

POLICY STATEMENT

To ensure that the ban on pre-medical offers (the settling of whiplash claims by insurers without a medical report) can be enforced, regulations are being prepared to take effect when the Civil Liability Bill has reached Royal Assent.

These regulations would enable the Financial Conduct Authority (“FCA”) to enforce the new provisions contained in the Bill. The regulations are proposed to modify the Financial Services and Markets Act 2000 by enabling the FCA to monitor and enforce the ban on pre-medical offers. This ban will apply to “whiplash claims authorised persons” (firms or persons who have permission to handle whiplash claims) as set out in the requirements of the Civil Liability Bill and the Regulations.

The Government will continue to refine and develop these regulations – working alongside the FCA – so that the FCA can robustly enforce the ban on pre-medical offers on firms they regulate. For the purposes of illustration of the mechanisms of enforcement, the Annex provided contains extracts of the draft text of the regulations. It should be noted that this text is not final, but is being developed further by the Government and the regulators, and may be subject to some further amendment.

The draft regulations will be published in full in due course, and will be confirmed ahead of Royal Assent.

ANNEX 1

This appendix contains a proposed format for the Regulations which will accompany the Civil Liability Bill and enable the FCA to enforce the provisions of the Bill as it relates to regulated activities and authorised persons. The Regulations are not yet in final form and HMT are working closely with the regulators to produce a full draft. In the interim, this document sets out how HMT envisages the Regulations may operate, and the type of clauses which it is proposed to include in the later draft.

PART 1

It is proposed that this section will contain the citation, commencement and interpretation provisions. The Regulation will be called the Civil Liability Act 2018 (Whiplash) Regulations 2018 and come into force after the Bill has been passed. The interpretation section (an early draft of which is excerpted below) is short and unlikely to be controversial.

Interpretation

2. In these Regulations—

“the Act” means the Civil Liability Act 2018;

“the 2000 Act” means the Financial Services and Markets Act 2000([1]);

“approved person” means a person in relation to whom the appropriate regulator (within the meaning of section 59(4) of the 2000 Act) has given its approval under section 59([2]) of the 2000 Act;

“authorised person” has the meaning given in section 31 of the 2000 Act;

“the FCA” means the Financial Conduct Authority;

“relevant requirement” means a restriction imposed by section 4 (rules against settlement before medical report) of the Act, or any requirement imposed by or under these Regulations;

“the Tribunal” has the meaning given in section 417(1) of the 2000 Act([3]);

“whiplash claims authorised persons” has the meaning given in paragraph 1 of the Schedule.

PART 2

In this part, HMT intends to detail the functions the FCA can exercise in respect of WCAPs, having regard to the principles of good regulation. We anticipate that the FCA will be able to exercise its functions for authorised firms and approved persons, including senior managers under the Senior Insurance Managers' Regime. An early draft of this wording is excerpted below.

Functions of the FCA

3.—(1) The FCA has the functions conferred on it by these Regulations.

(2) In discharging its functions under these Regulations, the FCA must have regard to—

(a) the need to use its resources in the most efficient and economic way;

([1]) 2000 c.8

([2]) Section 59 was amended by section 14 of the Financial Services Act 2012 (c.21), Part 4 of and Schedule 3 to the Financial Services (Banking Reform) Act 2013 (c. 33), S.I. 2012/1906 and S.I. 2013/1773.

([3]) The definition was inserted by S.I. 2010/22, Schedule 2, para. 48.

- (b) the principle that a burden or restriction which is imposed upon a person, or on the carrying on of an activity, should be proportionate to the benefits, considered in general terms, which are expected to result from the imposition of that burden or restriction;*
 - (c) the desirability of sustainable growth in the economy of the United Kingdom in the medium or long term;*
 - (d) the general principle that consumers should take responsibility for their decisions;*
 - (e) the responsibilities of the senior management of persons subject to the requirements referred to in paragraph (4), including those affecting consumers, in relation to compliance with those requirements;*
 - (f) the desirability where appropriate of the FCA exercising its functions in a way that recognises differences in the nature of, and objectives of, businesses carried on by different persons subject to the requirements referred to in paragraph (4);*
 - (g) the desirability in appropriate cases of the FCA publishing information relating to persons on whom the requirements referred to in paragraph (4) are imposed;(1)*
 - (h) the principle that the FCA should exercise its functions as transparently as possible.*
- (3) “Consumer” has the meaning given in section 1G of the 2000 Act.(2)*
- (4) The requirements referred to in this paragraph are—*
- (a) in relation to a whiplash claims authorised person—*
 - (i) a restriction imposed by section 4 of the Act;*
 - (ii) any requirement imposed by or under these Regulations;*
 - (b) in relation to any other person, any requirement imposed by or under these Regulations.*

Monitoring and enforcement

This article of the Regulations proposes to provide for the FCA to maintain such arrangements as it believes are appropriate to enable it to determine whether firms are complying with the requirements of the CLA 2018 and the Regulation.

Guidance

It is likely that these Regulations will include an article on FCA guidance which may enable the FCA to provide guidance “consisting of such information and advice as it considers necessary” where the FCA sees fit to do so.

Fees, etc.

The Regulations may include an article which will provide for the power of the FCA to raise fees to recover the costs of exercising its functions under these Regulations etc, as necessary and appropriate for the FCA to exercise its functions. It is likely that this provision will operate in line with the provisions of FSMA 2000.

PART 3

It is proposed that this part will detail the FCA powers to obtain information from WCAPs. On the theme of monitoring and information, it is also therefore likely to contain provisions which apply the FSMA restrictions in sections 348, 349 and 352 on disclosure of confidential information, as well as the FSMA 2000 (Disclosure of Confidential Information) Regulations 2001, as appropriate.

PART 4 – Investigatory Powers

(1) Section 1B was inserted by section 6 of the Financial Services Act 2012.
(2) Section 1G was inserted by section 6 of the Financial Services Act 2012.

HMT intends that the drafting of this Part will seek to apply Part 11 of FSMA (information gathering and investigations) with input from the regulators.

PART 5 – Disciplinary measures and offences

It is proposed that this Part will include provisions enabling the FCA to publicly censure (draft wording excerpted below), impose financial penalties, impose suspensions on an authorised persons preventing them from conducting specified regulated activity or restrictions requiring authorised persons take take (or stop taking) certain actions in relation to regulated activities. HMT and the regulators are also examining the possibility of drafting a clause which would provide that misleading the FCA about a material particular is an offence.

Public censure

“14. If the FCA considers that a whiplash claims authorised person has contravened a relevant requirement, the FCA may publish a statement to that effect.”

HMT intends in this Part to also set out the liability of bodies corporate and to provide that any prosecutions under this Part must be brought only by the FCA or by or with the consent of the DPP. A sample of the draft wording to illustrate this proposal is excerpted below.

Liability of officers of bodies corporate, etc.

- 21—(1) If an offence under regulation 19 (Misleading the FCA) committed by a body corporate is shown—*
- (c) to have been committed with the consent or connivance of an officer, or*
 - (d) to be attributable to any neglect on their part,*
 - (e) the officer as well as the body corporate is guilty of the offence and liable to be proceeded against and punished accordingly.*
- (2) If the affairs of a body corporate are managed by its members, paragraph (1) applies in relation to the acts and defaults of a member in connection with such member’s functions of management as if the member was a director of the body.*
- (3) If an offence under regulation 19 committed by a partnership is shown—*
- (a) to have been committed with the consent or connivance of a partner, or*
 - (b) to be attributable to any neglect on their part,*
 - (c) the partner as well as the partnership is guilty of the offence and liable to be proceeded against and punished accordingly.*
- (4) If an offence under regulation 19 committed by an unincorporated association (other than a partnership) is shown—*
- (a) to have been committed with the consent or connivance of an officer, or*
 - (b) to be attributable to any neglect on their part,*
 - (c) the officer as well as the association is guilty of the offence and liable to be proceeded against and punished accordingly.*
- (5) In this regulation—*
- (6) “officer”—*
- (a) in relation to a body corporate, means a director, manager, secretary, chief executive, member of the committee of management, or a person purporting to act in such a capacity, and*

- (b) *in relation to an unincorporated association, means any officer of the association or any member of its governing body, or a person purporting to act in such a capacity.*
- (c) *“partner” includes a person purporting to act in such a capacity.*

Proceedings for offences

22. *Proceedings for an offence under regulation 19 may be instituted only—*

- (d) *by the FCA, or*
- (e) *by or with the consent of the Director of Public Prosecutions.*

Proceedings against unincorporated bodies

23.—(1) *Proceedings for an offence under regulation 19 alleged to have been committed by a partnership or other unincorporated association must be brought in the name of the partnership or association (and not that of its members).*

(2) *A fine imposed on the partnership or association on its conviction of an offence is to be paid out of the funds of the partnership or association.*

(3) *Rules of court relating to the service of documents are to have effect as if the partnership or association were a body corporate.*

(4) *In proceedings for an offence brought against the partnership or association, section 33 of the Criminal Justice Act 1925(3) (procedure on charge of offence against corporation) and section 46 of and Schedule 3 to the Magistrates’ Courts Act 1980(4) (corporations) apply as they do in relation to a body corporate.*

(5) *Summary proceedings for an offence under regulation 19 may be taken—*

- (a) *against a body corporate or unincorporated association at any place at which it has a place of business;*
- (b) *against an individual at any place where they are for the time being.*

(6) *Paragraph (5) does not affect any jurisdiction exercisable apart from this regulation.*

PART 6 – Injunctions etc

It is proposed that this Part will apply Part 25 of FSMA for the purposes of the CLA 2018 and the Regulations.

Part 7 – Notices

It is proposed that this Part will set out requirements for the FCA to issue warning and decision notices (excerpts of draft wording below). These clauses may specify who must receive a notice and may provide a mechanism for referral of warning and decision notices to the Tribunal. As appropriate, this Part may also apply Part 26 of FSMA 2000 (Notices) for the purposes of these Regulations.

Requirement to issue warning notice

25.—(1) *Where the FCA proposes to—*

- (a) *publish a statement under regulation 14 or 15;*
- (b) *impose a penalty under regulation 16;*
- (c) *impose a restriction on permission under regulation 17, or*

(3) 1925 c. 86. Section 33 was amended by section 132 of and Schedule 6 to the Magistrates’ Courts Act 1952 (c.55), section 56(1) and Schedule 8 to the Courts Act 1071 (c. 23) and paragraph 71 of Schedule 8 to, and Schedule 10 to the Courts Act 2003 (c.39).

(4) 1980 c.43. Schedule 3 was amended by the Criminal Justice Act 1991 (c.53), section 25(2) and Schedule 13, and by the Criminal Procedure and Investigations Act 1996 (c.25) Schedule 1 paragraph 1 and by the Criminal Justice Act 2003 (c.44). Amendments made by Schedule 37, Part 4 of the Criminal Justice Act 2003 have not fully come into force at the time of making of these Regulations.

(d) *suspend or restrict an approval under regulation 18, it must give the person concerned a warning notice.*

(2) *The warning notice must set out the following—*

- (a) *in the case of a statement under regulation 14 or 15, the terms of the statement;*
- (b) *in the case of a penalty under regulation 16, the amount of the penalty;*
- (c) *in the case of a restriction on permission under regulation 17, the period for which the restriction is to have effect;*
- (d) *in the case of a suspension or restriction on permission under regulation 18, the period for which the suspension or restriction is to have effect.*

Requirement to issue decision notice

26.—(1) *If, having considered any representations made in response to the warning notice, the FCA decides to—*

- (a) *publish a statement under regulation 14 or 15;*
- (b) *impose a penalty under regulation 16;*
- (c) *impose a restriction on permission under regulation 17, or*
- (d) *suspend or restrict an approval under regulation 18,*

it must without delay give the person concerned a decision notice.

(2) *The decision notice must set out the following—*

- (a) *in the case of a statement under regulation 14 or 15, the terms of the statement;*
- (b) *in the case of a penalty under regulation 16, the amount of the penalty;*
- (c) *in the case of a restriction on permission under regulation 17, the period for which the restriction is to have effect;*
- (d) *in the case of a suspension or restriction on permission under regulation 18, the period for which the suspension or restriction is to have effect.*

PART 8 – The Tribunal

It is likely that this Part will modify Part 9 of FSMA 2000 (Hearings and appeals) for the purposes of the CLA 2018 and the Regulations (a sample of the draft text is provided for illustration).

[The Tribunal

27.—(1) *Part 9 (hearings and appeals) of the 2000 Act applies in respect of references to the Tribunal made under these Regulations as it applies in respect of references made to the Tribunal under that Act, with the following modifications.*

(2) *In subsection 133 (proceedings before the Tribunal: general provision)—*

]

PART 9 – REGULATED PERSONS

Specification of authorised persons to be regulated persons

28.—(1) *Paragraph (2) specifies the description of authorised persons for the purposes of the entry in column 2 of the table in section 7 of the Act corresponding to the Financial Conduct Authority.*

(2) *The description is all whiplash claims authorised persons.*

THE SCHEDULE

HMT lawyers and the regulators are looking to draft the Schedule in a manner that will provide an interpretation of the meaning of “whiplash claims authorised person”. It is envisaged at this point that this category of persons is likely to be defined by reference both to the permissions held by the WCAP and to the regulated activities engaged in by WCAPs in the course of handling and managing claims. The Schedule may also specify the regulated activities relevant to WCAPs in the Schedule with a reference to the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001.

To that effect, the Schedule will take the following format:

Meaning of whiplash claims authorised person

1. A whiplash claims authorised person means an authorised person falling within paragraph 2 or 4.
2. An authorised person falls within the paragraph if the authorised person has permission—
 - (a) given under Part 4A of the 2000 Act, or
 - (b) resulting from any other provision of that Act

to carry on regulated activities that consist of or include one or more of the regulated activities referred to in paragraph 3.

3. The regulated activities referred to in this paragraph are—
 - (a) the activity specified by article 10(1) of the Regulated Activities Order (effecting a contract of insurance as principal);
 - (b) the activity specified by article 10(2) of the Regulated Activities Order (carrying out a contract of insurance as principal);
 - (c) the activity specified by article 39A of the Regulated Activities Order (assisting in the administration and performance of a contract of insurance);
 - (d) the activity specified by article 21 of the Regulated Activities Order (dealing in investments as agent);
 - (e) the activity specified by article 57 of the Regulated Activities Order (managing the underwriting capacity of a Lloyd’s syndicate);
 - (f) the activity specified by article 58 of the Regulated Activities Order (arranging deals in contracts of insurance written at Lloyd’s);
 - (g) the activity specified by article 64 of the Regulated Activities Order (agreeing to carry on specified kinds of activity), so far as it relates to any kind of activity referred to in subparagraphs (c) to (f);
 - (h) [].