant period (26 May 2016 to 29 March 2018) will be covered by the proposed scheme unless they have already had redress for that advice, referred the matter to the FOS or had their advice considered under a past business review involving a skilled person.¹³ Excluding such individuals from the scope of the proposed BSPS consumer redress scheme is unfair, irrational and/or arbitrary; and
 - 13.3. The FCA treats this letter as a response to Consultation CP22/15.

ISSUES OF CONCERN

14. The three specific issues and case studies that we have identified regarding the calculation of redress to BSPS members, together with the over-arching issue, are set out below. Please note that our client's concerns regarding the calculation of BSPS redress are not limited to these particular issues.

1) **Financial advisor charges**

15. The first issue and case study relate to the FCA/FSCS/FOS: (i) unlawfully and/or irrationally assuming, when calculating redress, that if a BSPS member does not have a financial advisor at the time they make their complaint, they will not require one going forward; and (ii) unlawfully and/or irrationally withholding information from consumers as to how instruction of a financial advisor impacts levels of redress paid.
16. In DB schemes, the costs of running the scheme are paid by the employer. In contrast, consumers in DC schemes pay for product and advisor charges separately. These charges need to be allowed for when calculating redress. The FCA states that:

“charges can create a significant drag on investment returns over time. Consumers would have not been liable for such charges had they stayed in their DB scheme. Therefore, the current approach expects firms to allow for future charges up until the date of retirement in the calculation. Product charges are subject to a 0.75% cap per year or equivalent. On top of this,

¹³ Paragraph 1.11, *Consumer redress scheme for unsuitable advice to transfer out of the British Steel Pension Scheme Consultation Paper (CP22/6)*, FCA, March 2022

known adviser charges are allowed for in full. Where product charges are unknown, firms should allow for product charges at a default rate set at the 0.75% cap level.¹⁴

17. Therefore, if a consumer has not engaged a financial advisor at the time they lodge their claim, this significantly reduces the amount of redress s/he is paid. However, many consumers are not aware of this and it seems that the FSCS does not fully understand the position either. Mr Rush has anonymously called the FSCS on a number of occasions and requested information about how the instruction of a financial advisor affects redress; they have provided incorrect information in response each time. Despite these issues, the FCA's position is that consumers do not need to use a third party (e.g. a solicitor) to make a claim for redress.
18. By way of example, steelworker A¹⁵ worked as a steelworker but decided to change career in his 30s. He made a complaint to the FSCS regarding unsuitable advice he received to transfer out of the BPS. He asked FSCS to pause his claim so he could instruct a financial advisor, but FSCS refused to do so. Under the FG17/9 Guidance, where a consumer is currently paying advisor charges, it should be assumed that these will continue to normal retirement age. Therefore, as a result of FSCS's actions, A was awarded significantly lower compensation (at least £30,000 to £50,000) than he should have been because the advisor charges had not been taken into account.
19. We note that the FCA has proposed that:

“where consumers are not currently in an advice arrangement, we propose their redress provides for reasonable initial and ongoing advice fees in the future on the DC value fund and the redress pay out. This may give them a better chance of achieving the investment returns needed to put them back, so far as possible, in the position they would have been in if they had received compliant advice to remain in their DB scheme”.¹⁶
20. Similarly, in the Counsel's opinion obtained by the FCA in respect of Consultation CP22/15, it was acknowledged that victims would need the benefit of professional advice to assist them investing.¹⁷
21. In terms of what would constitute a “reasonable” level of ongoing advisor charges where consumers are not currently in an advice arrangement, the FCA has indicated that it considers that 0.5% is a reasonable level for its proposed fixed percentage.¹⁸
22. It is unlawful and/or irrational for the FCA/FSCS/FOS to not inform BPS members of the financial impact of instructing an advisor, especially in circumstances where the BPS member might ultimately instruct an advisor but receive lower redress because they had not engaged the advisor at the time the

¹⁴ Paragraph 6.15, *Calculating redress for non-compliant pension transfer advice Consultation Paper (CP22/15)*, FCA, August 2022

¹⁵ His details are provided anonymously, but if the FCA are willing to discuss the specifics of his case, we expect he will be willing to do so

¹⁶ Paragraph 6.18, *Calculating redress for non-compliant pension transfer advice Consultation Paper (CP22/15)*, FCA, August 2022

¹⁷ Paragraph 64, Legal Opinion of Michael Furness QC, 31 July 2022

¹⁸ Paragraph 6.19, *Calculating redress for non-compliant pension transfer advice Consultation Paper (CP22/15)*, FCA, August 2022

claim was made. BSPS members are financially unsophisticated, but in a position where they have to make complex financial decisions about their pensions. In these circumstances, it seems inevitable that, even if they do not have an advisor at the time they make a complaint, they will require one in the future. Therefore, it is arguably unlawful and/or irrational for the FCA/FSCS/FOS to assume that if a BSPS member has not instructed an advisor at the time they make a complaint they will not need one going forward and to reduce their redress accordingly.

23. Further, the FCA's proposal to provide for ongoing advisor charges of 0.5% where a consumer is not currently in an advice arrangement indicates that the FCA agrees that the current methodology is unfair to consumers. It is unlawful and/or irrational for the proposed reforms to exclude BSPS members who have already been compensated, because it effectively penalises them for seeking compensation early. The proposed reforms should apply retrospectively as well as going forward.

2) **Drawdown**

24. The second issue relates to the FCA/FSCS/FOS unlawfully and/or irrationally reducing levels of redress paid because of early draw down.
25. Calculating appropriate redress depends on firms making appropriate assumptions about the age at which retirement benefits from the DB scheme would have been accessed if the consumer had received compliant advice and remained in that scheme.
26. Since 2006 it has been possible for a DC member, instead of purchasing an annuity, to draw down annual amounts from his/her DC arrangement.¹⁹ A member of a DC scheme can elect how much of their benefits to crystallise each year. Generally, the earliest age a DC scheme member can draw down is 55 years old. A DC scheme member can usually take up to 25% of the amount built up in any pension as a tax-free lump sum. This approach is not available under a DB arrangement, because the rules of the scheme would require the whole pension to be taken at once.²⁰
27. The FCA has confirmed that "*current methodology does not set out how firms should determine when a consumer would have retired in their DB scheme. Before the pension freedoms [sic] it may have been reasonable for firms to equate a consumer accessing their DC pension benefits with them retiring in their DB scheme at the same age. This is because most consumers would only have accessed their DC pension to buy an annuity. However, the pension freedoms have given consumers greater flexibility in how they access their DC pension and means it may not always be appropriate to automatically presume that a consumer who has accessed their DC pension would have done the same if they had remained in their DB scheme. The risk of firms wrongly assuming when the consumer would likely have retired in their DB scheme is already mitigated by the SIB and PIA provisions and the DISP rules. Under these provisions, firms are expected to give the consumer full explanations of how redress was calculated.*"²¹

¹⁹ Paragraph 37, Legal Opinion of Michael Furness QC, 31 July 2022

²⁰ Ibid

²¹ Paragraph 6.7 – 6.8, *Calculating redress for non-compliant pension transfer advice Consultation Paper* (CP22/15), FCA, August 2022

28. However, we understand that a number of BSPS members decided to draw down from their DC pensions following advice from their financial advisors. They continued to work and did not retire. However, when calculating redress, the FSCS/FOS wrongly assumed that the BSPS members would have likely retired had they remained in their DB scheme and calculated their redress on that basis. As a result, these members have been undercompensated.
29. We note that the FCA has proposed introducing a ‘rebuttable presumption’ to ensure that firms make appropriate assumptions about when the consumer would have retired in their DB scheme.²² This would require firms to presume that the consumer would have retired in their DB scheme at the scheme’s normal retirement age, unless there is evidence which demonstrates that it is more likely than not that the consumer would have retired at an alternative date in their DB scheme.
30. Therefore, it is unlawful and/or irrational for the FCA/FSCS/FOS to reduce the levels of redress paid for early draw down on an assumption that equates to retirement when in fact BSPS members did not retire. The FCA’s proposal to introduce the ‘rebuttable presumption’ described above indicates that the FCA agrees that the current methodology is unfair to consumers. It is unlawful and/or irrational for the proposed reforms to exclude BSPS members who have already been compensated, because it effectively penalises them for seeking compensation early. The proposed reforms should apply retrospectively as well as going forward.

3) Inflation

31. The third issue and case study relate to the FCA/FSCS/FOS unlawfully and/or irrationally treating BSPS members vis-à-vis the impact of inflation on the level of redress offered.
32. Benefits in a DB scheme are often linked to inflation. When calculating redress, firms will need to estimate future inflation to place a value on the DB benefits given up. In March 2021, the FCA updated its guidance to reflect changes made by government in the way retail price index (“RPI”) inflation is measured.²³ Changes to the way RPI is calculated impact the methodology because it sets a differential (or ‘wedge’) between the RPI and the consumer price index (“CPI”) which is used in the valuation of CPI-linked DB benefits. This resulted in significantly higher levels of compensation for redress calculated after January 2021. For example, the FSCS recalculated 33 claims using the updated methodology and awarded an additional £900,000 to BSPS members.²⁴
33. This unfairly penalises those who followed the FCA’s guidance and sought compensation early.²⁵ Members are unable to seek further compensation, and many feel they have been treated unfairly because of the timing of their complaint.²⁶

²² Paragraph 6.9 – 6.14, Ibid

²³ <https://www.fca.org.uk/news/statements/retail-prices-index-changes-db-pension-transfer-redress>

²⁴ Paragraph 3.14, *Investigation into the British Steel Pension Scheme*, National Audit Office, 18 March 2022

²⁵ Paragraph 15, p13, *Investigation into the British Steel Pension Scheme*, House of Commons Committee of Public Accounts, 21 July 2022

²⁶ Ibid

34. By way of example, steelworker B²⁷ was a BSPS member who decided to move to part time work. In late December 2020, he made a claim for redress and was awarded approximately £4,000. However, if his compensation had been awarded in accordance with the FCA's updated March 2021 guidance, he should have received significantly more; at least £30,000 – £40,000.
35. In the November 2020 Spending Review, the Government announced changes to the way that the RPI inflation measure is calculated from February 2030. Therefore, from November 2020 the FOS and/or FSCS would have been aware of this imminent change to how redress would be calculated and should have informed potential complainants to wait before making their claim for redress. We note that, in your letter to our client dated 25 August 2022, your position is that *"it would have been premature to pause redress calculations on the announcement of the consultation which proposed introducing RPI reform in either 2025, 2030 or any year in between [...] This uncertainty is why we consider it was more appropriate to make changes to the RPI-CPI differential in the methodology after the Government had made its decision on the date of implementation in November 2020"*. However, during previous ongoing reviews of the FG/17 Guidance, the FCA advised firms to not make any full and final offers until they fully consulted on the new methodology, so a similar approach should have been taken in this case.²⁸
36. If the FSCS knew the change in the calculation of RPI inflation was imminent, they have breached COMP 7.6.4 of the FCA Handbook: *"The FSCS must endeavour to ensure that a claimant will not suffer disadvantage arising solely from his prompt acceptance of the FSCS's offer of compensation or from the subrogation of his rights and claims to the FSCS compared with what might have been the position had he delayed his acceptance or had his claims not been subrogated"*.
37. It unlawful and/or irrational for the FSCS/FOS/FCA not to advise victims to delay registering claims pending changes in the inflation rates applied, when the FSCS/FOS/FCA knew those changes would be made and knew that BSPS members would be disadvantaged by acting promptly. It is also arbitrary for BSPS members to receive significantly different amounts due to differences in days or a small number of weeks between when claims are awarded. This is particularly the case given issue (iv) below.

4) Overarching issue: 'point in time' calculations

38. There is often a degree of risk when it comes to the amount an individual will receive when they take their pension pot. For example, if someone in a DC scheme uses some of the money from their pension fund to buy a series of short-term annuities to provide themselves with an income, the value of the annuity depends on market forces in place at the time. However, they would be able to choose when and if to purchase the annuity; they would be in control.
39. On the other hand, the amount paid out under DB schemes depends on the pension scheme's rules, not on investments or how much has been paid in. Therefore, DB schemes are protected from market fluctuations in a way that DC schemes are not. However, the BSPS members cannot choose when they receive their compensation, which is subject to market fluctuations. BSPS members should be protected from such market forces to reflect the fact that BSPS was a DB scheme.

²⁷ The comments made above regarding steelworker A are repeated

²⁸ Paragraph 2, Annex 2, GC17/1 – *Changes to the way firms calculate redress for unsuitable defined benefit pension transfers*, FCA, March 2017

40. That is particularly the case given the 'point in time' calculation methodology employed by the FCA in respect of BSPS members. As we understand it, this methodology seeks to place the member, the consumer, so far as possible, back in the position they would have been in if they had received compliant advice and remained in their DB scheme.²⁹ However, the FCA has also acknowledged that absent being placed back into the scheme, which is not an option, the best option would be to purchase an annuity, but there is no market for deferred annuities, thus this is not (currently) an option.³⁰
41. Thus, firms calculate redress as the difference between the estimated value of the benefits given up in the DB scheme and the current value of the consumer's DC pension and pay that redress as a lump sum. As a result, a BSPS member is awarded compensation based on assumptions as regards: (i) the lump sum needed to achieve the necessary amount at retirement age; and (ii) the likely annuity rates at that age.
42. To take a typical example, this involves, for a 45 year old steelworker, projections being made as to the value of an investment at their anticipated retirement date and as to the annuity rates at that date – both many years in the future. The dramatic volatility in the financial markets this year, especially in respect of gilts, show that these types of projections: (i) cannot be undertaken reliably; and (ii) produce unfair and arbitrary results at the present time – the same person having their personal calculation for loss undertaken over the last three years would have had wildly varying amounts awarded to them.
43. Such arbitrary results are exacerbated by delays on the part of the FOS and FSCS in the processing of compensation claims. Many steelworkers have been awarded redress this year after a lengthy delay; if such steelworkers had been awarded compensation in a timelier fashion, economic conditions for the 'point in time' calculation would have been more favourable, therefore producing fairer offers. For example, XX and YY both joined Tata Steel in 1985 and transferred out of the BSPS scheme at the same time. Their transfer values were £524,000 and £522,000 respectively. Their claims were in the FSCS system for an extended period of time, and both were eventually found to have been victims of mis-selling. Due to administrative delays, redress was calculated to XX and YY a month or so apart. As a result of the methodology, XX received £62,000 in redress while YY received no compensation at all.³¹
44. To take another real life example,³² Lance Hardy is a retired steel worker who realised in 2019 that he had been missold his BSPS pension transfer. He submitted a complaint but it was not until 2022 that the FOS found in his favour. A week after that final decision, his financial advisor went into administration. It took the FOS over two years to find in Lance's favour mainly because his financial advisor repeatedly ignored the FOS's requests for information. If the FOS had been administering itself and the complaints process correctly, the delay would not have been as long, and Lance would have received his compensation at least a year before he had done. If that happened, prevailing discount

²⁹ *Calculating redress for non-compliant pension transfer advice Consultation Paper (CP22/15)*, FCA, August 2022, paragraph 3.18

³⁰ *Ibid*, paragraph 3.25

³¹ Details are provided anonymously, but if the FCA are willing to discuss the specifics of these cases, we expect the relevant persons will be willing to do so

³² See: <https://www.ftadviser.com/regulation/2022/03/16/ico-says-ifa-failed-after-taking-two-years-to-send-client-data/>. This example is cited with Mr Hardy's approval

rates would have worked more in his favour and the chances are he would have received far more than £30,000 which eventually did receive. This delay, and the subsequent lower amount of compensation, is directly due to maladministration by the FOS which was highlighted in the report which it commissioned in 2021.³³

45. Indeed, it is our understanding that previous FCA awards of redress for pension mis-selling in the 1990s have been shown with hindsight to be inadequate. We ask that the FCA undertakes an assessment of the accuracy and adequacy (or otherwise) of previous awards of compensation.
46. We note the guidance recently published by the FCA on 15 September 2022, as mentioned, seeks to justify a point in time calculation. We have a degree of concern that it therefore pre-judges the result of the current consultation. In any event, that guidance really highlights the problem facing steelworkers. It highlights why point in time calculations produce different results, but gives no concrete guidance at all as to what steelworkers should do to address this problem. Indeed, the guidance raises the possibility that steelworkers might wait either for changes to the FCA's methodology at the end of the consultation or for changes in the economy, acknowledging that both of these might affect the level of redress provided. Surely the FCA must see the uncertainty that this generates for steelworkers, and the undesirability of arbitrary outcomes based on what steelworkers decide to do?

Possible solutions

47. We acknowledge that the BPS scheme has a number of factors which distinguish it from other DB pension schemes. There are a number of potential solutions to the issue of BPS redress which take into account the unique features of the BPS scheme. These include:

(1) Deferred annuities.

- 47.1. The FCA has acknowledged, as noted above, that currently there is no market for deferred annuities. However, the FCA could create such a market. That would enable the point in time calculated redress payment to be used for the purpose intended, and remove the risk of intervening market movements. Our client's high level investigations indicate that deferred annuities are available from UK insurers on a bulk basis (e.g. £100-300m of premium) at a price equivalent to a lifetime implied investment return of around gilt yields. The current spike in gilt yields makes this affordable relative to the compensation. However, it would need to be organised centrally to insure sufficient scale to generate interest from an insurer. Given the current gilt yields and insurer pricing may not remain indefinitely, this option should be investigated urgently.

(2) Scheme common discount rate.

- 47.2. The FCA could use a common discount rate for BPS steelworkers. This would avoid the current problem that two workers who worked side by side for many years can now receive very different payments based on the arbitrary dates when compensation is calculated.

(3) Lower risk assets.

³³ *Financial Ombudsman Service 2021 Periodic Review*, Oaklin Consulting, 2 December 2021

- 47.3. Ordinarily, where a pension fund has promised to pay a guaranteed income in retirement, the trustees will match the assets to that outcome i.e. in gilts or other low risk income producing assets so there is little risk that the assets cannot produce the income in retirement. However, here we have the pre-retirement market risk not being matched by the presumed sudden change to gilts on retirement. This can be mitigated by the pre-retirement assumptions being based on lower risk assets.
- 47.4. The only argument which militates against this is that this leaves the balance of the upside risk with the steelworker, i.e. they might be overcompensated because they could invest the money in higher risk assets and which might produce a higher pension pot at the point of retirement but the alternative (which is in place now) leaves downside risk with the steelworker i.e. the innocent party. However, given the choice between allowing the wrongdoer to benefit from the upside risk or the innocent party, the right thing to do surely has to be to allow there to be a risk that the innocent party (where they are likely to be undercompensated in any event given the lack of PI and the FSCS cap) the potential benefit.

(4) Temporary suspension of the claims process until the discount rate has returned to a norm, or establishing a temporary methodology which takes into account the current volatility of the market.

- 47.5. In August 2021 the Bank of England warned that inflation would increase dramatically. By the start of this year, we had already seen increases in the prices. The conflict in Ukraine further exasperated that, and as a consequence we now have inflation in excess of 10%. This was not unforeseen though, which makes the inactivity of the FCA, FOS and FSCS all the more curious and its decision making process all the more irrational when you see of it being warned against. The Bank of England warned of it, and it was being reported in newspapers a year ago. The FCA should have foreseen that there would have been a dramatic impact on gilt yields as a consequence of the Bank of England's telegraphed position and it would have been aware of the consequence of this on values being offered as compensation, but it chose to do nothing. Further, it would also have known that the Bank of England was also suggesting that the attack of inflation would be significant, but short lived.
- 47.6. Therefore, it makes sense for the FCA to have recognised this fact. For the FCA not to do so, to not realise that the changing discount rate would work briefly and momentarily against steel workers making claims for compensation, is irrational. It is especially irrational when in the consultation document, what are referred to as 'event based triggers' are referenced. One of the 'event based triggers' mentioned is 'major events in wider financial markets'.
- 47.7. That is precisely what is occurring. A solution to this would be to suspend the claim process until the discount rate has returned to a norm, or establish a formula for allowing for the temporary turbulence. Not only must the process be fair, but it must also be seen to be fair.

NEXT STEPS

48. Our client and stakeholders appreciate the engagement that the FCA/FSCS/FOS have had to date, including the meeting on 5 September 2022. However, the impression of those attending the meeting received was that the FCA had a focus on explaining the challenges with redress generally and the FCA's current approach, as opposed to genuinely engaging with the issues set out in this letter (which have been raised previously with the FCA) and resolving them by actually changing the FCA's

approach. The guidance published on 15 September 2022 has fortified this impression.

49. This is reinforced by the FCA admitting in the meeting on 5 September 2022 that, given the BPS members are known to have suffered mis-selling, the FCA should not here be balancing fairness to the victims with fairness to the market. We also note that one of the FCA's operational objectives is consumer protection.³⁴ The FCA must also observe the eight principles of good regulation, including efficient and economic use of resources³⁵ which is reinforced by oversight by the National Audit Office ("**NAO**"). In circumstances where the NAO report into BPS roundly criticized the FCA's actions, the FCA cannot refer to this principle as a reason to leave the downside risk with the steelworker in its approach to redress.
50. We have set out above the deep concerns the FCA's current approach is causing within the community of steelworkers. Another possible example³⁶ of this is that, at the end of August 2022, our client Mr Rush had a conversation with Steelworker C who expressed frustration with the delays of his BPS complaint and compensation process. On this particular occasion, steelworker C relayed his concerns about the unfairness of lower compensation now being awarded to claimants, due to changes in the discount rate. He was polite yet seemed beleaguered. Hours later, steelworker C drove to a remote spot and ended his life. Mr Rush understands that C was navigating his way through many complex issues and although nobody will know what was going through his mind in his final hours, it is heart-breaking that at the forefront of his thinking may have been pension mis-selling. Mr Rush cannot be certain, but if his complaint had been handled promptly and fairly, Mr Rush believes his outlook and state of mind may have been very different.
51. We currently have a critical window of opportunity to give steelworkers fair compensation. Accordingly, whilst our client and stakeholders would welcome further engagement (including, but not limited to, a further call with the FCA/FSCS/FOS, particularly to focus on the possible deferred annuities solution discussion above), regardless of any such dialogue, it is requested that the FCA:
 - 51.1. Provide its decision to the issues we have outlined above (and in Appendix 2) by no later than the date on which the FCA publish their final plans for the proposed BPS consumer redress scheme.
 - 51.2. Specifically, please explain how the FCA/FSCS/FOS intends to remedy these issues for all BPS members, whether they have already been awarded redress or not.
 - 51.3. Alternatively, if the FCA/FOS/FSCS does not intend to remedy these issues, please provide a written summary of the decision, explaining the grounds on which this decision has been made, and providing copies of all documents considered by the relevant decision-makers when making it.
 - 51.4. As noted above, this letter is supported by the large group of steelworkers referenced in Appendix 1 and cites certain specific anonymised examples. If the FCA needs any more information or authorities to respond fully to this group of people and the examples, then it should confirm this to us by return, so

³⁴ Section 1C, Financial Services and Markets Act 2000

³⁵ FCA, Principles of Good Regulation

³⁶ This example has been included after steelworker C's survivors gave Mr Rush their approval, but asked that his name be withheld

that we may seek authority. In contrast the FCA should not send a response declining to engage on points or examples because it has failed to raise this with us in advance.

51.5. Once we receive the FCA's decision, our clients and stakeholders will consider taking further legal action if necessary, including but not limited to issuing judicial review proceedings. Relevant decisions by the FCA, FSCS³⁷ and the FOS³⁸ are amenable to judicial review. Our client is confident that a relevant steelworker, or group of steelworkers (including those set out in Appendix 1), will have standing to bring a judicial review claim, having a sufficient interest through being personally affected, and that the issues identified in this letter will reach the standard necessary for a successful judicial review should the FCA decline to address them.

52. We look forward to hearing from you. In the interim, all relevant rights remain reserved.

Yours faithfully

Hausfeld & Co LLP

Hausfeld & Co LLP

Encs: Appendix 1
Appendix 2

Cc: Financial Services Compensation Scheme
Financial Ombudsman Service
Nick Smith MP
Stephen Kinnock MP
All Party Parliamentary Group on Fair Business Banking c/o Kevin Hollinrake MP

³⁷ See *Emptage v FSCS* [2012] All ER (D) 109; *Emptage v FSCvS* [2013] All ER (D) 144

³⁸ See for example *R (on the application of Kelly) v Financial Ombudsman Service Ltd* [2017] EWHC 3581 (Admin)