NEWGATE COMPLIANCE

Newgate News

January 2021

- SolarWinds Orion cyber incident
- Blue Gate Capital Limited ordered to pay Connaught Income Fund investors £203,007
- Insider dealer Walid Choucair ordered to pay £3.9 million in confiscation
- FCA fines Charles Schwab UK £8.96 million over safeguarding and compliance failures
- Supreme Court judgment in FCA's business interruption insurance test case

SolarWinds Orion cyber incident

18/12/2020

The National Cyber Security Centre (NCSC) has published guidance to firms to help identify if they may be affected of an ongoing cyber incident affecting the SolarWinds Orion suite of IT management tools. It includes a list of immediate actions to take if you are using these tools.

Newgate's advice: ***Firms using the SolarWinds tool should review the NCSC guidance to ensure the safety of their firm's systems. Firms affected or compromised should contact their Newgate consultant and notify the Financial Conduct Authority (FCA). Full article here.***

Impact:

Impact assessment key:

Low

Medium

High

Blue Gate Capital Limited ordered to pay Connaught Income Fund investors £203,007

18/12/2020

The Fund, formerly known as the Guaranteed Low Risk Income Fund Series 1, was an unregulated collective investment scheme (UCIS) which commenced operation in March 2008. The Fund provided short term bridging finance to commercial operators in the UK property market. Blue Gate took over as Operator of the Fund from Capita Financial Managers Limited (CFM) on the 25th of September 2009 and remained as Operator until the Fund's compulsory liquidation on the 3rd of December 2012.

The Financial Conduct Authority (FCA) found that it had breached Principle 2 of the FCA's Principles for Businesses because it failed to conduct adequate due diligence on the Fund prior to taking it on, failed to investigate serious issues with the Fund of which it was aware and failed, throughout its tenure as Operator, to establish that the Fund was operating as it was supposed to. The FCA also found that Blue Gate had breached Principle 7 of the Principles because it failed to communicate with the Fund's investors in a way that was clear, fair, and not misleading.

The FCA has publicly censured Blue Gate and demanded a restitution fee of £203,007 to the investors in the Fund which reflects the profits earned by Blue Gate as Operator of the Fund.

For more information on this case, including the FCA action against CFM in 2017 click here.

Newgate's advice: ***Firms are reminded of the importance of adhering to Principle 2 (A firm must conduct its business with due skill, care and diligence) and Principle 7 (A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading). Proper due diligence must be taken before a Fund can operate and sufficient monitoring and oversight must be maintained thereafter. Firms should also ensure that communications and marketing material are always fair, clear, and not misleading. Please contact your Newgate consultant if you would like to discuss the specifics of this FCA action further. Full article here.***

Impact:

Supreme Court judgment in FCA's business interruption insurance test case

15/01/2021

The Newgate Newsletter publications has been tracking the developments of the business interruption insurance test case, spearheaded by the Financial Conduct Authority (FCA), and led by a team of legal experts at Herbert Smith Freehills.

Overview of the test case

Many policyholders whose businesses were affected by the Coronavirus pandemic suffered significant losses, resulting in many claims under business interruption (BI) policies. In some cases, insurers have accepted liability under disease clauses. In others, insurers have disputed liability while policyholders considered that they had cover leading to widespread concern about the lack of clarity and certainty.

The FCA's test case aimed to clarify key issues of contractual uncertainty for as many policyholders and insurers as possible. The FCA selected a representative sample of 21 types of policy issued by eight insurers.

For more information on the test case, see Newgate Newsletters June and October 2020 which can be located on our website http://newgatecompliance.com/newgate-news

Judgment

The High Court judgment last September said that most of the disease clauses and certain prevention access clauses provide cover and that the pandemic and the Government and public response caused the business interruption losses. The six insurers appealed those conclusions for 11 of the policy types, but the Supreme Court has dismissed those appeals, for different reasons from those of the High Court.

On the FCA's appeal, the Supreme Court ruled that cover may be available for partial closure of premises (as well as full closure) and for mandatory closure orders that were not legally binding; that valid claims should not be reduced because the loss would have resulted in any event from the pandemic; and that two additional policy types from insurer QBE provide cover. More policyholders will thus have valid claims and some pay-outs will be higher.

Newgate's advice: ***The FCA will publish a set of Q&As for policyholders to assist them and their advisers in understanding the test case. A dedicated page for all information related to the test case and next steps can be found here.***

Impact:

FCA fines Charles Schwab UK £8.96 million over safe-guarding and compliance failures

21/12/2020

The Financial Conduct Authority (FCA) has fined Charles Schwab Ltd (CSUK) £8.96 million for failing to adequately protect client assets, carrying out a regulated activity without permission and making a false statement to the FCA. The breaches occurred between August 2017 and April 2019, after CSUK changed its business model. Client money was swept across from CSUK to its affiliate Charles Schwab & Co., (CS&C), a firm based in the United States. The client assets, which were subject to UK rules, were held in CS&C's general pool, which contained both firm and client money and which was held for both UK and non-UK clients.

CSUK failed to arrange adequate protection for its clients' assets under UK rules. Specifically, the firm:

- Did not have the right records and accounts to identify its customers' client assets;
- Did not undertake internal or external reconciliations for its customers' client assets;
- Did not have adequate organisational arrangements to safeguard client assets; and
- Did not maintain a resolution pack, which would help to ensure a timely return of client assets in an insolvency

CSUK carried out a regulated activity without permission. The firm did not always have permission to safeguard and administer custody assets and failed to notify the FCA of the breach when applying for the correct permission.

CSUK made a false statement to the FCA, inaccurately informing the FCA that its auditors had confirmed that it had adequate systems and controls in place to protect client assets. The firm did not make sufficient enquiries to check whether this was correct. The firm took remedial action at various points after discovering the breaches. There was no actual loss of client assets and CSUK stopped holding client assets from the 1st January 2020. CSUK agreed to settle the case and qualified for a 30% discount. The financial penalty would otherwise have been £12,804,600.

Newgate's advice: ***Firms are reminded of the importance of conducting activities within their FCA-approved scope of permission and ensuring that their monitoring programme is comprehensive enough to substantially mitigate the risk of breach. Please contact your Newgate if you wish to discuss whether you may need to submit a variation of permission to change your existing FCA approved activities if aspects of you business model and service offering has changed. Full article here.***

Impact:

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