

## COVID-19 – FURTHER GUIDANCE IV

### Focus On The FCA

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In February this year Griffin hosted a Technical Forum at which Richard Burger of DWF LLP considered FCA Enforcement Investigations and Proceedings. Whilst fines cannot be recovered under professional indemnity policies, Griffin can provide defence assistance to any Member that is subject to such investigations or proceedings. Last year's priorities for the FCA enforcement team had been Brexit, culture and governance, operational resilience and financial crime. More recently there had also been a focus on non-financial misconduct, with the regulator having sent out a "Dear CEO" letter in January and taking particular interest in the Lloyd's market. Much has happened since February of this year, so what impact has the COVID-19 pandemic had on the FCA's regulatory focus?

#### FCA Business Plan 2020/2021

The FCA published its 2020/2021 Business Plan on 7<sup>th</sup> April 2020, setting out what it expects to be its strategic focus for the next three years but which it accepts will need to be kept under review. A joint statement from the Chair and Chief Executive in the first section indicated that the FCA's "*vital work to protect consumers and markets needs to continue but this will now be fundamentally reshaped by the impact of COVID-19...*" and ended with the comment: "*We will not compromise on our expectations of firms, .....*".

The Business Plan reminds firms that they must act in accordance with the FCA's principles and rules noting: "*We expect firms and their employees to meet these standards and we will hold them to account when they fail to do so*". It references a shift in focus towards smaller firms in the coming year and indicates it will "*... move swiftly to enforcement action...*" where the FCA's standards are not met. So whilst the focus may have shifted to the current crisis, it is clear the other areas, and indeed investigations and enforcement, have not fallen off the agenda. Indeed, solicitors report increased enforcement activity despite COVID-19.

#### FCA's Response to COVID-19

The FCA has set up a number of teams dedicated to dealing with the impact of COVID-19 and reports that it is monitoring the position closely. It is in regular touch with firms and indicates that it expects them to provide "*strong support and service to customers during this period*." Much of the detailed guidance to date has been aimed at insurers rather than intermediaries. The FCA set out its "*Expectations for insurance firms following the COVID-19 pandemic*" on 19<sup>th</sup> March. This was followed by a "Dear CEO" letter dated 15<sup>th</sup> April specifically addressing the issue of SMEs and Business Interruption (BI) cover, and urging insurers to settle any claim promptly where there is a clear obligation to pay. Things have moved on rapidly with the news last Friday, 1<sup>st</sup> May, that the FCA will seek a court declaration to resolve contractual uncertainty in BI cover. This is an unprecedented step and the FCA has said: "*It is clear that decisive action is appropriate given the severity of the potential consequences for customers in the current coronavirus emergency*."

Whilst the main focus of all of this is on insurers, that is not to say that the role of brokers has fallen off the FCA's radar. Its website includes the following statement under the "Expectations of brokers" heading: *"In these uncertain times, brokers have a key role to play to help consumers understand the market, the impact of coronavirus, and search the market for products that meet their demands and needs. We encourage brokers to keep abreast of market developments so they can suitably advise their customers."*

In addition, the 15<sup>th</sup> April "Dear CEO" letter included the following statement: *"Insurers and brokers have an essential role to play in supporting their customers who may be unclear whether they have appropriate cover in place. Clear accurate and timely communication is crucial, which we expect firms to deliver."*

The FCA also published draft guidance last Friday directed at regulated firms operating in the insurance and premium finance markets, making clear this includes insurers and insurance intermediaries (including Appointed Representatives). The guidance is titled: *"Coronavirus and customers in temporary financial difficulty: draft guidance for insurance and premium finance firms"* and applies in relation to natural persons and small business customers (i.e. a business with annual turnover of less than £6.5 million and which either employs less than 50 persons or has a balance sheet total of less than £5 million). The guidance considers not only a scenario where the customer contacts the firm about any difficulty in making payments, wishing to reduce cover and so on in light of coronavirus, but also where the firm has a reasonable basis for knowing customers are in difficulty, even if they have not made contact. The timescale indicates the urgency of the situation with the FCA requesting comments by Tuesday 5<sup>th</sup> May and the new measures coming into force on 13<sup>th</sup> May. Lest there be any doubt about the position, the FCA states that it may take the guidance into account in enforcement cases, when considering whether conduct of a firm has fallen below the standard expected.

The FCA has also indicated that it intends to send out surveys to smaller brokers to determine the COVID-19 business impact. Whilst this is understood to be an optional survey, it is another example of the FCA's continued interest in the sector.

## Enforcement investigations and proceedings

So has the current COVID-19 crisis increased the risk of becoming subject to an investigation? Statistically an investigation may be unlikely since the FCA regulates around 60,000 firms but whilst it is always dangerous to be complacent, that is perhaps even more so in the current climate. Keeping abreast of market developments, and engaging in clear communications with clients to keep them updated, is more important than ever. The firm must clearly evidence that this is being done.

Operational resilience and financial crime are identified areas of FCA focus and these are both also areas of particular risk in the current climate. Unprecedented numbers of people are working remotely and there is a heightened risk of security breaches and potential for fraud. Falling victim to a fraud and having to report this to the FCA may be bad enough. Things may get even worse if that report triggers a regulatory investigation and subsequent enforcement proceedings against the targeted firm for failing to have adequate systems and controls to counter the risks of fraud. This is sometimes referred to as 'double victim' impact: victim of fraud and victim of enforcement action. However, firms should still assess and make reports of fraud to the FCA and, if applicable, the National Crime Agency and/or Insurance Fraud Enforcement Department and/or Action Fraud.

The industry focus may have moved on to dealing with the challenges of COVID-19 but this will not preclude the FCA from instigating an investigation into a firm that it considers is not meeting the requisite standards. If the FCA opens a case against the firm it is likely to also do so against particular individuals within that firm. The regulatory authorities are keen that their deterrents should be credible and this targeting of senior individuals is a key tool. Another tactic can be to adopt “Close Supervision”. This may involve a senior manager or CEO of the firm being required to report to a FCA supervisor once a month. Significant fines can also be imposed. The total in 2014 was £1.4 billion. This included a penalty imposed on an intermediary for failing to have adequate systems in place to guard against corrupt payments. There was no suggestion that any corrupt payments had been made but it was enough that sufficiently robust procedures were not in place.

## Practical Tips In The Current Climate

There are a number of steps Members can take to help avoid falling below the expectations of the FCA:

- Ensure that any changes made to procedures to accommodate current remote working arrangements are clearly documented, together with the reason for the change. Keep a record to demonstrate that affected staff have been given clear guidance concerning any revised procedure. Ensure that any revised procedure still demonstrates adequate supervision of staff and that proper checking and sign-off still appears on file.
- Monitor staff absence and ensure that responsibility and accountability for any affected area is delegated to another suitably qualified staff member, as appropriate. Again, keep a record of the revised arrangements.
- Keep abreast of market developments and industry guidance, and encourage staff to maintain their Continuing Professional Development. Ensure that any decisions taken and action required in response to market developments or guidance are clearly communicated to staff. The guidance just issued by the FCA concerning customers facing financial difficulty is a good example of this. If a Member deals with customers covered by the guidance, it will need to be considered and clear instructions issued to staff to ensure they are acting in accordance with it.
- Maintain good communication with clients and ensure this is evidenced on file. The FCA has made clear that good communication is critical.
- Cyber criminals are exploiting the current situation. Where any changes have to be made to procedures e.g. payment authorisations, to facilitate remote working, ensure that the procedure remains sufficiently robust. It is also worth regularly reminding staff how they can avoid falling victim to a scam. (See Bulletin 2020/04 COVID-19 – Further Guidance for a list of simple steps.)

The practical tips outlined above should help Members to demonstrate that they are taking reasonable steps during this pandemic to meet the required standard.

## Griffin Support

The current situation continues to cause much uncertainty and the constantly developing picture is challenging. We would remind Members that the Griffin team remains available to provide liability advice, in the usual way, on any aspect of the current situation which may have a professional indemnity implication if it were not handled properly. We can be contacted on our usual phone numbers or by email, so please do stay in touch.

This bulletin is for general information purposes only and does not provide a comprehensive or complete statement of the law relating to the issues discussed nor does it constitute legal advice. In addition, by its nature, this bulletin may be superseded by subsequent regulatory or legal developments. Professional advice should be sought where appropriate in relation to any particular circumstances.

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First Issued: May 2020  
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