

KEVIN HOLLINRAKE MP



HOUSE OF COMMONS

LONDON SW1A 0AA

Andrew Bailey
Chief Executive
The Financial Conduct Authority
12 Endeavour Square
London E20 1JN

16th January 2019

Dear Andrew,

CLYDESDALE BANK TAILORED BUSINESS LOANS (IRHPs)

Thank you for your letter dated 19th November 2018 (Ref SA18107A) in response to my correspondence of 17th October, regarding the above. It appears that we are no further forward on this matter and I therefore wish to clarify and challenge the information provided.

I must express my frustration that it is, in this and many other cases, left to parliamentary groups, victims' groups and individuals to actively highlight wrongdoing and malpractice and press the case for justice and compensation in this and other matters, rather than the FCA, the body responsible for making sure that "consumers get a fair deal".

Review Process

You stated in your letter "*To be clear, the exercise also included the proactive identification and review of cases where product features had similarities to IRHP*".

I believe that this statement is incorrect. The features of fixed rate TBLs, in terms of their impact on customers, are identical to those of a vanilla swap. They were even sold directly by the bank to the customer using a CF30 trained bank treasury salesman in the same way. The only difference between them is that customers with swaps had two agreements, the loan and the swap, whereas TBL customers had everything rolled into one contract. The amount of money each customer paid each month was the same and the consequences of trying to exit the agreement were the same.

Clydesdale did not proactively identify and review the 8,372 of these products it sold.

Financial Services & Markets Act 2000

If the FCA follow the argument on the actual underlying hedge contract in the TBLs being a separate contract, booked by NAB not Clydesdale, then clearly the FCA not only can, but must, act if investments in the UK are being mis-sold whether they are designated under Financial Services and Markets Act or not.

Therefore, I am advised that the FCA can act under breaches of the Financial Promotions Order, and this regulatory approach has been established in other countries successfully. They fall into a grey area but, regardless, individuals can only sell hedged investments to certified sophisticated clients (under real FCA Handbook rules) or people experienced in such investments, that is why we believe they used CF30 advisers.

Contrary to your assertion, I am informed that the Approved Person's Rules (APER) at the time give the FCA a clear route to investigate where a Controlled Function individual i.e. David Thorburn, Clydesdale Bank's then CEO, is party to or has knowledge of, a product that has been designed to escape regulation or is aware of misleading sales practices under the Statements of Principle.

Mr Thorburn oversaw the sales side of the bank for years and must therefore be investigated for mis-selling the products that caused SMEs £billions of damages.

Treasury Select Committee

In their evidence session to the Treasury Select Committee, Mr Thorburn and Debbie Crosbie were disingenuous in a number of their statements. The supplementary written evidence provided by Clydesdale Bank to the Treasury Select Committee in June 2014 (Copy attached) confirmed that there were 10,499 such loans sold between 2001 and 2012.

The figure is broken down into 2,127 Category A, B & C loans, being the more sophisticated type and 8,372 of those loans tailored by Clydesdale Bank to fall outside regulation. I have now been provided with correspondence from Clydesdale Bank to Stewart Hosie MP and Ian Lightbody of the NAB Customer Support Group. The information that the FCA have provided in both cases is vague and misleading.

In both your response to me and your letter to the NAB Customer Support Group dated 20 December you state: "*TBLs. sit outside our regulatory remit. TBLs also known as 'hidden swap loans' or 'loans with embedded swaps'*".

When Clydesdale Bank's CEO, David Thorburn, gave evidence to the Treasury Select Committee in June 2014, he stated that "*there is not an embedded swap in any of these products*".

It is clear that the information that is being provided to the FCA is contradictory. How can such contradictions still exist, some five years on?

Indeed, in your recent letter to Stewart Hosie MP of 2 October 2018 (Ref:178807B – Copy attached) you confirm the number of these cases voluntarily reviewed to be "circa 1,500". Using your figure, the resultant number of loans that were not reviewed therefore amounts to circa 9,000.

You confirmed that Clydesdale Bank undertook “a voluntary review and redress remediation exercise” of cases which fell out with the “regulatory review” and that a “Skilled Person” oversaw the process.

1. *Can you please confirm out of the 1,500 or so cases how many businesses were compensated and to what extent?*

It is also interesting that the FCA “insisted” on the appointment of a “Skilled Person”, despite previously claiming that the FCA have no jurisdiction over the product.

It is no great secret that David Thorburn and Debbie Crosbie misled the Treasury Select Committee in June 2014, making a public commitment to investigate the Fixed Rate Loan situation, but we know that they only investigated cases where a complaint was already live or had previously been made.

They attached this **minor investigation** to the Category A Tailored Business Loan Product Review and then ended this “Review” in March 2015, nine months after making that commitment.

From March 2015 onward, they timed people out under the six-year FCA DISP rule limitation. The Fixed Rate Tailored Business Loans mirror Cat B Vanilla swaps, but whereas in the Interest Rate Hedging Product Review, the banks had to write to Cat B victims and offer them the chance to ‘opt-in’ to the Review, Clydesdale did not offer anyone with FRTBLs that option and only contacted people who had already complained.

This means around 7,500 businesses and victims were not contacted or given this opportunity over the 9,000 or so loans, some having multiple loans.

2. *How do the FCA intend to address these issues, including the six-year limitation rule?*

Furthermore, you may recall that having received the FCA response to the TSC Report into Conduct and Competition, the chair, Rt. Hon Andrew Tyrie MP, stated in October 2015:

“The Treasury Committee’s report in June 2015 identified a number of serious concerns about the FCA’s scheme. The Committee recommended – among other things – that the FCA should collect the information necessary to establish whether there are systemic failures in the review and publish its findings. It is welcome that the FCA now recognises the merit of conducting a review of how the redress scheme has been operating. It should get on with this. Restoration of confidence in the scheme is essential.”

3. *As the HMT also identified in the response published on 11 January 2019 your predecessor at the FCA committed to undertake a review of the IRHP scheme after legal proceedings related to the scheme were complete. Some three years later can we expect the publication of the FCA conclusions?*

Remaining SME Victims

In both your response to me and in your letter to Stewart Hosie MP, you refer to the remaining victims as a “*diminishing cohort*”. This is misleading as the NAB Customer Support Group number is increasing daily and are now in a position to reach out to the 7,500 or so other victims, which could have severe financial consequences for Clydesdale Bank if this is not dealt with quickly.

Regardless, quite clearly under DISP 1.3.6 several hundred existing complaints should automatically have led to an investigation of all the Fixed Rate sales.

Growing Support

At the Westminster Hall debate on Business Banking Fraud on 9 October 2018, one of five such debates in Parliament in the last calendar year, my colleague Paul Masterton MP spoke on behalf of constituents adversely affected by these CB loans.

Mr Masterton, quoted the Treasury Select Committee’s SME Finance Inquiry, stated that:

“The lack of public oversight, minimal transparency and limited coverage of the scheme means that the Committee cannot be confident that Clydesdale’s separate internal review will deliver outcomes equivalent to the FCA review upon which it is intended to be based.”

This is a particularly damning indictment of Clydesdale Bank’s stated review.

I understand that, subsequent to my original letter of 18 October 2018, the NAB Customer Support Group has written to the FCA on several occasions highlighting the true facts and figures, including the TSC 2015 Report which stated:

“141. The Committee explored the issue of the regulatory perimeter on multiple occasions, particularly in relation to commercial loans with ‘embedded’ interest rate hedging products, such as Tailored Business Loans...The FCA, when asked about problems illustrated by the possible mis-sale of certain TBLs by Clydesdale Bank, said: “I think we are of the view that this is a product that appears to be so close to one where we have had significant regulatory questions it would be better if we had the ability to regulate it.”

This report does not put the bank in favourable light, nor the product they sold.

We appreciate that there can be no retrospective sanction for breaches of regulation which were not in force at the time. However, there are other avenues to investigate if there is an appetite to do so.

4. *Why has the mis-sale of TBLs and subsequent mistreatment of customers never been the subject of a Section 166 review?*

FOS Concerns

Since the revelations to the Treasury Select Committee in June 2014, the sale of these loans has since been found, consistently, to contain further serious examples of malpractice.

The NAB Customer Support Group reports that it has recently been in direct contact with the management of the Financial Ombudsman Service regarding Clydesdale Bank's Tailored Business Loans and we understand from them that the FOS now has such concerns regarding this product, witnessed within so many individual cases, that they intend to refer it back to the FCA for further consideration, if they have not done so already?

5. *Have the FOS been in contact with the FCA regarding their concerns and, if so, how do you plan to address these concerns?*

Limited Options for Redress

It is also incorrect that "*customers continue to have the opportunity to complain to the bank*". Clydesdale have been refusing to accept valid complaints about mis-sales which are more than six years old for some time now because they can do so under FCA DISP rules.

You also stated in your correspondence to myself, Stewart Hosie MP and the NAB Customer Support Group that individuals can "*take the case to court*" or "*pursue his claim through legal channels if he feels he has exhausted the complaints process*". As I am sure you are aware from our campaigning in this area, these statements are unrealistic and impractical. Across the board banks have adopted extremely aggressive tactics using large and powerful legal teams to overwhelm and overpower SME owners who simply cannot afford to compete with them.

Research has shown that to raise an action against a bank for £1million, a capital provision of £400K is required to take the case to court. Badly affected SME owners just do not have this type of funding available.

At the recent NAB AGM in Australia, a victim suggested that this major institution should consider, like government departments are now compelled to do, being a "Model Litigant", which would require them to:

- act consistently in the handling of claims and litigation;
- deal with claims promptly and not causing unnecessary delay in the handling of claims and litigation;
- endeavour to avoid, prevent and limit the scope of legal proceedings wherever possible, including by giving consideration in all cases to alternative dispute resolution before initiating legal proceedings and by participating in alternative dispute resolution processes where appropriate;
- where it is not possible to avoid litigation, keeping the costs of litigation to a minimum

- pay legitimate claims without litigation, including making partial settlements of claims, or interim payments, where liability has been established and it is clear that their liability is at least as much as the amount to be paid;
- not seek to take advantage of an impecunious opponent;
- not contest matters which it accepts as correct;
- not institute and pursue appeals unless the State believes that it has reasonable prospects for success, or the appeal is otherwise justified in the public interest.

The NAB chairman committed to consider this at their first board meeting of 2019 in February.

6. *Would you agree that our major banks should be encouraged to take such an approach and what do the FCA propose in this regard?*

Compensation scheme for historic cases

You state that *"It is for Parliament to decide whether the FCA's remit should be extended to cover these loans. However, even if our remit were extended, we could not take action retrospectively"*

As you know, we have proposed a truly independent arbitration mechanism for businesses in disputes with their financial service providers, including those that have already gone through other ad hoc reviews, including those conducted by CYBG.

7. *Do you support inclusion of TBL/IRHP compensation claims within the historic cases scheme? If not, how do you foresee these issues being addressed?*

Conclusion

The fact that TBLs were phased out in 2012 means that most complaints regarding these products require a willingness to instigate a retrospective review, something that to date the FCA appear reluctant to instigate.

In view of this, and given the desire to deal with the legacy issues stated by UK Finance, it would be useful to clarify how the FCA approach to TBLs intend to resolve these matters.

I recently met with representatives of Clydesdale Bank's management team, at their request, and during the meeting I highlighted several issues relating to their poor treatment of customers via this TBL product. They have voiced a willingness to investigate these and other such cases that we can identify. In view of this, and their previously stated willingness to work with the FCA, on any other related matters, I suggest that we now jointly take them up on this pledge.

Rather than prolong the issue further with correspondence, I am willing to facilitate a meeting early this year, in which representatives of the relevant parties (the FCA, the FOS, CYGB Plc, NABCSG and the APPG for Fair Business Banking and our affiliates) are invited to participate.

This should provide an open forum where the facts are agreed, and all avenues can be discussed to get any remaining issues resolved quickly and amicably.

8. *Would you agree to take part in such a meeting?*

I look forward to hearing from you soon.

Kind regards,



Kevin Hollinrake MP
Co-Chair of the All-Party Parliamentary Group on Fair Business Banking

Encl.

Addendum 1 – Treasury Select Committee Supplementary Information Provided by Clydesdale Bank

Addendum 2 – Andrew Bailey’s reply to Stewart Hosie MP dated 2 October 2018

Addendum 3 – Andrew Bailey’s reply to NABCSG dated 20 December 2018

cc. Stewart Hosie MP
David Duffy, Chief Executive Officer, CYBG

Clydesdale Bank – Supplementary evidence submitted in relation to the SME Lending inquiry

Question 478 - Number of products sold since mid-2008.

Number of TBL products provided since mid-2008 that are within the scope of the FCA guided voluntary review.

	In-scope TBLs Provided		Still Live at 02/06/14	
	No. of Loans	No. of Customers	No. of Loans	No. of Customers
Total	572	497	283	260 customers

Number of fixed rate TB products provided since 2008 (not within scope of the FCA guided review).

	Fixed Rate TBLs Provided		Still Live at 02/06/14	
	No. of Loans	No. of Customers	No. of Loans	No. of Customers
Total	4235	3441	2444	2112 customers

Question 480 – Break Cost explanation material.

Examples of the break cost explanations that have been provided to customers over time are attached.

Question 517

The 'total asset/capital value' of all fixed rate and in-scope TBLs sold.

The numbers provided below relate to the amount of the Tailored Business Loan that includes interest rate protection ie the sum of protected loan starting amount rather than the total asset/capital value, which would include debt that is on a variable interest rate basis and not protected from rate movements.

Value and number of TBL products provided since 2001 that are within the scope of the FCA guided review			
Total No. of In-scope TBLs provided 2001-2012	Number of In-scope TBLs Still Live as at June 2014	Sum of protected loan starting amount	Sum of protected loan starting amount for those loans that are still live
2127	614	£1,541m	£467m

Value and number of Fixed Rate TBL products provided since 2001			
Total No. of Fixed Rate TBLs provided 2001-2012	Number of Fixed Rate TBLs Still Live as at June 2014	Sum of protected loan starting amount	Sum of protected loan starting amount for those loans that are still live

8372	3276	£6,269m	£2,178m
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The appendixes to this document can accessed [here](#).



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Stewart Hosie MP
SNP Parliamentary Office
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2 October 2018

Our Ref: 180807B

Dear Stewart

RE: Jim McGrory, Matchstart Ltd

Thank you for your letter of 3 August 2018 behalf of your constituent, Mr Jim McGrory. I am sorry it has taken me so long to respond. We contacted the Clydesdale Bank (Clydesdale) to understand the case, but even so I had hoped to have been able to write sooner.

Mr McGrory has been in contact with you regarding a Tailored Business Loan that he arranged with Clydesdale. His primary concern is the bank's failure to provide him with details of how the breakage costs and interest are calculated.

I understand there has been communication and correspondence between Mr McGrory and Clydesdale on this issue since 2010. Clydesdale investigated and reviewed the sale and upheld the complaint from Mr McGrory making an offer of direct losses and compensation for the interest paid. These offers were rejected by Mr McGrory. During 2013 and 2016, subsequent offers were made by Clydesdale, but these were also rejected by Mr McGrory. I understand Mr McGrory then took his complaint to the Financial Ombudsman Service.

If Mr McGrory disagrees with the decision and award made by the Financial Ombudsman Service, he may be able to either appeal the decision or pursue his claim through legal channels if he feels he has exhausted the complaints process.

Going back to the reason for your constituent's contact with you, I understand that Clydesdale and Mr McGrory exchanged emails in March 2018. Clydesdale offered to move the account to a variable rate loan, and to absorb any break costs incurred by moving the existing loan as part of the settlement that was offered.

On your request for an update on progress concerning Clydesdale Bank's Tailored Business Loans, the Bank has completed a voluntary review and redress exercise of the sale of the circa 1,500 loans. The methodology for this exercise was reviewed by us. The cohort of customers who remain in dispute with the Bank is diminishing and Clydesdale is keeping the FCA up-to-date with its progress.

I hope that this is helpful.

Yours Sincerely

Andrew Bailey
Chief Executive

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20 December 2018

Dear Mr Lightbody

CLYDESDALE BANK TAILORED BUSINESS LOANS

Thank you for your letter of 21 October 2018 and previous email correspondence. I apologise for the delay in getting back to you.

Your letter highlights concerns with Clydesdale Bank's ('Clydesdale') approach to reviewing Tailored Business Loans (TBLs) and you request that the FCA fully investigates the approach taken by Clydesdale and engages with Mr. Hollinrake MP and his team. You also express concern about the potential for undue influence by Clydesdale on the FCA regarding their approach to reviewing TBLs.

The FCA's Role

It may be helpful to explain the FCA's role in relation to TBLs as they sit outside our regulatory remit. TBLs, also known as 'hidden swap loans' or 'loans with embedded swaps', are types of commercial loans which, as highlighted by the Government, are not regulated by the FCA and our rules and principles do not apply to their sale. For this reason, the FCA cannot require banks to set up a redress scheme for such products. It is for Parliament to decide whether the FCA's remit should be extended to cover these loans. However, even if our remit was extended, we could not take action retrospectively.

Representatives from the FCA wrote twice to the Treasury regarding our regulatory remit in respect of TBLs in September 2013 and January 2014. In June 2014, our General Counsel, Sean Martin, also wrote to Andrew Tyrie MP and the Chair of the Treasury Select Committee (TSC) explaining our decision that loans with similar features to interest rate hedging products (IRHPs), such as TBLs, fell outside our regulatory remit. More recently, on 30 January 2018, I wrote to Nicky Morgan MP, the current Chair of the TSC about the regulatory perimeter, and the limits to our powers and redress schemes to benefit SMEs. For ease of reference, copies of the letters are attached and can also be found on the FCA and TSC websites:

https://www.parliament.uk/documents/commons-committees/treasury/140626_Sean_Martin_to_Andrew_Tyrie.pdf

<https://www.parliament.uk/documents/commons-committees/treasury/Correspondence/2017-19/FCA-powers-perimeter-300118.pdf>

Clydesdale's voluntary review of TBLs

In late 2013 Clydesdale agreed to undertake a voluntary review and redress remediation exercise for TBLs which had similar product features to IRHPs. This exercise was on similar terms to the IRHP review, including the use of a Skilled Person to ensure the scope, timescales and quality aspects were met. The number of customers who remain in the process with Clydesdale is diminishing and the firm is keeping the FCA up-to-date with its progress.

For TBL cases which did not meet the criteria to be part of the voluntary exercise, customers continue to have the opportunity to complain directly to the bank. Eligible customers¹ can also complain to the Financial Ombudsman Service (FOS) if a complaint can't be resolved between the bank and customer. The FOS will provide an unbiased view on the suitability of the sale and has the legal power to offer compensation up to £150,000. In the event of redress owed over £150,000, the FOS can recommend the bank to make a payment above this value but it cannot force them to do so. Customers can also look to take the case to Court.

Your concerns

Your letter expresses concern about Clydesdale's review approach to TBLs and requests that the FCA should fully investigate the process. However, as outlined above, the FCA's role in relation to TBLs is restricted given the unregulated nature of the product. We cannot, therefore, require banks to set-up redress schemes. For TBLs included as part of Clydesdale's voluntary review, the FCA has closely monitored the redress remediation exercise as outlined above.

Your letter highlights that Clydesdale's management team continue a "tactic of denial, despite substantial new evidence of their wrongdoings surfacing, pretty much, daily". The Senior Managers Regime ('SMR'), introduced in 2016, means there is a senior manager responsible for the operational effectiveness of redress scheme such as TBLs. SMR means that we are able to hold senior management of banks to account for the way that they treat their customers and the FCA will do that where evidence of wrongdoing is identified. We have seen SMR responsibilities incorporated into job descriptions and role profiles for Board members and Executives, as well as remuneration awards reduced for performance related issues linked to SMR responsibilities. We have also observed the senior managers regime positively impacting the way that banks operate and their understanding of their ongoing requirement to demonstrate competence in role.

You also suggest that Clydesdale may have applied pressure on the FCA, particularly given the bank's Risk Committee Chair, Clive Adamson, had previously worked as a Director of Supervision at the FCA. I can assure you that this is not the case. As outlined above on the FCA's role, we began our engagement with the TSC on our regulatory remit for TBLs back in 2014 and have worked with multiple firms as part of the process over a similar timeframe, including National Australia Bank and Clydesdale. The approach for reviewing TBLs with Clydesdale was agreed before Clive Adamson joined the Clydesdale Board in 2017 and has not altered. Our insistence on the use of a Skilled Person to provide independent oversight of the banks' review and report its findings to the FCA has also helped to ensure there is an independent assessment process in place.

Finally, you suggest that it is imperative that we take Mr Hollinrake MP and his team's enquiry seriously. This is absolutely the case and we continue to engage with Mr Hollinrake and the team on the matters raised.

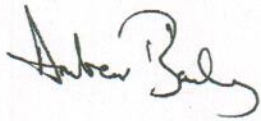
¹ Information on customer eligibility - <https://www.handbook.fca.org.uk/handbook/DISP/2/7.html>

Conclusion

I hope that this response is helpful in setting out the role of the FCA, our regulatory remit and the options available to customers who purchased a TBL product through Clydesdale.

I am sorry we cannot help you in the way you wanted and would like to thank you for bringing your concerns to our attention. If you believe there is any subsequent information that we should aware of, please do get in touch.

Yours Sincerely

A handwritten signature in black ink that reads "Andrew Bailey". The signature is written in a cursive style with a large initial 'A'.

Andrew Bailey
Chief Executive