

ALLEN & OVERY



FCA Business Plan

Key messages for litigators

2015/16

Introduction

On 24 March 2015, the FCA published its Business Plan for 2015/16. The purpose of the Business Plan is to set out the key areas of focus for the FCA during the forthcoming financial year.

In this document we set out an overview of key points made by the FCA in its Business Plan that may be of most interest to litigators working in financial institutions, as well as an indication of the possible litigation and regulatory enforcement risks they pose.

In particular, we focus on the following topics that were highlighted in the Business Plan:

03 | **Culture**

07 | **Financial crime**

04 | **Individual accountability**

08 | **Increased focus on certain markets:**
– Wholesale banking
– Investment and wealth management
– Retail banking & investments

06 | **Conflicts of interest**

10 | **Potential changes to the FCA's enforcement processes**

Culture

The FCA has previously emphasised the importance of firms embedding positive cultural changes and ‘setting the right tone from the top’. This topic featured prominently throughout the FCA’s Business Plan for 2015/16, which noted the various ways in which the FCA expects firms to reinforce standards of culture to their employees, including, for example:



However, on a positive note the FCA has acknowledged that firms have made improvements in relation to their cultures and embedding good cultural changes within their organisations. Nonetheless, the FCA has indicated in its

Business Plan that there is still more work to be done in this area, perhaps in part due to the number of enforcement cases published over the past year which have featured comments about firms’ cultures and values.

Proposed thematic review of culture change programmes

In 2015/16 the FCA is proposing to undertake a new thematic review on whether culture change programmes in retail and wholesale banks are driving the right behaviour, with a particular focus on remuneration, appraisal and promotion decisions of middle management, as well as how concerns are reported and acted on. If the FCA identifies deficiencies in a firm’s culture during this thematic review then it may use this as a basis for launching an enforcement investigation.

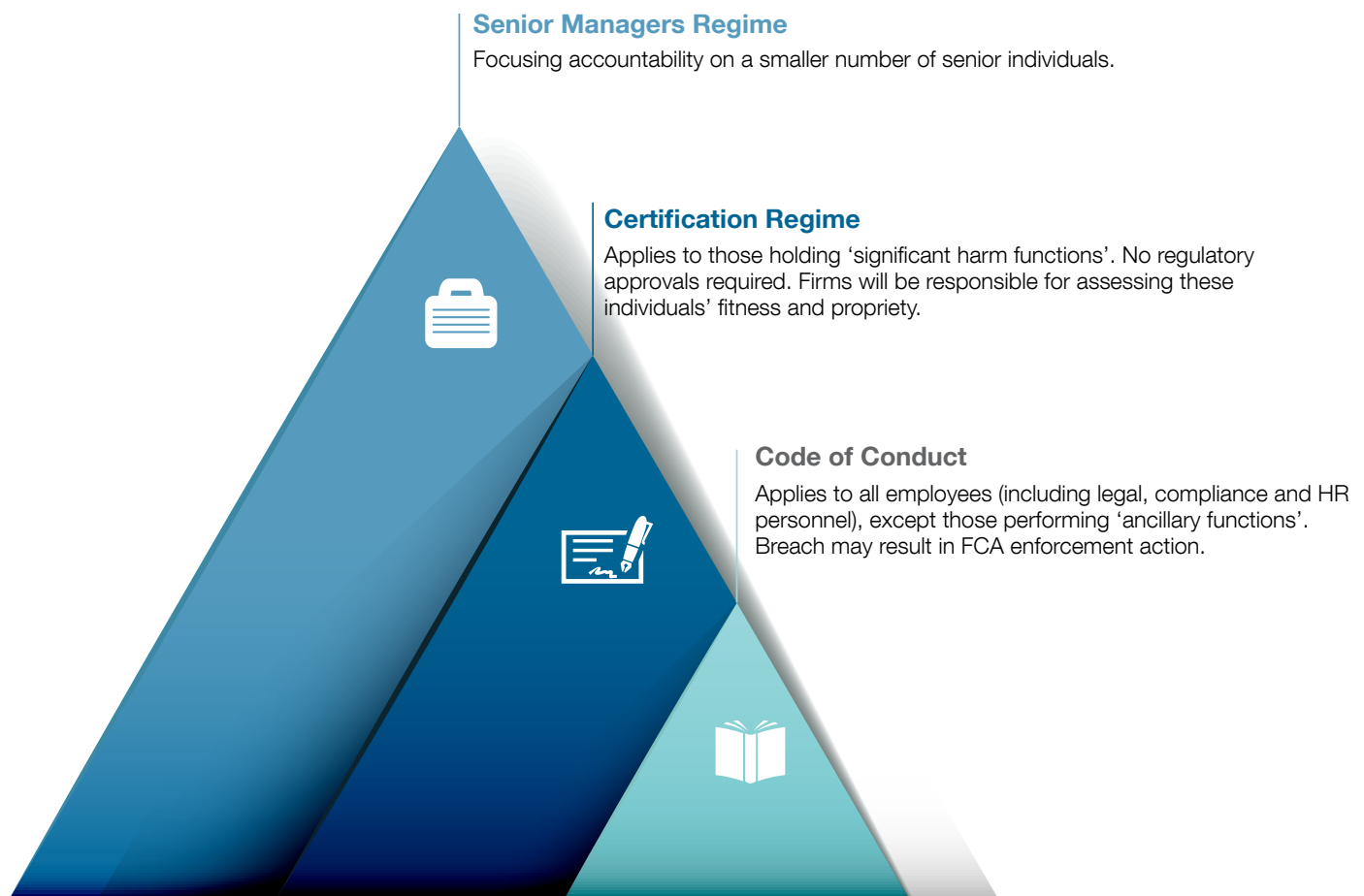
Individual accountability

The new Senior Managers and Certification Regime

High on the FCA's agenda for the next financial year is the introduction of the new Senior Managers and Certification Regime, as well as the new Code of Conduct. This is due to come into force from 6 March 2016.

Earlier in March 2015, the FCA and the PRA published their 'near final' rules for the Senior Managers and

Certification Regime, as well as the new Code of Conduct. As a result, there is much that affected firms need to be doing in order to implement the new regime, including various issues and risks that may need to be considered from a litigation perspective.



Allen & Overy has published a variety of client materials on the new Senior Managers and Certification Regime. If you would like to receive copies of these materials, please contact [magdalena.flynn@allenovery.com](mailto:magdalenaflynn@allenovery.com)

Whistleblowing

In the Business Plan for 2015/16 the FCA notes the 45% increase in the number of whistleblowing disclosures that have been made to it over the past year as well as the quality of the information it has received from whistleblowers. In particular, the FCA has announced that 124 reports made by whistleblowers have either directly contributed to the FCA's enforcement activities or were otherwise of 'significant value' to the FCA.

Earlier in 2015, the FCA published a consultation paper relating to various arrangements it intends to require firms to put in place relating to whistleblowing. These proposals appear to almost encourage employees to make disclosures directly to the FCA, as opposed to going through their employers' whistleblowing processes. For a copy of our briefing on this consultation paper, please [click here](#).

Unsurprisingly, the FCA is keen to maximise whistleblowers as a potential source of information which may assist with its enforcement and market surveillance activities.

Remuneration


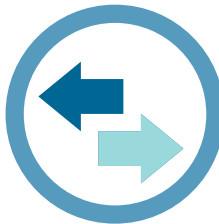


The way in which firms remunerate and incentivise their employees is also set to remain another key focus for the FCA for the next financial year and is closely linked to the FCA's continued focus on culture (see page 3). We have observed the FCA (and the PRA) becoming increasingly interested and involved in firms' remuneration decisions, especially where individuals may be the subjects of or witnesses in ongoing enforcement investigations.

In an enforcement context, it is becoming increasingly common for the FCA to request details of firms' remuneration structures and policies, as well as the rationales for them, as 'standard' items during enforcement investigations. The FCA also continues to expect firms to take appropriate action in relation to employees, including their remuneration, if they are found to have engaged in misconduct and report steps that have been taken in this respect to the FCA.

Conflicts of interest

The FCA has described conflicts of interest in its Business Plan for 2015/16 as being ‘at the root of many conduct risks across markets’ particularly in wholesale markets. Conflicts of interest have also been a focus in a number of FCA enforcement cases that have been concluded over the past year.

The FCA appears to be particularly focused on the following key areas where it believes conflicts of interest may arise:

 <p>Where information asymmetries arise between firms and their clients (both in retail and wholesale contexts).</p>	 <p>Business and trading models that fail to appreciate the risk of conflicts of interest.</p>
 <p>The potential for conflicts of interest where a firm acts as both agent and principal.</p>	 <p>The risk that firms’ large ‘back books’ may lead them to act against their clients’ best interests.</p>

Given that the FCA has highlighted these key areas, it is likely that the FCA will be particularly sensitive if it sees evidence of conflicts of interest not being managed

adequately in these situations, with a view to referring firms to enforcement.

The FCA is proposing to undertake a number of thematic reviews in relation to conflicts of interest

In the 2015/16 Business Plan, the FCA mentions that it is intending to undertake a number of thematic reviews which either focus on or may touch upon conflicts of interest. These include:

- inducements and conflicts of interest in retail investments (from Q2 2015);
- controls over flows of information in investment banks (in progress);
- trader controls around benchmarks (in progress); and
- conflicts of interest in dark pools (from Q2 2015).

The FCA may use its findings from these thematic reviews to refer firms to enforcement, if appropriate.

Financial crime

The importance of firms having systems and controls in place to prevent financial crime was listed in the FCA's Business Plan for 2015/16 as a 'new' forward-looking area of focus for the coming year. The FCA is proposing to focus on controls designed to prevent money laundering, bribery and corruption, as well as 'cyber-crime'.

The FCA has noted that some firms' approach to reducing the risk of financial crime in their organisations has been to move away from providing services to certain groups of customers or business sectors. In recognition of its new competition powers that take effect on 1 April 2015, the FCA described this approach in the Business Plan as being potentially anti-competitive and a way in which legitimate customers may be impeded from accessing financial services. The FCA has indicated that it is concerned by this approach and that it intends to

work with the PRA and the Financial Stability Board, as well as regulators in other countries, to take action to address its concerns.

As a result, firms will need to ensure that they have robust systems and controls to prevent financial crime that strike an appropriate balance between preventing financial crime whilst still satisfying the FCA's expectations that firms do not simply move away from providing services to certain higher risk categories of customers or businesses. This may be a challenging balance for firms to achieve in practice.

Increased focus on certain markets

In the 2015/16 Business Plan, the FCA states its intention to focus on specific markets and undertake more in-depth pieces of work in relation to them. Set out in the table below is an overview of the key areas highlighted by the FCA in its Business Plan that it intends to focus on in these markets. Given that the FCA is intending to focus its resources on these areas, there is the risk that this will give rise to an increased appetite on the part of the FCA to take enforcement action in relation to them.

Wholesale banking

Controls over flows of information in investment banks

Specifically the risk that information received by one part of a firm might be used improperly by another part of the firm.

Benchmarks

The FCA is intending to undertake an assessment as to whether firms have embedded appropriate processes and controls around benchmarks.

Dark pools

The FCA has stated publicly that it has been considering the risks relating to conflicts of interest that are associated with dark pools. Through a thematic review the FCA is proposing to increase its knowledge and understanding of the conflicts of interest that may be inherent in the operation of dark pools and how firms manage them.

Competition market study

Prior to the publication of the Business Plan, the FCA announced that it intends to undertake its first competition market study. The area chosen for this market study is the investment and corporate banking sector. The FCA is proposing to formally launch the market study and publish its terms of reference in spring 2015.

Investment and wealth management

Suitability standards

The FCA is actively assessing what improvements firms have made to their suitability standards across the wealth management industry.

Post-authorisation review of funds

The FCA is intending to undertake an assessment as to whether investment funds are operated in line with investors' expectations. This assessment will focus on whether investors' expectations set by marketing materials, disclosure material and investment mandates are met. In addition, the FCA is also proposing to consider firms' compliance with other responsibilities to investors, such as adherence to risk management parameters.

Competition market study

Later in 2015, the FCA is proposing to launch a further competition market study which focuses on the asset management industry. Issues that may be considered as part of this market review include the charges paid by investors to asset managers and the factors that drive the setting of those charges.

Retail banking and investments

Financial advisers

The FCA intends to continue its review of due diligence of financial advisers and intends to complete its ongoing work to identify risks in the way firms offer contracts for difference products and mitigate any risks found.

Inducements and conflicts of interest

Following guidance published by the FCA on this topic in January 2014, the FCA intends to undertake a further assessment of firms' practices in this area.

Non-advised sales

The FCA is intending to undertake a market study into non-advised sales of investment and protection products. The purpose of this market review will be to help the FCA better understand how consumers behave when they are making their own investment decisions and how the FCA support consumers in choosing products that are suitable for them.

Unauthorised transactions

The FCA intends to complete its review of unauthorised retail banking transactions with a view to ensuring that firms are not placing unreasonable obstacles or responsibilities on their customers, or unfairly rejecting claims and complaints relating to unauthorised transactions.

Potential changes to the FCA's enforcement processes

At the end of 2014, HM Treasury published its final report and recommendations relating to the FCA and PRA enforcement decision-making processes.

Although HM Treasury's final report indicated that *'there seems to be no desire for fundamental reform'* of the FCA and PRA's enforcement processes, it did set out a number of recommendations as to how these processes may be improved. Overall, HM Treasury's recommendations appear to be helpful and are designed to encourage the FCA and the PRA to be more transparent in their enforcement decision-making processes.

The FCA acknowledges HM Treasury's recommendations in its Business Plan for 2015/16. However, the FCA does not comment when and how it intends to implement the recommendations made by HM Treasury.

We expect that the FCA and the PRA will consider the recommendations made by HM Treasury in its final report and then publish consultation papers and policy statements setting out how they intend to implement these recommendations in practice during the course of 2015. However, the way in which HM Treasury has drafted its recommendations allows the FCA and the PRA a great deal of flexibility in terms of how they address and implement them. As a result, only when the FCA and the PRA indicate how they will go about implementing HM Treasury's recommendations will we get a better sense as to how helpful they are likely to be in practice.

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