INSURANCE COMPLIANCE SERVICES LTD

Stop Press

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The FCA has indicated that Brexit can allow it to clamp down more on scam advertising and has confirmed that it will proceed with a credit broking survey. In addition, as well as other key items, this news update also details the HM Treasury response and the proposed Government approach to the regulatory framework for financial promotions, and explains the EU Commission data protection 'adequacy' decision in favour of the UK (in relation to data protection) and its new tools for the safe international exchange of personal data.

In this edition

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FCA confirms that it will now proceed with its Credit Broking survey, and that it will carry out a Firms Forbearance Survey – FCA 28th June 2021

The FCA, in May this year, announced that it would be sending a survey to all firms holding the credit broking permission. The survey was initially sent to 300 firms as a pilot exercise on 20th May 2021. The survey will provide the FCA with an updated view of how firms are using their credit broking permission, which will help to mitigate the risks of harm to consumers. The questions asked will be relevant to firms' business models, for example, the type of credit broking activity carried out, including how the firm is remunerated and how many creditors the firm has a relationship with.

95% of firms in the pilot completed the survey within 30 minutes. The survey will be sent in batches over two weeks from 5 July 2021, and firms will have 15 working days to submit their responses.

Whilst the FCA is not seeking this information under its formal information gathering powers, firms are expected to complete it. Further information is available on the FCA's webpage. And in the useful Frequently Asked Questions page the FCA published in relation to the survey.

The FCA will send a warm-up/introduction e-mail to firms in the week before they receive the survey. Firms will then be e-mailed a link to complete the survey online, and the links will be unique to each firm. If firms need a different individual within their organisation (or a consultant) to answer and submit the survey, the link can be forwarded to the required person.

We know firms will be concerned about phishing emails and scams. Firms should check the email is from either FCA@fcanewsletters.org.uk or FCACreditBrokingSurvey@fca.org.uk. If you do not receive the survey, you may wish to check junk or spam folders.

In addition, any firms with FCA permission to lend money may also receive a Firm Forbearance Survey to complete. Any communication in relation to that survey is likely to come from FCAfirmforbearancesurvey@fca.org.uk. This survey follows on from the FCA's coronavirus-linked Forbearance project and is likely to ask questions about:

- Monitoring customers for financial distress before missing a payment
- Arranging forbearance solutions for customers who have missed at least one payment
- Fees and charging structures for customers in arrears
- Quality Assurance and Oversight of Collections and Recoveries
- Referring customers to debt advice organisations

The FCA will be asking firms to complete each survey within three weeks of the receipt date, and will be providing a Frequently Asked Questions document that could help firms complete the survey.

FCA issues a client money 'Dear CEO' letter to insurance intermediaries – FCA 2nd July 2021

The FCA has issued a Dear CEO letter – "Maintaining adequate client money arrangements - general insurance intermediaries". The FCA's previous Dear CEO letter about client money, sent to general insurance intermediaries on 30 September 2020, reminded firms of their obligations, specifically in relation to senior management oversight. The FCA is now writing to firms holding or controlling client money to remind them that they must establish and maintain arrangements to ensure the funds are adequately protected, and that those arrangements are in line with the expectations set out in the latest letter.

The publication of the letter follows work done by the FCA in conjunction with the financial resilience surveys and reminds firms of the failings it has found and the concerns it has for the potential for consumer harm:

- Carrying out client money calculations incorrectly or not on a timely basis
- Withdrawing commission early or without adequate evidence to support the withdrawal
- Whether client accounts are set up properly and acknowledged as client money accounts by the bank
- Not polluting the trust status of the client money account by putting other money through it unless allowed (such as a mixed remittance)
- Where co-mingling client money with insurer money under risk transfer, making sure the risk transfer agreement is compliant
- Having a client money audit where required.

The letter reminds firms not to use client money to support the business and suggests that firms should review previous Enforcement cases (a fine, a prohibition order and a combination of the two) and urges firms to continually review their client money arrangements and their compliance with the rules in Chapter 5 of the Client Asset Sourcebook (CASS). The FCA has again referred back to the FSA Guide to Client Money for General Insurance Intermediaries (the 'Client Money Guide') which remains current.

The FCA is aware that many insurance intermediary firms hold monies under risk transfer but has indicated that it is using its oversight of firms' client money arrangements as a test of "if a firm, is not getting this right, then what else are they not getting right?". In relation to risk transfer, the letter suggests that firms maintain a register of risk transfer agreements. That being the case, if firms do not have permission to hold client money and have not received this Dear CEO letter it might still be relevant for them.

The letter also states that firms may wish to give up their permission to hold client money. We recommend that you discuss such a decision with your dedicated ICS Consultant before making such a move.

FCA pushes the Premium Finance pricing rules commencement date to 1st January 2022 – FCA 25th June 2021

In its Handbook Notice 89, the FCA has confirmed that the new disclosure rules for premium finance contained within the Pricing Practices Policy Statement (ICOBS 6A.5.2 and ICOBS 6A.5.3) have been moved back to 1 January 2022 to be in line with the main price walking rules. This gives firms and their premium finance providers a further three months to comply and implement the new disclosure rules. In the Handbook Notice the FCA stated that adjusting the entry into force date of the premium finance disclosure rules is a correction to reflect the policy intention as announced in March 2021.

The effect of the new rules is that firms will need to provide retail customers with clear information, and draw their attention to it, regarding the impact the premium finance and its costs will have on the overall cost of the policy, as compared to paying for the policy up-front in a single premium.

FCA publishes a Research Note: Discounts, Cashbacks, and Soft Toys – FCA 28th May 2021

In addition to its Policy Statement on General Insurance pricing practices the FCA has announced that it has also released a Research Note on Discounts, Cashbacks, and Soft Toys: The Impact of Promotions on Consumer Decisions in the General Insurance Markets. To understand how promotions impact price comprehension and decision making in the GI market, the FCA undertook an online experiment which simulated the purchase of insurance.

During the experiment the FCA found that cash discounts and promotions that closely resemble cash, such as retail vouchers, loyalty points and cashbacks, significantly undermined participants' ability to select the best insurance deal and correctly assess policy premiums. Participants in the experiment were particularly attracted to promotions that included a pound sign or a percent sign, and found discounts incorporated into the underlying policy prices challenging to evaluate. Firms should consider their use of promotions, discounts and incentives and review them alongside the Pricing Practices Policy Statement (PS21/5) as these are captured within the pricing remedy.

BIBA publishes Premium Credit Limited insights about SME premium finance use – BIBA 2nd June 2021

The British Insurance Brokers Association (BIBA) has published findings, statistical analysis and insights from Premium Credit Limited in relation to the use of premium finance by SMEs to pay for their business insurances. The BIBA article points out that Premium Credit's research shows that that many SMEs and corporates are borrowing more to fund business insurance with owners most likely to rely on credit cards.

Firms should reasonably keep in mind these insights when considering their actions in relation to the FCA insurance pricing remedies (in particular, the pricing remedy itself and the product oversight requirements that will impact the provision of premium finance.)

European Commission adopts new tools (Standard Contractual Clauses) for safe international exchange of personal data – European Commission 4th June 2021

On 16 July 2020, the EU Court of Justice confirmed the validity of the EU Standard Contractual Clauses (known as SCCs) for the transfer of personal data to processors outside the EU/EEA, while invalidating the EU–U.S. Privacy Shield. The Court ruled, therefore, that international data flows under the European Union's comprehensive data protection regime, the General Data Protection Regulation (GDPR), could continue to be based on EU Standard Contractual Clauses, while also further clarifying the conditions under which they can be used. The European Commission has now adopted two new sets of standard contractual clauses, one for use between controllers and processors and one for the transfer of personal data to third countries to reflect new requirements under the General Data Protection Regulation (GDPR) and take into account the Schrems II judgement of the Court of Justice, ensuring a high level of data protection for citizens.

The EU-SCCs are, by far, the most important instrument for international transfers of personal data from the EEA to third countries. This is relevant in the UK because the same applies for the UK-SCCs, which were expected to be released by the ICO for public consultation during the second half of June. With the European Data Protection Board also expected to finalise its post-Schrems II guidance on international transfers this month, the steps that organisations need to take to share data cross-border should become much clearer.

The Main innovations of the new standard contractual clauses are that they have been updated in line with the General Data Protection Regulation (GDPR) and that they create one single set of clauses covering a broad range of transfer scenarios, instead of separate sets of clauses. The new SCCs will give more flexibility for complex processing chains and by offering the possibility for more than two parties to join and use the clauses. For controllers and processors that are currently using and relying on previous sets of standard contractual clauses, however, a transition period of 18 months is provided.

This will be of interest (ahead of the release by the IC of the UK SCCs) to any firms involved in transferring personal data to, and receiving personal data from, the USA or other countries outside of the EEA. Further information can be found here (Schrems II Summary), here and here (current UK ICO guidance).

CP21/16: Quarterly Consultation Paper No. 32 has been issued – FCA 4th June 2021

The FCA has released its latest Quarterly Consultation Paper No 32. In the current quarterly consultation the FCA is proposing, amongst other minor amendments, to make amendments to the DEPP and FEES Sourcebooks as a result of a new power (given to the FCA in the Financial Services Act 2021) to cancel or vary FCA-authorised firms' Part 4A permissions. The new power will allow the FCA to more quickly cancel or vary the permissions of authorised firms which appear to no longer be carrying on FCA-regulated activities where:

1. the firm appears to not to be carrying on any FCA-regulated activity, including, but not only, where the firm has failed to pay a periodic fee or levy, or to provide the FCA with information, such as an annual return, required under the Handbook; and
2. the FCA has served on the firm two notices and the firm has not responded or taken other steps as directed.

This new process will sit alongside the existing cancellation and variation process in FSMA. The deadline for submitting comments is 5th July 2021, and firms wishing to submit comments should do so using the FCA's online form or by e-mailing cp21-16@fca.org.uk.

Gefion Insurance A/S declared bankrupt – FCA and FSCS statements and information 7th June 2021

The Danish Financial Supervisory Authority (DFSA) has made the announcement that Gefion Insurance has been declared bankrupt by Denmark's Maritime and Commercial High Court. There are no remaining live policies in the UK, but claims can still be made against Gefion policies. The FCA and FSCS have both published statements, and the FSCS has declared Gefion in default. It is unlikely that any UK broker will still have any Gefion contracts in place for their clients, but brokers should contact FSCS in relation to any existing claims that are not met.

The Business interruption insurance test case – updated data – FCA 14th June 2021

The FCA wrote to the CEOs of the insurers affected by the Test Case which explained that they intended to gather information on all non-damage Business Interruption (BI) policies that are capable of responding to the Covid-19 pandemic following the Court judgments. A list of updated policies was published on 27th May 2021. The letter also set out the intention to gather information from all affected insurers regularly on the progress of their non-damage BI claims and to publish some of this data. The FCA has now published a fourth set of data in relation to BI claims.

The ICO fines national takeaway pizza company for unlawfully sending marketing messages to its customers – ICO 15th June 2021

The takeaway pizza company, Papa Johns (GB) Ltd, has been fined £10,000 by the ICO for sending nuisance marketing messages to customers.

Papa Johns were relying on the "soft opt-in" option for consent, which is set out at Article 22 of the Privacy and Electronic Communications (EC Directive) Regulations 2003; this allows organisations to send electronic marketing messages to customers whose details have been obtained for similar services. The ruling was that Papa Johns could not rely upon this option for customers who had placed their orders by telephone as they had not been given a copy of the Privacy Notice or the option to opt out. Although the information was gathered for a similar purpose to that which was the subject of the marketing, the key issue was the lack of provision of key privacy information. Firms should, therefore, ensure that they have the correct consent for all marketing methods and that appropriate privacy information has been provided.

There were further examples of fines issued in June to other firms for marketing offences. In all cases, the companies did not have the valid consent required to send direct marketing, under the (Privacy and Electronic Communications Regulations 2003 – PECR). For further guidance, the ICO's current direct marketing code of practice can be found here, with an updated guide to be published in due course.

ABI and Flood Re joint report highlights the need for adequate maintenance of UK's flood defences – ABI 16th June 2021

A joint report from the ABI and Flood Re has been published ahead of the UK government's spending review consultation. Flood risk specialist JBA Risk Management has evaluated the benefits of maintaining flood defences over a 30-year period for several different spending scenarios. The report highlights the vital need for the UK's flood defences to be maintained in good condition. A key findings from the research highlight that river flood defences provide protection to flood risk communities valued at £568million a year. Without such defences the research suggests flood losses of approximately £958million a year. With defences, inland flood losses reduce to £388 million a year, saving £568million.

Flooding is the greatest natural disaster risk in the UK and 6 of the 10 wettest years on record have occurred since 1998.

Lloyd's publishes its updated and renamed Code for Complaints Handling in the Lloyd's market – Lloyd's 16th June 2021

Lloyd's has updated the 'Code for UK Personal Lines Claims and Complaints', which has now been re-titled 'Code for Complaints Handling'. The update to the Code is not intended to implement substantive changes but rather consolidates several existing requirements and removes sections that no longer apply, including as a result of the UK's departure from the EU. The Code now consists of an updated Introduction section and separate sections dealing with UK complaints handling (Part 1) and international complaints handling (Part 2).

The main changes to the Code are:

- The inclusion of Lloyd's existing requirements for handling international claims. The Code previously only set out requirements for handling UK complaints while the requirements for international complaints were set out in market bulletins. These have now been brought together in one document. Detailed guidance on complaints handling in territories outside the UK will continue to be provided separately on Lloyds.com.
- The removal of the requirements for handling UK personal lines claims. The requirements for claims handling are now addressed in other documents, including in the Minimum Standards. Accordingly, the section in the Code on claims handling is no longer required and has been removed.
- The removal of a number of EU requirements that no longer apply following the departure of the UK from the EU. In particular, the requirements relating to the EU ODR Platform have been deleted.
- Paragraph 1.5.7A has been amended to reflect Lloyd's updated approach to reviewing, at the request of managing agents, Stage 2 decisions made by the Complaints Team.
- A number of minor changes have been made including replacing references to TPA (Third Party Administrator) with DCA (Delegated Claims Administrator), which is Lloyd's updated terminology for firms with delegated claims handling authority.

The updated Code takes effect immediately and copies can be downloaded from www.lloyds.com/complaintshandling. Copies of the Code showing the changes made can be obtained on request. Any questions relating to complaints handling at Lloyd's can be sent to complaintshandling@lloyds.com.

HM Treasury publishes response and proposed Government approach to the Regulatory Framework for Financial Promotions consultation – HM Treasury 22nd June 2021

The current requirement for an authorised firm to approve the financial promotion of an unauthorised firm may not operate as a strong enough safeguard to ensure such financial promotions are compliant with FCA rules that they are fair, clear and not misleading. Currently, any authorised firm can approve any financial promotion of an unauthorised firm. There is no specific process through which a firm must be assessed as suitable and competent before it is able to approve the financial promotions of unauthorised firms. In order to strengthen the FCA's ability to ensure the approval of financial promotions operates effectively, the government consulted and proposed to establish a regulatory 'gateway', which a firm must pass through before it is able to approve the financial promotions of unauthorised firms. Any firm wishing to approve the financial promotions of unauthorised firms would first need to obtain the consent of the FCA.

The Consultation ran from 20th July 2020 to 26th October 2020. After carefully considering all responses, the government intends to bring forward legislation to implement a regulatory gateway when parliamentary time allows. The regulatory gateway will be implemented through the imposition of requirements. The government has also developed proposals to implement a transitional period allowing an orderly transition between the two regimes.

Although the proposals for the structure of the proposed gateway appear strict (you can't sign off financial promotions unless you apply to have a Permission added to your Scope of Permissions, and you can apply to vary that if you wish… - so a "you can't do it until you have permission" approach), there are some useful and reasonable exclusions to that requirement which will benefit most authorised firms.

The new gateway will not apply to firms approving the financial promotions of an unauthorised person within the same group, nor to the approval of authorised firms' own promotions for communication by unauthorised persons. The consultation did not address how appointed representatives should be treated but, following feedback from the consultation, the government proposes to exempt from the gateway principals approving financial promotions for their appointed representatives in relation to regulated activities, for which the principal has agreed to accept responsibility.

Advertising Standards Authority publishes a guidance checklist to help avoid publishing misleading advertisements – ASA 24th June 2021

The ASA has published what it has referred to as a 'misleadingness checklist' to help firms avoid misleading consumers, including guidance on omitting material information and holding evidence for all objective claims. All the guidance provided is aligned to the FCA's 'clear, fair and not misleading' requirements and is in line with guidance published by the Regulators over many years (e.g., pricing, prominence, evidence etc.).

UK data protection 'adequacy' gets EU Commission sign-off – Information Commissioners Office and the EU Commission 28th June 2021

European Union member states had agreed that British standards for the protection of personal data are sufficiently high that such information can continue to flow between the EU and the UK.

The adoption of the decisions took place on 28th June, following the agreement from Member States' representatives. Two adequacy decisions enter into force from Monday 28th June - one under the General Data Protection Regulation (GDPR) and the other for the Law Enforcement Directive. Personal data can now flow freely from the European Union to the United Kingdom where it benefits from an essentially equivalent level of protection to that guaranteed under EU law. The adequacy decisions also facilitate the correct implementation of the EU-UK Trade and Cooperation Agreement, which foresees the exchange of personal information. Both adequacy decisions include strong safeguards in case of future divergence such as a 'sunset clause', which limits the duration of adequacy to four years.

Approved adequacy means that businesses can continue to receive data from the EU without having to make any changes to their data protection practices.