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6 Record Search Lessons From $43M Clydesdale Bank Penalty

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Clydesdale Bank PLC was recently hit with a more-than-$43 million fine, largely because it failed to search for documents that should have been subject to its destruction policy, and for misleading consumers and its regulators about the searches. The U.K.'s Financial Conduct Authority (FCA), which is something like the Consumer Financial Protection Bureau, the Office of the Comptroller of the Currency, the Federal Trade Commission and the U.S. Securities and Exchange Commission rolled into one, imposed this £20,678,300 fine on April 14, 2015, and issued a detailed notice explaining how it arrived at such a fine. The facts discussed here are as represented by the FCA in its order.[1]

As the recent Libor cases have shown, the U.S. and U.K. bank regulators are often found chasing the same fox.[2] Accordingly, the FCA's notice provides valuable lessons for all U.S. financial institutions, not only those who do business in the U.K.

Clydesdale's Policy on Record Searches

Clydesdale maintained a seven-year document retention period. When responding to consumer complaints regarding its credit insurance product, Clydesdale, as a matter of policy, would not search for any documents on loans and mortgages (which may have had single premium insurance) if the loan had been repaid or closed more than seven years prior to the date of the complaint. Prior to approving the policy, Clydesdale determined that, for most cases beyond the seven-year document retention period, there was insufficient documentation on which to base an investigation of the complaint.

The FCA faulted Clydesdale for not also determining, prior to approving the policy, the extent to which, notwithstanding the document retention policy, relevant documents would nevertheless be available on loans repaid or closed more than seven years prior. The FCA found that, for a small percentage of loans, relevant documents had not been destroyed pursuant to the retention policy, and were readily available on Clydesdale's electronic records systems, or, on its somewhat less accessible microfiche records. The FCA concluded that Clydesdale's policy was "inappropriate" and resulted in Clydesdale's failure to conduct reasonable searches for available records and to consider all available records in assessing consumer complaints. Notably, the FCA expressly refrained from criticizing the document-retention policy. It limited its criticism to the search policy.

Around the same time period, Clydesdale implemented a similar search policy with regard to complaints concerning purchase of credit insurance on credit card accounts. Clydesdale would review account statements only back to 2000, not earlier. Statements were available, albeit with large gaps, for some of the period before the year 2000, but the statements were held in microfiche rather than electronic form and were therefore not easily retrievable. Nor did Clydesdale estimate credit insurance premium payments made before that date. As a result, when calculating refunds for missold credit insurance, as required under FCA regulations, Clydesdale did not calculate any remediation prior to the year 2000.

When the Financial Ombudsman Service inquired about Clydesdale's credit insurance related records, Clydesdale misrepresented what information was available. It stated that Clydesdale had not been able to trace any documentation with respect to loans repaid or closed beyond the retention period or any credit card statements prior to the year 2000. Unbeknownst to Clydesdale's management or credit insurance leadership team, when the record search policy came under scrutiny by the FOS, a team within Clydesdale's complaint handling operation also adopted a practice of altering system printouts. For loans repaid or closed prior to the retention period, the printouts were altered to delete references to any documentation that may have been available prior to the retention period; this likely affected a small number of accounts. On a separate printout listing all products sold to the customer, they deleted all credit insurance information. These actions combined to make it appear as if Clydesdale held no relevant documentation, thereby conforming the printouts to the misrepresentations made to the FOS.

Based on these policies and practices, the FCA concluded that Clydesdale had breached applicable regulations and imposed a financial penalty of £20,678,300. In determining the penalty amount, Clydesdale was credited with a 30 percent discount for cooperating and agreeing to settle at an early stage. The FCA also took into account, as an additional mitigating factor, that Clydesdale undertook a review by a professional services firm during the relevant period and implemented the recommendations arising from that review, although the review did not catch the problems with the record search policies.

Standards for Record Searches

In assessing Clydesdale's record search policies and practices, the FCA applied regulations requiring that complaints be investigated "competently, diligently and impartially," including by considering "all the evidence available" to the company.[3] The FCA has placed a high priority on institutions' investigations of complaints that credit insurance was missold, and has emphasized institutions' duties to provide refunds in the event the product was missold.[4] Against this background of heightened scrutiny, the FCA applied its already stringent consumer protection standards to Clydesdale's complaint responses. The FCA explained that firms are expected to respond to consumer complaints by "(1) conducting reasonable searches of their systems (including archive systems); (2) reviewing all available information about the customer; and (3) setting out in the final response to the customer the level of investigation that had been undertaken together with relevant supporting documents."

The standard the FCA applied in assessing Clydesdale's record searches is comparable to standards that have been applied in the United States. For example, the CFPB requires mortgage servicers' responding to a qualified written request to conduct a reasonable search for the information requested by the borrower. In case the requested information is not found, the servicer must provide the borrower with a written notification that states that the servicer has determined that the requested information is not available and provide the basis for the servicer's determination.[5] The obligation to search for records may be restricted if the requested search is overbroad or unduly burdensome.[6]

Lessons for Record Search Policies

The FCA's findings are quite extensive and contain many points that will be relevant to U.S. institutions developing a search policy, or evaluating an existing one. Here are six we found particularly useful:

First, a document retention policy ought not to act as a stand-in for a document search policy. If relevant information is available, an institution may not ignore it because it should have been destroyed under a retention policy.

Second, although it is desirable to resolve complaints promptly and at a reasonable cost, those considerations need to be carefully weighed against considerations of fairness and accuracy. Clydesdale, confronted with a backlog of complaints, drew a bright line that conformed to its retention policy. The FCA found that instead the search policy should have required reasonable searches of available information.

A robust search policy will consider all electronic and other data that is reasonably available. With a nod to efficiency, the FCA criticism focused on the failure to search electronic databases, rather than on the failure to search microfiche records. In June 2013, following feedback from the FCA, Clydesdale changed its search policy to require a check of the electronic database for all loans, even those that had been repaid more than seven years prior, but did not appear to adopt a policy to search microfiche.

Third, before excluding sources of information from search protocols, the institution ought to assess the impact of that decision. For example, because of Clydesdale's retention policy, documentation was typically no longer available where credit insurance had been purchased in connection with a loan that had been repaid more than seven years prior. The FCA suggests Clydesdale should have assessed, perhaps by sampling old accounts, in how many cases that information had in fact not been destroyed. The FCA criticized Clydesdale for drafting its policy to eschew searches of old accounts without evaluating the implications of that decision.

Fourth, if a search identifies relevant information, that information should be considered, even if the presence of that data is a result of happenstance, and data of that type is not typically available. In the Clydesdale case, account files occasionally had old loan documents that predated the retention period. The FCA notice indicated this information was in the files "either by accident or because they had searched for them out of curiosity." The complaints team did not consider such anomalous documents however, apparently out of a desire to take a consistent approach. This decision to prioritize consistency over consideration of all information reasonably available was not made at the management level, and was criticized by the FCA.

Fifth, in some cases, estimating missing data may be permissible. Prior to the period in question, when calculating refunds for purchases of credit insurance on credit card accounts, if past billing statements showing the actual balance were unavailable, Clydesdale would estimate the account balance on which premiums would have been paid. An outside firm reviewed Clydesdale's estimation methodology and suggested that this methodology could result in excessive payments. As a result, Clydesdale ceased estimating, and paid no remediation if the account information was not readily available. It did not search its microfiche records where the missing statements may have been located. The FCA was critical of this strategy, and stated that, where the relevant data was missing, Clydesdale should have considered alternatives, such as estimating premium payments consumers had made.

Sixth, statements to regulators and consumers explaining the search policy can serve as means to evaluate the legitimacy of a policy, but to do so, they must be accurate. For example, in a number of cases, Clydesdale stated that documents were not available, when the reality was the documents were not likely to be available in a readily accessible format and therefore Clydesdale had chosen not to search for them. The FCA's notice

suggests that had senior management seen the policy expressed in the latter way, they may well have modified the policy.

Similarly, with regard to credit card statements, Clydesdale said the remediation had been made to place customers in the position they would have been in had they never purchased the credit insurance. In fact, that promise had to be qualified as true only to the extent the account had no balance during the period of missing information. Here also, the FCA suggests that had the policy been articulated so bluntly, management would have considered the wisdom of revising the policy.

In sum, when developing a search policy, regulators clearly expect a financial services provider to search all reasonably available information and to explicitly validate the rationale for any determinations that certain classes of information that it determines are not reasonably available. When evaluating complaints, consider all relevant information, even if the search policy typically would not have identified that information. When describing a search, be accurate. If the truth is awkward, consider modifying the policy, rather than modifying the description. Companies that ignore the lessons of the Clydesdale case may find themselves at increased risk of regulatory or judicial penalties if their search efforts come up short.

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[1] FCA Final Notice to Clydesdale Bank PLC. Available at: https://www.fca.org.uk/your-fca/documents/final-notices/2015/clydesdale-bank-plc.

[2] See, e.g., Deutsche Bank agrees to joint settlement of all remaining investigations with U.S. and U.K. regulators over interbank offered rates benchmarks, Deutsche Bank Press Release (Apr. 23, 2015), available at: https://www.db.com/medien/en/content/5060_5143.htm

[3] Dispute Resolution: Complaints Handbook ("DISP") 1.4.1R; DISP 1.4.2G; DIST app 3.2.1G (The firm should consider, in light of all the information provided by the complainant and otherwise already held by or available to the firm, whether there was a breach of ailing by the firm.") DIST App 3.2.6G ("The firm should take into account any information it already holds").

[4] Financial Services Authority. PS 10/12: The assessment and redress of Payment Protection Insurance Complaints; feedback on the further consultation in CP10/6 and final Handbook text, Aug. 2010.

[5] Real Estate Settlement Procedures Act (Regulation X), 12 C.F.R. § 1024.36(d)(ii) (2013).

[6] Real Estate Settlement Procedures Act (Regulation X), 12 C.F.R. § 1024.36(f)(iv) (2013).
