



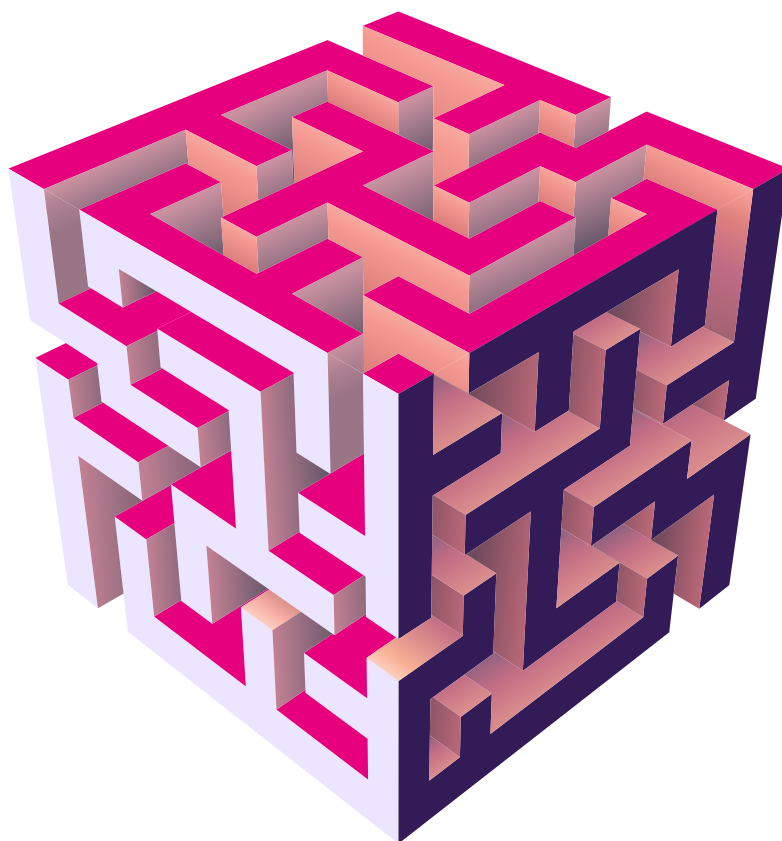
Regulatory update

October 2020

Welcome to the October edition of the Regulatory update, which pulls together recent developments from across the UK's regulators – to help you navigate the regulatory maze.

The past few weeks have been an extremely interesting time from a regulatory perspective. As the “FinCEN leak” story broke, it also emerged that fines from AML failures so far this year have already surpassed the total amount from last year. HMRC has introduced draft legislation that will see its information gathering powers increase, and the ICO has launched a consultation on the details of how it will regulate and enforce data protection legislation. The Government is consulting on a new law to clean up supply chains, and the High Court has handed down its judgment in the FCA business interruption insurance test case.

I hope you enjoy reading this latest update. Please do not hesitate to contact me, or your normal RPC contact, if you would like to discuss any of the topics highlighted or have any suggestions for areas you would like to see in future updates.



A handwritten signature in black ink, appearing to read 'Gavin Reese'.

Gavin Reese
Partner, Head of Regulatory

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WHITE COLLAR CRIME

by Sam Tate and Davina Given

“FinCEN files” could lead to onslaught of legal claims

The Financial Crimes Enforcement Network (FinCEN), is the arm of the US Treasury set up to combat financial crime. Any concerns about transactions made in US dollars must be sent to FinCEN (even if they took place outside the US).

The “FinCEN files”, consists of more than 2,500 documents from FinCEN that have been released to the press. Most of these files relate to suspicious activity reports that banks around the world had reported to FinCEN between 2000 and 2017.

As journalists sift through the documents, among other things, it is being claimed that the files show some organisations systems

and processes have allowed cash to be taken from sources that cannot be properly identify and some Russian clients to potentially bypass sanctions.

Lawyers are warning of an onslaught of litigation, as fraud victims become aware of potential negligence by the banks.

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Regulators impose heftier fines for anti-money laundering breaches

Regulators have imposed a greater volume of fines for anti-money laundering (AML) failures in the first half of 2020 than they did in the whole of 2019. A report, by consultancy Duff & Phelps, found that regulators issued a total of \$706m worth of AML fines in the first six months of 2020, compared with 2019's total of \$444m.

Since 2015, regulators have highlighted the same AML procedural shortcomings that continue to catch regulatory businesses out. Common failures include ensuring compliance with current AML rules, monitoring suspicious activity, and conducting proper due diligence on new customers. Customer due diligence remains the most frequent failing, accounting for 115 reported significant cases since 2015.

One of the most prolific enforcement actions this year involved the London branch of German lender Commerzbank, which was fined £38m by the Financial Conduct Authority for failing to make adequate AML checks over a prolonged period.

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TAX

by Adam Craggs

HMRC to gain increased information gathering powers

Draft legislation, published as part of Finance Bill 2020/21, will, if enacted, grant HMRC the power to issue 'Financial Institution Notices', requiring certain financial institutions to disclose information they hold relating to taxpayer, without any independent judicial scrutiny or right of appeal.

Currently, HMRC has the power to issue a notice to third parties, such as banks and other financial institutions, requiring them to provide information relating to a taxpayer if that information is 'reasonably required for checking the tax position' of the taxpayer concerned. Importantly, HMRC can only issue such a third-party notice if it has the agreement of either the taxpayer in question or

it has obtained approval from the First-tier Tribunal (the FTT) to issue the notice.

HMRC will be able to issue Financial institution Notices without having to first obtain the agreement of the taxpayer or approval from the FTT.

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Claiming R&D tax relief on furloughed employees

HMRC has updated its Corporate Intangibles Research and Development Manual, to provide guidance on whether costs of furloughed employees benefit from research and development relief (R&D relief) and research and development expenditure credit (RDEC).

The updated guidance states that, as furloughed employees will not have been directly and actively involved in the R&D activity when furloughed, costs of these employees will not qualify for R&D relief or RDEC.

Similarly, costs of flexibly furloughed employees do not qualify where those costs are in respect of the period that the employee was not working. Relief will be denied for both furlough

payments made under the coronavirus job retention scheme (CJRS) and any top-up payments made by employers.

In addition, R&D relief is not available if the staff costs are met by furlough payments under the CJRS because such payments are a subsidy.

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HEALTH AND SAFETY

by Gavin Reese

HSE launches new dust initiative

The Health and Safety Executive (HSE) has launched a month-long inspection initiative, targeting construction firms to ensure their health standards are up to scratch. Commencing on Monday 5 October, the initiative will focus on respiratory risks and occupational lung disease, examining the measures businesses have in place to protect their workers.

The initiative is part of HSE's longer-term strategy to improve health within the construction sector. It will focus specifically on the risks posed by asbestos, silica and wood dust, and the appropriate preventative measures.

Another element of the initiative is ensuring businesses are doing everything they can to provide a COVID-secure workplace for their staff.

Inspectors will use enforcement where necessary to make sure workers are protected.

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UK Government consults on new law to clean up supply chains

The UK Government has published plans to clamp down on illegal deforestation and protect rainforests. The world-leading new law would prohibit larger businesses from using products grown on land that was deforested illegally. The new law will apply to all businesses operating in the UK.

Businesses would be required to carry out due diligence on their supply chains, and publish information showing where key commodities came from. Businesses who fail to comply would be subject to fines, though the precise level is yet to be decided.

Deforestation accounts for 11% of global greenhouse gas emissions, with the vast majority of deforestation caused by the production of agricultural commodities.

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FSA launches 'Here to Help' campaign for food sector

The Food Standards Agency (FSA) has launched a new campaign to help the food sector adapt to the 'new normal'. The Here to Help campaign provides practical guidance for food businesses on how to register, re-open and trade safely during COVID-19. It is designed to assist small food businesses including restaurants, takeaways and coffee shops.

The guidance includes advice on a range of issues including safe food packaging, takeaway containers and the provision of allergen

information. The campaign includes a series of case studies showing how small businesses have been able to successfully adapt to the challenges created by the COVID-19 pandemic.

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DATA PROTECTION

by Jon Bartley

Information Commissioner publishes open letter

UK Information Commissioner Elizabeth Denham has released an open letter to UK organisations regarding the support they can expect from the Information Commissioner's Office (ICO) in the coming months. Throughout COVID-19, the ICO has continued to provide practical support on new data protection questions that the pandemic has presented, including working from home, contact tracing and testing staff for the virus.

The ICO will continue providing this support throughout the pandemic and recovery period. It will also provide support to

organisations looking to innovate and do things differently. It believes that effective data protection can enable innovation, as it increases the public's trust in how their personal data is used and protected.

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ICO re-opens regulatory sandbox to support organisations using personal data

The ICO is re-opening its regulatory sandbox. This is a free service designed to support organisations using personal data to develop products and services. The ICO is accepting applications from any type of organisation, including start-ups, SMEs and large organisations, across public, private and voluntary sectors.

This year, applicants are asked to submit projects focusing on either children's privacy or data sharing. The ICO is particularly interested in hearing about projects focusing on issues presented by the implementation of its Age Appropriate Design Code.

The regulatory sandbox allows organisations to work through how they use personal data, to ensure they comply with relevant data protection rules. It is hoped that this will increase public trust in these innovative products that they do protect users data.

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Consultation on ICO draft Statutory guidance

This month, the ICO launched a public consultation on its draft Statutory guidance. This document lays out details on how the ICO will regulate and enforce data protection legislation in the UK, including explaining its powers, when it will use them and how it calculates financial penalties.

However, the guidance also seeks to provide assurance to businesses that powers will be used proportionately. It sets out a risk based approach to taking regulatory action against organisations and individuals that have breached data protection law, with a focus on the areas of highest risk and most harm.

Elizabeth Denham, Information Commissioner said:

"The primary role of my office is to protect the rights and freedoms of individuals in the digital age, and this draft guidance explains how my office will achieve this.

"It sets out our proportionate approach to regulatory action, yet details the robust action we will take against those that flout the law".

The consultation remains open until 17.00 on Thursday 12 November 2020.

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INSURANCE AND FINANCIAL SERVICES

by Matthew Griffith and Jonathan Cary

Result of FCA's business interruption test case

The High Court has handed down its judgment in the Financial Conduct Authority's (FCA) business interruption insurance test case. It found in favour of many of the arguments put forward by the FCA on behalf of policy holders.

The judgment, which runs to over 150 pages, will bring welcome news for many policyholders. However, it did not state that the eight defendant insurers are liable across all 21 different types of policy wording in the representative sample. Rather, it removed the need for policyholders to resolve a number of the key issues with their insurers.

Interim Chief Executive of the FCA, Christopher Woolard, commented: "We brought the test case in order to resolve the lack of clarity and certainty that existed for many policyholders

making business interruption claims and the wider market. We are pleased that the Court has substantially found in favour of the arguments we presented on the majority of the key issues."

Following the High Court's decision, the FCA and several of the other parties to the case were granted "leapfrog" appeal certificates. This paves the way for a fast tracked appeal to the Supreme Court (bypassing the Court of Appeal). However, the FCA has reiterated that it will continue discussions with insurers and action groups, to find a solution which resolves the outstanding issues.

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FCA outlines proposals to reform general insurance pricing

The FCA has released the final report of its Market Study into the pricing of home and motor insurance. It is proposing significant reforms to the rules governing these markets in order to increase public trust, and ensure consumers receive fair value.

The FCA is consulting on a range of measures to boost competition between providers and deliver value to customers including:

- making it easier to stop automatic renewal across general insurance products

- requiring firms to report certain data sets so the FCA can check the rules are being followed, and
- product governance rules requiring firms to consider how they can deliver fair value to consumers over the long-term.

The FCA is seeking views on these proposals by 25 January 2021. It intends to publish a Policy Statement and new rules next year.

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FCA consults on the fair treatment of vulnerable customers

The FCA has published draft guidance for firms on the fair treatment of vulnerable customers, in order to bring about a practical shift in behaviour. This is a key area of focus for the FCA and was included in its 2020/21 Business Plan.

In July 2019 the FCA published an initial consultation GC 19/3 setting out its view of what firms need to do to treat customers fairly. GC 19/3 sought feedback on the draft guidance, including the costs and benefits of implementation.

The FCA's latest guidance discusses the feedback it received on GC 19/3 and now seeks views on its updated guidance and cost benefit analysis. This consultation will be of interest to FCA-regulated firms, industry groups, trade bodies and consumers.

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PROFESSIONAL SERVICES

by Rob Morris and Graham Reid

SRA urges law firms to remain vigilant to cyber threats

With large numbers of employees continuing to work remotely, the Solicitors Regulation Authority (SRA) has told law firms to remain extra vigilant to the threats posed by cyber criminals. The SRA has published its Cybercrime Thematic Review which takes a detailed look at forty incidents of cyber-crime reported by law firms over a three-year period. The review found that law firms continue to be a significant focus for cyber criminals.

Human error was identified as firms' biggest risk to their cyber security. However, a fifth of firms did not provide specific training on cyber security, and more than a quarter did not have appropriate

cyber security controls in place. The SRA found that only around two-thirds of staff in firms it visited claimed to be 'knowledgeable' about IT and cyber security issues.

Good practice identified throughout the review included two-factor authentication, widespread use of anti-virus software and regular backing up of data.

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FRC publishes Annual Enforcement Review

The Financial Reporting Council (FRC) has released its second [Annual Enforcement Review](#), highlighting that driving audit quality improvements is a key priority for it. The FRC believes that this has to be achieved through developing a change in culture from those responsible, and a greater use of constructive engagement between regulator and firm.

Constructive engagement will allow swift and targeted remedial action in less serious cases, ensuring that the causes of failures and risks of repetition are minimised. In the last year, the Case Examination team opened 88 cases and successfully resolved 31 through constructive engagement.

Where more formal enforcement action is deemed necessary, there is a range of non-financial sanctions, including mandated improvements to policies and procedures, suspensions to accountancy memberships and monitoring of regional offices. However, the report makes clear that these do not replace financial penalties which remain a necessary tool to changing behaviour.

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SRA warns law firms advising on investment schemes

Law firms have been urged to show caution when advising on investment schemes, with a new SRA report highlighting the risks of people falling victim to dubious schemes. The report studied cases in which law firms had acted on behalf of sellers of potentially dubious investment schemes and found that, in 63% of cases, lawyers had failed to carry out proper due diligence. In 20% of cases, no checks were carried out at all.

The SRA also found that firms were too often focusing solely on the interests of the scheme promoter, and were not taking appropriate precautions to protect the interests of consumers.

As a result, the SRA has issued a warning notice to the profession, stating that lawyers must watch out for:

- transferring funds through the client account, without the transactions being connected to any underlying legal work
- doing no real legal work and legal fees being generated when they are not necessary, and
- dubious schemes being presented as routine conveyancing or investment in "land".

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NAVIGATING THE MAZE

From the world's largest financial, corporate and professional services firms, to highly successful entrepreneurs and individuals, many turn to our specialist Regulatory team to navigate the maze. They do this because they know we don't sit on the fence, we work with our clients to ask the tough questions and challenge conventions; ensuring they continue to thrive in a rapidly evolving regulatory world.

From helping to implement robust compliance strategies to conducting investigations and defending against enforcement proceedings, our multidisciplinary team can be relied on to add value, provide ideas and deliver a complete regulatory service whatever challenges you face, now and in the future.

- **White collar crime and investigations:** The burden of facing a regulatory or criminal investigation can be significant. We defend clients under investigation for regulatory breaches, corruption including; breaches of financial sanctions, false accounting, insider dealing and market misconduct.
- **Anti-bribery and corruption:** Our team works closely with clients to implement robust, cost effective anti-bribery programmes in line with international standards, and to manage risks and responses when things go wrong.
- **Anti-money laundering:** AML continues to be one of the most significant regulatory risks to firms. We help clients from implementing effective AML processes and controls to defending clients under investigation of breaches.
- **Data protection:** Protecting the data you hold has never before been so essential to your business. We regularly advise on data regulations, including GDPR, relating to subject access requests, data handling, sharing and processing, breaches, and training strategies.
- **Product liability and compliance:** Our Products team have the expertise you needed if you are faced with product recall or class actions.
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