



LATHAM & WATKINS

15 January 2020

Financial Regulation Monthly Breakfast Seminar

Overview



Key regulatory focus areas of 2020

Brexit: preparing for 31 January and beyond

The FCA's "Dear CEO" letter in relation to non-financial misconduct

The recent FCA fine of a director for breaching MAR



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Key regulatory focus areas of 2020
Rob Moulton, Nicola Higgs and Stuart Davis

Key regulatory focus areas for 2020

1. **Future Regulatory Framework**

- Focus on whether there will be a UK-EU trade deal, and what this will cover
- Shift to consider the UK's position on the global stage
- HM Treasury Financial Services Future Regulatory Framework Review
- True approach to deregulation (or not) remains unclear
 - Key (?) battle – Mandatory Share Trading Obligation

Key regulatory focus areas for 2020

2. Scheduled European Reviews

- MiFID II: number of scheduled reports due in 2020, expect a consultation on the transparency regime and a focus on areas such as the share trading obligation, the double volume cap mechanism, the commodity derivatives regime, and issues with data and reporting requirements
- MAR: ESMA due to submit its final report on the MAR review to the Commission in the spring, which could lead to changes to the Level 1
 - Insider list requirements
 - Reporting share buybacks
 - Pre-hedging guidance
- BMR: Commission to report on its review of the BMR, which addresses issues such as benchmark transition, and the third-country regime

Key regulatory focus areas for 2020

3. **LIBOR transition**

- Firms need to focus on preparing for transition, as end-2021 is not far away
- Expected that industry work will move forward this year, facilitating further progress
- Firms should also note the FCA's guidance on conduct risk

Key regulatory focus areas for 2020

4. **New Prudential Regime for Investment Firms**

- Regime will introduce new streamlined prudential categories for investment firms
- Although billed as a simplification and a more proportionate regime, it is likely to entail an uplift for many firms
- Implementation date is 26 June 2021; firms should prioritise working out their classification quickly to understand the likely impact

Key regulatory focus areas for 2020

5. Financial Crime / AML

- Interaction between STORs and SARs clarified somewhat
- Further progress on reform of the SARs regime expected
- MLD5 implementation date 10 January 2020 – new requirements and extension to cryptoassets bringing with it significant FCA registration and fit and proper regime

Key regulatory focus areas for 2020

6. **Green Finance and Climate Change Risk Management**

- Key policy measures likely to bite this year
- EU Sustainable Finance Action Plan – various measures adopted, and political agreement reached on the taxonomy
- UK Green Finance Strategy set to take shape this year, along with measures from the PRA and FCA

Key regulatory focus areas for 2020

7. Governance, Risk Management, and Accountability

- SMCR is now in force for most firms, but the work is not done – firms need to focus on continued compliance and prepare for potential post-implementation reviews
- We might expect to see some enforcement cases come to fruition
- Culture and conduct remain high on the FCA's agenda
 - Keeping up to date with FCA's agenda a key challenge
 - Diversity, mental health, #metoo
 - Industry behaviour to shift (not slowly improve)
 - Fitness and properness assessments an ongoing test of standards

Key regulatory focus areas for 2020

8. Operational Resilience

- Continued focus on operational resilience, and December 2019 Consultation Papers mean that we will see concrete regulatory requirements and expectations on this topic
- Outsourcing continues to attract regulatory attention, and the PRA will finalise new guidance on outsourcing this year
- More firms expected (at board level) to demonstrate they have considered this from their client's perspective

Key regulatory focus areas for 2020

9. Settlement Discipline

- New settlement discipline measures under the CSDR due to apply from September
- Measures include a mandatory buy-in regime, and will impact most parties in the settlement chain, from trading venues and CSDs, to banks and asset managers

Key regulatory focus areas for 2020

10. FinTech: Cryptoassets

- Regulators continue to grapple with the appropriate regulatory treatment of cryptoassets, but developments in the UK are bringing clarity
- The EU has launched a consultation to explore whether the existing EU regulatory framework is suitable for cryptoassets
- The emergence of possible global stablecoins may be the impetus for governmental and international bodies to develop publicly issued and controlled stablecoins that digitally represent fiat currency



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Brexit: preparing for 31 January and beyond
Anne Mainwaring

No deal risk

- Two key dates
 - 31 January 2020
 - 31 December 2020
- In order to avoid a no-deal exit, both the UK and the EU need to approve and sign the Withdrawal Agreement by 31 January 2020
- Otherwise, the default position is that the UK will leave the EU on a no-deal basis at the end of January

Will the UK avoid a no-deal exit?

- If the UK leaves the EU on 31 January 2020 with a Withdrawal Agreement in place, the UK will enter into a transitional arrangement until 31 December 2020
- During this period, the UK and the EU will need to negotiate and agree what the terms of their future relationship after 31 December 2020 will be
- Failure to reach a trade agreement covering financial services by the end of the transitional period would result in the UK exiting the EU on effectively a no-deal basis unless the UK government requested (and the EU agreed to) an extension to the overall transitional arrangement

Will the UK avoid a no-deal exit?

- The deadline for the UK government to request an extension to the transitional arrangement is 1 July 2020 – however the government has legislated to rule this option out
- Note that currently the government is not required to seek parliamentary approval for any trade deal that it negotiates with the EU

What happens during the transitional?

- EU law continues to apply in the UK
- UK firms continue to benefit from passporting rights
- UK regulators lose their 'seat at the table'

If there is a no-deal exit, what will happen on Day 1?

- UK onshoring exercise
- Fully domestic regulatory framework will be phased in
- Identify and map the implementation timeline
- Less flexibility for Day 1 requirements?

The new government's early pronouncements, and what they mean for financial services

- New Financial Services Bill
 - Legislation will be brought forward to ensure “that the UK maintains its world-leading regulatory standards and remains open to international markets after we leave the EU”
- FCA Leadership

EU policy

- Tightening approach to third country access
- Although arguably motivated by Brexit, the changes will affect any non-EU firms doing business cross-border into the EU
- Narrowing the equivalence regime
- Autonomy in relation to equivalence decisions



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The FCA's "Dear CEO" letter in relation to
non-financial misconduct
David Berman

Non-financial misconduct – latest from the FCA

- FCA view's on non-financial misconduct were first highlighted in Megan Butler's letter to the Women and Equalities Committee (September 2018):
 - *“Sexual harassment and other forms of non-financial misconduct can amount to a breach of our Conduct Rules ...”*
 - *“There have been instances where either we [the FCA] or a firm we supervise have found an individual not to be fit and proper on the basis of their ‘non-financial’ conduct”*
 - *“How firms handle poor personal misconduct, including allegations of sexual misconduct, is a topic which we are increasingly discussing with firms ... We will continue to focus on this issue”*

Non-financial misconduct – latest from the FCA

- FCA feedback report on its 5 Conduct Questions Programme (May 2019)
 - *“... the troubling fact that non-financial misconduct in the form of bullying, sexual harassment and other forms of personal misbehaviour are widespread”*
 - *“The largest component of investigated cases in the Whistleblowing channel were categories like Dignity at Work or Non-financial misconduct which captured topics such as bullying, favouritism, exclusion and sexual harassment”*

Non-financial misconduct – latest from the FCA

- FCA “Dear CEO” letter (wholesale general insurance firms) (January 2020)
 - *“How a firm handles non-financial misconduct throughout the organisation, including discrimination, harassment, victimisation and bullying, is indicative of a firm’s culture”*
 - *“... a senior manager’s failure to take reasonable steps to address non-financial misconduct could lead us to determine that they are not fit and proper”*
 - To our knowledge, this is the first time that the FCA has drawn an explicit link between: (i) the response to any non-financial misconduct; and (ii) the F&P of the individual responsible for the area(s) in which such conduct is occurring - even if that individual him/herself has not been engaging in the misconduct concerned. We would assume that the FCA takes a similar stance in respect of any form of misconduct (whether non-financial or otherwise)



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The recent FCA fine of a director for breaching MAR
Jon Holland

Background

- Mr Gorman was MD of Braemar Shipping Services' Logistics Division and one of five members of Braemar's ExCo, which received monthly group management accounts and discussed board-level confidential information
- He was a person discharging managerial responsibilities (PDMR) for the purposes of MAR
- Between August 2016 and January 2017, he sold 22,221 Braemar shares, but failed to notify Braemar (which was therefore unable to announce the necessary PDMR notifications to the market) or the FCA as required by MAR, or seek prior approval as required by Braemar's internal policies implementing MAR

Background

- Shortly before the first transaction, Mr Gorman, along with the other Braemar PDMRs, received a briefing pack on his responsibilities and was asked to confirm that he understood his legal and regulatory obligations
- He failed to sign and return the acknowledgment required by Braemar, at the time or when he was chased immediately after the first transaction. He only signed and returned the form shortly after the second transaction, in November 2016
- But he told the FCA that, despite signing and returning the form, he hadn't actually read the documents

Background

- Mr Gorman first notified Braemar shortly after the third transaction, in January 2017, following a further reminder from Braemar, and only about the third transaction
- Braemar notified the market and the FCA, which investigated and identified the two prior transactions
- Mr Gorman only notified Braemar about the two prior transactions in October 2018. Braemar in turn notified the market, over a year after the first transaction

Findings

- No personal benefit from the breach
- No evidence of material adverse impact on the market or significant impact on Braemar's share price
- Breach in relation to the first two trades was negligent – because Mr Gorman hadn't signed and returned the acknowledgment
- Breach in relation to the third trade – after Mr Gorman signed and returned the form – was reckless

Penalty

- No disgorgement
- 10% of relevant remuneration (£643k) based on level 2 seriousness
- No adjustment for aggravating or mitigating factors
- No adjustment for deterrence
- Less 30% for stage 1 settlement
- Penalty of £45,000, payable in instalments

Lessons

- For individuals
 - The FCA is looking for non-compliance
 - Read and implement the stuff you're sent by compliance – and don't say you've done so if you haven't
- For firms
 - Slight question mark over the fact that Braemar didn't provide training to its PDMRs – but no adverse finding as a result

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[Brexit: 10 Commonly Asked Questions](#)

[Third-Country Firms Operating Cross-Border Into the EU - Upcoming Reform](#)

[Crypto Coming of Age: UK Regulation Hits Cryptoasset Business](#)

[A Tipping Point for the Regulation of Cryptoassets in the EU?](#)

