2020 Regulatory Bulletin Issue 6

> ***"We are embedding health & well-being at the heart of our business strategy because our people are our greatest asset, and we recognize that a healthy happy and committed workforce is vital to our business success"***
>
> ***-Alex Gourlay, Co-Chief Operating Officer***
> ***Walgreens Boots Alliance, INC***

It is vital that culture in financial services is of the highest standard in particular during unprecedented times.

Guidance for firms on the fair treatment of vulnerable customers

The FCA has set out new best practice guidance for firms to do more to protect vulnerable consumers.

They say that more than 24 million people display one or more potential characteristics of vulnerability – which include physical and mental health issues, recent life events such as bereavement, capability and financial resilience or put another way nearly 50% of UK adults. Over a million people received debt advice last year. The FCA says firms should do more to ensure that vulnerable consumers are receiving positive outcomes.

This latest consultation incorporates feedback from a range of bodies including consumer organisations, firms and trade bodies following the first phase of consultation in July 2019.

The FCA found many examples of good practice and firms thinking carefully about their customers and potential vulnerability. However, the FCA is also aware of cases where vulnerability is either not considered by firms or positively exploited for gain.

The guidance aims to provide a framework that allows all firms to accurately assess whether they are treating vulnerable consumers fairly, ensuring consistency across the financial services sector.

Alongside the draft guidance the FCA has also published research on vulnerable consumers' experiences of dealing with financial services firms.

The FCA have created a video animation for firms as a good starting point as to the purpose and intent of the guidance.

General Data Protection Regulation ("GDPR")

It is illegal to transfer data to the US, where you rely upon the US-EU Privacy Shield from **16th July 2020.**

GDPR prohibits the transfer of personal data from the EEA to third countries. There are exceptions to this general position, including where the European Commission (the Commission) has determined that the third country has adequate laws to protect personal data. Once the Commission has issued an adequacy decision, personal data can be transferred freely to firms in the relevant country.

The United States, however, was considered by the Commission not to have adequate data protection laws. However, the Commission issued a decision in 2016 that established the US-EU Privacy Shield (the Privacy Shield Decision). The Privacy Shield Decision permitted transfers of personal data to the United States if the recipient firm had certified to the US Department of Commerce that it complied with certain privacy principles. If it did the firm was deemed adequate and transfers could take place freely, both from the certified entities' affiliated companies within the EEA, and also from unrelated persons located in the EEA.

It was therefore a valuable tool to ensure compliance with the GDPR.

The other common mechanism to transfer personal data outside of the EEA in compliance with the GDPR is the use of Standard Contractual Clauses (SCCs). These are standard contractual provisions designed by the Commission that are executed between a data exporter in the EEA and a data importer outside of the EEA. These were also subject to the CJEU's review in the instant case.

However on 16th July 2020 the Court of Justice of the European Union (CJEU) ruled in the case of Data Protection Commissioner v. Facebook Ireland Limited and Maximillian Schrems (Schrems II) that the US-EU Privacy Shield is invalid. This was so because the Privacy Shield Decision enshrines the position (as did Safe Harbour) that US national security, public interest and law enforcement will take priority over the rights of the European data subjects whose personal data has been transferred pursuant to the Privacy Shield.

It did however conclude that SCC clauses used by Facebook were valid, but each firm should review their clauses to ensure that US Law does not prohibit their effectiveness and provide access to EU data to law enforcement agencies without equivalent safeguards to the EU GDPR.

What Next?

This decision may cause Privacy Shield certified firms which number in the thousands a significant degree of business interruption. Data transfers to the United States relying on the Privacy Shield mechanism should cease, and should only recommence once a new mechanism (such as SCCs) is put in place.

Fortunately, the GDPR does provide for alternative arrangements to accomplish the data transfers. Firms should consider whether these alternative methods need to be implemented both within corporate groups and with third parties from whom they receive personal data from Europe. Within corporate groups, binding corporate rules (a form of intra-group data transfer agreement, approved by a supervisory authority) may also be a good alternative.

The Information Commissioner's Office refers to The European Data Protection Board (EDPB) which has now issued its FAQs on the invalidation of the Privacy Shield and the implications for the Standard Contractual Clauses (SCCs). This guidance still applies to UK controllers and processors. Therefore unless alternative arrangements are put in place **no transfer of data should occur – it is illegal.**

Further work is underway by the European Commission and EDPB to provide more comprehensive guidance on extra measures you may need to take. In the meantime you should take stock of the international transfers you make and react promptly as guidance and advice becomes available.

The EDPB has recommended that you must conduct a risk assessment as to whether SCCs provide enough protection within the local legal framework, whether the transfer is to the US or elsewhere.

The ICO state that they will continue to apply a risk-based and proportionate approach in accordance with their Regulatory Action Policy.

Dear CEO letter published on complying with the (PSRs) and (EMRs) and safeguarding client assets in the way the FCA expects.

The FCA believe that some firms may not be complying with the Payment Services Regulations 2017 (PSRs) and Electronic Money Regulations 2011 (EMRs) and safeguarding client assets in the way the FCA expects. It published a Dear CEO letter to such firms covering safeguarding along with other matters.

It therefore recently introduced some guidance which is designed to mitigate, in the short-term, their concerns and to help prevent potential harm to customers in the event of insolvencies caused by Covid-19.

In summary the guidance sets out:

- the FCA's expectations on compliance with the PSRs and EMRs safeguarding rules;
- an example acknowledgement letter
- when the FCA expects to be notified of a firm's failure to comply with the safeguarding rules
- clarifications on how Principle 10 applies to small firms
- guidance on various prudential risk and capital issues and rules for payments and e-money firms; and
- guidance on matters which the FCA expects payments and e-money firms to address in their wind-down plans.

Firms should expect greater regulatory focus by the FCA in this area. As with the client money regime for investment firms, it is likely that the FCA will see failures to comply as a serious matter.

FCA and City Corporation collaborate to help innovative companies drive recovery from coronavirus

The FCA and the City of London Corporation will collaborate on the pilot of a 'digital sandbox' to support innovative firms tackling challenges caused by the coronavirus pandemic.

The strategic partnership will see both organisations work together to develop and launch a digital testing environment to provide innovative firms with access to high-quality data sets to allow for the testing and validation of technology solutions.

In its pilot stage, the digital sandbox will support large financial institutions and start-ups looking to play a key role in the recovery from coronavirus through supplying relevant data sets and expertise in the areas of detecting and preventing fraud and scams, supporting vulnerable customers, and improving access to finance for SMEs financially affected by the pandemic.

The role of investment managers in the post Covid-19 recovery

The FCA has been trying to build a bridge across the economic aspects of the Covid-19 crisis to ensure that as many consumers and firms can come through the other side in the best shape possible.

Overall, the speech by Christopher Woolard, Interim Chief Executive at the FCA promoted the view that the fund management industry showed considerable resilience in the face of volatile market conditions. The FCA will look to consult later this summer on finding a way in which funds could safely transition to a structure in which liquidity promises to investors are better aligned with the liquidity of fund assets.

The FCA believe they now have an opportunity to look again at their rulebook, focusing less on tick box compliance and more on promoting outcomes that serve the public interest. Woolard stated that The FCA "*wants rules that balance and meet the needs of both issuers and investors. This is vital. High standards, properly monitored, and if necessary enforced, give investors the confidence to invest.*"

FMConsult fully support this approach and will continue to champion a true risk based approach that focuses on their client's needs**, not aimless tick box exercises.**

FCA seeks views on extending the implementation deadlines for the Certification Regime and Conduct Rules

The FCA has published a consultation paper on making changes to its rules following the extension to the deadline by which FCA solo-regulated firms need to have implemented the Certification Regime.

To ensure other SM&CR deadlines remain consistent and to provide extra time for firms that need it, the FCA is consulting on extending the deadline for the following requirements from 9 December 2020 to 31 March 2021:

- the date the Conduct Rules come into force
- the deadline for submission of information about Directory Persons to the FS Register
- changing references in the rules to the deadline for assessing Certified Persons as fit and proper (which has been agreed by the Treasury)

If firms are able to certify staff and submit information about Directory Persons to the FS Register earlier than March 2021 they should do so. The FCA will still publish details of certified employees of solo firms starting from 9 December 2020 on the FS Register as the FCA expects that this published information will be of immediate benefit to consumers and firms.

The FCA expects accountable Senior Managers to ensure that all Certified Persons are fit and proper. Firms should not wait to remove staff who are not fit and proper from certified roles. Similarly, accountable Senior Managers must ensure that Conduct Rules training is effective, so that staff are aware of the Conduct Rules and understand how they apply to them in their jobs. These programmes will require planning, time and effort to deliver effectively.

The FCA is asking for comments on the consultation by 14 August 2020.

The FCA has launched its updated Financial Services (FS) Register – including a simpler design and clearer language.

The redesign aims to help consumers protect themselves from harm and will provide a better experience for the Register's users.

It can help consumers avoid scams and enables firms to cross-check references and make their key staff known to customers.

Key enhancements include:

- a clearer navigation and design
- simpler language
- more information on the Register's purpose, how to use it and how to avoid scams
- important information being made more prominent, including past actions against individuals and firms, and consumer protections

- optimisation for some mobile devices

The FCA will review and improve the FS Register on an ongoing basis, to ensure it meets the needs of users.

Fake Financial Services Register website

The FCA are aware that there has been an attempt to reproduce the Financial Services Register on a non-FCA website. The FCA are currently working to get the page taken down and have alerted members of the public through their website and social media channels.

The domain that is not official is www.thefca.net.

FCA, PRA and Bank of England launch Complaints Scheme consultation

The FCA, PRA and the Bank of England have recently launched a joint consultation on the Financial Regulators' Complaints Scheme which closes on 14 September.

The consultation asks how the scheme's language can be improved to make it more accessible to consumers. It also clarifies the policy on making ex-gratia compensatory payments.

Updated Statement on firm's handling complaints during coronavirus.

In the current circumstances relating to coronavirus, handling complaints remains an important function which should continue. Firms should take all reasonable steps to ensure as much complaint handling as possible continues including where staff are working from home, where this can be done fairly and effectively.

Where firms are experiencing reduced complaint handling capacity as a result of coronavirus, firms should prioritise:

1. paying promptly complainants who have been offered redress and accepted that offer (including compensation awarded by the Financial Ombudsman Service[FOS])
2. the prompt and fair resolution of complaints from:
   - consumers who are likely to be vulnerable to harm if their complaint is not resolved promptly and fairly, and
   - micro-enterprises and small businesses who are likely to face serious financial difficulties if their complaint is not resolved promptly and fairly
3. sending timely holding responses to those complainants in 2 where their complaints cannot be resolved promptly.

Firms should ensure they continue to meet the relevant obligations, including investigating complaints competently, diligently and impartially, cooperating with FOS and paying appropriate redress or making other appropriate remediation.

While the circumstances relating to coronavirus continue, the FCA expects claims management companies (CMCs) to allow firms the time requested in their holding responses, to give a final response before referring complaints to the Ombudsman Service, if the CMC considers this amount of time reasonable.

FCA reveals it has no plans to revisit FSCS funding

The FCA has revealed it has no plans to revisit the funding structure of the Financial Services Compensation Scheme, despite its chairman warning the system needed a restructure last month. It follows a warning by Charles Randell, the FCA's chairman, last month that the already "unacceptable" levy was likely to increase as a result of the coronavirus crisis.

The FCA boss said the system needed to be redesigned so "polluting firms" in the financial sector paid the bill for high risk and unsuitable investments, not "well-run firms" via the FSCS. In the FCA's policy statement they said: "*Although this is outside the scope of the consultation, we are aware of concerns about the rising compensation levy*." These comments were made in response to a stakeholder's calls for the FSCS levy to be based on operating profit rather than turnover and a limitation period on compensation claims to be introduced.

The FCA has categorised medium and smaller firms as those who will pay fees and levies in 2020-21 of less than £10,000. But this £10,000 threshold includes all fees and levies paid to the FCA, PRA, the Financial Services Compensation Scheme, the Financial Ombudsman Service, Money and Pensions Service, Financial Reporting Council and under the illegal money lending levy. The regulator warned it still expected larger firms to pay their fees and levies under the usual payment terms.

FCA confirms MoUs with ESMA and EU securities regulators

The FCA reminded firms on 17th July 2020 that in February 2019 they had announced the agreement of Memoranda of Understanding (MoUs) with the European Securities and Markets Authority (ESMA) and EU regulators. These MoUs covered cooperation and exchange of information in the event the UK left the EU without a withdrawal agreement.

The UK has since left the EU on 31 January 2020 and the UK entered into a transition period. As EU law continues to apply in the transition period, these MoUs were not required to take effect.

The FCA, ESMA, and EU securities regulators, confirmed that these MoUs remain relevant and appropriate to ensure continued good cooperation and exchange of information. The MoUs will come into effect at the end of the transition period, which is set to expire on 31 December 2020.

As such these assist investment managers of EU domiciled UCITS funds; as under article 13 of Directive 2009/65/EC one of the conditions for delegation of investment management from the Management Company to third country investment managers requires an MOU.

UK Investment firms should still consider whether this provides sufficient comfort post-Brexit as investments into non-EU collective schemes is only permitted by a UCITS scheme under Article 50 if the target funds are authorised under laws considered by the competent authorities of the UCITS home Member State to be equivalent to that laid down in Community law, and that cooperation between authorities is sufficiently ensured.

For instance Luxembourg have previously said that they will deem the UK equivalent, so investment in UK UCITS (which will be non-EU AIFMs post Brexit) should be allowable.

Brexit Divergence?

The European Insurance and Occupational Pensions Authority (EIOPA) published final Guidelines on outsourcing to cloud service providers for insurance and reinsurance undertakings ('the Guidelines'). Today the FCA notified EIOPA that the Guidelines are not applicable to regulated activities within the UK's jurisdiction, as they will enter into force on 1 January 2021, after the EU withdrawal transition period is expected to end.

The FCA will continue to apply the FCA FG16/5 Guidance for firms outsourcing to the cloud and other third-party IT services in the UK.

FCA Fines and Bans Former trading company's CEO on the grounds of Market fraud

The former CEO was fined £658,900 ($821,000) and banned from regulated activities.

The former CEO was involved in drafting admission documents prior to the firm's listing on the London Stock Exchange (LSE) in August 2007, according to the FCA.

These documents contained misleading and hide important information that investors needed to make well-informed decisions about the company. In particular, the documentation did not mention that some of the firm's executives had made significant loans to the firm and its subsidiaries. This was also never disclosed in the annual company accounts.

The FCA fined and banned the company's CFO and Financial Controller, in April 2017 for falsifying critical financial information concerning the client liabilities and its cash position, which was passed to the company's auditors.

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- Fund authorisation services
- Outsourced MLRO services
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- Regulatory project assistance (e.g. Investment Restrictions, Money Laundering, Client Money, ICAAPs)
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UK and Ireland

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- AIFM monitoring (including risk services)
- Dublin also provides Fund UCITS IV Reporting, MLRO and Company Secretarial Services.
- Related Training

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