

FCA Investigations and Insurance in 2021

Throughout 2020, regulatory investigations remained a key risk area for regulated firms (and their senior individuals) in which insurance can play a part. In this bulletin, we reflect on the latest trends identified in the FCA's enforcement report for the 2019/20 financial year (published in September 2020) and new investigations issues arising from the pandemic, and consider what those might mean for investigations in 2021. We also take stock of the current insurance market for investigations cover, and provide some guidance for policyholders, both when renewing cover and when an insured investigation arises involving a firm and/or individual.

The cost and focus of FCA investigations

The latest enforcement report reveals that the FCA imposed penalties of £224.4m in 2019/20 (similar to the £227.3m imposed in 2018/19)¹. As FCA fines are not insurable as a matter of law, the penalties do not provide a direct guide to regulated firms as to the appropriate level of insurance for investigations. However, the numbers do demonstrate the seriousness of the issues, and the sort of resources a firm or individual may wish to deploy (the costs of which may be covered by insurance) to seek to prevent or minimise a fine. The average length of cases – increasing to almost two years according to the FCA report – also indicates the costs that can be incurred in responding to investigations. The average case time for matters on which action was taken is much longer, with the averages for different types of case suggesting that the more complex and contested matters can go on for over six years.

In terms of the types of institution in focus, Banks, Asset Managers/Funds and Insurers remain top of the FCA priority list, with research from one law firm suggesting they account for, respectively, 30%, 20% and 17% of FCA enforcement actions over the last three years². The FCA also suggested in its business plan for 2020/21 that it would be “*shifting our focus towards smaller firms*”³. Whilst the extension of the Senior Managers and Certification Regime has not (yet) led to the anticipated explosion of regulatory actions against individuals in smaller firms, the risk remains and the FCA's overt focus on such firms in its latest business plan may mean that 2021 is the year that happens.

Investigations to rise in 2021?

¹ <https://www.fca.org.uk/data/enforcement-data-annual-report-2019-20>

² If you would be interested in the underlying research, please contact [Allen & Overy](#)

³ <https://www.fca.org.uk/publication/business-plans/business-plan-2020-21.pdf>

One impact of the pandemic has been an apparent reduction both in the number of open FCA enforcement cases, and of the number of new investigations commenced. The number of enforcement actions has remained relatively stable in recent years - 647 open as at 1 April 2019 and 646 open as at 31 March 2020⁴. The FCA's response to a Howden freedom of information request puts the number at 576 as at 5 January 2021, and the reduction seems to have been at least partly as a result of practical difficulties with opening new investigations during periods of lockdown and work from home directives. As the UK gets back to some form of normality later in 2021, therefore, and those practical issues reduce, we anticipate an increase in new investigations.

Covid related investigations

In addition to the areas already under scrutiny, the pandemic has created a number of other risk areas for FCA regulated firms. These could form the backdrop for regulatory investigations in 2021. Particular issues to watch include:

- There have been at least 47 whistle blower reports to the FCA regarding such things as a lack of PPE and failure to observe government guidance on social distancing⁵.
- The FCA has opined that working from home may increase the risk of Market Abuse and Insider Trading⁶, which are key areas of investigations (both for the individuals concerned, and for regulated entities required to provide oversight and controls to prevent this behaviour).
- The increased use of personal devices and informal applications (such as WhatsApp) for work related matters⁷.
- Compliance with document retention and confidential destruction of documents policies whilst working from home.
- FCA emphasis on insurer obligations to treat customers fairly in relation to travel, motor and home insurance where the risk profile and/or need may have changed as a result of coronavirus⁸.
- On 15 December 2020, the FCA announced a fine of £26m for Barclays bank entities (on top of a reported £273m in customer redress) relating to failures to treat customers fairly when they fell into arrears or faced financial difficulties. Many more consumers and business will be facing financial hardship in 2021, and so the themes from this action could emerge in future investigations⁹.
- Significant business loan schemes to help support SMEs affected by the pandemic were administered by banks (with government/taxpayer backing), resulting in lending of some £55.3bn. A National Audit Office investigation¹⁰ into one such scheme highlights the risks of fraud and default. Although both were to be expected to some extent, the scale of eventual issues may call into question the approval procedures put in place by Banks.

⁴ <https://www.fca.org.uk/data/enforcement-data-annual-report-2019-20>

⁵ <https://www.cityam.com/city-watchdog-receives-nearly-two-coronavirus-complaints-from-whistleblowers-per-week/>

⁶ <https://www.fca.org.uk/news/speeches/market-abuse-coronavirus>

⁷ Note also the FCA recently brought its first case (albeit, unsuccessfully) for the criminal offence of destruction of documents relating to an investigation, which involved the deletion of WhatsApp records -

<https://www.fca.org.uk/news/press-releases/konstantin-vishnyak-found-not-guilty-destroying-documents>

⁸ <https://www.fca.org.uk/firms/insurance-and-coronavirus-our-expectations>

⁹ <https://www.fca.org.uk/news/press-releases/fca-fines-barclays-treatment-customers-financial-difficulty>

¹⁰ <https://www.nao.org.uk/wp-content/uploads/2020/10/Investigation-into-the-Bounce-Back-Loan-Scheme-Summary.pdf>

These are all areas ripe for investigations against firms, directors and senior managers if the FCA considers there are questions to be answered.

Insurance coverage and the current market

It has been widely reported that the trading conditions in the insurance market are the most challenging they have been for many years (frequently referred to as a “hard market”). As the FCA (and other regulators) have become increasingly active in enforcement in recent years, investigations cover has become a key protection under PI and D&O insurance. The hardening insurance market means that, in 2021, policyholders face a reduction in that cover and/or a significant increase in its cost at a time when it may become even more crucial. Guidance for policyholders at this time includes:

- Ensure that you are clear on the point at which the cover triggers. Will it respond to preliminary questions and document requests from a regulator (for example) or only at the point at which a formal investigation procedure is commenced? How does the sit with your organisation’s appetite for risk?
- Cover for the corporate entity is particularly under attack in the current insurance market. Be clear on what entity cover you have (and/or need).
- Consider the potential cost of an investigation as compared to the price for the cover and the excess that will apply to any matter, as well as any applicable sub-limits. As noted above, investigations can run for many years. What would it mean for your business if it had to fund the costs of responding to an investigation?
- Consider where coverage fits into both your Professional Indemnity and D&O programmes and ensure there are no pluggable gaps in coverage.
- The hard market also affects insurance claims experience. It is imperative that you notify insurers (usually via your broker) of anything triggering the policy, or that could lead to a triggering event. Investigations that are covered by the scope of the insurance often lead to disputes nonetheless as to, in particular, the fee rates of lawyers, if not notified promptly and before significant action is taken.
- Investigations can lead to conflicts between firms and individuals. A policy wording should make provision to deal with conflicts (e.g. by allowing separate legal representation, and allowing individuals to notify investigations to insurers). Claims should also be set up to ensure confidentiality is maintained between conflicted parties (and claims handlers at your insurance broker can assist with that).

Prevention is better than cure

Ultimately, the FCA’s approach to enforcement and its key messages on priorities and themes for 2021 are designed to assist firms in avoiding regulatory action. The FCA also continues to offer guidance on how firms can ensure they make a positive contribution to the financial services market (and to customers), including a recent emphasis on a positive culture¹¹, and operational resilience (with an FCA Policy Statement on the latter expected imminently¹²).

Insurance remains an important risk management tool for investigations, and it is inevitable that some firms (and individuals) will face enforcement action. Increases in the cost of insurance and reduction in scope and availability make this a good time to ensure the coverage in place works for

¹¹ <https://www.fca.org.uk/news/news-stories/fca-encourages-firms-develop-purposeful-cultures>

¹² <https://www.fca.org.uk/publication/business-plans/business-plan-2020-21.pdf> pg. 19

your organisation and its individuals, whilst redoubling efforts to identify any steps that can be taken to keep your organisation out of the FCA's sights.

This article was authored by members of Howden's Legal, Technical & Claims team. The Legal, Technical & Claims team is made up of senior insurance lawyers and experienced claims professionals, and provides support on insurance claims, policy wordings and legal and regulatory developments as they impact your business. If you have any queries on the issues raised, please feel free to contact a member of the team directly.

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