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The Wider Implications process is an alternative form of redress to the courts system that can help investors to recover some or all of their investments more quickly. **Laurence Lieberman and Adam Mason report**

Arrowing in on justice

A consumer with a financial services complaint may, in appropriate circumstances and if eligible, approach the Financial Ombudsman Service (FOS) to seek to resolve his or her complaint. However, on occasion, there are financial services issues which affect such a significant number of individuals/businesses that the FOS may not be the most appropriate body through which to seek recourse.

Accordingly, if an issue is deemed to have wider implications for a number of consumers and/or financial services businesses, the FSA, the Office of Fair Trading (OFT) and/or the FOS may decide that it should be remedied through what is known as the “Wider Implications Process” (the WI process).

The WI process is used to bridge potential regulatory gaps or overlaps between the FSA, FOS and OFT on significant issues, including those that may give rise to widespread consumer detriment. It is appropriate where the

issue affects either a large number of consumers, a large number of businesses, the financial integrity of a large business, the interpretation of FSA rules or guidance from the FSA/OFT or a common practice by businesses. The term “businesses” includes regulated financial services firms or businesses with a consumer credit licence issued by the OFT.

Anyone with a legitimate interest can identify a potential WI process issue in writing to the FSA/FOS/OFT directly (depending upon whether a financial services, consumer credit or competition related issue arises).

If it is agreed that the WI process is suitable for the issue in question then, in the case of the FSA, it can take any number of actions, including taking enforcement action, taking regulatory action under the Unfair Terms in Consumer Contracts Regulations 1999, securing redress or publishing rules and/or guidance. Other actions can be taken by the OFT and the FOS within the remit of their powers.

The most recent example of the WI process in action can be seen in relation to Lehman Brothers-backed structured products.

In simple terms, guaranteed structured products typically offer a “floor” to any investment risk, limiting potential losses, along with “capped” participation in stock market returns. In other words, investors put money into these types of structured products because they want access to the upside performance of equities but also a guarantee they will not lose capital. A considerable number of UK investors had taken out Lehman Brothers-backed structured products where Lehman had offered either a full or partial guarantee, to many investors, such a guarantee would have appeared to be valuable and the probability (and therefore credit risk) of Lehman becoming insolvent would have been remote.

After Lehman’s collapse in September 2008, consumer investors quickly realised that capital guarantees in structured products are only as strong as the financial

strength of the guarantee provider.

Since Lehman’s insolvency, the FOS has been investigating complaints it has received from investors, and other parties involved, about the sale of Lehman-backed products. Among other things, investors are complaining that the marketing communications issued at the time of their investment did not properly disclose the risk that the guarantee provided could possibly disappear.¹ However, despite the fact that approximately 6,000 people in the UK invested more than £200 million into these products, only 2000 complaints were made to the FOS about structured products in 2008, of which approximately 50 (less than 1%) related to the collapse of Lehman Brothers.

In light of the above the FSA wrote to the FOS in May 2009 to ask them to consider deferring issuing any adjudicator views, or Ombudsman decisions, in cases concerning Lehman Brothers-backed structured products on the basis that this would allow the FSA to explore all options to achieve the best outcome for consumers via the WI process. In August the FSA asked for a further three-

month deferral.

With regard to Lehman Brothers it is hard not to be sympathetic to investors who purchased the structured product because they believed it was guaranteed at a time when nobody would have foreseen Lehman’s collapse. While there are risks with almost any investment, it is the disclosure and understanding of those risks that will be the focus of the WI process.

With thousands of Lehman investors potentially standing to benefit from the WI process, many will be paying a close eye on its outcome. A speedy process in which investors may be able to recover some or all of their investment, where appropriate, is preferable to the years it would take to seek compensation through the courts.¹⁸

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The wider implications website is available at www.widerimplications.info