

“You can have all the right strategy in the world; if you don’t have the right culture, you’re dead”

- Patrick Whitesell, CO-CEO of WME

Culture in financial services has become a key regulatory issue following the financial crisis with regulators exploring new approaches around interpreting conduct. There has been a shift in the Financial Conduct Authority’s (FCA) approach. Where a few years ago “tone from the top” was the main focus, more recently their focus has shifted to embrace new areas and disciplines. The increase in the number of FCA enforcement investigations opened in the last year on governance and accountability grounds tells us that it remains highly topical and is high on the agenda for the FCA. An organisation’s “tone at the top” must be translated into a “tone at the middle” before it can reach the rest of the organisation.

FCA proposes ban on sale of crypto-derivatives to retail consumers

The FCA is proposing rules to address harm to retail consumers from the sale of derivatives and exchange traded notes (ETNs) referencing certain types of crypto assets.

The FCA considers these products are ill-suited to retail consumers who cannot reliably assess the value and risks of derivatives or ETNs that reference certain crypto assets (crypto-derivatives). This is due to:

- inherent nature of the underlying assets, which have no reliable basis for valuation
- the prevalence of market abuse and financial crime in the secondary market for crypto assets (e.g. cyber theft)
- extreme volatility in crypto asset prices movements, and
- inadequate understanding by retail consumers of crypto assets and the lack of a clear investment need for investment products referencing them

These features mean retail consumers might suffer harm from sudden and unexpected losses if they invest in these products.

The FCA is therefore consulting **on banning the sale, marketing and distribution to all retail consumers of all derivatives (i.e. contract for difference - CFDs, options and futures) and ETNs that reference unregulated transferable crypto assets by firms acting in, or from, the UK.**

This consultation fulfils the FCA’s commitment in the UK Cryptoasset Taskforce Final Report to explore a potential ban. Reports estimate the potential benefit to retail consumers from banning these products to be in a range from £75 million to £234.3 million a year. Christopher Woolard, Executive Director of Strategy & Competition at the FCA, said:

‘As with our work on the wider CFD and binary options markets, we will act when we see poor products being sold to retail consumers. These are complex contracts built on top of complex assets. Most consumers cannot reliably value derivatives based on unregulated crypto assets. Prices are extremely volatile and as we have seen globally, financial crime in crypto asset markets can lead to sudden and unexpected losses. It is therefore clear to us that these derivatives and exchange traded notes are unsuitable investments for retail consumers.’

Optimising the Senior Managers and Certification Regime: Policy Statement 19/20 and Feedback to CP 19/4

The Senior Managers and Certification Regime (SMCR) is being extended to FCA solo-regulated firms on **9 December 2019**.

The SMCR aims to strengthen individual accountability and help set a new standard of personal conduct for people working in financial services. In January 2019, in CP 19/4 the FCA consulted on changes to optimise the SMCR.

These rules are relevant to all SMCR firms. In general, the FCA implemented the proposed changes to the SMCR as consulted on, which include:

- confirming that the Head of Legal function is excluded from the requirement to be approved as a Senior Manager- they will be in scope of the certification regime;
- clarifying the requirements and scope of the Certification Regime; and
- extending Senior Manager Conduct Rule 4 (SC4) to non-approved Executive Directors at Limited Scope firms.

Senior Managers and Certification Regime: Finalising FCA rules

In July 2018, FCA published near-final rules in PS18/14 on extending the SMCR to FCA firms. They consulted on further changes in CP19/4 to optimise the SMCR ahead of commencement. In March 2019, FCA published near-final rules to extend the SMCR to claims management companies (“CMCs”) in PS19/9 and near-final rules to introduce the Directory of financial services workers in PS19/7.

The FCA have been working closely with HM Treasury on preparation of the Commencement Order needed to enable the FCA to publish final rules on the extension of the Senior Managers and Certification Regime. The aim of the SMCR is to reduce harm to consumers and strengthen market integrity by creating a system that enables firms and regulators to hold individuals to account. The SMCR is due to be extended to FCA solo-regulated firms CMCs from 9 December 2019. As set out in near-final rules, CMCs will also not come into scope until they have been authorised by the FCA.

Following publication of the Commencement Order, the Policy Statement will finalise rules.

FCA launches consultation guiding firms on the fair treatment of vulnerable customers

The FCA has recently launched a consultation on proposed guidance for firms on the fair treatment of vulnerable customers. The guidance sets out the FCA's view of what the FCA Principles require of firms to ensure that vulnerable consumers are consistently treated fairly across financial services sectors. The FCA wants to see doing the right thing for vulnerable consumers deeply embedded in firms' culture.

Firms will need to think about what the guidance means for their business and customers, and how they are understanding and addressing the needs of vulnerable customers. As part of the FCA's priority to protect vulnerable consumers, it has been working extensively with stakeholders on this issue.

Whilst many firms have made significant progress in how they treat vulnerable consumers, the FCA believes that there needs to be more consistency across financial services sectors. In some cases, firms are clearly failing to consider the needs of vulnerable consumers, leading to harm.

The guidance will be consulted on in 2 stages and the FCA is asking for comments on this first stage of the consultation by 4 October 2019.

Speaking up: small steps to big changes

Continuing the FCA's focus on Culture – and how firms can change it the FCA issued a paper on encouraging employees to speak up. Recognising that there is no magic bullet, the FCA says recognising that the employee's decision to come forward is contingent on the subject, target and channel of communication is an important first step.

According to the FCA, **it is not enough to have good intentions**. Organisations wishing to engender real change need to take more targeted action. This begins with understanding what speaking up really means within the organisational environment, and what obstacles can, often unintentionally, be put in its way.

Studies show that the risks of speaking up are often felt as both personal and immediate; reputational damage, disrupted relationships, negative career consequences or suffering personal retaliation. Employees are often mindful of past experiences in which their input (or indeed the input of others) has been unheard or ignored. The FCA suggests four questions that organisations and leaders may wish to ask to help them foster a culture of speaking up:

- what do employees currently find it easy or difficult to speak up about?
- who needs to be targeted to change the culture?
- how should employees be able to speak up?
- how will you know what you are doing is working?

There is no magic bullet that will change the speak up culture of an organisation overnight. But recognising that the employee's decision to come forward is contingent on the subject, target and channel of communication is an important first step.

Breaking the process down in this way can help to change the working environment so that it provides long term consistency in its approach to speaking up and listening. Starting small and proceeding systematically can turn good intentions into real and lasting cultural change.

New platform to replace Gabriel and improve the way we collect data from firms

The FCA have started work to improve the way which they collect data from firms and plan to move to a new platform for the data collection systems, which will include replacing Gabriel. The FCA aims to implement an easy-to-use system so that firms can submit data in a way that is efficient and through a system and approach that can be adapted to changing needs. Early changes to the platform will be technology focused, so initially there will be no change to the way you currently provide data. More significant improvements will be made in the future. The work is central to Data Strategy, which is designed to help the FCA deepen their understanding of markets and consumers, and more swiftly identify, appropriately intervene and remediate issues to minimise harm. This new data collection platform supports Digital Regulatory Reporting work which is exploring how technology could make it easier for firms to meet their regulatory reporting requirements and improve the quality of information they provide.

FCA sets out its priorities for 2019/20

As the UK finalises preparations to leave the EU, the immediate priority will remain supporting an orderly transition post-exit. The FCA will also continue to play a leading role in shaping the global regulatory framework working with other national regulators and international bodies. The Business Plan outlines four ongoing cross-sector priorities:

- Work on firms' culture and governance
- Ensuring the fair treatment of firms' existing customers by monitoring firms' practices
- Developing the work being done on operational resilience
- Combating financial crime and improving anti-money laundering practices

The plan also sets out three additional cross-sector priorities, which have longer time horizons:

- the future of regulation
- ensuring innovation and the use of data work in consumers' interests
- examining the intergenerational challenge in financial services

Andrew Bailey, FCA Chief Executive, said:

'Dealing with Brexit will be the most immediate challenge we face. But this plan also commits us to a stretching programme of work across the financial sector. In order to ensure we are a regulator that continues to serve the public interest, we need to adapt to the ever-changing environment. This is why the future of regulation is a key priority in this year's Business Plan. We will be leading a debate about this with stakeholders so that we can keep pace with the developments taking place in the markets that we regulate and in wider society.'

FCA calls for consumers to think back, and then act as PPI deadline closes in

With only one month to go until the 29 August 2019 PPI complaints deadline, the FCA is urging consumers to jog their memories back to the 1990s and 2000s when they may have bought products and were mis-sold PPI at the same time.

Research released by the FCA, shows the majority of UK adults hit a significant milestone during the 1990s and 2000s – when many of the estimated 64 million PPI policies were sold in the UK. 49% bought a car, 35% purchased a house and 27% got married. More than four in 10 people recall taking out credit to help fund these big-ticket items, including products that commonly had PPI attached such as loans, mortgages, credit cards or store cards. Brits estimate they have had four different credit streams on average – 71% remember taking out some form of credit, with 53% having between one and five credit products and 18% six or more. The FCA is urging consumers to jog their memories by visiting its website which includes a comprehensive list of providers that have sold PPI. This includes high street stores, catalogue firms, building societies and supermarkets.

It is also extending its PPI contact centre opening hours from 5 August to 8pm on weeknights and 5pm on Saturdays to provide further support to consumers. Emma Stranack, FCA's PPI Deadline Campaign Lead, says: *"The PPI deadline is closing in. With just over four weeks to go until 29 August 2019, we're asking people to cast their minds back to the nineties and noughties and what might have caused them to take out a loan, credit card or other finance agreement. Weddings, house moves, new cars and holidays are just some of the types of investments people commonly employ credit to help with..."* *If this rings a bell and you think you might have been mis-sold PPI, the next step is to identify your provider – you can search FCA's list at fca.org.uk/ppi. Providers have online tools that make PPI claims simple and will help you through the process. It's free to do yourself and you don't need to worry about paperwork. You just need your date of birth and previous home addresses to get started."*

Conviction for money laundering revealed after reporting restrictions lifted

An individual has been convicted of dealing in criminal property between October 2007 and November 2008. The criminal property laundered was £1.5 million representing the proceeds of a conspiracy to insider deal by co-defendants. The individual used off-shore companies, bank accounts and false invoices to effect his money laundering.

The FCA also brought contempt of court proceedings against him in relation to the breach of a Restraint Order made in June 2011. The Restraint Order prevented him from in any way disposing of, dealing with or diminishing the value of any of his assets. He admitted his contempt on 13 November 2015. Until today reporting restrictions have been in place which has prevented the FCA from publicising the conviction.

Mark Steward, Executive Director of Enforcement and Market Oversight, said: *'Combating money laundering is a priority for the FCA. This was a complex investigation involving the tracing of funds through layers of international banking transactions by off-shore companies. **The FCA will not tolerate criminals who facilitate others to abuse our markets.** The case also sends a clear message that the FCA is determined to deprive criminals of the proceeds of crime.'*

Operation Tabernula is one of the FCA's largest and most complex insider dealing investigations. The offending in this case was highly sophisticated and took place over several years.

The investigation was demanding and time-consuming. Investigators, forensic accountants, lawyers, markets experts, intelligence analysts and digital forensic specialists pooled their skills to unravel the conspiracy and subsequent laundering by the individual. This was achieved through analysis of trading, financial and communications data, documentary evidence from the investment banks, and the material seized during searches under warrant. **This conviction brings to six the number of convictions secured in the Operation Tabernula insider dealing investigation.**

ESMA Consult on enhancing the guideline applicable to firm's Compliance functions.

As MiFID II rules apply directly to firms the proposed changes will apply to FCA regulated firms, and even after Brexit it is likely that these will form a part of the FCA's thinking. Whilst there are not too many changes envisaged, ESMA have proposed one new guideline: the need for the Compliance function to have the necessary skills, knowledge, expertise and authority to undertake the role. This specifically includes the need for Compliance functions to have knowledge of all MiFID II regulations, maintaining knowledge through training and the need for the Compliance Officer to have a higher level of expertise than the rest of the function.

So the new proposed guidelines address 12 areas of the compliance function:

1. Requirement to undertake a Compliance Risk Assessment
2. Compliance must undertake monitoring of the business
3. Compliance should report to senior management
4. Advisory and assistance obligations
5. Effectiveness of Compliance
6. Skills, knowledge, expertise and authority
7. Permanence
8. Independence
9. Proportionality and effectiveness
10. Combining with other functions
11. Outsourcing
12. Review by competent authorities

With the proposed new guideline in mind we have seen that the FCA is applying more rigour in approving CF10 applications and this may become an area of focus for desk based reviews from the FCA, particularly when they review the implementation of SMCR in firms.

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UK and Ireland

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- Dublin also provides Fund UCITS IV Reporting, MLRO and Company Secretarial Services.
- Related Training

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