Pinsent Masons

Financial Services: Contentious Regulatory Trends

September 2022

A PURPOSE-LED PROFESSIONAL SERVICES BUSINESS WITH LAW AT THE CORE

Welcome…

… to this quarter's 'Financial Services: Contentious Regulatory Trends' – Pinsent Masons' update on some of the 'hot topics' our financial services lawyers think you should know about.

This edition comes at a time of sustained economic turmoil, as inflationary pressures continue to increase customer vulnerability. In this context, the FCA's new Consumer Duty will be of particular interest, as the regulator seeks to deliver good outcomes in relation to pricing, communications and support to customers. However, as important as the Consumer Duty is, firms should not lose sight of the other consumer-focused measures the FCA is introducing, including new rules on oversight of appointed representatives and promotion of high-risk investments. The FOS has also been supporting this agenda with high uphold rates as it sees large numbers of complaints about fraud and unaffordable lending, as well as a "long tail" of BSPS/DB pension advice cases.

In terms of wider trends, the Carillion and Ghana International Bank cases illustrate the need for continued vigilance by companies in relation to market disclosure and AML systems and controls. For firms looking to innovate in the post-Brexit financial services sector, there are some exciting opportunities to contribute to debates about the regulation of insurance SPVs, critical third parties for outsourcing and cryptoassets.

We hope this publication is useful to you, your stakeholders and your businesses and we look forward to providing you with our views and insights on these matters as they develop further through the course of the year, together with any new developments. In that regard, our next edition will include contributions from several new team members joining from the FCA. They have extensive experience in FCA policy, supervision and enforcement matters - in both a retail and wholesale market context, so we hope to bring you some really interesting insights from their perspective.

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Jonathan Cavill comments on the FCA's confirmation of its plans to introduce the new Consumer Duty and its recently published Perimeter Report.

FCA PERIMETER REPORT

In a nutshell…

In July 2022, the FCA published its perimeter report, covering its approach to the perimeter and actions it is taking in relation to perimeter-linked issues.

Further detail…

The report covers how the FCA is:

- identifying challenges and responding to consumer and market risks;
- working with other regulators and agencies;
- addressing fraud risks, including some 'around' the perimeter; and
- tackling scams, perimeter breaches and non-compliant financial promotions.

Of particular relevance is the FCA's targeting of certain firm business models:

- ***Appointed representatives*** – principals generate more complaints and cases than other directly authorised firms, sparking concerns of increased consumer risk. The FCA has consulted on changes to the Appointed Representative regime and published final rules (PS22/11) in August 2022.
- ***Third parties*** – failure of a third party caused 23% of operational incidents reported to the FCA between 2018 and 2021. The FCA and PRA published a joint discussion paper (DP3/22) proposing measures to manage systemic risks caused by a limited regulatory framework.
- ***General insurance*** – the FCA believes certain products, structured so as to fall outside of its remit, should be properly regarded as insurance, including:
  - ***Contract terms*** – where a provider claims absolute discretion not to pay out, this may involve scenarios where the FCA considers the discretion to have no real content or to be an unfair term; and
  - ***Warranties*** – firms are claiming that warranties are mainly service contracts containing minor indemnity elements, but the FCA believes many of these are actually insurance contracts.

The FCA recognises there is no complete legal definition of 'insurance' and plans to provide further clarity in relation to general insurance products. The regulator has also proposed amending perimeter guidance for insurers (PERG 6) and otherwise taking steps to intervene where insurance is provided without authorisation.

Key takeaways…

The report offers useful insights as to where the FCA is directing its attention, as well as where it is likely to take aim in the near future – something of particular note to those firms with multiple AR and outsourcing arrangements. For example, the FCA's perimeter team is putting pressure on firms which are offering warranties in the automotive sector. Beyond the report, we note that the incoming Financial Services and Markets Bill includes measures which, when in force, may also alter the regulatory perimeter, depending on how the legislation is ultimately passed.

NEW CONSUMER DUTY CONFIRMED BY THE FCA

In a nutshell…

The FCA has recently confirmed its plans to introduce a new Consumer Duty. The Duty is due to be implemented on 31 July 2023, a three-month extension from the original implementation date of 30 April 2023. Firms will also have an additional year to implement the Duty in relation to closed book products.

Further detail…

The new Consumer Duty aims to create greater transparency and higher standards of consumer protection in the financial services sector. At its core, the Duty will require firms to ensure good outcomes for its retail clients - underscored by cross-cutting rules which require firms to act in good faith; avoid foreseeable harm to customers; and ensure that they are supporting to pursue their financial objectives. The Duty also sets out more specific expectations in the form of four outcomes centred on: i) Communication; ii) Products and Services; iii) Customer Service; and iv) Price and Value.

The Duty forms part of the FCA's plan to become a data-led regulator. The FCA hopes the Duty will help it to identify situations in which consumers are not being treated fairly. It also hopes that the Duty will clarify the expectations which it has of firms, allowing them more flexibility and enabling them to innovate to improve customer experience.

Key takeaways…

The Consumer Duty represents a significant new regulatory 'benchmark' in the world of financial services regulation. Whilst it has been welcomed in some quarters, there remain concerns that, even with the additional three-month extension to the implementation deadline, it will be difficult for firms to implement the necessary changes in time. The additional one year to implement changes for closed book products is sensible as it will be more difficult for firms to make these changes.

Firms should ensure that they have clear strategies to meet these the deadlines. In order to meet the July 2023 deadline, it will be necessary for Boards to sign off implementation programmes within the next three months. The FCA's guidance will be useful for firms checking whether their programmes comply with the Duty, with the guidance including examples of good and poor practice illustrating what compliant customer communications should look like.

Charlotte Pope-Williams looks at the regulators' plans to improve the oversight of Critical Third Parties and the PRA's proposals to change the way in which insurance SPVs are authorised and supervised.

CRITICAL THIRD-PARTY OVERSIGHT

In a nutshell…

The Bank of England, the PRA and the FCA (the **"Supervisory Authorities"**) have issued a set of proposals about supervising and increasing the resilience of 'Critical Third Parties' ("**CTPs**").

Further detail…

Technology is now at the heart of our society as never before, including for financial services firms and financial market infrastructure firms ("**FMIs**"). The Supervisory Authorities understand that the ever-increasing use of technology by financial services firms and FMIs gives rise to innovation, greater resilience and transformation, but also risk. This is particularly the case where the core technology used by firms, such as cloud data services, is found in highly concentrated markets.

The Supervisory Authorities will continue to hold firms responsible for operational resilience irrespective of whether said resilience is in part contingent on third parties such as CTPs. However, and in addition to those regulatory requirements on firms, the Supervisory Authorities recognise that oversight and building the resilience of CTPs is of vital importance. The Supervisory Authorities have therefore recently issued a discussion paper ("**DP**"), which stems from the Government's legislative proposals in the Financial Services and Markets Bill to grant them powers to directly oversee CTPs in light of the impact that CTPs can have on financial stability. The DP invites firms to comment on the proposals by **23 December 2022.**

Key takeaways…

- Any new rules for CTPs would not replace the regulatory requirements to manage risks associated with outsourcing and third-party contracts. Instead, the new obligations for CTPs would seek to complement the existing obligations placed on firms.
- The DP proposes (i) mechanisms for identifying those CTPs that could impact financial stability by the Supervisory Authorities recommending to HM Treasury that firms should be designated as CTPs; (ii) having rules setting out minimum resilience standards for CTPs; and (iii) testing CTPs' resilience, e.g. through scenario testing and sector-wide exercises.
- The Supervisory Authorities implicitly acknowledge that technology is effectively borderless. The DP therefore states that the proposed measures would be agnostic about the location of CTPs and instead focus on the services provided by those CTPs.
- Mirroring FCA PRIN 11 and PRA Fundamental Principle 7, the Supervisory Authorities consider that: *"a potential requirement on all CTPs to 'proactively and promptly disclose' to them 'any information of which they would reasonable expect notice' could be beneficial."*

THE SUPERVISION AND AUTHORISATION OF INSURANCE SPVS

In a nutshell…

The PRA is proposing changes to the way in which it authorises and supervises insurance special purpose vehicles.

Further detail…

The changes would result in amendments to the PRA's Supervisory Statement (SS) 8/17, 'Authorisation and supervision of insurance special purpose vehicles ("**ISPVs**")'. The PRA's proposals stem from its enhanced understanding over the past 5 years of the new regulated activity of "insurance risk transformation" by protected cell companies used by ISPVs introduced following HM Treasury's Risk Transformation Regulations 2017 as well as informal feedback from firms.

The PRA's proposals relating to standard applications, i.e. straightforward applications about short-tail, wholesale, general insurance risks, include:

- The PRA removing the expectation for firms to submit a legal opinion about the effectiveness and enforceability of any contractual arrangements that are not governed by English law.
- One person with relevant skills and experience can hold and/or perform more than one of the three SMF roles for an ISPV.
- The PRA considers that it may be appropriate, subject to an aggregate limit, to allow more than one insurance entity from a group to cede risks within a single contract to an ISPV or a cell in a Multi-arrangement SPV.
- The PRA seeks to clarify the meaning of quantifiable risks which should as a minimum include (i) insurance risk, (ii) market risk, (iii) operational risks and (iv) asset risk that may exist in an ISPV.
- Applicants would no longer be expected to submit the full suite of written policies relating to the system of governance in written applications.

The PRA remains firm that the FCA is a distinct organisation and that the FCA's approach is that which is set out in the FCA's Statement of December 2017. The PRA is consulting on these changes. The consultation will end on **11 October 2022** with the PRA proposing to implement these changes by **30 November 2022.**

Key takeaways…

The proposed supervisory statement represents a more streamlined approach for ISPV authorisation and supervision. Standard applications which enter the PRA's green channel are expected to result in a decision on authorisation within 4 to 6 weeks from the date of the application. There is no indicative timeline for non-standard applications beyond those set out in statute. The PRA will consider these applications on a case-by-case basis.

Here, Nicholas Kamlish comments on the FCA fining Ghana International Bank for anti-money laundering failings and the Treasury Committee's cryptoasset inquiry.

FCA FINES GHANA INTERNATIONAL BANK FOR AML FAILINGS

In a nutshell...

The FCA has fined Ghana International Bank plc ("**GIB**") £5,829,900 for poor anti-money laundering and counter-terrorist financing controls over its correspondent banking activities. The breaches took place between 1 January 2012 and 31 December 2016 ("**the Relevant Period**"). GIB obtained a 30% discount to the penalty for settling at the first opportunity and agreed to a new business restriction and skilled person review.

Further detail...

GIB provided correspondent banking services to overseas banks, allowing them to provide products and services in UK/EU markets, including making payments in different currencies and across borders. The business was worth £9.5 billion during the Relevant Period.

Under the Money Laundering Regulations 2007 ("**the MLRs**"), GIB was obliged to carry out enhanced customer due diligence and ongoing monitoring in relation to its correspondent banking customers, to reduce the higher risk of money laundering and terrorist financing associated with these relationships.

During the Relevant Period, GIB did not comply with the requirements of the MLRs. In particular, it failed to demonstrate it had assessed correspondent banks' anti-money laundering controls and undertaken annual reviews of the information it held on the banks it had relationships with. GIB also failed to give staff adequate training on how to scrutinise transactions properly and did not establish appropriate policies and procedures for staff.

GIB's failings were aggravated by the fact that it did not follow independent expert advice on its AML controls in order to make "sufficient amendments to its policies and procedures to ensure that they were appropriate and risk-sensitive".

Key takeaways...

This decision is a further illustration that AML systems and controls, particularly in higher-risk business lines like correspondent banking, continue to be a priority area for the FCA. Moreover, the FCA has enhanced powers to address AML/CTF failings under the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, which apply to senior managers as well as firms. The FCA will continue using its powers in Enforcement and Authorisations cases, especially with the Money Laundering and Terrorist Financing (Amendment) (No. 2) Regulations 2022 coming into force from 1 September 2022 onwards. It will therefore remain vital for firms to continue maintaining and implementing robust AML/CTF policies and procedures and following independent expert advice in a timely manner.

TREASURY COMMITTEE INQUIRY INTO CRYPTO-ASSETS

In a nutshell...

The House of Commons' Treasury Committee ("the **Committee**") is calling for evidence on the potential risks and opportunities associated with the use of cryptoassets, their impact on social inclusivity and the possible need for regulatory change in the future. The deadline for submissions is 12 September 2022.

Further detail...

The Committee will explore the role of cryptoassets in the UK, as well as the opportunities and risks they bring to consumers and businesses.

Key themes will include:

- whether cryptocurrencies are likely to replace traditional currencies;
- how regulation could be balanced to provide protection for consumers without stifling innovation; and
- whether the Government and regulators are suitably equipped to address the use of cryptoassets.

The Committee has expressed concerns with the use of cryptoassets to facilitate money laundering and sanctions evasion, as well as their volatility.

Key takeaways...

From a regulatory perspective, cryptoassets continue to be a high-risk area. In particular, firms should note that cryptoasset exchange providers and custodian wallet providers will be subject to additional due diligence obligations for transactions worth €1,000 or more as a result of the Money Laundering and Terrorist Financing (Amendment) (No. 2) Regulations 2022. The FCA will also gain the power to publish decisions refusing applications for registration by cryptoasset exchange and wallet providers.

Applicants considering registration as cryptoasset service providers will note that the FCA is taking a firm approach to such applications at the gateway, often refusing them on the basis that applicants cannot demonstrate they have sufficient systems and controls to carry out (enhanced) customer due diligence and ongoing monitoring in relation to all their transactions under the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017. Further, the FCA has obtained two recent decisions in the Upper Tribunal (Tax and Chancery Chamber) dismissing attempts by firms applying for registration to continue trading pending the determination of their references where the FCA has provisionally decided to refuse the applications.

As the UK continues to seek inward investment in its financial services sector post-Brexit, the inquiry may give firms involved in cryptoasset activities a welcome opportunity to make the case for a fair and clear regulatory framework.

Colin Read looks at the FCA's amendments to the Appointed Representative Regime, following their December consultation on the same topic, and the FCA's update on its second data strategy.

FCA CUTS APPOINTED REPRESENTATIVE PRE-NOTIFICATION PERIOD TO 30 DAYS

In a nutshell...

The FCA has announced that it will reduce the pre-notification period for new appointed representative ("**AR**") appointments to 30 days instead of 60 days, as originally proposed in its December consultation paper.

Further detail...

The reduction of the pre-notification period was supported by almost all respondents to the FCA's consultation, with respondents considering the 60-day period to be unduly lengthy. There was a concern that the longer period would make it more difficult for ARs to switch principals, negatively impacting competition. The FCA believes that the 30-day period will be sufficient for an initial assessment to be carried out and have confirmed that the period will not be in addition to the existing three-month period for determining approved person applications. Both introducer ARs and full ARs will be subject to the same 30-day pre-notification period.

In addition, the FCA is introducing requirements for principals to verify the details of, and assess the risks posed by, their ARs on a regular basis, despite some consultation respondents arguing that this was unnecessary. Principals will also be required to give the FCA details of their ARs' complaints data and revenue from unregulated financial activities. Firms will be given more time to provide their annual AR complaints and revenue data reports than initially proposed, with the period for doing so being extended to up to 60 business days from the principals' accounting reference dates.

The changes to the FCA's Handbook will take effect from 8 December 2022. Given that the AR regime is also based on primary legislation which the FCA is unable to amend, the Treasury has invited views on the AR regime and the FCA will continue to work closely with them on this topic.

Key takeaways...

These changes will help further the FCA's strategic objective of protecting consumers from harm as they will encourage greater oversight of ARs by their principals. However, whilst it may become quicker for new ARs to be appointed, principals will need to invest in their data collation and reporting capabilities to interact successfully with the regulator's Authorisations and Supervision teams. Firms can also expect tougher intervention/Enforcement action where data suggests ARs are linked to misconduct: principals will need to demonstrate they have adequate systems and controls around AR due diligence, monitoring and oversight to mitigate this.

FCA UPDATE ON 'DATA STRATEGY 2020'

In a nutshell...

In June 2022, the FCA published an update on its second data strategy, the regulator's response to how firms are now using advanced technology, data and analysis. This is part of the FCA's aim to become a "digital and intelligence led" regulator, applying new technologies and techniques.

Further detail...

The FCA published its second data strategy in January 2020, nearly 7 years after its first data strategy launched. Set over 5 years, the FCA's objectives broadly are to:

- achieve a deeper understanding of markets and consumers;
- enable it to better identify and respond to firm and market issues; and
- become a more agile, 'fit-for-the-future' regulator.

Some interesting developments in the recent update include:

- integrating 'Data Science Units' across the organisation to triage cases, automate processes and analyse risks to consumers from marketing on social media and elsewhere online;
- migration and consolidation of FCA datacentres via the cloud, providing cost-savings and scalability, and implementation of new data tools to improve modelling efficacy; and
- success with new service offerings, including the 'Regulatory Sandbox', testing innovative firm propositions and 'Innovation Pathways' and providing tailored regulatory guidance.

The FCA estimates its organisational and systems improvements have led to £20m of efficiency savings. However, the data strategy is about more than streamlining. The FCA will invest a further £34m next year on recruiting 'data experts', collaborating with other regulators to develop new platforms, and expanding its analytics capabilities. In a speech on data and future regulatory trends, delivered a week before the strategy update, Nikhil Rathi, FCA Chief Executive, noted the FCA perceives a risk that products will become less accessible for certain consumers in the future due to the data-heavy processes used by lenders and insurers.

Key takeaways...

The FCA is faced with an increasingly difficult role in terms of regulating how firms collect and use data. Given its drive to protect consumers and hold firms accountable, alongside recent shifts in pricing and marketing rules, firms should remain alert to the FCA's rapidly evolving approach to data so that they can adapt to increasingly rigorous expectations in this area.

The FCA will provide further updates on progress and explain how the strategy supports its 2021 'Transformation Vision' and its 2022/23 Business Plan priorities.

Rachael Preston takes a look at the FCA's approach to compromise agreements and its recent 'Dear CEO letter' on Buy Now Pay Later.

FCA DEAR CEO LETTER ON 'BUY NOW PAY LATER' AGREEMENTS

In a nutshell…

In August 2022, the FCA published a 'Dear CEO' letter warning firms, merchants, and even social media influencers involved in offering Buy Now Pay Later (BNPL) products to consumers that they must comply with FCA rules on financial promotions.

Further detail…

The FCA is concerned that the presentation of BNPL products appears unbalanced in some quarters, potentially breaching section 3 of the Consumer Credit Sourcebook (CONC 3).

Under CONC 3, authorised firms and merchants must ensure that a financial promotion is clear, fair and not misleading. To meet this requirement, a financial promotion needs to be: balanced; easily understood; and transparent.

Lenders and merchants do not currently require FCA authorisation to enter into BNPL agreements, however the financial promotions of those unregulated agreements must still comply with the regulatory requirements (unless exempt).

The FCA says many promotions fail to or are not clear enough in the way that they mention the relevant risks to consumers, identifying a lack of transparency for consumers as regards:

- the risk of taking on debt they cannot afford to repay;
- the consequences of missing debt payments; and
- explanations of when charges become payable.

A separate concern is that some adverts take advantage of behavioural biases, hindering effective consumer decision-making and potentially encouraging 'impulse buying'.

Unless exempt, lenders and merchants may be committing a criminal offence by continuing to promote BNPL products in ways that do not these requirements and may face a fine, up to two years imprisonment, or both (s.25, Financial Services and Markets Act).

Non-exempt unauthorised lenders need an authorised firm's approval of the promotion to avoid committing a criminal offence, and non-exempt unauthorised merchants should consider whether they need an authorised firm to approve relevant communications to avoid the risk of committing a criminal offence.

Key takeaways…

This letter mirrors the sentiment of the FCA's new Consumer Duty and demonstrates the regulator's role in mitigating the impact of the rising cost of living for consumers. Firms must ensure they have the correct expertise and understanding of the regulations when promoting products such as BNPL to consumers. Going forward, the FCA will proactively monitor the market to assess compliance and will consider any immediate further actions as appropriate.

FCA PUBLISHES GUIDANCE ON APPROACH TO COMPROMISES

In a nutshell…

The FCA has published new guidance on how it will approach the assessment of compromises. The guidance outlines the information which firms will need to submit to the FCA and focuses on schemes of arrangement, restructuring plans and voluntary arrangements in relation to liabilities only.

Further detail…

The new guidance has been introduced against the backdrop of the FCA witnessing an increase in firms proposing compromises for significant liabilities, particularly redress liabilities, and aims to enhance transparency around the information required to be submitted to the FCA. The guidance will not apply retrospectively to compromises where the firm has issued a Practice Statement Letter or proposal to its creditors prior to the guidelines coming into effect. Rather, these will be reviewed on a case-by-case basis, although the guidance may be relevant to their assessment.

- Information which firms need to provide to the FCA includes:
- An explanation detailing how the liabilities subject to the compromise came about;
- Details of which liabilities will be part of the compromise;
- Details of the actions the firm is taking/has taken to remedy the underlying cause of the liabilities;
- The structure of the compromise; and
- The firm's plans after the compromise.

The FCA will consider factors including how customers are being treated, the extent of the underlying misconduct, and the number of, and impact on, vulnerable customers. If the FCA require further analysis on the compromise, they may ask the firm to appoint a skilled person to produce a report, pursuant to s.166 of the Financial Services and Markets Act 2000, to enable the FCA to assess the potential harm to consumers.

It should be noted that since schemes of arrangement and restructuring plans do not fall under the FCA's statutory role under the Companies Act 2006, the FCA may charge a "Special Project Fee" to cover their supervisory costs.

Key takeaways…

The guidance highlights the FCA's commitment to the new consumer duty, as, in addition to ensuring the integrity of the market, the rationale underpinning the guidance is to ensure that consumers are adequately protected. In addition, the clarification of the information which the FCA requires when assessing compromises should help firms to better frame their proposals. This should reduce the risk of the FCA objecting to them in the High Court, as it previously did in the recent case of Amigo Loans.

Daniela Ivanova considers the FCA's new financial promotion rules for high-risk investments, as well as examining regulators' approaches to defined benefit pension transfer advice complaints.

REGULATORS GRAPPLE WITH SURGE IN DEFINED BENEFIT PENSION TRANSFER ADVICE COMPLAINTS

In a nutshell...

The FSCS and FOS have identified a surge in financial advice claims and complaints, notably negligent Defined Benefit ("**DB**") pension transfer advice. Against this backdrop, the FCA is progressing its plans to mandate redress for people who transferred out of the British Steel Pension Scheme ("**BSPS**"). The House of Commons' Public Accounts Committee ("**PAC**") has also released a report criticising the FCA's regulation of the DB pension transfer market and financial advice in general.

Further detail...

In a statement on 28 June 2022, the FSCS' Chief Executive commented that the amount the FSCS pays in compensation for financial advice is rising, with around 78% of claims currently linked to financial advice. The FSCS expects these costs to remain high in the future.

The FOS' new complaints data about financial advisers for 2021/22 shows that DB transfer advice was one of the top five sources of advice-based complaints. The FOS also noted that it received 550 complaints about unsuitable advice to transfer out of the BSPS and upheld 90% of those.

Addressing unsuitable DB advice is also underscored by the FCA's consultation on a consumer redress scheme for former BSPS members. The FCA expects the scheme will take effect in early 2023, with compensation to be paid in late 2023/early 2024. The FSCS expects the scheme to cover a further 1,400 members, bringing the total redress to £71.2 million. The scheme will operate on an opt-out basis.

The PAC's report on its investigation into the BSPS criticises the FCA for not taking sufficient enforcement action (having issued only one fine to relevant advisers). It also highlights significant risks including the overall function of the pension advice market and the capacity of redress organisations to manage large scale consumer detriment.

Key takeaways...

There is a clear trend in rising complaints in this area, and the complexity of pension transfer advice may mean that complaints for advice given more than 6 years ago are still within limitation periods. The PAC report's criticism of the FCA's lack of enforcement may also result in increased FCA scrutiny of firms operating in this area. The opt-out approach to the BSPS scheme is also potentially problematic as redress may not be covered by the definition of a third-party claim in professional indemnity insurance policies where the member has not actively opted in

FCA PUBLISHES NEW FINANCIAL PROMOTION RULES FOR HIGH-RISK INVESTMENTS

In a nutshell...

The FCA's new rules will require firms approving and issuing marketing to have appropriate expertise, conduct better checks to ensure consumers and their investments are well matched, and use clearer and more prominent risk warnings. The new rules come into force on 1 February 2023, with the exception of the main risk warning proposals which must the implemented by 1 December 2022.

Further detail...

The new rules are aimed at:

- rationalising existing rules in COBS 4 using the terms 'Restricted Mass Market Investments' and 'Non-Mass Market Investments';
- strengthening risk warnings, banning inducements to invest, introducing positive frictions, improving client categorisation and stronger appropriateness tests; and
- strengthening the role of, and standards for, section 21 FSMA approvers, as they play an important role in enabling unauthorised issuers of high-risk investments to reach consumers.

In addition, the FCA will publish non-Handbook guidance on its website on 1 February 2023.

The FCA has announced further work which will extend the scope of the rules to cover additional products:

- Long Term Asset Funds will be classified as Restricted Mass Market Investments. The FCA is consulting on broadening retail access to this type of investment; and
- In January 2022, the Treasury confirmed its intention to bring certain cryptoassets into the scope of the financial promotions regime. The FCA will make final rules for cryptoasset promotions once the relevant legislation has been made by the Treasury.

Key takeaways...

Regulatory risks will arise for authorised firms which approve and communicate financial promotions. A new rule will require firms to self-assess whether they have the necessary competence and expertise, and if not, to find authorised persons that do. They will also have to ensure approved promotions remain compliant for the lifetime of the promotions and undertake preliminary assessments of suitability based on clients' profiles and objectives. Firms will need to implement appropriate processes to ensure they comply with these requirements.

Finally, Anthony Harrison discusses the trends in the FOS' annual complaints data as well as commenting on the FCA's public censure of Carillion.

FCA IMPOSES PUBLIC CENSURE ON CARILLION AND FINES THREE FORMER DIRECTORS

In a nutshell...

The FCA has imposed a public censure on Carillion plc and fined three of its former executive directors in relation to Carillion's breaches of the Listing Rules and the Market Abuse Regulation ("**MAR**"). The three directors are referring their Decision Notices to the Upper Tribunal, so the FCA's findings against them are provisional. Carillion neither admitted nor denied the matters set out in its Decision Notice but chose not to make a referral.

Further detail...

The FCA considers that Carillion failed to meet its obligations under Listing Rule 1.3.3R (not publishing misleading information), Listing Principle 1 (procedures, systems and controls), Premium Listing Principle 2 (acting with integrity) and Article 15 of MAR (prohibition of market manipulation). The company allegedly failed to put in place and maintain adequate procedures, systems and controls to comply with the Listing Rules. The FCA also considered that Carillion published misleading market announcements between December 2016 and May 2017 which did not fully and accurately disclose Carillion's financial position. Had Carillion not been insolvent, the FCA would have imposed a fine of £37,910,000.

The firm's former CEO and two former finance directors were fined £397,800, £318,00 and £154,400 respectively. The FCA considers that these individuals failed to ensure the announcements for which they had responsibility were accurate and failed to inform Carillion's Board and the Audit Committee about the firm's true financial position.

In the FCA's view, this meant Carillion's deteriorating financial performance was not properly disclosed to the market and shareholders, exacerbating the effects of its insolvency. Further, the FCA suggested that Carillion's alleged misconduct was "as damaging to market integrity as insider trading".

Key takeaways...

This case demonstrates the FCA's robust approach to tackling all forms of market abuse and signals its willingness to pursue those who issue misleading statements to the markets. It is therefore imperative for listed companies to have adequate systems and controls to ensure that any market announcements are accurate. The Decision Notices also highlight a wider point about the need for listed companies and regulated firms to establish clear channels for the escalation and monitoring of issues which may affect financial stability, as part of a wider culture of ensuring good governance and transparency. Failure to embed a positive culture can seriously aggravate the risk of FCA enforcement when things go wrong.

FOS PUBLISHES ITS ANNUAL COMPLAINTS DATA

In a nutshell...

The FOS has published its annual complaints data for 2021/22; whilst it shows a decrease in complaints from c.279,000 in 2020/21 to c.165,000 in the last financial year, the FOS expects to see an uplift in cost-of-living complaints in the near future.

Further detail...

The Administration and customer service issues generated the most complaints, with 35,000 such complaints being recorded; almost 25,000 of these were in the banking and credit sector. The overall uphold rate increased by 7% to 38% in 2021/22, although when PPI claims are excluded, the uphold rate fell from 40% in 2020/21 to 37% in 2021/22.

The most complained about products were current accounts. A significant proportion of these complaints relate to "authorised push payment" (APP) fraud. There were 9,370 such complaints, a 20% uplift compared with 2020/21. It is notable that the FOS upheld roughly 75% of APP fraud complaints. Scams which utilise social media and fake investment scams also increased, which the FOS believes may be due to people trying to make additional income whilst they were furloughed.

Going forward, the FOS expects to see: an increase in complaints related to cost-of-living issues, caused by inflation rates and fuel prices; a potential increase in more sophisticated scams; and consumers being unable to access credit. Indeed, even in 2021/22, the FOS received 75,000 complaints related to borrowing, with annual interest rates of 35% being applied to some loans.

Key takeaways...

It is unsurprising that APP fraud complaints have increased as the pandemic has triggered a shift towards an increased use of technology, which creates the possibility of new and more sophisticated scams. It is also perhaps to be expected that, against the backdrop of the FCA introducing its new Consumer Duty, the FOS has been upholding around 75% of these complaints. In this context, it is also likely the FOS will take a more robust view of banks and credit agencies offering loans with extremely high interest rates in the coming year, especially since the increased cost of living is likely to mean that more consumers will be categorised as financially vulnerable. Firms will need ensure that their systems and controls, including their complaint handling systems, are sufficiently rigorous and agile to meet these new challenges.

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