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Horizon scanner

Financial Services Regulatory Investigations and Enforcement

March 2022

RISK RATING

Immediate impact | Short-term impact | On the horizon

Immediate Impact

Legal risk	Links	Action required
New Consumer Duty In December 2021, the FCA commenced its second consultation on a new Consumer Duty, which will set a higher level of consumer protection in retail financial markets. The second consultation expands on the proposals in the FCA's first consultation (CP21/13). Failure to follow any final rules could result in regulatory action, including enforcement investigations. The new Consumer Duty is intended to set higher expectations for the standard of care that firms provide to consumers and will comprise three key elements: • a new Consumer Principle (Principle 12 in the FCA's Principles for Businesses) that would replace Principles 6 and 7 for retail business • three cross-cutting rules that require firms to: act in good faith towards retail customers; avoid causing foreseeable harm to retail customers; and enable and support retail customers to pursue their financial objectives • four outcomes the FCA expects the new rules to achieve: the product and services outcome – consumers are sold products and services that have been designed to meet their needs, characteristics and objectives; the price and fair value outcome – consumers are sold products and services that represent fair value to them; the consumer understanding outcome – consumers are equipped with the right information to make effective, timely and properly informed decisions; and the consumer support outcome – customers receive the support they need. In light of the concerns raised in response to the first consultation, the FCA is proposing not to provide a private right of action for breaches of any part of the Consumer Duty at this time.	CP21/36 Eversheds Sutherland briefing FCA speech: Regulating for better outcomes - next steps in consumer credit	The consultation closed on 15 February 2022. The FCA expects to confirm any new rules by 31 July 2022, with a full implementation deadline of 30 April 2023. In view of the significance of the proposals and the relatively short timetable, you should review existing and incoming products and services and take steps to fully implement the new duty.
Culture - the 'tone from within' The Senior Managers and Certification Regime (SMCR) aims to reduce harm to consumers and strengthen market integrity by setting a new standard of personal conduct for everyone working in financial services. Firms should be thinking about SMCR in the context of their wider culture as the FCA looks to senior managers to foster/drive healthy cultures. Failure to do so may result in	Eversheds Sutherland briefing and webinar FCA press release and expectations FCA 5 conduct questions	You should review the FCA's expectations, including the 5 Conduct Questions, and keep under review how you can best meet them. The PRA was expected to publish an evaluation of the effectiveness of SMCR in Q2 2021 but nothing has been published to date. The evaluation findings could lead to

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enforcement action and reputational damage. In a speech on compliance, culture and evolving regulatory expectations, Mark Steward (FCA Executive Director of Enforcement and Market Oversight) stated that the regulator's 5 Conduct Questions, which start with 'tone from the top', are increasingly focusing on 'tone from within', which requires every person in an organisation to be personally accountable and engaged.		consequential policy proposals that would be subject to further consultation. See our linked briefing and webinar for a comparison of SMCR and equivalent regimes.
Diversity and inclusion (D&I) in financial services In July 2021, the FCA, PRA and Bank of England published a discussion paper seeking views on plans to improve D&I and setting out a range of policy options, including: • the use of targets for representation • measures to make senior leaders directly accountable • linking remuneration to D&I metrics • the regulators' approach to considering D&I in non-financial misconduct A one-off survey to capture D&I data took place in Q3 2021. The FCA has also consulted on proposals to improve transparency for investors on the diversity of listed company boards and their executive management teams (CP21/24). The FCA has issued a letter to Chairs of Remuneration Committees highlighting the need to "review pay data across all protected characteristics and to act swiftly to address any discrepancies". The Financial Services Skills Council has also launched an inclusion measurement guide to improve and develop inclusion data metrics and analysis across the FS sector.	Consultation paper FCA letter to chairs Eversheds Sutherland briefing	The deadline for submitting comments on the discussion paper was 30 September 2021. The regulators will use the feedback and data received to develop more detailed proposals, which they intend to consult on in Q1 2022, with a formal policy statement expected in Q3 2022. Given the far-reaching nature of many of the policy options, it is in your interests to start considering the feasibility of complying with the types of requirements set out in the discussion paper. New FCA rules to improve transparency on diversity for investors are expected by early 2022.
Cessation of LIBOR Publication of 24 LIBOR settings has ended, and the six most widely used sterling and Japanese yen settings are now being published using a changed methodology. The FCA has made clear that: senior managers and boards are expected to understand the risks associated with LIBOR transition and take appropriate action to move to alternative rates; and firms must take reasonable steps to treat customers fairly.	UK Finance toolkit FCA LIBOR resources Eversheds Sutherland briefing - LIBOR transition Eversheds Sutherland briefing - five quick takeaways for financial litigators	Further information on the risk of regulatory enforcement and customer/counterparty claims is set out in the linked articles. You should also consider the UK Finance guide, intended as a toolkit to support the move away from LIBOR.

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Operational resilience In March 2021, the Bank of England, PRA and FCA published final rules and guidance on operational resilience. The new rules are designed to ensure financial services firms and FMIs are better prepared to deliver and maintain 'important' business services in the face of a significant disruption event (such as a cyber-attack or a major IT failure). Financial institutions are expected to map the services they deliver and identify those which are most important. They are also expected to define risk-tolerances and test their ability to respond to and recover from a range of severe but plausible events. Regulators expect these services to be delivered (or quickly restored), no matter the cause of the disruption. Additionally, an important component of operational resilience is outsourcing and various papers have been published specifically on that topic (including the PRA paper SS 2/21 and the FSB report).	PS21/3 Eversheds Sutherland Briefing ES FSDI hub - Operational Resilience Eversheds Sutherland Briefing – How do you measure up?	You have until 31 March 2022 to complete the first phase of changes to internal structures and external arrangements in order to meet regulatory expectations and take the first step towards compliance with the rules. There is then a hard stop date of 31 March 2025 to achieve full compliance.
FCA Perimeter Report The report recommends that duties on internet companies in the Online Safety Bill should extend to paid-for advertising, as well as user-generated content. The FCA also considers that the Online Safety Bill should designate content relating to fraud offences as 'priority' illegal content and so require monitoring and preventative action by platforms. The report again calls for amendments to the Financial Promotions Order to reduce risk to ordinary investors who are at risk of receiving financial promotions, including for high-risk products. The FCA also outlines other areas where it considers legislative change is needed, including extending the SMCR to payment and e-money firms. The FCA will formally discuss the report with the Economic Secretary to the Treasury later this year.	FCA perimeter report	You should review the Perimeter Report to ensure you are familiar with the FCA's proposed changes to the perimeter. Any decision to extend the regulatory perimeter rests with the Government.
Strong Customer Authentication (SCA) The SCA rules are set out in the Payment Services Regulations 2017 and the related technical standards and are intended to enhance the security of payments and limit fraud during the authentication process. They apply when a payer: • initiates an electronic payment transaction • accesses their payment account online	Payment services regulation 2017 FCA update UK Finance SCA resources	As of 14 March 2020, you should be complying with requirements for SCA with respect to online and mobile banking. The FCA has granted a further extension to 14 March 2022 (from 14 September 2021) in respect of implementation of SCA for card-based e-commerce transactions but has said that if a firm can apply SCA to an e-commerce transaction then it should do so.

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• carries out any action remotely that may imply a risk of payment fraud (unless an exemption applies). The FCA expects firms to take robust action to reduce the risk of fraud. Where SCA is not in place, or firms are facing difficulties, the FCA expects it to be discussed with them as a priority. On 6 October 2021, the FCA wrote to CEOs to reiterate its expectation that firms are fully compliant with SCA requirements by 14 March 2022, taking all reasonable steps to support consumer and merchant readiness.		
Regulation of cryptoassets In January 2022, the FCA launched a consultation on proposals to strengthen financial promotion rules for high-risk investments, including cryptoassets. This is a central element of the FCA's Consumer Investments Strategy, published in September 2021. The FCA is acting to address concerns about the ease and speed with which people can make high-risk investments by proposing a significant strengthening of its rules on how high-risk financial products are marketed. Alongside the consultation paper, the FCA has published the findings of research used to test its proposed interventions. Other developments include: • commitment by the FCA in its Business Plan to tackle firms and individuals who cause consumers harm • the FCA continues to warn of the risks associated with cryptoasset investments • the FCA has extended the end date of the Temporary Registration Regime for existing cryptoasset businesses from 9 July 2021 to 31 March 2022 • in March 2021, the FCA announced that UK cryptoasset firms must submit annual financial crime reports • in October 2021, to coincide with the launch of its InvestSmart campaign, the FCA published research showing that young investors in high-risk products are driven by competition and hype	CP22/2 Eversheds Sutherland briefing Eversheds Sutherland Briefing FCA hub: Cryptoassets: AML / CTF regime ASA guidance Eversheds Sutherland LinkedIn flash update	The consultation closes on 23 March 2022 and final rules are expected to be confirmed in Summer 2022. You should consider the proposals and assess their applicability and impact on your business. Note that the Advertising Standards Authority (ASA) has recently released guidance on cryptoassets. Until some forms of cryptoassets are brought into regulation by the FCA, all unregulated cryptoassets will continue to be subject to the Advertising Code. Following the date on which the FCA takes on responsibility for regulation of most forms of cryptoassets, the ASA will nevertheless continue to retain oversight of across all forms of cryptoasset advertising.

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Independent Review into the FSA and the FCA's supervisory intervention on Interest Rate Hedging Products (Swift Review) In December 2021, the FCA published the Swift Review, which covered the period from 1 March 2012 to 31 December 2018 and examined the quality and effectiveness of the FSA and FCA's supervisory intervention, including judgments relating to securing redress for SMEs. The review identified several recommendations for the FCA, categorised as follows: • general recommendations • good regulatory practice in the development and use of voluntary redress schemes • greater willingness to use statutory powers • implementation/oversight and the importance of retaining ownership and control over regulatory interventions • FCA decision-making and processes, including the principles of transparency and regulatory independence The FCA has also published its response to the Swift Review, which sets out the regulator's response to each recommendation.	Swift Review FCA response FCA Update APPG letter to the FCA FCA response to APPG	The FCA will incorporate the recommendations of the Swift Review into a wider workstream, building on existing work on the regulator's approach to redress. The FCA will incorporate the redress workstream into a wider work programme in response to the findings of the LCF and Connaught reviews and will report regularly on progress. The All-Parliamentary Group (APPG) on Fair Business Banking asked the FCA to reconsider its response because it considers that it fails to address the conclusions reached in the review in several material respects and that the FCA's decision not to seek to use its powers to require any further redress to be paid to the excluded IHRP customers is flawed and unlawful. The FCA has declined to reconsider. The APPG now intends to apply for a judicial review (JR) of the response. The APPG sent a letter of claim on 8 February 2022 and the deadline for issuing the JR is 13 March 2022. The APPG has launched a crowdfunding campaign to fund the JR. If the £100,000 initial target is achieved, the APPG intends to commence the JR by 13 March 2022 and pursue to final judgment.
Tailored support for consumers - impact of COVID-19 Lenders are obliged to provide tailored support for customers struggling to keep up with repayments, taking into account their individual circumstances.	FCA updated guidance - consumer credit FCA update FCA COVID-19 consumer support hub	Where appropriate, customers should be signposted towards sources of debt advice. Given ongoing uncertainties arising from the impact of COVID-19, the FCA is keeping this guidance under review.
FCA guidance on 'buy now, pay later' (BNPL) contract terms Recent years have seen an increase in the use of BNPL products, particularly for online purchases. Although not all BNPL products are regulated by the FCA, all firms must comply with consumer protection legislation, which the FCA has powers to enforce. This includes the Consumer Rights Act 2015 (CRA) for contracts entered	FCA guidance Government consultation	The guidance applies with immediate effect. You should review the terms and conditions of any BNPL products you offer and take steps to ensure compliance with the guidance.

Legal risk	Links	Action required
into from 1 October 2015 and the Unfair Terms in Consumer Contracts Regulations 1999 for contracts entered into between 1 July 1995 and 30 September 2015. The Government intends for BNPL products to be regulated by the FCA in future. Ahead of this, the FCA has used the CRA to assess the fairness and transparency of the terms of certain firms offering unregulated BNPL products and published guidance for firms operating in this sector. The guidance covers the following contract terms: • terms setting out what happens if a consumer cancels the contract for purchases funded by the BNPL loan • terms enabling firms to terminate and/or suspend a consumer’s account or access to services • right of set-off terms • continuous payment authority terms		The Government consultation closed on 6 January 2022 and further news is awaited.

Short-term impact

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New FCA cancellation and variation power The Financial Services Act 2021 gave the FCA an additional power to allow the FCA more quickly and efficiently to vary or cancel a firm's regulatory permissions where those permissions are not being used and to reflect such variations/cancellations on the Financial Services (FS) Register. The FCA has consulted on changes to its Handbook and its Enforcement Guide to reflect the new power and provide guidance on how the FCA will use it. The proposed changes also provide guidance on the possibility that the FCA may, when relevant firms apply, reverse or annul its decision to use the new powers. The changes are intended to help prevent scams and to ensure the FS Register presents a clearer picture of the permissions firms hold.	Consultation paper Financial services act 2021	The consultation closed on 29 October 2021. The FCA will publish feedback on responses and issue a Policy Statement in due course.
Regulatory focus on loyalty - risk of long term customers overpaying for financial products Ensuring that markets work well and provide fair outcomes for longstanding and vulnerable consumers continues to be a priority for the FCA. Failure to look after the interests of all customers and treat them fairly may result in the FCA exploring all options to address this using the full range of its powers. Recent developments include: • the FCA has implemented a package of remedies to improve competition and protect home and motor insurance customers from loyalty penalties. This includes new rules so that renewal quotes for home/motor insurance are not more expensive than they would be for new customers • the FCA has published feedback received in response to a Call for Input for open finance (which includes draft principles) • the FCA's Mortgage Prisoner Review has been laid before Parliament	PS21/5: General insurance pricing practices market study PS21/11 General insurance pricing practices - amendments General insurance pricing practices - Q&As on the published rules FCA statement – Mortgage Prisoner Review	Alongside PS21/5, the FCA has also published research on how incentives affect consumers' choices, focusing on purchases of motor and home insurance made through price comparison websites which you may wish to consider. You should also consider the FCA's proposals on the new Consumer Duty (see above), as one of the harms that the new duty intends to address is the exploitation of consumer loyalty or inertia. The FCA will continue to monitor the market closely to ensure firms are ready to implement the pricing changes on time. The FCA will also review the effects of the remedies over the course of 2022, ahead of a full evaluation in early 2024. In relation to the open finance feedback statement, the FCA will support the government as it considers the timing, scope and nature of legislation on open finance. In relation to the Mortgage Prisoner Review, the FCA is encouraging lenders to consider if they can amend their lending criteria to lend

Legal risk	Links	Action required
		to mortgage prisoners who are close to their risk appetite.
Guidance consultation on the FCA's approach to compromises for regulated firms The FCA has published proposed guidance making it clear to firms seeking to limit their liabilities (e.g. under a scheme of arrangement, restructuring plan, or voluntary arrangement) that they should provide the best possible outcome for customers. This will include providing the maximum amount of funding possible to meet compensation claims by customers. The guidance consultation (GC22/1) has been launched in response to an increase in the number of regulated firms proposing compromises to deal with significant liabilities to consumers (in particular, redress liabilities). The proposed guidance relates only to compromises in relation to liabilities. Failure to act in accordance with the final guidance could result in the FCA objecting to firms' proposals in court. The FCA also has the option to intervene by using its regulatory powers, including taking enforcement action against firms and their senior managers where appropriate.	GC22/1	The consultation closes on 1 March 2022. The FCA is seeking feedback on its proposals from all interested parties. The FCA will consider the feedback and publish its final guidance in due course. You should consider the proposed guidance and assess its applicability to and impact on their business.
FCA's powers regarding non-financial misconduct Tackling non-financial misconduct is a regulatory priority: • recent FCA prohibitions resulted from convictions for serious sexual offences leading to prison sentences and requirements to sign the sex offenders register (see linked ES briefing). However, the High Court decision (Beckwith) may give employees who are dismissed for non-financial misconduct which does not directly relate to the work they carry out some assistance in arguing that the decision was unfair • in the recent discussion paper by the FCA, PRA and BoE on diversity and inclusion in financial services, it was recognised that it may be useful to develop guidance as to what constitutes non-financial misconduct so that firms could assess whether evidence of such behaviour constitutes a breach of	Eversheds Sutherland briefing Discussion paper	Misbehaviour which crosses the line of acceptability may lead to an individual failing a fitness and propriety test or worse. As noted above, the deadline for submitting comments on the discussion paper on diversity and inclusion was 30 September 2021.

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the Conduct Rules. It is envisaged that a failure to take reasonable steps to address certain behaviours could also constitute a breach of the Conduct Rules.		
FCA reforms decision-making process The FCA's senior managers are now able to take decisions on the following matters: • a firm's authorisation or an individual's approval • action in straightforward cases to cancel a firm's permissions and that action is contested • commencing civil proceedings, such as seeking an injunction • commencing criminal proceedings, such as a prosecution for insider dealing • using the FCA's powers to vary or limit a firm's permissions • using the FCA's powers to impose requirements on a firm. The RDC will continue to make decisions in relation to contentious enforcement cases, where the FCA is proposing a disciplinary sanction or seeking to impose a prohibition order.	Policy statement	The changes came into effect on 26 November 2021. The FCA intends to carry out a six-month post-implementation review to assess the effectiveness of the reforms.

Legal risk	Links	Action required
Climate-related disclosures Focus on climate change by the government and regulators means that companies (including financial services firms) can expect to provide much more information about their environmental, social and governance (ESG) risks in their annual report, including whether climate-related risks have been identified and are being managed. In December 2020, the FCA published PS20/17, which confirmed its final policy position in relation to climate-related disclosures by commercial companies with a UK premium listing. In November 2021, the FCA announced its ESG strategy and published a discussion paper (DP21/4) seeking initial views on new sustainability disclosure requirements for asset managers and FCA-regulated asset owners and a new classification and labelling system for sustainable investment products. In December 2021, the FCA published PS21/23, which sets out its final rules and guidance on enhancing climate-related disclosures by standard listed companies, and PS21/24, which sets out its final rules and guidance on enhancing climate-related disclosures by asset managers, life insurers and FCA-regulated pension providers. Failure to comply with changes to the reporting processes could result in supervisory intervention, and where serious misconduct is suspected, investigation and enforcement action against firms (and, potentially individuals).	FCA ESG strategy PS21/23 PS21/24 Eversheds Sutherland briefing Eversheds Sutherland briefing	The closing date for comments on DP21/4 was 7 January 2022. The new rule for climate-related disclosures by standard listed companies applies from 1 January 2022. The first annual reports subject to the new rule will be published in early 2023. The new climate-related disclosure rules for asset managers, life insurers and FCA-regulated pension providers apply from 1 January 2022 for the largest in-scope firms and one year later for smaller firms above the £5 billion exemption threshold. The first public disclosures in line with the requirements must be made by 30 June 2023. The FCA will separately consider stakeholder views on the ESG-related discussion topics in capital markets, with a view to publishing a Feedback Statement in the first half of 2022. The FCA will monitor progress against its ESG strategy commitments and measure the success of its interventions, provide interim updates as part of its Business Plan and Annual Report in 2022, and provide a more detailed stock-take on progress in 2023. Separately, you should also review the Financial Reporting Council's (FRC) recently published Statement of Intent on ESG challenges. The FRC is interested in hearing views on its statement. The FRC's Annual Review of Corporate Reporting 2020/21, published in October 2021, states that the FRC's routine monitoring of annual reports and accounts during the 2021/22 cycle will include a focus on climate-related risks and new disclosures.

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Financial Services Future Regulatory Framework (FRF) Review The Government is undertaking a review of the UK financial services regulatory framework to address the need for it to adapt to be fit for the future (particularly in light of Brexit). In October 2020, HM Treasury published a consultation, setting out proposals for redesigning the financial regulatory framework. In November 2020, the Treasury Select Committee (TSC) announced an inquiry into the future of FRF and has recently published its first report which includes a recommendation that HM Treasury consider how the decision-making processes of FOS would interact with the future regulatory framework for the FCA. On 9 November 2021, HM Treasury published a consultation paper setting out the UK Government's response to the feedback received on the previous consultation and making a series of proposals to deliver the intended outcomes of the FRF Review.	Second consultation: proposals for reform TSC Future of Financial Services hub	The initial consultation closed in February 2021. The second consultation closed on 9 February 2022. The TSC is taking evidence as part of its inquiry, which will focus on a wide range of issues, including what the Government’s financial services priorities should be when negotiating trade agreements with third countries, how consumer interests should be taken into account, and how policy/UK regulators can facilitate the emergence of FinTech and new competition.
FCA review of the retained provisions of the Consumer Credit Act 1974 In March 2019, the FCA submitted its final report on the review of the retained provisions of the Consumer Credit Act 1974 to HM Treasury. The report follows from the responses received by the FCA to its Call for Input on the topic in February 2016. The FCA's view is that: • the protections offered by these provisions continue to be important, and should be retained in some form • a framework for the provision of information by firms to customers continues to provide important consumer protection and the nature of the consumer credit market merits taking a different approach to regulation in comparison with other markets, for example in relation to striking the right	FCA final Report on retained provisions of CCA 974 Eversheds Sutherland briefing FCA update	The decision on the future of the legislation falls on the Government. It is unlikely that there will be any changes in the immediate future given that Parliament remains concerned with COVID-19 and the fact that the FCA has not recommended any radical changes to the retained provisions (as regards the protections afforded to consumers).

Legal risk	Links	Action required
balance between prescriptive or more principles-based requirements • the 'self-policing' nature of the sanctions of unenforceability and disentitlement to interest and default sums contributes significantly to ensuring key customer information needs are met.		
The Government's vision for financial services On 1 July 2021, Rishi Sunak, Chancellor of the Exchequer, delivered his Mansion House speech. Alongside the speech, a document entitled "A new chapter for financial services" was published. The document sets out the vision for an open, green and technologically advanced financial services sector that is globally competitive and acts in the interests of communities and citizens, creating jobs, supporting businesses and powering growth across the UK. It is based around four key themes: • an open and global financial hub • a sector at the forefront of technology and innovation • a world leader in green finance • a competitive marketplace promoting effective use of capital.	Mansion house speech A new chapter for financial services	By the end of this Parliament, the Government intends to have: • secured best-in-class financial services agreements with new partners and deepened existing relationships, supporting stable and open markets • put in place the building blocks to enable financial markets to support the transition to net zero in the UK and across the world • delivered regulatory changes to harness the most innovative and cutting-edge technology in financial services • tailored the regulatory framework to ensure the UK is recognised internationally as one of the safest and most competitive places to locate financial services businesses and activities.

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