**Regulators and regulation**

This element introduces you to certain concepts and aspects connected with regulators and regulation.

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In addition to the court proceedings that you look at in your studies of litigation and dispute resolution you have focused on the way the courts (civil and criminal) may regulate and impact upon your client’s conduct. Here we look at other bodies which have been granted powers that could impact upon the ways in which your clients conduct themselves.

Which regulators are relevant to your clients will depend on the client’s industry and activities but you may well find that you represent individuals or companies that are affected by more than one regulator. In this situation, you will need to be aware of the way that the powers and regulatory objectives of all these bodies may affect your client’s business and conduct.

**Examples**

There are many examples of regulators. You are likely to be aware of lots of them eg:

- The Office of Gas and Electricity Markets (OFGEM) seeks (amongst other objectives) to protect the interests of electricity and gas consumers by promoting value for money; promoting security of supply and sustainability, for consumers, domestic and industrial users.

- The Office of Communications (OFCOM) regulatory remit includes the TV, radio and video-on-demand sectors, fixed-line telecoms, mobiles and postal services, in the UK.

- The Financial Reporting Council (FRC). The FRC regulates auditors, accountants and actuaries. The FRC is responsible for promoting high quality corporate governance and reporting to foster investment.

- The Prudential Regulation Authority (PRA) and Financial Conduct Authority (FCA) regulate the financial services sector.

- The Information Commissioner’s Office (ICO) is the UK’s data regulator (irrespective of industry).

**Practicalities of dealing with a regulatory problem**

A regulatory problem can come to light in a number of ways. A firm could become aware of a potential regulatory breach:

- when a specific incident occurs;

- from the confessions or reports of an employee;

- through audit or compliance checks; and/or

- from complaints by customers, competitors or other participants in the market.

A regulator could also become aware of the problem from information obtained through its regular monitoring of the firm.

When a firm becomes aware of a potential regulatory breach, the key issue above all is likely to be whether and how to investigate the matter: it is hard to assess how serious a problem is (and therefore what action, if any, needs to be taken) before a firm has a proper understanding of what that problem actually involves. Other stakeholders and interested parties may be involved (or need to become involved) in addition to the regulator(s), as shown on the next page.

**Parties potentially impacted by, or interested in, a regulatory dispute**

- Customers

- Suppliers

- Shareholders

- Staff

- Insurers

- Press

**Investigation is key…**

Who should investigate and how should it be done? A firm must therefore get to the root of the problem as quickly as possible and make an assessment as to its implications. Fully considering a problem at an early stage may well reduce the prospect of a regulatory investigation and increase the prospects of a successful outcome.

**- Who?** It may be useful to involve the firm’s staff (for instance, members of the Compliance, Risk, Audit or IT departments) or the firm’s senior management in the investigation, but there will usually be strong reasons for in-house or external lawyers to conduct the investigation. One of the principal reasons for this would be to ensure that the documents created in the investigation are (wherever possible) protected from inspection by legal professional privilege.

**- Scope of the investigation**. This will depend on the nature and seriousness of the matter concerned.

**- Document review**. The firm should collate and review documents at an early stage so that it can grasp the scope of the problem and identify the documents that may be withheld from the regulator (primarily on grounds of legal professional privilege) if there is a regulatory investigation.

**- Individual employees**. It is important to identify at an early stage whether it might be appropriate to suspend certain employees or remove them from sensitive positions, especially where it appears that the breach resulted from a deliberate action by an employee.

**- Any conduct that needs to be stopped**. If certain practices need to cease in order to stabilise the situation or prevent it from worsening, it is important for the firm to be proactive and where necessary do this on its own initiative, rather than wait for instructions from the relevant regulator(s).

**- Other internal action**. A firm should also take steps to ensure that the problem will not recur. For example, a firm might assess whether any deficiencies in systems or controls gave rise to the problem or contributed to it; and consider whether the problem reveals issues about inadequate management and supervision.

**- Insurance.** A firm will need to check the terms of its insurance policies and follow any necessary steps, for example in relation to notification of circumstances of possible claims. Firms cannot generally claim under insurance policies for regulatory penalties although they may have cover for legal expenses and/or customer remediation.

**- Could the problem give rise to enforcement or criminal proceedings?**A firm may have to report such activity to its regulator(s) under its regulatory obligations. The police may also have to be informed; for example, if any fraud is alleged.

**- Customers.** In general terms, when a regulatory problem arises which affects customers, the firm needs to take (and to be seen to be taking) steps to look after the interests of its customers, including (amongst other things) keeping them informed of developments (if the matter is public knowledge); safeguarding their interests (e.g., by identifying losses and ensuring they suffer no further losses); and paying compensation.

**- Document destruction**. Once it discovers a regulatory problem, a firm should stop its normal document destruction processes. Destroying or disposing of potentially relevant documents can cause embarrassment and suspicion with the regulator; give rise to negative inferences in litigation proceedings; and even possibly lead to criminal liability.

**- Document creation**. A firm should also take care not to create any additional documents which may be prejudicial. This material may have to be disclosed to the regulator, and/or to third parties who bring civil proceedings against the firm.

**Summary**

-There are many regulators, in all sorts of sectors, industries and professions.

- Whether and how to investigate a regulatory matter is a key issue.

- Careful consideration needs to be given to:

Who might be impacted by a regulatory dispute? and

Who should be involved in investigating a regulatory matter?

- Other early actions to consider are:

What steps should be taken to suspend individual employees?

Does any problematic conduct need to be stopped?

Is other internal action necessary?

Does anything need to be reported to an insurer?

What steps should be taken in relation to customers? and

What steps should be taken in relation to document creation and destruction?