REGULATION NEWS | ISSUE 19 APR 16

GEM Compliance Consulting

Welcome to the latest edition of Gem Compliance's monthly regulation newsletter. The aim of the newsletter is to tailor industry news in an easily digestible format. As such, not all sources of industry information and FCA publications (and no PRA publications unless specified) will be covered. Therefore clients and associates of Gem Compliance should periodically check the FCA's website for other developments.

April has been a busy month for publications and news. On 6th April the FCA automatically added advising on peer to peer agreements to the permissions of all authorised firms with permission to provide investment advice including insurance intermediaries. There is a temporary streamlined process in place to remove the permission, which could impact capital requirements and fees. This process is available until 6th October 2016. If firms fail to complete this process in time they will be required to submit a normal Variation of Permission application.

The FCA's Live and Local programme has been in Northern Ireland this month and is moving to the North East of England in May. The sessions are aimed at regulated firms in the investment, general insurance and mortgage sectors and the focus of this year's sessions is '*The advice process: building a solid base*'.

This month we also said goodbye to Sumreena Haidar, whose contract ended at the end of March. We wish Sumreena all the best in her next role.

The FCA's monthly Regulation Round-up was published along with the latest issue of the FCA's Policy Development Update (Issue 32).

For the latest on MiFID II please visit the FCA's dedicated webpages.

We hope you find this newsletter useful and should you have any compliance queries or require advice on any of these topics, please do not hesitate to contact us.

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Main features

- CP16/9: FCA regulated fees and levies: rates proposals 2016/17
- FCA Business Plan 2016/17
- TR16/3: Meeting investors' expectations
- Inducements and Conflicts of Interests Thematic Review: Key Findings
- Industry News
- Enforcement Actions and Prosecutions
- Other FCA News, Speeches and Publications

Industry News

European Commission adopts delegated Directive to supplement MiFID II covering safeguarding of client assets, product governance and inducements.
Click here for Directive.

Lehman Brothers UK, which was declared insolvent in September 2008, has been ordered by the High Court to make loan repayments to its parent company now that all its debts plus interest have been paid.
Click here for article.

PRA publishes consultation paper on proposed minimum standards for firms when underwriting buy-to-let contracts.
Click here for consultation.

FOS and FCA issue warning against a community bank, WeRE Bank, which created its own currency, the RE, claiming it is a unit of energy that can be used to discharge debts such as those relating to tax, bills and mortgages. The FOS has received a number of complaints from customers that have been unable to use cheques from the bank to make payments to other businesses. One FOS adjudicator ruled against a couple who were unable to make payments on their mortgage using the cheques and are now facing the prospect of losing their home. In the response the adjudicator refers to a contract signed by the complainants in the form of promissory note to pay WeRe Bank £150k. The adjudicator believes the note creates a legally binding obligation to pay the money if WeRe Bank demands it. The adjudicator also said it's possible the complainant has been the victim of a scam and has urged them to contact the police.
Click here for article.

Advisers at firms affected by the introduction of the Senior Managers Regime are being marked inactive on the FCA register causing concern and confusion among customers.
Click here for article.

Lloyds denies its execution-only service involving live webchats with customer service advisers is giving advice.
Click here for article.

FCA's interim CEO, Tracy McDermott is to leave the FCA when the PRA's Andrew Bailey takes over as CEO.
Click here for article.

CP16/9: FCA regulated fees and levies: rates proposals 2016/17

This paper sets out the proposed regulatory fees and levies for the FCA, FOS and MAS for 2016/17 – FSCS fees are consulted on separately.

The FCA's annual funding requirement (AFR) excluding consumer credit is the same as last year (£481.6m) . Ongoing regulatory activities have decreased by 1.6% on last year, so most fee blocks will receive a 1.6% decrease in the AFR allocation. Minimum fees in the 'A' (authorised) fee blocks will remain unchanged from 2015/16 and the financial penalty rebate will mean total fees from fee payers for the next year will reduce by £49.6m.

During 2016/17 the FCA expects to complete the full authorisation of consumer credit firms, which started in April 2014. Therefore, the FCA is including consumer credit costs in the AFR for the first time, so the total AFR including consumer credit costs is £519.3m, an increase of 7.8% on last year's AFR.

The FCA is also introducing a ring-fencing implementation fee (RFIF), which apply to firms that are required to ring-fence their core activities in line with the Financial Services (Banking Reform) Act 2013. The FCA's budgeted costs for this work are £6.4m, with 0.6m being carried forward from last year.

The Pension guidance levy (PGL) for 2016/17 is £22.6m, a decrease of 42% on 2015/16.

The FOS levy will increase by £1.2m on the amount for 2015/16 to cover consumer credit firms, which are now under the compulsory jurisdiction.

The MAS levy for 2016/17 will reduce by 5% on last year's but the amount actually levied will be even less because consumer credit contributions collected last year and anticipated contributions during 2016/17 are yet to be allocated.

Year on year movements in FCA Periodic fee **rates** for certain fee blocks are as follows:

- A7 – Portfolio managers: decrease of 4.5%
- A9 - Managers and depositaries of investment funds, and operators of collective investment schemes or pension schemes: decrease of 10.6%
- A13 - Advisory arrangers, dealers or brokers: decrease of 5.7%
- A18 - Home finance providers, advisers and arrangers: decrease of 2.3%
- A19 - General insurance mediation: decrease of 3.4%
- A21 - Firms holding client money or assets or both: decrease of 7.8%

Variance of FCA periodic fee **rates** for other bodies:

- C - Collective investment schemes: decrease of 11.8%.
- D - Designated professional bodies: variances range from a decrease of 3.5% (The Association of Chartered Certified Accountants) to an increase of 5.2% (The Institute of Chartered Accountants Scotland).
- G –
  - ➡ Firms registered under the Money Laundering Regulations 2007: annual fee of £433 for 2015/16 is unchanged for 2016/17.
  - ➡ Firms covered by the Payment Services Regulations 2009: decrease of 8.3% on last year.
  - ➡ Firms undertaking consumer buy-to-let business: flat rates of £400 and £200 for lenders and arrangers/advisers respectively are proposed.

The 2016/17 annual fee for small registered UK Alternative Investment Fund Managers (AIFMs) is £750, unchanged from 2015/16.

The FCA's consultation rates fee calculator for 2016/17 is now available on its website and firms are advised to use this to estimate fees for the forthcoming year. However, **firms should be aware that consultation rates could differ materially from final rates, which will be published in June and not all levies may be included.** Firms that are not on-account fee payers will be invoiced from July.

Click here for consultation paper.

Industry News continued…

Investment management firm announces it will stop charging investors for research as part of a new initiative to be open and transparent on the costs associated with active management of an investment fund.
Click here for article.

FOS upholds complaint from customer who believed she would be able to take tax-free cash lumps sums from her pensions without having to transfer them but later found that her pensions had been transferred. FOS ruled in favour of the complainant, who could not read or write, stating the complainant was heavily reliant on the advice she received from the firm and could not have fully understood the written information she was given/signed. Therefore, the firm should have proceeded with extreme caution and should not have arranged the transfer even on an insistent client basis.
Click here for article.

The FCA has written to a number of firms, as a result of revelations regarding Panama law firm Mossack Fonseca asking them to review links they may have with the firm. The FCA's letter said: "Beyond 15 April we will require updates on any significant issues or relationships identified and a full response detailing your findings when your investigation is concluded." The FCA also reports it is working closely with a number of other agencies that are looking into this.
Click here for article.

Concerns have been raised over the FCA's authorisation and supervision processes as an authorised firm enters administration. The firm, and some of its owners, were the subject of investigations in the US four years before its collapse. The US investigations revealed the firm had solvency problems in 2010 yet in 2014 the FCA granted an extension of the firm's permissions to include provision of advice.
Click here for article.

ESMA reports that the FCA has a "selective approach" to disciplinary action concerning breaches of MiFID requirements in respect of retail investment advice. The report states "…the FCA will only refer a case to enforcement where the failings are serious and typically systemic, and if the enforcement action will have a deterrent effect. Consequently, many enforcement actions are not carried out despite there being evidence of breaches."
Click here for final report.

FOS supports firm in pension transfer/advice complaint in which complainant confirms he signed a letter from the firm without reading it.
Click here for article.

Former head of retail investment policy at the FSA issues warning about the recommendations detailed in the Financial Advice Market Review.
Click here for article.

ESMA issues consultation paper detailing proposed guidelines regarding disclosures, commodity derivatives markets and related spot markets under the Market Abuse Regulation.
Click here for guidelines.

FCA Business Plan 2016/17

This paper sets out the FCA's work programme and priorities for the coming year based on its Risk Outlook – a report on the trends in regulated markets and firms and the risks the FCA feels it needs to respond to.

The FCA has listed seven priority themes for 2016/17:

- "**Pensions**: fair treatment for consumers, stronger competition and a market that meets consumers' needs." The FCA's planned work in this area includes:
  - Retirement outcomes review;
  - Developing how to implement a cap on early exit charges;
  - Review of regulatory changes related to pensions reforms;
  - Annuities – sales practices and secondary markets;
  - Review into the effectiveness of Independent Governance Committees.
- "**Financial crime and anti-money laundering**: better, proportionate and more efficient AML controls in firms and consumers who are better able to avoid scams." The FCA will:
  - Roll out its Financial Crime Annual Data Return;
  - Complete its de-risking impact assessment;
  - Investigate how technology can make AML processes more efficient
  - Continue to target scams.
- "**Wholesale financial markets:** strong controls, which protect market integrity and ensure clean, efficient and effective markets." In 2016/17 the FCA will:
  - Continue its work to implement the Market Abuse and the Markets in Financial Instruments Regulations/MiFID II Regime;
  - Introduce enhanced regulatory reference rules as part of the Senior Managers and Certification Regime (SM&CR) to prevent the recycling of individuals with poor conduct between firms;
  - Work with the Treasury on the FEMR (Fair and Effective Markets Review) recommendations;
  - Assess the effectiveness of primary markets;
  - Continue work on its study of the asset management sector.
- "**Advice:** Affordable, professional advice to meet consumers' changing and complex needs." FCA work will involve:
  - Implementing the recommendations of the Financial Advice Market Review;
  - Continuing its supervisory focus on professionalism and suitability in the financial advice sector.
- "**Innovation and technology:** resilient systems and new sources of competition." Key pieces of work will include:
  - Launch of the Regulatory Sandbox;
  - Continuing to communicate to firms its expectations regarding effective IT and operational resilience;
  - Analyse the results from its Call for Input on Big Data in the general insurance sector to decide next steps;
  - Continue to work collaboratively with the Treasury and Bank of England on cybercrime;
  - Monitor development of automated advisory services.
- "**Firms' culture and governance:** strong culture and governance, which helps competition and consumers alike … – experience has demonstrated that poor culture and poor conduct are closely related." in 2016/17 the FCA will:
  - Continue to embed the SM&CR, and equivalent regime for insurers, throughout the regulatory lifecycle;
  - Maintain its focus on culture, remuneration and effective risk management as drivers of poor conduct.
- "**Treatment of existing customers:** effective competition, a fair deal and greater transparency for long-standing customers." Planned work for 2016/17 includes:
  - Working with the Competition and Markets Authority (CMA) to improve competition and better consumer outcomes in the retail banking sector;
  - Developing a package of remedies following findings in its cash savings market study;
  - Further work to ensure long-standing life insurance customers are treated fairly.

Continued on page 4…

Industry News continued…

ESMA publishes UCITs infringement reporting form template.
Click here for template.

ESMA publishes final guidelines on sound remuneration policies under the UCITS and AIFM Directives.
Click here for final guidelines.

ESMA publishes Q&A on the Market Abuse Directive.
Click here for Q&A.

ESMA publishes updated UCITS Q&A.
Click here for Q&A.

ESMA publishes updated AIFMD Q&A.
Click here for Q&A.

ESMA publishes final draft technical standards in relation to the Key Information Document.
Click here for final draft of standards.

ESMA publishes guidelines regarding reporting obligations under certain articles of the AIFMD.
Click here for guidelines.

ESMA publishes guidelines compliance table on ETFs and other UCITS issues.
Click here for compliance table.

ICO releases new encryption guidance.
Click here for guidance.

ICO updates its direct marketing guidance.
Click here for updated guidance.

ICO launches GDPR (General Data Protection Regulation) website, which is where the ICO will now publish information relating to the reform of data protection regulation.
Click here to access dedicated website.

It is reported that 700 IFAs have received letters from the FCA asking them to provide suitability reports for sample review by the regulator.
Click here for article.

Chancellor, George Osborne, grants Treasury Select Committee veto powers over FCA CEO appointments and dismissals. However, the new powers will not apply to Andrew Bailey who has already been appointed as FCA CEO.
Click here for article.

There are more signs that the fund management industry is taking steps to address key person risk.
Click here for article.

HMRC issues consultation on the proposed rules behind a secondary annuity market.
Click here for consultation.

FOS uses three-year time bar rule - more than three years have passed since the consumer knew or could reasonably have known that he or she had cause to complain - to dismiss complaint regarding poor performance of an investment portfolio.
Click here for article.

FCA Business Plan 2016/17 continued …

Many of the priority areas are the same as last year but wholesale markets and the provision of advice are new for 2016/17.

The business plan also includes useful tables detailing key dates for forthcoming and ongoing activity.

Click here for Business Plan.

TR16/3: Meeting investors' expectations

This report focused on whether 23 UK authorised investment funds, and 4 segregated mandates, of 19 fund management firms were being operated in line with investors' expectations, as detailed within the firms promotional/ disclosure material and investment mandates. (It should be noted, the funds were open to retail investors and followed active investment strategies.)

Overall, the FCA reports firms are taking the right steps to meet expectations and comply with their responsibilities with most funds in the sample investing in line with their stated strategy, and there was no exposure to undisclosed investment risks. However, weaknesses were found in relation to:

- **Product descriptions:** some funds in the sample did not set out clearly in the KIID - key investor information document – how the funds would be managed. Restrictions to the investment strategy present in some of the funds were not disclosed and one fund document included jargon unlikely to be understood by a retail investor. Therefore, firms are asked to ensure they clearly describe how funds are to be managed and the risks associated with investing in funds, and ensure these messages are consistent between marketing and disclosure documents.
- **Oversight and Governance:** four funds within the sample were not actively managed and oversight issues were found with all of them. For example, one firm reviewed its annual management charge following negative publicity and reduced it partly because the fee included a charge for advice, which was no longer necessary. In addition, two of the funds didn't disclose that a significant part of the portfolios were tracking indices. Firms are therefore reminded that they must monitor funds, even if the fund is no longer being promoted to investors, review stated investment objectives and take action where the fund is deviating from these.
- **Distribution:** the FCA found that not all firms carefully monitored the distribution of their funds through third parties. Two funds were found on execution-only platforms, however the management firm meant for the funds only to be available with advice. Firms should ensure they obtain sufficient data from distributors to ensure and demonstrate appropriate distribution of their products. Management firms and distributors should also ensure fund literature is used appropriately – three factsheets did not make it clear that they were designed for professional use only and two of these documents were accessible on execution-only retail platforms.

All fund management firms are being asked to consider the findings in this paper and review/update processes and procedures accordingly. Senior management, and those involved in fund governance, are being specifically asked to review operations against the findings in this report "and take action to minimise the risk of poor outcomes for consumers."

Click here for thematic review.

Inducements and Conflicts of Interests Thematic Review: Key Findings

In 2015 the FCA conducted a thematic review into benefits provided and received by firms conducting MiFID business and regulated retail investment activities. The FCA has published its key findings on a dedicated webpage rather than in the form of a report because the findings are to be included in a MiFID II consultation paper but the delay to implementation of the Directive meant early publication of the findings was necessary.

The FCA's main findings are as follows:

- Certain types of hospitality did not always appear to be designed to enhance the quality of service,…

Continued on page 5…

Enforcement Actions and Prosecutions

Scottish firm pays £2m penalty after uncovering breaches of the Bribery Act in relation to two freight-forwarding contracts. The employees involved have been dismissed.
Click here for article.

Former RBS LIBOR submitter, Paul White, has been banned by the FCA for lacking integrity. Between March 2007 and November 2010 White took requests from other traders and brokers into account when submitting RBS's Japanese Yen and Swiss Franc LIBOR rates to the BBA. The FCA confirmed White would also have received a fine of £250k were it not for serious financial hardship.
Click here for press release.

Former wealth manager, Simon Beesley, pleads guilty to defrauding his friends out of £278k. Beesley convinced two of his friends to purchase thousands of worthless shares and then used the money for first class travel on luxury holidays abroad.
Click here for article.

The founding director of pensions firm Noisnep, Darren Say, has been charged with fraud. Essex police confirmed Say is alleged to have "committed fraud while occupying a position in which he was expected to safeguard, or not to act against, the financial interests of Noisnep Sipp members between January 2009 and January 2016."
Click here for article.

FCA issues decision notice regarding former UBS Libor trader, Arif Hussein, who sent 21 communications to UBS's GBP submitters regarding his preferences for GBP LIBOR rates. The FCA concluded that Hussein is not a fit and proper person and has banned him from performing any role in regulated financial services. However, Hussein has referred the decision to the Upper Tribunal.
Click here for press release.

FCA achieves victory at the Supreme Court against Asset Land, which had been operating an unauthorised Collective Investment Scheme in the course of operating a land bank.
Click here for article.

FCA issues final notice to M I Wealth Management for failing to submit its Retail Mediation Activities Return and for inadequate responses to repeated requests for it to be submitted. As a result, the FCA concluded the business "failed to manage its business in such a way as to ensure that its affairs are conducted in a sound and prudent manner, that it is not a fit and proper person, and that it is therefore failing to satisfy the threshold conditions in relation to the regulated activities for which MI Wealth has had a permission." The firm's permissions were therefore cancelled.
Click here for article.

ESMA fines DTCC Derivatives Repository Ltd €64k and issues a public notice for failing to put in place systems capable of providing regulators with direct access to derivatives trading date, as required under the European Markets and Infrastructure Regulation.
Click here for press release.

Inducements and Conflicts of Interests Thematic Review: Key Findings continued…

…as they were either not conducive to business discussions or the discussions could better take place without the activities associated with the event - e.g. spectating/participating in sporting events.

- Hospitality that is not designed to enhance the quality of service to clients is offered in connection with other benefits that do meet the requirements.
- Hospitality logs did not always record relevant detail or were not well maintained. Missing details included how the benefit was designed to enhance service quality, the recipient, and some benefits had not been recorded at all.
- Product providers were making payments to advisory firm in excess of the costs incurred by them.
- MiFID firms were not providing clients with an indication of the value of benefits provided.

The FCA's webpage also details its expectations against each key finding. All firms should consider the findings and ensure they meet the requirements/ expectations.

Click here to access FCA's webpage.

Other FCA News, Speeches and Publications

FCA Press Releases

FCA publishes results of a survey involving 17 retail banks and building societies into customer understanding. The firms involved were asked to review how they made sure customers understood the products they had bought. Click here for press release.

FCA announces the redesign of its website has entered the final phase and will be launched in June, with a further update due in September. Click here for speech.

Other Publications

GF16/2: Primary Market Bulletin No. 12

GC16/3: Primary Market Bulletin No. 13

PS16/10: Financial Services Compensation Scheme – Management Expenses Levy Limit 2016/17

FG16/3: Guidance on voluntary redress schemes under the Competition Act 1998

Latest complaints data from authorised firms

FCA Statement on peer-to-peer applications for full authorisation

PS16/11: Complaints against the Regulators

FG16/4: Guidance on Small and Medium Sized Business (Credit Information) Regulations

DP16/3: Availability of information in the UK Equity IPO process

Occasional Paper No. 15: Quid pro quo? What factors influence IPO allocations to investors?

MS15/1.2 Investment and corporate banking market study: Interim report

Occasional Paper No. 16: Are high-frequency traders anticipating the order flow? Cross-venue evidence from the UK market

CP16/11: PSR regulatory fees 2016/17

Continued in column 2, page 5…

Enforcement Actions and Prosecutions continued…

Former Catalyst CEO, Timothy Roberts, whose firm promoted ARM bonds - structured products issued by a Luxembourg entity, ARM, the underlying assets of which were senior life settlements purchased in the United States - to advisers before his firm collapsed costing investors millions, has lost his appeal to avoid a fine and ban from the FCA.
Click here for article.

Two fraudsters convicted in 2014 of conspiracy to defraud - for operating a scheme whereby investors, who thought they were investing in US listed companies, were in fact buying shares in shell and non-operational companies - have been told to repay £11m in compensation to the victims. If they fail to repay the money within three months they will have their prison sentences (currently 9.5 and 7.5 years) extended.
Click here for article.

Other Publications continued…

FCA's Response to the European Commission Green Paper: Retail Financial Services

CP16/12: Secondary annuity market – proposed rules and guidance

FCA Speeches

"Electronification of trading" by Edwin Schooling Latter, FCA's Head of Markets Policy
Click here for speech.

"**Consumer credit regulation: the journey so far"** by Tracey McDermott, Acting CEO of the FCA
Click here for speech.

Innovative Finance Global Summit by Christopher Woolard, the FCA's Director of Strategy and Competition
Click here for speech.

"The regulation of advice – recommendations post FAMR" by Tracey McDermott, Acting CEO of the FCA
Click here for speech.