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Policy Framework for Financial Consumer Protection in Korea: Focusing on the Financial Consumer Protection Act of 2020*

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ABSTRACT

In Korea, the unified Financial Consumer Protection Act (FCPA) was enacted in March 2020, and will come into effect in March 2021, to consolidate dispersed provisions relating to financial consumer protection under the relevant financial regulation laws such as banking law, capital market and securities law, and insurance business law, and to set up a new regime capable of further enhancing financial consumer protection. As a single unified law for financial consumer protection, the FCPA is considered a good model for other countries that are attempting to reform their financial consumer protection systems. In general, the FCPA establishes a robust framework to promote financial consumer protection, including (i) six principles for business conduct such as suitability rule and explanation duty, (ii) consumers' rights to terminate unlawful contracts, (iii) a financial supervisor's product intervention power, and (iv) improvements to the financial dispute mediation system. However, further enhancements to financial consumer protection are needed. Therefore, this article suggests additional improvements, including allowing binding mediation decisions and 'class' dispute mediation and establishing a twin-peaks regulatory model of financial regulation.

Keywords: Financial Consumer, Financial Consumer Protection Act, Financial Dispute, Financial Ombudsman, Suitability Rule, Appropriateness Rule, Duty to Explain, Financial Product Seller, Financial Advisor

I . Introduction

In Korea, in March 2020, the integrated Financial Consumer Protection Act (FCPA) was enacted to come into effect in March, 2021, after long and tedious discussions on the National Assembly floor after the bill was first introduced in 2011, and proposed again by the government in 2017. Conflicts between relevant interested

groups such as financial institutions and financial consumer civic groups, as well as further unresolved issues on reforming the financial regulatory system for promoting financial consumer protection, delayed its enactment. However, the recent cases in 2019 and 2020 of huge mis-selling of private hedge funds that inflicted large financial losses on financial investors prompted the National Assembly to enact the FCPA.

This new law consolidates several provisions or regulations dispersed in various relevant laws under the Bank Act for banks, the Capital Market and Financial Investment Business Act for securities companies and asset management firms, the Insurance Business Act for insurance companies, the Credit Specialty Financing Business Act for credit card companies, and the Mutual Savings Bank Act for mutual savings banks. In addition, the FCPA

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is introducing several new schemes for enhancing financial consumer protection, which is the main purpose of enacting the new single law.

In particular, the FCPA is adopting the “same-function-same-regulation” principle where as long as financial institutions selling financial products or providing financial advice engage in the same activities or conduct, the same regulations will apply to all financial institutions, regardless of their type. Further, the FCPA reflects the trends toward reinforcement of the financial consumer protection regime since the 2008 global financial crisis (GFC).

In retrospect, the background for the enactment of the FCPA dates back to the 2008 GFC that caused losses for many financial consumers and investors and also to the occurrence of several cases of mis-selling of financial products, including mis-selling of ‘KIKO’ (knock-out knock-in) currency option derivative products sold by banks to small- and medium-sized export companies in 2008,¹ mis-selling of subordinated bonds issued by mutual savings banks in 2011, mis-selling of investment products such as specified monetary trusts by DongYang Securities Co., Ltd. in 2013, mis-selling of derivative-linked fund products in 2019, and mis-selling of private hedge fund products in 2019 and 2020. These several mis-selling cases have greatly affected the enactment of the FCPA aimed at promoting financial consumer protection.

The main objective of this article is to analyze the FCPA and suggest some improvements for more enhanced financial consumer protection. With this goal, Part II reviews the main contents of the FCPA, Part III assesses the FCPA and recommends improvements for promoting financial consumer protection, and Part IV presents the conclusions.

II. Overview of the Korean Financial Consumer Protection Act (FCPA) of 2020

Overall, the FCPA reinforces regulations on the conduct of business in selling or providing financial advice on financial products, such as requiring registration for financial product sellers or financial advisors, mandating that financial companies set up a robust internal control scheme for financial consumer protection, and adopting six principles for conduct of business, including suitability rule and explanation duty principle. It enhances remedies for harmed financial consumers by introducing new schemes such as allowing financial consumers the rights for termination of unlawful contracts, and improving the financial dispute mediation system. It also seeks to reduce information asymmetry problems by imposing stronger disclosure requirements, expanding the scope and contents of financial products to be disclosed, and enhancing the financial education system. It further reinforces supervision by regulators upon whom great powers are conferred, such as the product intervention power and the right to set punitive administrative financial penalties. The following discussion details the new regime for financial consumer protection to be implemented by the FCPA 2020.

A. Entry Regulation - Registration Requirements for Financial Product Sellers and Financial Advisors

The FCPA requires financial companies or entities seeking to sell financial products or provide financial advice to their customers to register with the Financial Services Commission (FSC), a financial regulator, by satisfying certain requirements as prescribed by the FCPA and the regulations thereof. But, financial companies are exempt from this registration requirement if such business of selling financial products or providing financial advice is permitted under the relevant law applicable to such financial companies.² For example, since banks are allowed to engage in a business of insurance agency under the Insurance Business Act,³ the banks are not required

¹ For more information and analysis of mis-selling cases of KIKO products, see Jung Hoon Kim, “Regulation of Mis-selling of Over-the-Counter Derivatives: Comparative Study of South Korea and the UK,” Dissertation for the Degree of Doctor of Philosophy, University of Birmingham, Jan. 2019.

² FCPA Art. 12.

to file a registration with the FSC.

The FCPA categorizes financial product sellers into two types: (i) direct sellers and (ii) agents or brokers for selling financial products. The direct sellers are financial firms or entities that directly sell financial products to their customers without using agents or brokers, such as manufacturers of financial products, including banks, securities firms and insurance firms.⁴ For example, banks are able to directly sell financial products such as deposit or loan products manufactured by themselves to their customers.

The agents or brokers who sell financial products are financial companies or entities or even individuals, including individual deposit or loan brokers or insurance agents or brokers.⁵ Banks as agents or brokers are able to sell financial products manufactured by securities firms, asset management companies or insurance firms to their customers. For example, banks are allowed to sell insurance products to customers under the Bank Act and the Insurance Business Act so that banks can be regarded as agents for insurance products under the FCPA.⁶

In addition, the FCPA introduces a new business category of advisors on financial products, such as independent financial advisors, who do not sell financial products but only provide advice on financial products which customers are interested in purchasing.⁷

B. Category of Financial Products

The FCPA categorizes financial products into four types: deposit-type financial products, loan-type financial products, investment-type financial products, and insurance-type financial products.⁸

Deposit-type financial products are deposit instruments provided by banks and mutual savings banks, including time or demand deposits and installment deposits, which are permitted to conduct such deposit business under the Bank Act and the Mutual Savings Bank Act, respectively, as well as financial products similar to deposit

products as prescribed by the Enforcement Decree of the FCPA.⁹

Loan-type financial products are loan instruments provided by banks, mutual savings banks, and credit specialty financing companies, including credit card companies, leasing firms and installment financing companies,¹⁰ which are allowed to engage in such lending business under the Bank Act, the Mutual Savings Bank Act, and the Credit Specialty Financing Business Act, respectively. They also include financial products similar to loan products as prescribed by the Enforcement Decree of the FCPA.¹¹

Investment-type financial products are financial investment products such as securities and financial derivative products under the Capital Market and Financial Investment Business Act, as well as products similar to financial investment products, the principal of which is not guaranteed, as prescribed by the Enforcement Decree of the FCPA.¹²

Insurance-type financial products include insurance products such as life insurance products and casualty insurance products, provided by insurance companies, which are permitted to engage in such insurance business under the Insurance Business Act, as well as products similar to insurance products as prescribed by the Enforcement Decree of the FCPA.¹³

The FCPA intends to comprise new types of financial products subject to regulations by prescribing those in the regulations of the FCPA through a ‘similarity test.’ Thus, the role of the FSC as a financial regulator will be important since it will decide which products should be included in the scope of the regulated financial products.

C. Reinforcement of an Internal Control System of Financial Product Sellers and Financial Advisors

The FCPA reinforces an internal control system of financial product sellers and advisors for promoting financial consumer protection. Under this law, financial product

³ Insurance Business Act Art. 91(1), Enforcement Decree Art. 40(1).

⁴ FCPA Art. 2 Item 2 & 3.

⁵ FCPA Art. 2 Item 2 & 3.

⁶ Bank Act Art. 28, Enforcement Decree of Bank Act Art. 18-2, Insurance Business Act Art. 91(1), Enforcement Decree Art. 40(1).

⁷ FCPA Art. 2 Item 4 & 5.

⁸ FCPA Art. 3.

⁹ FCPA Art. 3 Item 1.

¹⁰ FCPA Art. 3 Item 2.

¹¹ FCPA Art. 3 Item 2.

¹² FCPA Art. 3 Item 3.

¹³ FCPA Art. 3 Items 4.

sellers and financial advisors as prescribed by the Enforcement Decree of the FCPA are required to set up the internal control standards that their employees and agents or brokers should comply with in discharging their duties.¹⁴ Further, financial product sellers and financial advisors as prescribed by the Enforcement Decree of the FCPA are required to stipulate the financial consumer protection procedures and standards which their employees should comply with when they conduct their business, in order to protect financial consumers by preventing financial consumers' complaints and procuring speedy remedies for inflicted financial consumers.¹⁵ This framework is designed to promote financial consumer protection.

D. Adopting Six Principles for Conduct of Business

In order to protect financial consumers, the FCPA prescribes six principles or rules in respect of conduct of business for financial product sellers and financial advisors: suitability rule, appropriateness principle, duty to explain, prohibition of unfair business activities, prohibition of unfair recommendation activities in selling or providing advice on financial products, and restriction of unfair and unclear advertising.

1. Suitability Rule

The suitability rule, one of the most important principles in the regulation, applies to financial product sellers or financial advisors who sell or provide advice on insurance-type financial products, investment-type financial products and loan-type financial products. It excludes deposit-type products and applies only to unsophisticated financial consumers, not to accredited financial consumers.¹⁶ Under this rule, financial product sellers or financial advisors are prohibited from recommending financial products not suitable to financial consumers when taking into account their assets or income, investment experiences, or creditworthiness, depending on the types of financial product.¹⁷ Previously, this suitability rule was not applicable to loan-type financial products, but the new law

expands this rule to such loan-type financial products.

2. Appropriateness Principle

The appropriateness principle, like the suitability rule, also applies to financial product sellers or advisors who sell or provide advice on insurance-type financial products, investment-type financial products and loan-type financial products, excluding deposit-type products and applying only to non-accredited financial consumers.¹⁸ Under this principle, if financial products that consumers want to purchase are believed to be unsuitable for them (taking into consideration their assets or income, investment experiences or creditworthiness, depending on the types of financial product), financial product sellers or advisors are required to notify such financial consumers of the inappropriateness and then obtain their confirmation.¹⁹

3. Duty to Explain

The duty to explain applies to all types of financial products, but only for unsophisticated financial consumers.²⁰ Financial product sellers or advisors are required to explain details of financial products as prescribed by the FCPA and the Enforcement Decree thereof, including the interest rate or its change and prepayment penalties in case of loan-type financial products, when they recommend financial products to their financial consumers or the consumers request them to do so.²¹

4. Prohibition of Unfair Business Activities

Financial product sellers or financial advisors are prohibited from conducting unfair business activities, such as activities forcing financial consumers to execute contracts against their will or requiring unfair collaterals in relation to executing contracts in cases of loan-type financial products, and other activities infringing on rights of financial consumers, taking advantage of financial companies' superior powers.²²

¹⁴ FCPA Art. 16(2).

¹⁵ FCPA Art. 32(3).

¹⁶ FCPA Art. 17(1), (2).

¹⁷ FCPA Art. 17(3).

¹⁸ FCPA Art. 18(1).

¹⁹ FCPA Art. 18(2).

²⁰ FCPA Art. 19(1).

²¹ FCPA Art. 19(1).

²² FCPA Art. 20(1).

5. Prohibition of Unfair Recommendation Activities

Financial product sellers or financial advisors are prohibited from providing unfair recommendation activities in selling or providing advice on financial products, including misrepresenting the contents of financial products, providing misleading information on financial products, providing only favorable information on financial products, and comparing with other financial products without any objective grounds or without disclosure of comparison standards on financial products.²³

6. Fair and Clear Advertising Regulation

Financial product sellers or financial advisors are required to make advertising fair and clear on financial products, without misleading financial consumers' understanding of financial products.²⁴ Also, the FCPA prescribes certain elements to be listed in the advertisements, including contents of financial products, names of financial product sellers or advisors, investment risks in case of investment-type financial products, and terms of loans in case of loan-type financial products.²⁵

E. Regulations on Conduct of Business for Financial Advisors

The FCPA introduces a regulated category of a financial advisor who provides financial advisory services to consumers with respect of all types of financial products, especially an independent financial advisor who has not relationship with financial product sellers or manufacturers. Of course, currently, there exist financial investment advisors who provides advisory services with respect to investment financial products such as securities and financial derivatives under the Capital Markets and Financial Investment Business Act. The FCPA expands the regulations of financial investment advisors into financial advisors dealing with all types of financial products, including loan-type financial products.

The FCPA, particularly, stipulates the standards of business conduct which financial advisors should adhere

to. Financial advisors must provide financial advice with due care for the best interests of financial consumers.²⁶ Further, in providing financial advisory services, financial advisors are required to notify financial consumers of, among others, (i) whether they are independent financial advisors, (ii) the scope of financial products on which financial advice is provided, and (iii) the size and kinds of monetary benefits if such benefits are provided by financial product sellers.²⁷ The FCPA also lists prohibited activities of independent financial advisors, such as prohibition of receiving monetary benefits from financial product sellers, including their employees, except in certain minor cases, and other activities that may cause conflicts of interest with their financial consumers.²⁸ These prohibitions aim to maintain independent financial advisors' independence from financial product sellers or manufacturers, preventing unfair influences from them.

F. Reinforcement of Remedies for Financial Consumers

The FCPA introduces new several schemes to promote financial consumer protection, particularly for the purpose of reinforcing remedies for financial consumers who are damaged by mis-selling behaviors of financial product sellers or by advice activities of financial advisors. For example, this new law allows financial consumers the right to terminate unlawful contracts within five years after execution of contracts when it is discovered that financial product sellers or advisors had violated the relevant provisions regarding the suitability rule, duty of explanation, appropriateness rule, unfair business activities, or unfair recommendation activities.²⁹ This new regime might significantly contribute to promoting financial consumer protection, although this will be harmful or burdensome to financial product sellers or advisors. However, the cases of disputes in which financial service providers violated those provisions may increase, even leading to complicated legal issues. Hence, a regime for resolving such disputes needs to be developed by, for example, creating an internal special review and decision

²³ FCPA Art. 21.

²⁴ FCPA Art. 22(2).

²⁵ FCPA Art. 22(3).

²⁶ FCPA Art. 27(1), (2).

²⁷ FCPA Art. 27(3).

²⁸ FCPA Art. 27(5).

²⁹ FCPA Art. 47(1).

committee in financial institutions, the main role of which is to determine whether financial companies' violations trigger financial consumers' termination of contracts.

In addition, the FCPA confers upon financial consumers the right to withdraw their offers to contracts regarding those financial products except for deposit-type financial products, within 7, 10, or 15 days, depending on the types of contract, after execution of the contracts.³⁰ This is also expected to provide financial consumers with more benefits in terms of enhancing financial consumer protection. However, cases of disputes over satisfaction of the terms to withdraw the offers between financial product sellers and financial consumers may increase. Hence, like financial consumers' termination of contracts, a scheme for determining whether financial consumers' withdrawals of the offers satisfy the terms of contracts should be invented.

Further, the FCPA stipulates that financial product sellers or financial advisors are liable for damages incurred by financial consumers due to product service providers' violation of the FCPA regulations, if willful or negligent.³¹ Particularly, financial product sellers or financial advisors are liable for damages to financial consumers due to violation of the duty to explain unless they prove their violation was perpetrated without intent or negligence.³² In other words, the responsibility for the proof is on financial service providers so that financial consumers do not have to show that financial service providers violated the duty to explain with intent or negligence. In addition, direct sellers of financial products are liable for damages to financial consumers due to their agents or brokers' activities unless they prove that they discharged their duties to supervise their agents or brokers with due care and then exerted efforts to prevent damages to consumers.³³

G. Improvements for Operating a Financial Dispute Mediation Scheme as an ADR

The FCPA implements new measures to upgrade efficiency in the financial dispute mediation system for consumers who are damaged from mis-selling of financial

products by financial institutions such as banks, securities firms and insurance companies. Currently, the financial dispute mediation scheme is conducted by the Financial Dispute Mediation Committee (FDMC) within the Financial Supervisory Service (FSS), another non-governmental financial regulator mainly dealing with examinations and sanctions on financial institutions.

The FCPA introduces two new regimes to pursue a more efficient financial dispute resolution system. First, the FCPA introduces a new scheme where a court is able to order suspension of the litigation process for a case which is still in the process of financial dispute mediation.³⁴ Second, the FCPA prohibits financial institutions from bringing a lawsuit to a court for cases of disputed amounts below 20 Million Won (approximately US\$17,000) initiated by unsophisticated financial consumers, that are still in the process of financial dispute mediation.³⁵ This newly introduced system is assessed to be a measure to give more protection in the financial dispute resolution system, taking into account financial consumers' weak position compared with financial institutions.

H. Measures for Reducing Information Asymmetry for Financial Consumers

The FCPA also seeks to improve the financial education system for financial consumer protection and to resolve the problems of information asymmetry, which refers to "imbalance of information between insiders, who have direct access to information about the benefits and risks of particular products or industries, and outsiders, who lack such information."³⁶ The Financial Education Council consisting of officials from other relevant government departments is established for reviewing and making a resolution on financial education policy, and is sponsored by the FSC.³⁷ The FCPA also requires the FSC to set up a national financial education plan and strategy, reflecting investigative reports on financial consumers' ability

³⁰ FCPA Art. 46(1).

³¹ FCPA Art. 44(1).

³² FCPA Art. 44(2).

³³ FCPA Art. 45(1).

³⁴ FCPA Art. 41.

³⁵ FCPA Art. 42.

³⁶ William Magnuson, "Financial Regulation in the Bitcoin Era," *Stanford Journal of Law, Business & Finance*, Vol. 23. No. 2, 2018, pp. 178-179 ("Asymmetric information can lead to market failure if insiders are able to extract rent from outsiders, or alternatively, if outsiders refrain from entering into the markets at all.").

³⁷ FCPA Art. 31.

and knowledge in finance every three years.³⁸

Further, the FCPA expands the scope and contents subject to comparison of financial products, the details of which will be prescribed in the Enforcement Decree of the FCPA, in order to provide financial consumers with more information disclosure on financial products.³⁹

I. Reinforcement of Financial Supervision

The FCPA gives stronger powers to financial supervisors, recognizing a need to strengthen financial supervision of financial companies' business conduct which create damages or losses to financial consumers. For example, the FCPA bestows the FSC with a product intervention power that allows the FSC to make an order prohibiting or restricting the sale of financial products if the FSC deems that such sale is highly likely to inflict damages on financial consumers.⁴⁰ This is modeled after the UK's product intervention power under the Financial Services and Markets Act 2000.⁴¹ It also introduces a punitive administrative financial penalty scheme by imposing financial penalties up to the maximum 50% of relevant total revenues when direct sellers of financial products or financial advisors engage in unlawful business conduct such as violation of the explanation duty, unfair business activities, unfair recommendations, or violation of advertising regulations.⁴²

III. Assessment of the FCP Act and Future Tasks

A. Assessment of the FCP Act 2020

Overall, it can be assessed that the FCPA has introduced new 'reformative' schemes for enhanced protection of financial consumers, who are in a weak position relative to financial service providers. Nevertheless, the incidence

of disputes or conflicts between financial consumers and financial institutions may increase in the process of enforcing the regulations introduced by the FCPA. For example, in exercising consumers' rights to withdraw an offer for purchasing financial products, cases of disputes on the satisfaction of the conditions for withdrawal may increase. Further, in the matter of consumers' rights to terminate unlawful contracts due to financial product sellers' violations of principles of business conduct such as the suitability rule or explanation duty, disputes between financial consumers and financial product sellers over whether a specific conduct was in violation of the relevant provisions in the FCPA may increase.

Thus, a more efficient regime for resolving such disputes needs to be set up. In this connection the roles of the regulators, the FSC and the FSS, will become more important. So, for setting-up a framework for more effective regulation and supervision in enforcing the FCPA, the current inefficient 'vertical dual regulatory system' of the FSC and the FSS should be improved, in order to prevent previous incidents, such as not being able to prevent cases of mis-selling of financial products and insolvencies of mutual saving banks. We need to create a more independent and specialized supervisor. In this context, we may consider establishing a twin-peaks financial regulatory system, which establishes two separate regulators, a prudential regulator and a business conduct regulator, the latter of which will focus more on financial consumer protection. This author believes that a twin-peaks regulatory scheme will be the best model for protecting financial consumers.

B. Suggestions for Reform of the Financial Dispute Mediation Scheme

With respect to promoting financial consumer protection, an efficient system needs to be established to procure remedies for financial consumers' harms caused by financial companies' unfair or illegal activities. Financial consumers may seek legal remedies through the court; however, this procedure is very costly and takes a long time for resolution. Instead, an alternative dispute resolution (ADR) system may be preferable because the ADR is significantly less expensive and faster than litigation procedures in court. The ADR system will be an efficient tool to provide remedies for consumers in financial dispute

³⁸ FCPA Art. 30(3), (4).

³⁹ FCPA Art. 32.

⁴⁰ FCPA Art. 49(2).

⁴¹ Section 137D.

⁴² FCPA Art. 57(1).

cases, taking into account the features of these cases, which entail small disputed amounts and many affected consumers. In this connection, the current financial dispute mediation scheme should be improved as discussed below.

1. Creating an Independent Financial Dispute Mediation Agency

It is necessary to create a new independent financial dispute resolution agency by separating the mediation function currently conducted by the FDMC within the FSS from the FSS organization. The FSS as a financial regulator currently operates this mediation system in the matter of financial disputes.⁴³ One of the advantages of the mediation scheme operated by the FSS is that if both disputing parties accept the decisions offered by the FDMC as a mediator, then the resolution award becomes legally binding without further recourse to the court.⁴⁴ However, the current mediation scheme lacks fairness in that the regulator operates this system. The regulated financial firms are highly likely to be burdened by the 'implicit' pressure from the regulator to accept the decision proposed by the FDMC. The current system also lacks specialization in the matter of financial mediation, because financial dispute settlement is not regarded as an important function within the FSS organization as compared with prudential regulation and business conduct regulation. So, it is more difficult to retain qualified staff, including legal experts, who are eligible to handle the legal issues of disputed cases.

This necessitates the establishment of a system where injured financial consumers are impartially and sufficiently protected through a fair financial dispute mediation procedure. To achieve this, the mediation system needs to be handled by an independent institution, rather than by a supervisor. Thus, the financial dispute mediation function should be separated from the FSS, and a new independent agency should be established under the auspices of a regulator. Securing such impartiality and specialization will promote reliability of mediation procedures so that financial consumers should prefer the mediation procedure to the court system. Comparatively, the UK

and Australia have set up their respective independent financial dispute resolution agencies, called the Financial Ombudsman Service, to be operated independently, although it is under the auspices of the regulators.⁴⁵

2. Requiring the FDMC's Decisions to be Binding on Financial Institutions

To promote protection of financial consumers, we need a new scheme that the FDMC's decisions should be binding on financial institutions once a financial consumer accepts such decisions in cases with a small disputed amount (for example, below 30 Million Won). This argument is persuasive in that we need to protect financial consumers who are weak parties against financial institutions. When financial companies are not satisfied with a mediator's proposal for the settlement, they are usually inclined to bring the case to the court rather than accepting the mediator's proposal. Then, in that case, weak financial consumers do not have any other choice but to defend a lawsuit brought by financial institutions, which is very costly and disadvantageous to financial consumers.

Of course, the counterargument may be raised that imposing binding decisions on financial institutions violates their rights to bring litigation, as permitted under the Korean Constitution.⁴⁶ However, if we introduce this system only for disputed cases involving small amounts, this counterargument will not be so persuasive because the Constitution allows some restrictions on people's basic rights, including the rights of bringing litigation, for public policy purposes, which may include the policy for pursuing protection of weak financial consumers.⁴⁷

Comparatively, the UK imposes binding decisions in financial dispute cases under the Financial Services and Markets Act 2000, providing that "if the complainant notifies the ombudsman that he accepts the determination, it is binding on the respondent and the complainant and is final."⁴⁸ In Australia, binding decisions are also permitted under the Compliant Resolution Scheme Rules issued by the Australian Financial Complaints Authority (AFCA),

⁴³ Financial Services Commission Establishment Act, Art. 51. The relevant clauses of this Act regarding a financial dispute mediation scheme will be moved into the FCPA to be effective on March 2021.

⁴⁴ Financial Services Commission Establishment Act, Art. 55.

⁴⁵ Section 225, Schedule 17 of Financial Services and Markets Act 2000; Financial Ombudsman Service, 'About us,' <<http://www.financial-ombudsman.org.uk>>; Financial Ombudsman Service, 'About us,' <<http://www.fos.org.au/centric/homepage.jsp>>.

⁴⁶ Constitution Art. 27(1).

⁴⁷ Constitution Art. 37(1).

⁴⁸ Section 228(5) of Financial Services and Markets Act 2000.

prescribing that “A Determination by an AFCA Decision Maker is a final, and is binding upon the parties if accepted by the Complainant within 30 days of the Complainant receives the Determination.”⁴⁹ Hence, based on the UK and Australia’s legal structure, such proposal may be accepted in Korea, too.

3. *Requiring a Mediation Procedure Before Bringing a Lawsuit*

We also need to introduce a new scheme that a mediation procedure must be engaged in before bringing an action to a court in case of financial dispute cases of an amount less than 30 Million Won. As emphasized above, most financial dispute cases entail the characteristics of small disputed amounts and many financial consumers involved. Litigation is not appropriate for resolving these kinds of financial disputes. Rather, a mediation as an ADR is a more effective method of procuring remedies for financial consumers.

A critique can be presented that this new scheme may violate the Korean Constitution, which guarantees the right to bring an action to a court.⁵⁰ But, if we restrict the requirement to those disputed cases involving small amounts, we may overcome such controversy as argued above.

4. *Introducing a ‘Class Mediation Scheme’ for Financial Disputes*

We also need to introduce a ‘class mediation scheme’ where a mediation decision applies to all consumers involved in the same financial dispute case where at least fifty damaged consumers are involved in such a dispute in terms of legal or factual issues, although they have not made complaints to the FDMC. The consumer protection rationale for this argument is as follows: most financial dispute cases entail small amounts of loss for each consumer, but many financial consumers involved. Therefore, an expensive lawsuit that takes a long time to reach judgement is not an appropriate method to provide remedies for inflicted financial consumers. Hence, this author believes that the introduction of a new scheme of class mediation will significantly enhance financial consumer protection.

⁴⁹ Complaint Resolution Scheme Rules dated on April 25, 2020, Section A15.3.

⁵⁰ Constitution Art. 27(1).

C. Suggestions for Creating a Twin-Peaks Regulatory Regime for Promoting Financial Consumer Protection

To enhance financial consumer protection, a twin-peaks regulatory model needs to be introduced, because this system can focus more on business conduct regulation whose main function is to protect financial consumers. The twin-peaks model has a structure of two regulators: a prudential regulator and a conduct of business regulator. The former focuses mainly on prudential regulation of financial firms, while the latter specializes in regulating business conduct of companies selling financial products and in supervising capital and securities markets.⁵¹ This scheme has been operated in a few jurisdictions, including Australia,⁵² the Netherlands,⁵³ New Zealand,⁵⁴ and the UK.⁵⁵

Of course, the twin-peaks model possesses both advantages and drawbacks. As to the advantages, we may assess that each supervisor is able to pursue specialization in the respective field by focusing more on their respective tasks. However, drawbacks include the following: (i) regulatory ‘underlap’ in which some areas are not covered by either regulator; (ii) regulatory duplication, which places additional regulatory burdens on financial institutions; (iii) lack of cooperation between two supervisors; and (iv) problems in sharing financial information between two supervisors.⁵⁶

Notwithstanding such shortcomings of this model, in terms of enhancing financial consumer protection, the

⁵¹ Heidi M. Schooner & Michael W. Taylor, *Global Bank Regulation*, Elsevier, 2010, p. 267.

⁵² Group of Thirty, *The Structure of Financial Supervision: Approaches and Challenges in a Global Marketplace*, 2008, pp. 188-196. Further, for discussions how to enhance the efficacy of consumer protection within the twin-peaks regulatory system in Australia, see Andrew Schmulow, “Regulating the Regulator: Improving consumer protection under a Twin Peaks regulatory framework,” *The International Review of Financial Consumers*, Vol.3 Issue.1, April 2018, pp. 1-9.

⁵³ Hugo Oppelaar, “Financial Services: Regulators Reshape to Match Consolidation,” *Int’l Fin. L. Rev.*, May 23, 2005.

⁵⁴ Reserve Bank of New Zealand, “Briefing on the Reserve Bank of New Zealand,” Dec. 2011, pp. 21-22. < <http://www.rbnz.govt.nz/about/whatwedo/4663879.pdf> >.

⁵⁵ Andrew Bailey, Sarah Breeden & Gregory Stevens, “The Prudential Regulatory Authority,” *Quarterly Bulletin*, Bank of England, Dec. 2012, p. 1. <<http://www.bankofengland.co.uk/publications/Documents/quarterlybulletin/qb120405pre.pdf>>.

⁵⁶ Dong Won Ko, “Financial Regulatory Reforms in Korea Responding to the 2008 Global Financial Crisis: Are They Following the Global Trends?,” *Asian Pacific Law Review*, Dec. 2014, pp. 41-42.

proposed specialization will give this system a more efficient structure. However, this goal needs to be achieved by setting up an institutional scheme to resolve such problems or drawbacks, where mutual agreement between two regulators in a type of memorandum of understanding is implemented. This may include agreements on cooperating, enhancing information sharing, abolishing regulatory duplication, and resolving areas of regulatory underlap.

IV. Conclusion

Although we may need to wait to judge the performance gains from enacting the unified FCPA, the FCPA as written contains promising new schemes for reinforcing financial consumer protection. In particular, since the FCPA is an integrated statute containing a new framework for promoting financial consumer protection, it may be a good model for other jurisdictions that seek to reform their respective financial consumer protection systems.

However, further changes need to be implemented to create a more robust financial consumer protection scheme. For example, the introduction of a 'class action' regime in the matter of financial consumer protection and punitive damage remedies for financial consumers in lawsuits remains controversial. Further, since the FCPA generally reinforces the financial consumer protection scheme, it may place great burdens on financial institutions to comply with the new law so that we may not exclude the possibility of increased disputes between financial institutions and financial consumers. In that sense, we need to set up a new framework to efficiently resolve those disputes and further to establish an effective system of financial regulators who should play an important role in enforcing the FCPA. Therefore, this article strongly argues that the current financial regulator system that is causing many problems in terms of enforcing financial law, including several serious cases of mis-selling of financial products, should be improved and then a twin-peaks scheme for financial regulators should be set up.

In sum, the FCPA is a product of the Korean government's efforts to promote financial consumer protection after the 2008 GFC and the experiences of several serious cases of mis-selling of financial products. This author

is hopeful that the FCPA will greatly enhance financial consumer protection.

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