ABOUT FRT

Financial Recovery Technologies LLC (www.frtservices.com) is a leading global securities class action recovery provider. It supports 2,500+ customers worldwide with more than $45 trillion in collective AUM. FRT clients include the world's largest sovereign wealth funds, custodians, public and corporate pension funds, asset managers, banks, brokerages, and other financial service firms.

In the United States (U.S.) alone, each year FRT clients receive, on average, about 25% of all money distributed in securities class action settlements. These funds compensate victims of investment fraud including (but not limited to) millions of public and private company employees, retirees and pensioners, police, fire and municipal pension systems, and other small investors.

FRT offers monitoring and participation support for investors in all countries where there are legal mechanisms for recovery through claimant registration or proof of claim submission processes. We also track emerging markets that may support recovery efforts in the future.

Relevant to this submission, FRT services include:

- Settled Class Action Recovery covering U.S. and Canadian securities and antitrust (competition) class actions, as well as U.S. Securities & Exchange Commission (SEC) Fair Funds.

- Passive Group Litigation Recovery covering Australia/New Zealand (collectively, AU) class actions, Dutch Collective Settlements, United Kingdom (U.K.) (regulatory) Compensation Schemes, and efforts in other countries that, like the U.S., use class actions or representative processes with no opt-in risks and burdens or active participation required from claimants.

- International Opt-In Recovery covering efforts in countries that use direct or group suits and require investors to actively participate in litigation proceedings to some degree.

FRT's internal Legal Team includes 3 lawyers with more than 50 years of combined legal experience. In particular, prior to joining FRT, Attorney Michael G. Lange, SVP Worldwide Litigation, spent 12 years at one of the leading US securities class action law firms investigating, prosecuting, and settling securities suits for institutional investors.

THE GLOBAL LANDSCAPE FOR OPT-OUT GROUP PROCEEDINGS

More than a dozen countries use opt-out group proceedings for investor recoveries. However, in practice, the most robust and effective efforts occur in the U.S. and AU. In the U.S., each year roughly 125 securities and investment-related antitrust class action

settlements return several billion dollars to investors. In Australia, each year roughly a dozen securities settlements return about $250M to investors.

Investment-related suits, including those alleging violations of U.K. securities laws, are covered by Scotland's current opt-in group proceedings. These types of suits should continue to be covered by any new opt-out group proceeding rules. While we understand that any opt-out procedures will cover many different types of suits, we focus our comments below on investment-related recovery efforts. However, we believe the approaches recommended will be equally useful for non-investment-related legal claims.

The securities class action processes in the U.S. and AU share approaches worthy of consideration by this Working Group when formulating new rules for opt-out group proceedings in Scotland. Below, we offer suggestions on how the current opt-in procedures could be modified for opt-out proceedings to align investor recovery proceedings in Scotland with the successful approaches in those two countries, further enhancing claimant access to justice and collective redress.

We respond only to those Questions relevant to these issues. We are happy to submit fuller responses and/or more information or examples upon request.

RESPONSES TO QUESTIONS

General Questions

Question 1 – What are your views on the introduction of opt-out group proceedings in accordance with Part 4 of the Act?

FRT considers opt-out group proceedings in Scotland important to the overall progress of investor rights in the U.K. If adopted, Scotland would be the first country in the U.K. to offer an opt-out regime outside of competition matters covered by the Competition Appeal Tribunal (CAT). Success with these proceedings could positively influence the development of representative processes elsewhere in the U.K., including in England where, in recent years, courts have narrowed rather than expanded their use.

In England, the primary mechanism for investor recoveries is opt-in litigation. These include multi-plaintiff writs or multiple writs by individuals or small groups coordinated via group litigation orders (GLOs). Recent court decisions have rejected representative proceedings under Civil Procedure Rule 19.8.[1] Also, last month the Supreme Court sustained the CAT's rejection of opt-out proceedings for investor claims involving foreign exchange transactions, despite acknowledging that opt-in proceedings were not viable. In our view, these decisions have reduced access to justice and efficient resolution of claims.[2]

[1] See Representative proceedings not permitted in Indivior and Reckitt securities claims - Stewarts.
[2] See FX collective proceedings: The Supreme Court judgment.

Questions of Procedure

Question 4 – How should court procedures for opt-out proceedings differ from those which already apply to opt-in actions?

The existing opt-in advertisement and registration process
Under existing rules, a person or entity contemplating applications for opt-in group proceedings and appointment as representative must advertise to prospective group members, who can register with the applicant or file competing applications. Rules 26A.5, 26A.9. When evaluating applications, courts consider the adequacy of the applicant's advertising efforts and order more, if deemed necessary. Rules 26A.5(2)(b), 26A.9(2)(b).

Claimant registries are established early and used throughout proceedings. The court-approved representative regularly updates the registry to add or remove group members and provides updated registry versions to the court, defenders, and other group members. Rules 26A.14, 26A.15.

The representative is responsible for updating registered claimants on the progress of litigation and any potential settlements. Rule 26A.30. After commencement of proof, courts must grant permission for claimants to be added or removed from the registry. Rule 26A.17.

Suggested changes for opt-out proceedings.
For opt-out proceedings, the method for pre-application advertising should be specified and focus on notifying claimants of their right to submit competing applications. It should *not* focus on creating a final registry of claimants who will be treated as parties to proceeding and bound by court decisions. As discussed further below, the final registry should instead be prepared later in the proceedings, either before commencement of proof or before an attempted voluntary resolution of the case by the representative and defenders.

Class actions in the U.S. and Australia follow similar processes. In the U.S., the plaintiff who files the first class action complaint for securities law violations must cause a press release to be issued notifying other harmed investors of their right to seek appointment as lead plaintiff by a deadline set by statute at 90 days after the date of the first filed complaint.[3] After this deadline, the court chooses from among competing applicants the lead plaintiff best suited to represent the class using criteria set by statute and case precedent.[4]

Later in proceedings, courts set deadlines for class members to make their decision to remain in or opt out of the class. The court does so only after it grants class certification, either on its own motion or as part of the parties' proposed settlement. If done as part of

[3] See 15 U.S. Code § 78u-4, 15 U.S. Code § 78u-4 - Private securities litigation | U.S. Code | US Law | LII / Legal Information Institute.
[4] Id.

the parties' voluntary settlement, the court also sets deadlines and procedures for class members to register or submit claims for compensation.[5]

Similarly, in Australia, clients may register with counsel for the representative plaintiff at the outset of, or during, class action proceedings; however, doing so is voluntary. It does not affect a class member's right to join later. Prior to court ordered mediations, judges will set deadlines for class members to opt out of classes and/or register their claims.[6]

In practice, the two jurisdictions differ only in the time for class members to present their claims. In Australia, they do so before the parties attempt resolution or go to trial. In the U.S., they present claims after the parties have negotiated a class-wide settlement.

When creating opt-out rules, this Working Group should adopt approaches like these and only require claimant registration late in proceedings, either before a court-ordered mediation or just before commencement of proof. Back-ending the creation of the registry will significantly increase participation rates for opt-out proceedings as compared to opt-in proceedings. Clients can register after the proceedings have progressed to the point where there are meaningful prospects for receiving compensation.

Claimant identities should be protected from disclosure to defenders.
Under current rules, opt-in group proceedings are excepted from the open record requirements of Chapter 22. Rule 26A.2. However, as noted earlier, the claimant registry and updated versions of it are regularly provided to the court and defenders during proceedings.

The new opt-out rules should shield class member identities and contact information from disclosure to the public and to defenders. Disclosure of this information to either or both will have a chilling effect on participation by some class members, particularly those fearing adverse publicity or public perception, or retaliation by defenders with whom they ongoing relationship or interactions.

In the U.S., claim registration occurs post-settlement (or, less frequently, after court judgements). Defendants have no role in the distribution process and thus have no need for claimant details. From their perspective, the suit is over.

In AU, class members present their claims before a court-ordered mediation or trial. However, courts protect claimant identities and contact information from disclosure even if the parties exchange their trading data and other information to prepare for mediation. Again, once resolved, defendants are not involved in the distribution process and thus have no need for claimant details.

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[5] See, e.g., Settlement Notice in *Wells Fargo Securities Litigation*, Wells Fargo Securities - Home, Notice.pdf

[6] See, e.g., Court ordered notice in the CIMIC securities class action, Order_JusticeNeskovcin_VID5642020_DOC141032.

Creating opt-out group proceeding rules modelled on the successful approaches in the U.S. and AU will maximize class member participation in opt-out group proceedings. In both countries, class member participation is passive, anonymous, and free of risks and burdens, and FRT clients register or submit claims in all securities class actions in these two countries whenever they have eligibility. This Working Group should formulate new opt-out rules that maximize the prospects for achieving similar results.

Question 5 – How do you think the certification process for opt-out group proceedings should operate.

Under current opt-in rules, courts set the group definition including eligibility criteria. Rule 26A.12. While limited, court precedent to date suggests court decisions on applications will be made expeditiously and will set a low bar for approving the suitability of proposed representatives and allowance of opt-in applications. This furthers the underlying goals of the Act: to promote access to justice and the efficient resolution of mass claims.[7]

For opt-out group proceedings, courts in Scotland should use a similar approach. They should not impose stricter certification requirements. Indeed, representative processes have failed in other countries like Germany where similar determinations have devolved into multi-year disputes on the standing of group members and merits challenges.

Unfortunately, in England, something similar has occurred with CAT proceedings. Parties spend years litigating the approval of group proceedings and whether they should proceed on an opt-in or opt-out basis. The Working Group should avoid rules that create similar barriers.

Question 6 – What procedural steps are required to protect the rights of the group members in opt-out group proceedings (many of whom may not know that they are part of group proceedings)?

For opt-in groups, the representative maintains the claimant registry and knows their identities and contact information. This allows the representative to interact with claimants directly, via e-mail or letter, on the progress of proceedings and proposed settlements.

For opt-out groups, the representative will *not* know the identities of claimants except for those domiciled outside of Scotland who opt-in to the opt-out group proceedings. The representative will *not* have information on claimants domiciled in Scotland who are automatically included in the group proceedings.

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[7] See Collective Redress & Class Actions 2025 - Scotland | Global Practice Guides | Chambers and Partners

As detailed above, we recommend that Scotland notify group members and establish a final registry when proceedings have progressed to the point where decisions will bind their rights by settlement or trial. When that time comes, group members can be notified by direct and indirect methods. These should include press releases and other public announcements, direct notifications to known members via e-mail and mail, and indirect notifications via nominees holding shares for beneficial owners.

In the U.S. and AU, notification occurs when the court announces a deadline by which claimants must exclude themselves, usually (in both countries) shortly before trial, or (in Australia) before court-ordered mediation, or (in the U.S.) after the parties reach a class-wide settlement.

In both countries, notices are disseminated in several ways. In Australia, class counsel directly notifies any claimants that have previously registered with them. They also make public announcements. Case information is posted on the websites for plaintiff's counsel and for the court, depending on the court in which the case is pending.[8]

Most shares are held in street names. In the U.S. and Australia, notices get sent to the nominees to distribute to their impacted account holders. In the U.S., courts order the nominees to - typically within 7-10 days - either forward the class notice to impacted account holders or to provide their names and addresses to a settlement administrator who directly notifies them.[9] Courts in Australia rely on the shareholder registries and do not impose requirements on the time by which nominees must notify account holders. We believe the U.S. process to be more effective.

Scotland should adopt similar claimant notification processes that maximize opportunities for direct communication with group members.

Questions about settlement and distribution

Question 9 – If the case is resolved by a decision of the court, what role should the court have in approving the distribution of the award?

New rules for opt-out group proceedings should empower courts to approve resolutions for distribution of settlement monies and/or judgment awards to those who timely register their claims.

In the U.S. and AU, courts make preliminary determinations on the fairness of proposed settlements and if satisfied, order that notice be given to class members, who then have an opportunity to comment or object to settlements before the court gives them final approval and binds all claimants who have not previously excluded themselves.[10]

[8] See Treasury Wine Estates class action | Maurice Blackburn.
[9] See, e.g., footnote 5, par. 58.
[10] See, e.g., footnote 5, par. 7.

Question 10 – If the case is resolved by a settlement, what role should the court have in approving the settlement amount and its distribution?

In the U.S., courts approve final settlement terms including the method by which class members receive compensation. This includes specifying the formulas for valuing individual claims and the proof required to substantiate them.[11] The Working Group should consider rules that specify similar processes.

Question 11 – Do you have any views on how unclaimed damages awards or settlement sums should be distributed?

In both the U.S. and AU, investment-related suits are typically resolved by voluntary settlements. As a result, investors rarely recover their full losses. So, in both countries, unclaimed funds are distributed to other eligible claimants who submitted timely and valid claims. If the amount of undistributed funds is less than their expected cost of distribution, the funds get donated to a court-approved charity.

Questions about funding

Question 12 – What do you regard as being the main issues for the funding of group proceedings in Scotland (whether opt-in or opt-out)?

Question 13 – How do you think that opt-out group proceedings should be funded and what protection measures should be put in place for group members regarding those funding agreements, in your view?

For opt-in proceedings, group members can choose to accept or reject funding terms by either joining or not joining them. For group opt-out proceedings, group members are more numerous and have less ability to negotiate funding terms, and no ability to do so if registration occurs later in proceedings as we suggest.

Any new opt-out rules should follow similar processes to the U.S. and Australia, where courts actively review and approve compensation to lawyers and funders. In both countries, the representatives negotiate compensation terms. However, courts review those terms at time of resolution and reduce them if deemed unfair to the class or group members. In other words, regardless of what fees the representative initially sets, courts have the final word and can ensure group members receive fair economic treatment.

This Working Group should create rules for opt-out proceedings aligned with this approach.

[11] See, e.g., footnote 5, par. 67-80.

Question 14 – What are your views on disclosure of funding arrangements and confidentiality around funding documents which are lodged with the court (whether opt-out or opt-in)?

We understand that to date, Scottish court decisions applying the opt-in rules have confirmed that details of funding arrangements do not need to be disclosed at the application stage and terms are not a barrier to granting permission to proceed.[12]

This same approach should apply to opt-out procedures. Confidentiality of funding terms is critical, as their disclosure would give advantage to defenders. For example, defenders may choose to litigate proceedings longer if they're aware of maximum budgets, in order to gain greater leverage in settlement negotiations.

Instead, as noted in response to Question 13, courts in Scotland should retain power to review funding terms at the end of proceedings and, if necessary, alter or reduce them if they appear unfair to group members.

Questions about expenses

Question 15 – Do you have any views on whether there should be changes to the Taxation of Judicial Expenses Rules 2019 for group proceedings (opt-in or opt-out)?

Under current opt-in rules, all registered group claimants face risk of adverse cost awards if proceedings fail. In U.K. recovery efforts, risk of adverse cost awards is by far the greatest concern for clients considering participation in investor recovery efforts. In practice, this risk is partially or fully mitigated by funding agreements and the purchase of after the event (ATE) insurance policies. However, even if the risk is fully insured, court orders are still against claimants directly, so there's still some risk and chilling effect on claimants. As a result, most FRT clients set minimum loss thresholds - estimated loss amounts that must be exceeded before they consider joining. This ensures that if successful, their efforts will result in a recovery large enough to justify the related participation risks and burdens. As a result, we typically, we have only a limited number of FRT clients joining any given U.K. recovery effort.

For Scottish opt-out group proceedings, registrants should be fully insulated from the risk of adverse cost awards. This will maximize their access to justice, as it does in the U.S. and AU, where non-representative class members face no such risk.

In the U.S., there is no similar loser pays rule and no risk of adverse cost awards. In Australia, there is a loser pays rule, but responsibility for cost awards is solely with the

[12] See footnote 7.

representative plaintiff. Absent fraud in the presentation of their own claims, by statute class members in AU are protected from any risk of cost awards.[13]

Question 16 – Are there any aspects for substantive law which could be a barrier to group proceedings working effectively?

We have already discussed ways to minimize the risks and burdens on group members by deferring registration until late in proceedings and ensuring opt-out group members do not bear any risk of costs or adverse cost awards.

The final deterrent to participation is the burden of substantiating claims to receive compensation. For investor recovery efforts, these burdens typically relate to the reliance element for some U.K. securities law claims. Unlike the U.S., U.K. courts have not yet accepted a fraud on the market presumption of reliance.

While U.K. securities law is still evolving on the required elements for different claims and their proof, whatever burdens are mandated, they should not be imposed on opt-out group members until the end of the case, when there are greater prospects for compensation. Class members will be more willing to invest their time and effort in matters if there's a near-term prospect for recovery. Before then, nothing should be required from them beyond provision of their names and contact information.

[13] See Section 43(1A) of the Federal Court of Australia Act 1976.