

Insights

A NEW HORIZON FOR REGULATED FUNERAL PLAN PROVIDERS: OPPORTUNITIES, RISKS AND LESSONS TO BE LEARNED

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SUMMARY

On 29 July 2022, funeral plan providers (“FPPs”) will be brought within the remit of the Financial Conduct Authority (the “FCA”). While entering into a funeral plan contract as a provider has been a regulated activity for many years, the exclusions introduced by the government in 2001 meant that the FCA has not authorized any firm for the purpose of entering into funeral plan contracts. The 2018 Call for Evidence and subsequent consultation conducted by HM Treasury, as well as the FCA’s own information gathering, identified a number of potential harms to customers arising from practices which have not been adequately regulated by the former industry voluntary regulator, the Funeral Planning Authority (“FPA”). This is now changing for both providers and distributors of pre-paid funeral plans. Below, we consider some of the key risks and opportunities this presents to those impacted by these changes.

REGULATION OF FPPS

The following firms will be subject to regulation from 29 July 2022:

- providers: firms that enter into and administer funeral plan contracts (including those sold before FCA regulation)
- intermediaries: firms that sell funeral plans to customers on behalf of providers (this may include, for example, funeral directors, will writers and lead generators)

The FCA rules that the firms need to comply with if operating in this sector are set out in the [FPCOB Funeral Plan: Conduct of Business Sourcebook](#) (“FPCOB”); part of the FCA Handbook. The FCA has also published two policy statements ([PS21/8](#) and [PS21/15](#)) which provide further guidance on the regulator’s expectations of the firms. FPPs should be mindful that selling or administering a funeral plan contract without permission after 29 July will be a criminal offence.

Within a span of 18 months, FPPs have had to get to grips with the rules which make up the new regulatory framework. In November 2021, the FCA issued a “[Dear CEO](#)” letter with further information to support firms’ preparations. The FCA cautioned that it would operate a robust authorisation gateway resulting in 10 firms withdrawing their applications and further 17 transferring their books to other providers. So far, the FCA has indicated that it intends to authorise 26 providers. Yet it appears that some providers remain unaware of the imminent regulation as demonstrated by the fact that there are still firms who only recently submitted their applications, with others failing to apply altogether.

The Financial Ombudsman Service (“FOS”) has also published a [helpful overview](#) of their work and how they engage with financial institutions to aid the FPPs implementation of policies, procedures and controls for complaints handling.

We set out below certain risks and opportunities that entering the regulated sector brings.

RISKS

The incoming regulatory regime will significantly extend the exposure of individuals within authorized FPPs to personal regulatory action, and will require careful explanation and messaging from firms to their employees. On a personal level, this is likely to be the biggest change for many individuals working at FPPs, most of whom have never been accountable directly to the regulators for their personal conduct and are now at risk of regulatory sanctions. Firms themselves will also be under a statutory obligation to provide suitable training to persons performing designated senior management functions (“SMFs”), non-executive directors (“NEDs”) and Certification staff to help them understand their personal regulatory duties. As a result, alongside the authorization process, many FPPs have had to work on upskilling staff and filling the resource gaps. Recruitment and training remains an ongoing priority.

Another aspect of the new rules that is likely to have a significant impact on the business models is the commission ban on payments to intermediaries. The proposal was [opposed](#) on the grounds of the impact it could have on competition within the sector and the access to products for consumers. While the FCA decided to implement the ban regardless, it provided little guidance on the scope of the relevant rule. Based on our experience, the FCA interprets the rules strictly, with the ban affecting all forms of payments, including by way of commission or benefit of any kind. Firms should be particularly attuned to the fact that the ban appears to have a broad application and may affect their marketing channels – unless the payment is made to a person merely to communicate a financial promotion (which has a specific meaning under the FCA rules), it is likely to be captured by the commission ban.

The new rules also require that FPPs must comply with legal and regulatory obligations to deter and detect financial crime. This includes money laundering. Firms will need to establish and maintain appropriate and risk-sensitive policies and procedures to reduce the risk that they may be used to

further financial crime. While the FCA has published guidance on how firms can meet their financial crime obligations, for many it will be another new area of risk that will have to be actively monitored.

Although FPPs should be alive to the above risks, it is unlikely that we will see any formal enforcement action from the FCA at this stage, not least because they are still in the process of authorising firms, with others having until October 2022 to wind down outside of the perimeter.

OPPORTUNITIES

The opportunities which present as a result of being part of a regulated industry ought not to be understated. Firstly, it ensures level playing field – through a consistent enforcement regime and common regulatory standards, firms have confidence that they are operating in a fair commercial environment. Given that the firm's reputation is a key driver of consumer choices, investment in robust compliance processes should have positive impact on the firm's brand recognition. Likewise, the high standards of professional competency required of the regulated providers is likely to increase consumers' trust. Regulation also leads to a better-trained workforce which results in a greater efficiency in running the business and lower risk of regulatory failure.

LESSONS LEARNED FROM OTHER REGULATED SECTORS

Given the challenges of ensuring compliance with the new requirements, there are other sectors that FPPs can draw inspiration from when designing their internal policies and processes.

A broad range of [product governance rules](#) ("PROD") will apply to FPPs. These are based primarily on the PROD rules for insurance products. While the rules have been modified for funeral plans, FPPs may use the [guidance for the insurance sector](#) on product design to meet the needs of a defined target market and pricing so that the plan provides fair value to customers.

Although requirements for firms, directors, senior management and significant shareholders as well as any trustees to be fit and proper existed under the FPA rules, the application of the FCA's Senior Managers and Certification Regime ("SM&CR") will introduce much more onerous obligations, especially since it extends to non-financial misconduct. In this respect, FPPs may wish to take note of the [Dear CEO letter](#) on non-financial misconduct in wholesale general insurance firms, which may provide a useful source of reference regarding the FCA's expectations. This includes addressing non-financial misconduct through effective leadership with potential personal implications for a failure to tackle it effectively: a senior manager's failure to take reasonable steps to address non-financial misconduct in their area of responsibility could lead to a determination that they are not fit and proper. The FCA has also previously published [guidance](#) on its approach to improving the culture in financial services which FPPs should also be mindful of.

Firms are also reminded that many consumers purchasing pre-paid funeral plans are likely to be vulnerable (e.g. because of recent bereavement or difficult financial circumstances). Last year, the

FCA published [guidance for firms on the fair treatment of vulnerable customers](#). This sets out the FCA's view on what actions firms should take to understand the needs of their target market and ensure that their staff has the right skills and capabilities to recognise and respond to the needs of vulnerable consumers throughout product design process, flexible customer service and communications. The guidance applies to all firms to which the FCA's [Principles for Businesses](#) apply, therefore FPPs should consider it when designing their policies and training programmes.

CONCLUSION

Many of the rules to which FPPs will be subject from 29 July 2022 already existed (albeit in a less prescriptive form) under the FPA framework. However, the FCA is a very different regulator from the FPA, as firms who have been through the authorization process recently will have experienced. We can expect to see robust supervision of funeral plan providers by the FCA over the coming years, with enforcement activity to be expected where the FCA suspects risk of consumer harm. Benefits for funeral provider firms will include the fruits of improved corporate governance and clearer senior manager accountability, leading to greater customer trust and confidence in the brand.

Polly James and Joanna Munro regularly advise on regulatory issues related to funeral plan providers and provide training on the matters covered by this article. Please feel free to reach out to them with any queries.

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