

Legal & Regulatory Working Group



Competition Law Notice

Meeting participants are reminded that this meeting must adhere to competition law rules and as such no confidential or commercially sensitive information must be shared directly or indirectly between competitors.

Please do not share any confidential or commercially sensitive information and please do not ask questions that could lead to other participants to sharing confidential or commercially sensitive information about their organisation.

A written agenda has been circulated in advance and all discussion must keep to the agenda.

Please read our **Competition Law Guidelines** for further information:

[Competition Law Guidelines - Payments Innovation Forum](#)

Agenda – 11 December 2023

1. Proposed changes to the safeguarding requirements
2. FCA proposed guidelines on the new anti-greenwashing rule
3. PSR Cycle 2 APP fraud data reporting guidance for PSPs
4. FCA Regulatory Initiatives Grid
5. A.O.B.

1. Proposed changes to the safeguarding requirements

Proposed changes to the safeguarding requirements

1) Treatment of funds within D+1 - the FCA proposes that funds are held within a designated safeguarded account with an authorised credit institution **at the point at which those funds are received**

- **Rationale:**

- In the event of an insolvency, funds held during D+1 where they are not held in a designated safeguarding account would be less likely to be identified promptly, and there are potential issues around third-party rights being asserted where funds have not been identified as safeguarded funds.

- **Initial feedback:**

- Banks being unable to execute payments directly from client money accounts due to the right of offset banks have with FX trades, (some banks will not service firms unless they have a transactional account to settle the FX trade), or bank systems lack the capability
- Some firms use transactional (non-safeguarding) accounts as the customer-facing (front) account (whilst safeguarding separately) so as not to expose the safeguarding account details for e.g., for AML/fraud purposes or to reduce the risk of misdirected payments
- Where there are multiple firms operating under the same permission, a separate account helps minimise the risk of co-mingling of funds
- Separate (non-safeguarding) accounts allow firms to deal with practicalities, e.g., where multiple currencies are involved, and a conversion needs to take place

Proposed changes to the safeguarding requirements

2) Record requirements – Reconciliations the FCA's intention at this stage is to **codify its expectations**

- **Rationale:**

- The existing rules are not particularly specific; the FCA wants to make clearer their expectations as to what the requirement is in relation to internal and external reconciliations and the frequency of these. Because the existing guidance is not as helpful as it could be, there are inconsistencies in approach which give rise to issues in the event of insolvency, i.e. an Insolvency Practitioner is unable to 'make sense' of where funds are.

- **Initial feedback:**

- More guidance would be helpful to address different responses from auditors as to what does/doesn't constitute an internal or external reconciliation
- If the guidance is codified, it needs to take into account how and why discrepancies arise and how they are managed
- Guidance on how firms can deal with the impact extraordinary events, e.g., the 2022 Autumn budget, and how firms can manage events, e.g., the impact on valuations where multiple currencies/jurisdictions are involved
- Guidance should consider the complexity of different business models and be sufficiently flexible to achieve the same outcome without causing an unsustainable operational overhead

Proposed changes to the safeguarding requirements

- **Initial feedback (continued):**

- The audit framework needs to be worked through with industry to make sure it reflects reality and real processes, e.g., auditors can have different views on how discrepancies are managed, particularly in relation to low-risk assets. This would help to address technical 'arguments' with auditors, e.g., when profits are recognised.
- There are some practical hurdles, e.g., in relation to the point at which e-money stops being e-money and the point at which a firm releases money from safeguarding.

Proposed changes to the safeguarding requirements

3) Audit requirements the FCA's intention at this stage is to **codify the requirement for a safeguarding audit** in rules which would be extended to all firms. The proposal covers the appointment of a safeguarding auditor, a duty to cooperate with the auditor and to provide a report to the FCA. The FCA intends to set out the auditor's duties and the standards they must report against.

- **Rationale:**

- Making the requirement for a safeguarding audit would help address the significant variation in the quality of audits.

- **Initial feedback:**

- It would need to be proportionate in terms of cost, which can be significant. A minimum specified scope of what the FCA would expect would be helpful. There is a need to consider what this would mean in terms of time and cost in relation to auditors meeting the standards.
 - It would be helpful to define in the standards what the auditor is required to document in order to demonstrate that they have carried out the audit sufficiently and considered the relevant elements of the safeguarding regime. It should reflect the nature, scale of practices of the firm.

Proposed changes to the safeguarding requirements

4) Implementing a statutory trust – the FCA does not agree that safeguarded funds are legally owned by the EMI and is looking to put in place a statutory trust. This would be provisioned in the statutory instrument HM Treasury would make, which would enable the FCA to make these rules by repealing the PSRs and EMRs.

- Other questions raised:
 - What is the FCA's view on alternative safeguarding methods, e.g., insurance guarantee, low value assets?
 - Can the FCA assess why de-risking continues to happen and explore potential remedies? e.g., making the notice period longer to help firms manage the practicalities of finding another provider
 - What is the FCA's view on the Bank of England supporting the provision of safeguarding accounts e.g., for larger, more complex firms.

2. FCA proposed guidelines on the Anti-Greenwashing rule

Supporting documents:

[GC23/3: Guidance on the Anti-Greenwashing rule \(fca.org.uk\)](https://www.fca.org.uk/guidance/gc23/3)

FCA proposed guidance on the Anti-Greenwashing rule

- **Background**

- As demand for sustainable products and services continues to grow, so does the risk of 'greenwashing'. The FCA is concerned that as firms increasingly make sustainability-related claims, some of these may be exaggerated, misleading and unsubstantiated.
- The **anti-greenwashing rule (ESG 4.3.1R)**, which was introduced into the FCA Handbook, allows the FCA to challenge firms they consider are making misleading claims about their products and services, and take further action if appropriate.
- The rule applies to all communications about financial products or services which refer to the environment and/or social ('sustainability') characteristics of those products or services. Sustainability references can be present in e.g., statements, assertions, targets, strategies, policy, information and images
- The FCA is now **consulting on guidance** to help industry better understand the anti-greenwashing rule.
- The **guidance will apply to all FCA-authorised firms** who make sustainability-related claims, and includes firms that approve financial promotions for unauthorised persons, for communication in the UK

FCA proposed guidance on the Anti-Greenwashing rule

- **Summary of proposed Guidance**

- What constitutes a sustainability-related claim in the context of the new rule?

- It could be a claim that a product or an account is 'green' and aims to deliver positive outcomes for people or the planet. It could also include claims relating to the environment, climate or climate change, biodiversity and nature, social issues, or corporate social responsibility

- Sustainability-related claims should be:

- **Correct and capable of being substantiated** – claims should be factually correct and not overstate the positive social and/or environmental impact of a product or service. Products and services should do what they say they do, and 'live up' to claims made. Firms should be able to support claims with robust, relevant credible evidence. Firms should regularly review their claims and approvers of financial promotions should take steps to periodically monitor the continuing ongoing compliance of the financial promotion with the anti-greenwashing rule, and all other financial promotions rules that apply over the lifetime of the promotion, not just on approval.
 - **Clear and presented in a way that can be understood** – the meaning of terms used should be generally understood by the intended audience and any technical terms should be explained unless their meaning is clear and widely understood. Claims may be undermined if what they say is factually correct, but their visual presentation (images, logos, colours etc.) conveys a different impression. Firms subject to the Consumer Duty should test their communications where appropriate.

FCA proposed guidance on the Anti-Greenwashing rule

- **Complete** – claims should convey a representative picture of the product or service, and not omit or hide important information that might influence decision-making. Where claims are only true if conditions or caveats apply, these should be clearly and prominently displayed. Claims should not highlight only positive sustainability impacts where this disguises negative impacts. Firms should consider the whole life cycle of a product or services and consider which elements of the product life cycle are most likely to be of interest in a decision-making process
 - **Comparisons should be fair and meaningful** – claims should make clear what is being compared, how a comparison is being made, and should compare like for like. Firms should be careful when making claims about the extent to which a feature of a product or service has sustainability characteristics when it may simply be meeting a minimum standard of compliance with existing regulations.
- **Consultation questions:**
- The FCA is seeking views on whether the proposed guidance clarifies the anti-greenwashing rule, and if not, what more they could do to provide clarity, and the proposal for the guidance to come into force on **31 May 2024**
 - **The guidance consultation closes on 26 January 2024**

3. PSR Cycle 2 APP fraud data reporting guidance for PSPs

Supporting documents:

[PSR app scams data reporting guidance - cycle 2 - December 2023](#)

PSR Cycle 2 APP fraud data reporting guidance for PSPs

- The PSR has published its finalised reporting guidance for the second reporting cycle to help PSPs provide the PSR with the correct data. The guidance is applicable to PSPs who are required to report and publish APP scams data under Specific Direction 18. It also provides general guidance to receiving PSPs, including sponsors.
- Metric C process revisions include:
 - Receiving PSPs whose data is eligible for publication are **not required** to validate all their Metric C data with sending PSPs. However, a receiving PSP has the **opportunity to obtain and check** its data from the sending PSP before it is published.
 - Subsequently, a receiving PSP may make a request, **supported by evidence**, to a sending PSP to amend its submission. The sending PSP will need to conduct its own investigation and it will be for the sending PSP to decide whether to make a revision before re-submitting the revised data to the PSR.
- The guidance also covers:
 - How the PSR selects firms and compiles final lists for publication
 - Timelines and reporting periods
 - Data-sharing agreements
 - Disputes between sending and receiving PSPs
 - Threshold challenges to the data by receiving PSPs

PSR Cycle 2 APP fraud data reporting guidance for PSPs

- Guidance in relation to **indirect PSPs** includes
 - For Metric C data, sending PSPs may be asked to identify and report receiving PSP data at sort-code level, via the Extended Industry Sort Code Directory (EISCD) listings. This will require sponsor PSPs to ensure that, for indirect sort code access clients, their EISCD listing is up to date and that the indirect PSP is properly identifiable.
 - Depending on the model adopted by sponsor PSPs, some indirect PSPs, where they have their own unique sort code, may be identified directly as receiving parties at this first stage. However, there will remain some indirect PSPs that do not have a separate unique sort code. In this case, their Metric C results will remain aggregated within the overall results for the sponsor PSP.
 - In terms of what is published, where sponsor PSPs are able to provide the PSR with an accurate disaggregation of data on their indirect PSPs, the PSR will publish this. However, where a sponsor PSP is unable to disaggregate their data, the PSR will publish the aggregated result for them.

4. FCA Regulatory Initiatives Grid

Supporting documents:

[Regulatory Initiatives Grid - November 2023 \(fca.org.uk\)](https://www.fca.org.uk/regulatory-initiatives-grid)

FCA Regulatory Initiatives Grid

- The FCA has published its latest **Regulatory Initiatives Grid** which sets out the regulatory pipeline for the next 24 months which aims to help firms to plan for forthcoming initiatives. It is also available in the form of an interactive dashboard and Excel spreadsheet to help users interact with the underlying data.
- Upcoming payments sector initiatives include:
 - **Changes the safeguarding requirements** – consultation paper expected **H1 2024**. Policy Statement and final rules expected **H2 2024**, subject to consultation and legislative changes made by HM Treasury [FCA]
 - **Reforms to the PSRs to allow PSPs to delay the processing of a payment** when there is a reasonable suspicion the payment is fraudulent – publication of draft legislation to enact reforms due **EOY 2023** [HMT]
 - **Market review of card scheme and processing fees** – publication of final report expected Q2 2024 [PSR]
 - **Authorised Push Payment Fraud prevention** – PSPs to implement the capability to send and receive intelligence sharing data [PSR] **Q1 2024**
 - **Confirmation of Payee – October 2024** for Group 2 firms implementation

5. A.O.B.

- FCA, PRA, BoE are jointly consulting on [proposed requirements and expectations for critical third parties \(CTPs\)](#) until 15 March 2024 – proposals aim to manage the potential risks to the stability of the UK financial system due to a disruption to the services a CTP provides.
- FCA is consulting on [Access to Cash](#) – which sets out proposals for how the FCA supports cash in an increasingly digital world which would require banks and building societies designated by the Government to ‘fill gaps’ in cash access provision.

Any questions?