

Mesothelioma compensation: amending the Financial Services Compensation Scheme

A consultation

September 2006



HM TREASURY





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amending the Financial Services
Compensation Scheme**

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INTRODUCTION

SUMMARY OF PROPOSALS

1.1 This consultation document seeks views on proposed changes to the Financial Services Compensation Scheme (FSCS) to broaden the circumstances in which responsible persons (eg employers) and/or insurers can claim a contribution directly against the Scheme in mesothelioma cases.

1.2 Mesothelioma is a cancer of the lining of the lungs or abdomen, which is almost always caused by exposure to asbestos. A recent House of Lords' case (*Barker v Corus*) decided that liability for damages was to be apportioned among those responsible for the wrongful exposure according to the relative degree of contribution to the chance of the person contracting the disease. This meant that claimants would have to trace all relevant defendants before liability could be apportioned and full compensation paid, or alternatively to issue multiple claims to recover damages on a piecemeal basis. The practical effects of this decision (which the House of Lords was not asked to consider) were that claims could take much longer to be concluded, and would be much more difficult and time-consuming for claimants in circumstances where they and their families were already under considerable stress, and claimants may not be able to recover full compensation where some negligent defendants or their insurers could not be traced. Given this, the Government decided to reverse the effects of the *Barker* judgment to enable claimants, or their estate or dependants, to claim full compensation from any liable person. It will then be open to the person who has paid the compensation to seek a contribution from other negligent persons. This was achieved through the Compensation Act 2006.

1.3 At present, the FSCS cannot contribute to all cases which have been settled in full by a third party. This prejudices responsible persons (for example an employer who is liable in tort and their insurer) since they are not able to claim contributions against the FSCS and this could lead to delays in paying compensation while liability of all parties is established.

1.4 The changes to the FSCS would allow a person who is liable in tort for having negligently exposed a person to asbestos or the insurer of that person, and who has settled that claim, to recover a contribution from the FSCS where the exposed person has developed mesothelioma and could presently recover compensation from the FSCS. These changes should assist victims of mesothelioma in receiving timely access to compensation and are beneficial to responsible persons and insurers who, in specified circumstances, can claim contributions from the FSCS.

1.5 The changes to the FSCS would be implemented by the introduction of secondary legislation and changes by the Financial Services Authority (FSA) to the rules relating to the FSCS.

1.6 Given responsibility for making the necessary amendments lies with both HM Treasury and the FSA, HM Treasury and the FSA are undertaking a joint consultation on the proposed Statutory Instrument and rules. Given the urgency of the need to change the FSCS quickly to ensure individuals receive compensation as soon as possible, the consultation period will be limited to 4 weeks and will close on 6 October 2006.

2

RESPONDING TO THE CONSULTATION

HOW TO RESPOND

2.1 The Government and the FSA welcome the views of all stakeholders on the issues raised in this document. The consultation period begins with the publication of this document and will run for 4 weeks. Please ensure that responses to this consultation reach us by 6 October 2006. We cannot guarantee to consider responses received after this date. Responses to the consultation should be sent to:

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1 Horse Guards Road
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Tel: 020 7270 5468

Fax: 020 7451 7524

Email: fscs.consultation@hm-treasury.x.gsi.gov.uk

2.2 This document can be found on HM Treasury's website: <http://www.hm-treasury.gov.uk> and the FSA's website: <http://www.fsa.gov.uk>.

2.3 When responding, please state whether you are responding on behalf of an individual or representing the views of an organisation. If responding on behalf of a larger organisation, please make it clear who the organisation represents and, where applicable, how the views of members were assembled.

2.4 All responses to this consultation will be shared with the FSA.

CONFIDENTIALITY DISCLOSURES

2.5 All written responses will be made public on HM Treasury's website unless the author specifically requests otherwise in writing.

2.6 Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act (DPA) and the Environmental Information Regulations 2004). If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality will be maintained in all circumstances.

2.7 An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on HM Treasury. HM Treasury will process your personal

data in accordance with the DPA, and in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

2.8 Subject to paragraphs 2.5, 2.6 and 2.7 if you wish part (but not all) of your response to remain confidential, please supply two versions – one for publication on the website with the confidential information deleted, and another confidential version for use by HM Treasury and the FSA.

PARTIAL REGULATORY IMPACT ASSESSMENT

2.9 The partial Regulatory Impact Assessment (RIA) follows this document and should be read in conjunction with it. The Government and the FSA welcome views on the partial RIA.

HOW THIS CONSULTATION IS BEING CONDUCTED

2.10 There is an urgent need for these changes to be made quickly so claimants, responsible persons and insurers have certainty as to how mesothelioma claims will be dealt with. This is particularly pressing given that the aim is to ensure individuals receive compensation as soon as possible because of the nature of mesothelioma and the impact that the disease has on people's lives.

2.11 Given this urgency, HM Treasury and the FSA have decided to conduct a joint consultation. Since the aim is to have the revised scheme in place as soon as practically possible after Parliament returns from recess, Ministers have decided that the consultation period should be limited to 4 weeks.

2.12 To ensure stakeholders are properly consulted, HM Treasury and the FSA will hold a small stakeholder event involving affected parties. This event will be an opportunity to discuss the technical proposals outlined in this consultation document. It will be jointly chaired by HM Treasury and the FSA. Representatives of the Department for Constitutional Affairs, the Department for Work and Pensions and the FSCS will also be attending the meeting.

2.13 A summary of responses to the consultation will be published on HM Treasury's website.

2.14 With the exception of the time period for consultation for the reasons set out above, this consultation is being conducted in line with the Code of Practice on Consultation. The criteria are listed below (a full version can be found at <http://www.cabinet-office.gov.uk/regulation/consultation/code.htm>). The six consultation criteria are:

1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
2. Be clear about who may be affected, what questions are being asked, and the timescale for responses.
3. Ensure your consultation is clear, concise and widely accessible.
4. Give feedback regarding the responses received and how the consultation process influenced policy.
5. Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.

6. Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.

If you have concerns as to how this consultation is being conducted, please contact:

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3

PROPOSED CHANGES TO THE FINANCIAL SERVICES COMPENSATION SCHEME

BACKGROUND

Financial Services Compensation Scheme

3.1 The Financial Services Compensation Scheme (FSCS) provides a consumer safety net in relation to financial services – it is the UK's statutory fund of last resort for consumers of authorised financial services firms, including persons affected by the default of such firms. The FSCS can pay compensation if a firm is unable, or likely to be unable, to pay valid claims against it. The FSCS is an independent body, set up under the Financial Services and Markets Act 2000 (FSMA).

3.2 The FSCS covers business conducted by firms authorised by the Financial Services Authority (FSA), and protects:

- deposits,
- insurance policies,
- insurance mediation (for business on or after 14 January 2005),
- investment business, and
- mortgage advice and arranging (for business on or after 31 October 2004).

The FSCS is funded by levies on authorised firms.

3.3 The FSCS insurance sub-scheme broadly covers claims for compensation that arise following the failure of an authorised insurer under the terms of that insurer's insurance policies. In general, the FSCS will safeguard policyholders if an authorised firm (ie an insurer) is unable to meet claims against it, for example, if it has been placed in provisional liquidation or administration. There are currently 27 general business insurers in insolvent run-off with claims covered by the FSCS, and two small life assurance firms.

3.4 The power to set up the compensation scheme is set out in FSMA, which gives the FSA power to make rules regarding the operation of the scheme. The new FSCS regime applied from 1 December 2001 and, for insurance, included transitional provisions which save provisions of the Policyholders Protection Act 1975 (PPA) in relation to certain claims whose facts relate to the period prior to 1 December 2001. There are no compensation arrangements for insurance company insolvencies that occurred prior to 1974.

3.5 In practice the existence of the FSCS and PPA means that claimants will be afforded different types and levels of cover depending on the facts relating to the claim. Relevant facts can include a) when the insurer default took place; b) when the insurance was taken out; and c) whether the policy was compulsory. To date, FSCS has only paid claims in respect of insurers insolvent before 1 December 2001, and individual claimants received either 90% or 100% of the value of their policy as long as the insolvency occurred after 29 October 1974.

3.6 The table in Annex C summarises the coverage provided by the FSCS in relation to insurance cases. However, to determine the precise legal position in relation to a

particular claim it will be always necessary to consult the relevant legal provisions in Part XV of FSMA, the FSCS Order¹ and the FSA Handbook (COMP).

3.7 Further information on the FSCS can be found on its website (<http://www.fscs.org.uk>). The FSA rules establishing the FSCS can be found in the FSA Handbook (the COMP Sourcebook), which is available online (<http://www.fsa.gov.uk>).

Mesothelioma 3.8 Mesothelioma is a cancer of the lining of the lungs or abdomen, which is almost always caused by exposure to asbestos. It is distinct from other forms of asbestosis, in that although it is more likely in cases where there was extensive exposure to asbestos, it can arise in people who have been exposed to only small numbers of asbestos fibres, and can even be triggered by a single fibre. This created difficulties for claimants in bringing a claim for damages, in that prior to the House of Lords' judgment in the case of *Fairchild v Glenhaven Funeral Services Ltd and others* in 2002², it had been held that a claimant who had been employed by multiple employers over the course of their working life could not successfully claim as they could not prove which exposure had actually caused the mesothelioma.

3.9 In *Fairchild*, the House of Lords decided that a person who had contracted mesothelioma after wrongful exposure to asbestos at different times by more than one negligent person could sue any of them, notwithstanding that he could not prove which exposure had actually caused the disease – because all had materially contributed to the risk of him contracting the disease. *Fairchild* did not resolve whether liability should be joint and several, although it was presumed by the parties that this would be the rule and this was the approach taken in practice. However, in *Barker v Corus UK Ltd* (and conjoined cases)³, the House of Lords decided that instead the liability for damages was to be apportioned among those responsible for the wrongful exposure according to their relative degree of contribution to the chance of the person contracting the disease.

3.10 That decision did not impose a limit on the damages which could be recovered from those responsible for the exposure to asbestos. But it did mean that in practice the claimant would have to trace all relevant defendants, as far as this was possible, before liability could be apportioned and full compensation paid, or alternatively to issue multiple claims to recover damages on a piecemeal basis. The practical effects of this decision (which the Lords were not asked to consider) were that claims could take much longer to be concluded, and would be much more difficult and time-consuming for claimants in circumstances where they and their families are already under considerable pain and stress, and claimants may not be able to recover full compensation where some negligent defendants or their insurers could not be traced.

Compensation Act 2006 3.11 Given this, the Government decided to reverse the effects of the *Barker* judgment to enable claimants, or their estate or dependants, to recover full compensation from any liable person. It will then be open to the person who has paid the compensation to seek a contribution from other negligent persons. This was achieved through section 3 of the Compensation Act 2006.

3.12 Section 3 came into force on Royal Assent on 25 July 2006. It has retrospective effect and applies to cases which had not been settled, or determined by a court, before 3 May 2006 (the date of the judgment in *Barker v Corus* and conjoined cases). It

¹ Financial Services and Markets Act 2000 (Transitional Provisions, Repeals and Savings) (Financial Services Compensation Scheme) Order 2001, SI 2001/2967 (“the FSCS Order”)

² [2002] UKHL 22

³ [2006] UKHL 20

provides that where a case was settled, or legal proceedings determined, on or after 3 May 2006 and before 25 July 2006, a party to that case or those proceedings may apply to a court to vary the settlement or determination.

PROPOSED CHANGES TO THE FSCS

3.13 The Government's decision to legislate to reverse the effects of the Barker judgment through the Compensation Act means responsible persons⁴ will be jointly and severally liable to meet the full amount of any claim arising from negligently exposing an individual to asbestos and that individual developing mesothelioma as a result.

3.14 This will mean that claimants will be seeking compensation from one responsible person, typically medium to large employers or from Government (in relation to state-owned industries). Once liability has been established the responsible person (including its insurer if it has one) will be liable to pay 100% of the compensation. The responsible person (or its insurer) can then seek a contribution from other responsible persons.

3.15 At present, the FSCS cannot contribute to all cases which have been settled in full by a third party, for example, another employer or its insurer. The FSCS is a fund of last resort, so that if a claim is already settled, or another party might pay, FSCS cannot provide compensation. This would put responsible persons, including their insurers, at a disadvantage. (The current practice is that the FSCS agrees to make a parallel payment to the claimant in respect of compensation, but this can cause delay whilst the position of any insolvent insurer and the extent of FSCS involvement (if any) is established). Thus if a particular person is found to be liable to the victim for the whole of his damages (by virtue of joint and several liability with other responsible persons), and settles the claim in full, in the absence of these proposed changes, such a responsible person or his insurer would not be able to recover a contribution funded by the FSCS.

3.16 HM Treasury and the FSA are therefore proposing an amendment to the FSCS that would put responsible persons and/or their insurers in the position to ensure that they can claim a contribution from the FSCS. This ensures i) that there is no delay in compensation being paid to claimants while the FSCS' involvement is being established and ii) insurers/responsible persons are paying the same compensation as they would have done prior to the Barker judgment.

3.17 A power was included in the Compensation Act allowing HM Treasury to make regulations about the provision of compensation via the FSCS to a responsible person (eg the employer) or an insurer of a responsible person in specified circumstances. Although many of the required changes could have been made through FSA rules, this additional power was necessary to allow various technical changes to be made including how the FSCS deals with claims (in relation to which parts of the 1975 Policyholders Protection Act are saved by the transitional provisions applying to the FSCS).

3.18 The powers included in the Compensation Act 2006 are strictly limited to mesothelioma claims as defined in the Act. The regulations would require affirmative resolutions by both Houses of Parliament for them to come into effect.

⁴ "Responsible person" is defined in the Compensation Act 2006 (see Part 1, 3(1)(a) and 3(10)(a)). Relevant sections of the Compensation Act 2006 can be found at Annex D.

Amendments to the FSCS 3.19 HM Treasury's draft Statutory Instrument is included in Annex A. Broadly the Statutory Instrument makes amendments to the FSCS Order⁵ and provides a further power for the FSA to make rules in relation to mesothelioma claims. The FSCS Order sets out provisions which allow claims for compensation to be made against the scheme manager of the Financial Services Compensation Scheme which relate to the period prior to the coming into force of FSMA on 1 December 2001. HM Treasury's draft Statutory Instrument enables the FSA, which is responsible for making the rules of the FSCS, to modify the FSCS to enable a person who is liable in tort (or his insurer) for having exposed a person to asbestos to recover a contribution from the FSCS in the circumstances described below. The regulations set out the circumstances where a contribution can be paid to such persons by the FSCS.

3.20 Presently many mesothelioma claims which relate to the period before 1972, when employers were not obliged to have employers' liability insurance, are dealt with under transitional provisions to the FSCS scheme, rather than under the new FSCS scheme itself. These claims rely on the provisions of the Policyholders' Protection Act 1975, which are saved by the FSCS Order. The combination of the FSCS rules, the FSCS Order and the saved provisions of the PPA makes for a complex set of rules to interpret even for professionals. One way of achieving the policy aim would be to amend the PPA, but this would be technically complicated and not very transparent. The approach, therefore, is to apply the new FSCS scheme to all mesothelioma claims, subject to not expanding the liability of the scheme, achieved by tying liability back to what a victim could have expected to be paid under the old rules.

3.21 The FSA's rules will govern the detailed working of the scheme. HM Treasury's Statutory Instrument gives the FSA power to make specific rules relating to mesothelioma claims, which are subject to two conditions. The conditions are that:

- claims of responsible persons or their insurers can be entertained only where the victim's claim could be the basis for a claim under the transitional order or under the FSCS; and
- the responsible person or their insurer is claiming a contribution from another responsible person, but is unable to get it because the insurer of the other responsible person is unable or likely to be unable to pay.

In addition, the draft Statutory Instrument allows the payment of compensation to a responsible person or their insurer notwithstanding that they have already made a payment to the victim where the application for payment is made on or after 25 July 2006. It should be noted that the provisions in the Statutory Instrument are tied into section 3(1) of the Compensation Act. If medical science advances so that it becomes possible to determine with certainty whether a specific exposure caused the disease then claims will no longer be possible under this instrument or the Act itself.

3.22 HM Treasury would welcome comments on its draft Statutory Instrument as set out in paragraph 2.1.

3.23 The FSA rules covering compensation are in the COMP Sourcebook of the FSA Handbook. COMP sets out the rules governing the Financial Services Compensation Scheme (FSCS) and the circumstances in which compensation may be paid and to whom compensation may be paid.

⁵ Financial Services and Markets Act 2000 (Transitional Provisions, Repeals and Savings) (Financial Services Compensation Scheme) Order 2001, SI 2001/2967 ("the FSCS Order")

3.24 The FSA will need to amend the FSCS rules so the FSCS can consider mesothelioma claims in line with the policy intention set out during consideration of the Compensation Act 2006. As explained above, HM Treasury’s proposed Statutory Instrument gives the FSA the power to make rules applying to circumstances where compensation would be payable in relation to mesothelioma claims, including in situations covered by the transitional rules in the FSCS Order.

3.25 The draft FSA rules are set out in Annex B. The proposed rules make two amendments to the Compensation Sourcebook (COMP) of the FSA’s Handbook. They would enable the FSCS to make payments to a responsible person or its insurer notwithstanding that they have already made a payment to the victim. This would avoid delay of the current parallel payment approach (described above) in compensation being paid to claimants until the FSCS’ involvement is established. The rules apply to applications for payment made on or after 25 July 2006 and are made under the powers given in the draft Statutory Instrument.

3.26 The effect of the amendments is that all claims for a contribution in relation to mesothelioma claims will now be dealt with under the FSCS, whether the claim to which it relates was dealt with under the FSCS Order or the FSCS itself.

3.27 The FSA would welcome views on its proposed changes to the COMP Sourcebook as set out in paragraph 2.1.

Removing the statutory requirement on the FSA to consult

3.28 When the FSA make rules under FSMA 2000, sections 155 and 157(3) of FSMA apply consultation obligations. Given the urgency with which HM Treasury and the FSA need to implement the changes to the FSCS, using powers in the Compensation Act 2006, HM Treasury is proposing on this occasion to relieve the FSA of its specific statutory duty to consult on rules or guidance relating to mesothelioma claims. This removes any doubt that further consultation by the FSA beyond this consultation will be necessary in respect of proposed changes to the FSA Handbook in respect of mesothelioma contribution claims. It should be noted that a similar provision was made in relation to rules and guidance concerning general insurance and mortgage complaints.

Other Government work

3.29 These changes to the FSCS are part of wider work, being led by the Department for Work and Pensions, to speed up the handling of claims for people suffering from mesothelioma as announced by the Secretary of State for Work and Pensions, John Hutton, on 20 July 2006.

Questions

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

4

PARTIAL REGULATORY IMPACT ASSESSMENT

TITLE OF PROPOSAL

4.1 Amending the Financial Services Compensation Scheme (“FSCS”) to enable a person who is liable in tort for having exposed a person to asbestos (or his insurer) to recover a contribution from the FSCS if the exposed person develops mesothelioma and that person (or his insurer) is owed a contribution by another exposor or insurer.

PURPOSE AND INTENDED EFFECT

Background, objective and rationale

4.2 The Government’s decision to legislate to reverse the effects of the House of Lords’ judgment in *Barker v Corus* (and conjoined cases)¹ through the Compensation Act 2006 means responsible persons (for example employers) will be jointly and severally liable to meet the full amount of any claim arising from negligently exposing an individual to asbestos and that individual developing mesothelioma as a result.

4.3 This will mean that claimants will be seeking compensation from one responsible person, typically medium to large employers or from Government (in relation to state-owned industries). Once liability has been established the responsible person (including its insurer if it has one) will be liable to pay 100% of the compensation. The responsible person (or insurer) can then seek a contribution from other responsible persons.

4.4 At present, the FSCS cannot contribute to all cases which have been settled in full by a third party, for example, another employer or its insurer. The FSCS is a fund of last resort, so that if a claim is already settled, or another party might pay, FSCS cannot provide compensation. This would put responsible persons, including their insurers, at a disadvantage. (The current practice is that the FSCS agrees to make a parallel payment to the claimant in respect of compensation, but this can cause delay whilst the position of any insolvent insurer and the extent of FSCS involvement (if any) is established). Thus if a particular responsible person is found to be liable to the victim for the whole of his damages (by virtue of joint and several liability with other responsible persons), and settles the claim in full, in the absence of these proposed changes, such a responsible person or his insurer would not be able to recover a contribution funded by the FSCS.

4.5 HM Treasury and the FSA are therefore proposing an amendment to the FSCS that would put responsible persons and/or their insurers in the position to ensure that they can claim a contribution from the FSCS. This ensures i) that there is no delay in compensation being paid to claimants while the FSCS’ involvement is being established and ii) insurers/responsible persons are paying the same compensation as they would have done prior to the *Barker* judgment.

4.6 A power was included in the Compensation Act allowing HM Treasury to make regulations about the provision of compensation via the FSCS to a responsible person² (eg the employer) or an insurer of a responsible person in specified circumstances. Although many of the required changes could have been made through FSA rules, this

¹ [2006] UKHL 20

² “Responsible person” is defined in the Compensation Act 2006 (see Part 1, 3(1)(a) and 3(10)(a)). Relevant sections of the Compensation Act 2006 can be found at Annex D.

additional power was necessary to allow various technical changes to be made including how the FSCS deals with claims involving facts relating to before the commencement of FSMA (1 December 2001) (in relation to which parts of the 1975 Policyholders Protection Act are saved by the transitional provisions applying to the FSCS).

4.7 The powers included in the Compensation Act 2006 are strictly limited to mesothelioma claims as defined in the Act. The regulations would require affirmative resolutions by both Houses of Parliament for them to come into effect.

CONSULTATION

4.8 This partial RIA concerns amending the FSCS via Statutory Instrument and FSA rules to facilitate the payment of compensation claims to sufferers of mesothelioma. Given the urgency of amending the FSCS to ensure sufferers get quick access to compensation the consultation period will be limited to 4 weeks from the date of publication and will close on 6 October 2006. Given the short consultation timetable, HM Treasury and FSA will be holding a small stakeholder event to explain the proposals and discuss feedback from stakeholders.

4.9 This partial RIA sets out the implementation options and considers the qualitative, and where possible, quantitative costs and benefits. Risks, unintended consequence and any compliance and enforcement issues have also been incorporated as costs and benefits. Competition issues and the impact on small firms have also been considered.

4.10 When formally responding to the partial RIA, HM Treasury and the FSA are seeking comments on the cost benefit analysis, likely risks and unintended consequences of the proposals to amend the FSCS, including supporting evidence. If you feel that there are alternative options please suggest these. The feedback to this partial RIA will provide valuable information which will feed into the final RIA following this consultation.

4.11 The consultation document and partial RIA should be read together.

Questions

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

OPTIONS

Do nothing **4.12** As with all proposals for legislation, HM Treasury has considered the option of making no changes. This would mean that if a particular person is found to be liable to the victim for the whole of his damages (by virtue of joint and several liability with other responsible persons), and settles the claim in full, such a responsible person or his insurer would not be able to recover a contribution funded by the FSCS. To make no change would disadvantage responsible persons and insurers as a result of the changes in the Compensation Act 2006, and could delay compensation to victims of mesothelioma.

4.13 HM Treasury and the FSA are therefore proposing an amendment to the FSCS that would put responsible persons and/or their insurers in the position to ensure that they can claim a contribution from the FSCS.

HM Treasury's SI 4.14 HM Treasury's draft Statutory Instrument is included in Annex A. Broadly the Statutory Instrument makes amendments to the FSCS Order³ and also provides further power for the FSA to make rules in relation to mesothelioma claims. The FSCS Order sets out provisions which allow claims for compensation to be made against the scheme manager of the Financial Services Compensation Scheme which relate to the period prior to the coming into force of FSMA on 1 December 2001. HM Treasury's draft Statutory Instrument enables the FSA, which is responsible for making the rules of the FSCS, to modify the FSCS to enable a person who is liable in tort (or his insurer) for having exposed a person to asbestos to recover a contribution from the FSCS in the circumstances described below. The regulations set out the circumstances where a contribution can be paid to such persons by the FSCS.

4.15 Presently many mesothelioma claims which relate to the period before 1972, when employers were not obliged to have employers' liability insurance, are dealt with under transitional provisions to the FSCS scheme, rather than under the new FSCS scheme itself. These claims rely on the provisions of the Policyholders' Protection Act 1975, which are saved by the FSCS Order. The combination of the FSCS rules, FSCS Order and the saved provisions of the PPA makes for a complex set of rules to interpret even for professionals. One way of achieving the policy aim would be to amend the PPA, but this would be technically complicated and not very transparent. The approach, therefore, is to apply the new FSCS scheme to all mesothelioma claims, subject to not expanding the liability of the scheme, achieved by tying liability back to what a victim could have expected to be paid under the old rules.

4.16 The FSA's rules will govern the detailed working of the scheme. HM Treasury's Statutory Instrument gives the FSA power to make specific rules relating to mesothelioma claims, which are subject to two conditions. The conditions are that:

- claims of responsible persons or their insurers can be entertained only where the victim's claim could be the basis for a claim under the transitional order or under the FSCS; and
- the responsible person or their insurer is claiming a contribution from another responsible person, but is unable to get it because the insurer of the other responsible person is unable or likely to be unable to pay.

In addition, the draft Statutory Instrument allows the payment of compensation to a responsible person or their insurer notwithstanding that they have already made a payment to the victim where the application for payment is made on or after 25 July 2006. It should be noted that the provisions in the Statutory Instrument are tied into section 3(1) of the Compensation Act. If medical science advances so that it becomes possible to determine with certainty whether a specific exposure caused the disease then claims will no longer be possible under this instrument or the Act itself.

FSA rules 4.17 The FSA rules covering compensation are in the COMP Sourcebook of the FSA Handbook. COMP sets out the rules governing the Financial Services Compensation Scheme (FSCS) and the circumstances in which compensation may be paid and to whom compensation may be paid.

³ Financial Services and Markets Act 2000 (Transitional Provisions, Repeals and Savings) (Financial Services Compensation Scheme) Order 2001, SI 2001/2967 ("the FSCS Order")

4.18 The FSA will need to amend the FSCS rules so the FSCS can consider mesothelioma claims in line with the policy intention set out during consideration of the Compensation Act 2006. As explained above, HM Treasury's proposed Statutory Instrument gives the FSA the power to make rules applying to circumstances where compensation would be payable in relation to mesothelioma claims, including in situations covered by the transitional rules in the FSCS Order.

4.19 The draft FSA rules are set out in Annex B. The proposed rules make two amendments to the Compensation Sourcebook (COMP) of the FSA's Handbook. They would enable the FSCS to make payments to a responsible person or their insurer notwithstanding that they have already made a payment to the victim. This would avoid delay of the current parallel payment approach (described above) in compensation being paid to claimants until the FSCS' involvement is established. The rules apply to applications for payment made on or after 25 July 2006 and are made under the powers given in the draft Statutory Instrument.

4.20 The effect of the amendments is that all claims for a contribution in relation to mesothelioma claims will now be dealt with under the FSCS, whether the claim to which it relates was dealt with under the FSCS Order or the FSCS itself.

COSTS AND BENEFITS

Groups affected **4.21** The following main groups have been identified as potentially being affected by these proposals:

- mesothelioma sufferers and their families, needing quick access to compensation;
- responsible persons having asbestos liabilities and their liability insurers, who, following these proposed changes, will be able to claim a contribution from the FSCS where the exposed person has developed mesothelioma (an asbestos related cancer of the lining of the lungs or abdomen) and where presently a victim of the disease could recover compensation from the scheme; and
- other insurers may also be affected through changes in the timing of levy payments if claims are paid earlier than under current provisions.

Benefits **4.22** The changes to compensation arrangements should speed up payments of compensation to victims of mesothelioma by allowing responsible persons or their insurers to make swift and full payments to the victim. It will also allow them subsequently to recover any appropriate contributions from other responsible persons or their insurers (and therefore if the insurer is insolvent, the FSCS). This ensures i) that there is no delay in compensation being paid to claimants while the FSCS' liability is being established and ii) insurers/responsible persons are paying the same compensation as they would have done prior to the Barker judgment.

4.23 Mesothelioma used to be a rare cancer, but there are now over 1800 cases a year. However, the long latency means that despite far better controls on the use of asbestos the rate is still rising. Although predictions are uncertain and highly sensitive to assumptions, cases could reach 2400 deaths per year by 2013 then fall away to perhaps 500 cases per year by 2050. Because cases are complicated and it is difficult to establish liability there is often a delay in making payments. The changes in liability brought about through the Compensation Act coupled with the changes to the operation of the

FSCS should facilitate the quicker payment of compensation potentially benefiting a large number of individuals who may contract the disease in the future.

Costs 4.24 The changes to the FSCS rules included in this document will not change the eligibility rules, the limit of compensation for mesothelioma claims, or the scope of the FSCS. As the resulting rule changes will not alter the total amount of compensation paid, the total cost to the insurance industry levy payers will be the same.

4.25 However, if claims are paid more quickly by the FSCS, which is the policy intention, then the cost to levy payers will also arise more quickly as a result. Given the projections set out in paragraph 4.22 above, the shift in levy from future time periods to the present should imply that the cost impact may be felt more heavily by the insurance industry in the next few years.

4.26 It should be noted that the FSA have published a discussion paper (DP06/1 'FSCS Funding Review' March 2006) on reviewing the funding of the FSCS and a consultation paper will follow. The proposed changes may impact on firms that contribute to the costs of the general insurance block. The Discussion Paper is available on the FSA website at: www.fsa.gov.uk/pubs/discussion/dp06_01.pdf.

4.27 HM Treasury and the FSA would welcome views on this potential cost as part of this consultation.

Other Government work 4.28 It should be noted that the changes to the FSCS are part of wider work, being led by the Department for Work and Pensions, to speed up the handling of claims for people suffering from mesothelioma as announced by the Secretary of State for Work and Pensions, John Hutton, on 20 July 2006.

SMALL FIRMS IMPACT TEST

4.29 It is highly unlikely that these proposals in themselves will have a disproportionate impact on smaller firms. However, the ongoing review of FSCS funding, mentioned above in para 4.25 may impact on firms that contribute to the costs of the original general insurance block.

COMPETITION ASSESSMENT

4.30 This change to the FSCS is unlikely to have any competition impacts.

ENFORCEMENT, SANCTIONS AND MONITORING

4.31 The FSCS will implement changes to the scheme following the changes to FSA rules and will keep operation of the rules under review.

HOW TO RESPOND

4.32 The consultation period will begin with the publication of this document and will run for 4 weeks until 6 October 2006. We cannot guarantee to consider responses received after this date. Responses to the consultation should be sent to:

Darren Philp
Financial Stability and Risk Team
HM Treasury
1 Horse Guards Road
London SW1A 2HQ

Tel: 020 7270 5468
Fax: 020 7451 7524
Email: fscs.consultation@hm-treasury.x.gsi.gov.uk

4.33 This document can be found on HM Treasury's website: <http://www.hm-treasury.gov.uk> and the FSA's website: <http://www.fsa.gov.uk>.

4.34 When responding, please state whether you are responding on behalf of an individual or representing the views of an organisation. If responding on behalf of a larger organisation, please make it clear who the organisation represents and, where applicable, how the views of members were assembled.

4.35 All responses to this consultation will be shared with the FSA.

CONFIDENTIALITY DISCLOSURES

4.36 All written responses will be made public on HM Treasury's website unless the author specifically requests otherwise in writing.

4.37 Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act (DPA) and the Environmental Information Regulations 2004). If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality will be maintained in all circumstances.

4.38 An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department. The Department will process your personal data in accordance with the DPA, and in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

4.39 Subject to paragraphs 4.36, 4.37 and 4.38 if you wish part (but not all) of your response to remain confidential, please supply two versions – one for publication on the website with the confidential information deleted, and another confidential version for use by the Treasury and the FSA.

CONSULTATION DOCUMENT

4.40 The consultation document is published with this document and should be read in conjunction with it. A copy of the consultation document can be found on both HM Treasury's (www.hm-treasury.gov.uk) and the FSA's (www.fsa.gov.uk) websites.

HOW THIS CONSULTATION IS BEING CONDUCTED

4.41 There is an urgent need for these changes to be made quickly so both claimants and insurers have certainty as to how mesothelioma claims will be dealt with. This is particularly pressing given that the aim is to ensure individuals receive compensation as soon as possible because of the nature of mesothelioma and the impact that the disease has on people's lives.

4.42 Given this urgency, HM Treasury and the FSA have decided to conduct a joint consultation. Since the aim is to have the revised scheme in place as soon as practically possible after Parliament returns from recess, Ministers have decided that the consultation period should be limited to 4 weeks.

4.43 To ensure stakeholders are properly consulted, HM Treasury and the FSA will hold a small stakeholder event involving affected parties. This event will be an opportunity to discuss the technical proposals. It will be jointly chaired by HM Treasury and the FSA. Representatives of the Department for Constitutional Affairs, Department for Work and Pensions and the FSCS will also be attending the meeting.

4.44 A summary of responses to the consultation will be published on HM Treasury's website

4.45 With the exception of the time period for consultation for the reasons set out above, this consultation is being conducted in line with the Code of Practice on Consultation. The criteria are listed below (a full version can be found at <http://www.cabinet-office.gov.uk/regulation/consultation/code.htm>). The six consultation criteria are:

1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
2. Be clear about who may be affected, what questions are being asked, and the timescale for responses.
3. Ensure your consultation is clear, concise and widely accessible.
4. Give feedback regarding the responses received and how the consultation process influenced policy.
5. Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.
6. Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.

If you have concerns as to how this consultation is being conducted, please contact:

Julie Humphreys
Enterprise Team
HM Treasury
1 Horse Guards Road
London
SW1A 2HQ

Tel: 020 7270 5543

Email: Julie.Humphreys@hm-treasury.x.gsi.gov.uk



DRAFT STATUTORY INSTRUMENT

Draft Regulations laid before Parliament under section 3(11) of the Compensation Act 2006, for approval by resolution of each House of Parliament.

DRAFT STATUTORY INSTRUMENTS

2006 No.

COMPENSATION

Compensation Act 2006 (Contribution for Mesothelioma Claims) Regulations 2006

Made - - - - - ***

Coming into force- - - - - ***

A draft of these Regulations has been approved by a resolution of each of House of Parliament pursuant to section 3(11) of the Compensation Act 2006;

The Treasury, in exercise of the powers conferred by section 3 of the Compensation Act 2006⁽¹⁾, make the following Regulations:

Citation, commencement and interpretation

1.—(1) These Regulations may be cited as the Compensation Act 2006 (Contribution for Mesothelioma Claims) Regulations 2006 and come into force on

(2) In these Regulations—

“the Act” means the Compensation Act 2006;

“the FSCS Transitional Order” means the Financial Services and Markets Act 2000 (Transitional Provisions, Repeals and Savings)(Financial Services Compensation Scheme) Order 2001⁽²⁾;

“FSMA 2000” means the Financial Services and Markets Act 2000;

“mesothelioma claim” means a claim by a responsible person for a contribution from another responsible person, where an insurer of the other responsible person is unable or likely to be unable to satisfy the claim for a contribution.

(3) Subject to paragraph (2), expressions used in these Regulations shall have the same meaning as the same expressions used in the Financial Services and Markets Act 2000⁽³⁾ and in the FSCS Transitional Order.

Amendments to the FSCS Transitional Order

2.—(1) The FSCS Transitional Order is amended as follows.

(2) In article 2(2) (interpretation) after the definition of “relevant former scheme” insert—

(1) 2006 c. 29.

(2) S.I. 2001/2967 to which there are amendments not relevant to these Regulations.

(3) 2000 c. 8.

““responsible person” and “victim” have the same meaning as in section 3 of the Compensation Act 2006 (mesothelioma: damages);”

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

(4) After article 9 insert—

“Contributions in relation to mesothelioma claims

9A.—(1) This article applies where—

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

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

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

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

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

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

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

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

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

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

Further power for Authority to make rules concerning mesothelioma claims

3.—(1) This regulation applies where—

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

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

- (a) A could claim a contribution from another responsible person in accordance with section 3(3)(a) of the Compensation Act 2006, but
 - (b) A is unable or likely to be unable to obtain a contribution, because an insurer of the other responsible person is unable or likely to be unable to satisfy the claim for a contribution.
- (3) The Authority may make rules modifying the new scheme to enable the scheme manager to receive, assess, determine and make payments in respect of applications for compensation from responsible persons and give guidance in relation to those rules.
- (4) Such rules may, in particular, permit—
- (a) payment of compensation to a responsible person *notwithstanding* that he has made a payment to the victim;
 - (b) payment of compensation to a responsible person not exceeding the amount a victim would, if he had not received payment from such a person, have been able to recover from the scheme manager directly in respect of the contribution;
 - (c) payment in respect of an application for compensation made on or after 25 July 2006, including an application which relates to a victim’s claim which is settled on or after 3 May 2006 or in relation to which there are legal proceedings which are determined on or after 3 May 2006.
- (5) In paragraph 2(b) “insurer” means an authorised person who has permission to effect or carry out contracts of insurance.
- (6) The power granted to the Authority in this article is in addition, and without prejudice, to any other power of the Authority.

Modification of FSMA 2000 in relation to FSA rules for mesothelioma claims

4. On the first occasion on which the Authority proposes to make rules or give any guidance concerning mesothelioma claims, sections 155 and 157(3) of FSMA 2000 do not apply to the proposed rules or guidance.

Name

Name

Two of the Lords Commissioners of Her Majesty’s Treasury

XX October 2006

EXPLANATORY NOTE

(This note is not part of the Regulations)

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

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

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

Regulation 2 makes amendments to the FSCS Transitional Order to enable the FSA which is responsible for making the rules of the FSCS and for giving guidance on those rules, to modify the FSCS to enable a person who is liable in tort (or his insurer) for having exposed a person to asbestos

to recover a contribution from the FSCS. The Regulations set out the circumstances where a contribution can be paid to such a person by the FSCS.

Regulation 3 provides a power for the FSA to make rules, and to give guidance on those rules, having similar effect in relation to claims other than those dealt with in the FSCS Transitional Order. These would be claims against insurers that are, or are treated as being, authorised under FSMA.

When the FSA make rules or gives guidance under FSMA 2000, sections 155 and 157(3) apply consultation obligations. Regulation 4 relieves the FSA of its specific statutory duty to consult on the first occasion on which it makes rules or guidance in relation to mesothelioma claims under these Regulations. Similar provision was made in relation rules and guidance concerning general insurance and mortgage complaints.

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

COMPENSATION SOURCEBOOK (AMENDMENT NO 8) INSTRUMENT 2006

Powers exercised

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

Commencement

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

Amendments to the Handbook

- D. The Glossary is amended in accordance with Annex A to this instrument.
- E. The Compensation Sourcebook is amended in accordance with Annex B to this instrument.

Citation

- F. This instrument may be cited as the Compensation Sourcebook (Amendment No 8) Instrument 2006.

By order of the Board

[] 2006

Annex A**Amendments to the Glossary**

Insert the following new definitions in the appropriate alphabetical positions. The inserted text is not underlined.

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

Annex B

Amendments to the Compensation Sourcebook (COMP)

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

- 4.2.1 R Unless *COMP* 4.2.3 R applies, an *eligible claimant* is any *person* who at any material time:
- ...
- (2) Did come within *COMP* 4.2.2 R, but satisfied the relevant exception in *COMP* 4.3 or *COMP* 4.4.

After *COMP* 4.3, insert the following new section. The inserted text is not underlined.

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

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

1 Transitional Provisions Table

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

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

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

C

TYPES OF CLAIM COVERED BY THE FSCS

This table attempts to provide an overview of the main categories of claims which are relevant to mesothelioma victims under the FSCS and the relevant transitional provisions. Given the restrictions on space and the complexity of the provisions the table can only give an overview; to determine the precise legal position in relation to a particular claim it will be always necessary to consult the relevant legal provisions in Part XV of FSMA, the FSCS Order and the FSA Handbook (COMP).

	Type of claim	Limit to compensation
1	Compulsory insurance policy ¹ where the act or omission ² giving rise to the claim occurred after N2 ³ and the insurance company is unable or unlikely to be able to satisfy the claim.	100% of claim. (COMP)
2	Non-compulsory insurance policy ⁴ , where an Article 9 default ⁵ occurred before N2 (but NB see (6) below).	
	A Payable to “private policyholders”. ⁶	90% (s8(2) PPA)
	B Corporate policyholder ⁷ which went into liquidation prior to Article 9 default of insurer.	90% (s8(2) PPA)
	Corporate policyholder which went into liquidation after Article 9 default of insurer.	No liability on part of the scheme
3	Compulsory insurance policy, where an Article 9 default occurred before N2 (but NB (6) below) and the application is not made under Article 10 or 12 of the Transitional Provisions Order 2001.	
	A Payable to any policyholder in respect of liability of a company in liquidation.	100% (s6(4) PPA)
	B Payable to “private policyholders” where the liability is covered by a compulsory insurance policy, but the liability is not itself one in relation to which compulsory insurance applies.	90% (s6(6) PPA)
4	Compulsory insurance policy, where an Article 9 default occurred before N2 (but NB (6) below), and the extent of the liability of the authorised insurance company concerned to the person making the claim was not determined prior to N2.	100% (COMP 10.2.3)
5	Where an authorised insurer is unable or likely to be unable to meet a claim in respect of liability under the policy (compulsory or non-compulsory), the circumstances giving rise to the	Compulsory insurance: 100%; Non-compulsory insurance 100% of first £2000 and 90%

	Type of claim	Limit to compensation
	claim occurred before N2 and could previously have given rise to a liability to pay under the PPS, there was no Article 9 default before N2, and the application could not otherwise be brought under the new scheme.	of remainder of claim (COMP 10.2.3)
6	Compulsory or non-compulsory insurance policy where insolvency event ⁸ occurred before 29 October 1974.	No liability on part of the scheme

1. Refers to Employer's Liability Insurance throughout.
2. The "act or omission" are broadly interpreted to include a situation where the facts giving rise to liability occurred prior to N2, but the liability was only liquidated whether by judgment or arbitration or settlement after N2.
3. 1 December 2001. The relevant "act or omission" can be the judgment.
4. I.e. pre 1972 in relation to Employer's Liability Insurance.
5. Among other defaults, voluntary winding up resolution passed; winding up order made by the court; appointment of a provisional liquidator; or company in other financial difficulties.
6. Individual or unincorporated body.
7. Note a claim via a corporate policyholder might be possible where the Third Parties (Rights Against Insurers) Act 1930 applies.
8. As set out in S5(1) PPA.

3 Mesothelioma: damages

(1) This section applies where-

(a) a person ("the responsible person") has negligently or in breach of statutory duty caused or permitted another person ("the victim") to be exposed to asbestos,

(b) the victim has contracted mesothelioma as a result of exposure to asbestos,

(c) because of the nature of mesothelioma and the state of medical science, it is not possible to determine with certainty whether it was the exposure mentioned in paragraph (a) or another exposure which caused the victim to become ill, and

(d) the responsible person is liable in tort, by virtue of the exposure mentioned in paragraph (a), in connection with damage caused to the victim by the disease (whether by reason of having materially increased a risk or for any other reason).

(2) The responsible person shall be liable-

(a) in respect of the whole of the damage caused to the victim by the disease (irrespective of whether the victim was also exposed to asbestos-

(i) other than by the responsible person, whether or not in circumstances in which another person has liability in tort, or

(ii) by the responsible person in circumstances in which he has no liability in tort), and

(b) jointly and severally with any other responsible person.

(3) Subsection (2) does not prevent-

(a) one responsible person from claiming a contribution from another, or

(b) a finding of contributory negligence.

(4) In determining the extent of contributions of different responsible persons in accordance with subsection (3)(a), a court shall have regard to the relative lengths of the periods of exposure for which each was responsible; but this subsection shall not apply-

(a) if or to the extent that responsible persons agree to apportion responsibility amongst themselves on some other basis, or

(b) if or to the extent that the court thinks that another basis for determining contributions is more appropriate in the circumstances of a particular case.

(5) In subsection (1) the reference to causing or permitting a person to be exposed to asbestos includes a reference to failing to protect a person from exposure to asbestos.

(6) In the application of this section to Scotland-

- (a) a reference to tort shall be taken as a reference to delict, and
- (b) a reference to a court shall be taken to include a reference to a jury.

(7) The Treasury may make regulations about the provision of compensation to a responsible person where-

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

(8) The regulations may, in particular-

- (a) replicate or apply (with or without modification) a provision of the Financial Services Compensation Scheme;
- (b) replicate or apply (with or without modification) a transitional compensation provision;
- (c) provide for a specified person to assess and pay compensation;
- (d) provide for expenses incurred (including the payment of compensation) to be met out of levies collected in accordance with section 213(3)(b) of the Financial Services and Markets Act 2000 (c. 8) (the Financial Services Compensation Scheme);
- (e) modify the effect of a transitional compensation provision;
- (f) enable the Financial Services Authority to amend the Financial Services Compensation Scheme;
- (g) modify the Financial Services and Markets Act 2000 in its application to an amendment pursuant to paragraph (f);
- (h) make, or require the making of, provision for the making of a claim by a responsible person for compensation whether or not he has already satisfied claims in tort against him;
- (i) make, or require the making of, provision which has effect in relation to claims for contributions made on or after the date on which this Act is passed.

(9) Provision made by virtue of subsection (8)(a) shall cease to have effect when the Financial Services Compensation Scheme is amended by the Financial Services Authority by virtue of subsection (8)(f).

(10) In subsections (7) and (8)-

- (a) a reference to a responsible person includes a reference to an insurer of a responsible person, and
- (b) "transitional compensation provision" means a provision of an enactment which is made under the Financial Services and Markets Act 2000 and-
 - (i) preserves the effect of the Policyholders Protection Act 1975 (c. 75), or

(ii) applies the Financial Services Compensation Scheme in relation to matters arising before its establishment.

(11) Regulations under subsection (7)-

- (a) may include consequential or incidental provision,
- (b) may make provision which has effect generally or only in relation to specified cases or circumstances,
- (c) may make different provision for different cases or circumstances,
- (d) shall be made by statutory instrument, and
- (e) may not be made unless a draft has been laid before and approved by resolution of each House of Parliament.

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CONSULTATION LIST

Association of British Insurers (ABI)
Association of Personal Injury Lawyers (APIL)
Association of Run-off Companies
Beachcroft LLP, Solicitors
Berrymans Lace Mawer, Solicitors
British Chambers of Commerce
Confederation of British Industry
Confederation of British Industry Scotland
Confederation of Shipbuilding and Engineering Union
Department for Constitutional Affairs
Department for Transport
Department for Work and Pensions
EEF, the manufacturers organisation
Equitas
Financial Services Compensation Scheme
Institute of Directors
Institute of Directors Scotland
International Underwriters Association
Irwin Mitchell, Solicitors
Lloyds
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Ministry of Defence
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The Forum of Insurance Lawyers (FOIL)
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