REGULATION NEWS | ISSUE 20 MAY 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.

Since the last newsletter the FCA has held a MiFID II Conduct Forum where product governance, costs and charges were discussed. The FCA has published the slides and minutes for this event. The FCA also held a MiFID II Trade Association Round-table and released the minutes for this event. For the latest on MiFID II please visit the FCA's dedicated webpages.

In May, Andrew Bailey, the new CEO of the FCA (effective from 01/07/16), delivered his last speech as the current CEO of the PRA. In his speech Bailey highlighted the importance of the right firm culture and the link between poor culture and firm failings. Bailey also mentions hubris risk - the risk of blinding over-confidence by those in charge. See page 4 of this newsletter for a summary of Bailey's speech.

The FCA's monthly Regulation Round-up was published along with the latest issue of the FCA's Policy Development Update (Issue 33).

This month we welcome Natalia Popova who has joined Gem Compliance as Compliance Associate. A summary of Natalia's professional background can viewed on the Gem website.

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

Industry News

Corruption in Brazil: $125m (£86m) of dirty money 'repatriated' in 2015. Authorities say part of the money had been used for bribes.
Click here for article.

PwC report on managing operational tax risk highlights confusion between asset managers and custodians regarding responsibilities. The report also states that only 2% of asset managers would classify their controls and risk monitoring systems as robust.
Click here for report.

It is reported that increasing costs and an insufficient number of suitable candidates for compliance roles is exposing wealth firms to regulatory risk.
Click here for article.

Lord Hill announces consultation to be launched in May 2016 "to improve the passporting system for investment funds, including UCITS … and flush out any other barriers to funds operating in other countries, so that we can work out how best to overcome them."
Click here for speech.

Calls for delay to PRIIPS Regulations.
Click here for article.

ICO publishes guidance on Subject Access Requests.
Click here for guidance.

Publication of new Data Protection Regulation in Official Journal.
Click here for final text of Data Protection Regulation.

ICO publishes a 12-step guide to preparing for the General Data Protection Regulation on its dedicated website. The regulation is expected to come into force mid-2018.
Click here for guide.

Firm's CEO reveals the details of a deal it has almost reached with the FCA regarding ongoing liabilities of a failing firm it has rescued.
Click here for article.

ESMA publishes its response to the EC's Green Paper on retail financial services.
Click here for paper.

FCA reveals it has issued a request to a further 44 firms instructing them to ascertain their exposure to the Panama papers leak.
Click here for article.

PS16/12: Pension reforms – feedback on CP15/30 and final rules and guidance

This paper summarises the responses received to CP15/30 and includes final rules and guidance.

The FCA reports that respondents were broadly in favour of the proposals in CP15/30. Therefore the FCA is taking the proposals forward as consulted but with some minor adjustments:

- Introducing further flexibility regarding retirement risk warnings by allowing firms to start asking questions before the customer has decided how to access pensions savings to help identify which risk warnings should be given.
- Delaying the commencement date of the rules and guidance in a number of areas by 6 months (see below), although firms are being encouraged to adopt the changes as soon as possible.

The final rules and guidance for the areas listed below will come into force on the following dates:

- Communications concerning accessing pension savings – 10/10/2016
- Pension freedoms communications (except advice on pension freedoms) – 06/04/2017
- Advice on pension freedoms - 25/04/2016
- SIPP retained interest – 06/04/2017
- Retirement risk warnings – minimum pot size – 25/04/2016
- High net worth investors and restricted investors – 10/10/2016
- Using pension savings to repay debt – 25/04/2016
- Attachment orders – 25/06/2016
  Determining maximum projection rates – 06/04/2017
- Projections including guarantees – 06/04/2017 (transitional available immediately)
- Projecting a future annuity – mortality assumption – 06/04/2017
- Glossary amendments – 10/10/2016

The FCA will continue to monitor the market and will consider further changes where necessary. In its Business Plan for 20016/17 the FCA announced a Retirement Outcomes Review. The launch of the review is planned for Q2-Q3 2016.

Click here for policy statement.

PS16/13: Implementation of the Market Abuse Regulation (MAR)

This policy statement (PS) summarises the feedback to consultation papers CP15/35 and CP15/38 and sets out the final changes to the Handbook to implement the EU MAR, which comes into force on 03/07/2016.

The feedback received to both consultation papers was broadly supportive of the proposals and an overview of responses is provided below:

- MAR 1: The areas that received the most input were in response to proposals relating to legitimate behaviours, the removal of provisions which overlap with the indicators of manipulation under Art 12(5) of EU MAR, and the change of language across several provisions.
- COBS 12.4: The main request was for guidance on the interpretation on the scope of Article 20: Investment Recommendations and Statistics. Other respondents were seeking copy out of the European texts into the Handbook.

Industry News continued…

FCA Chairman and Acting CEO are grilled by the Treasury Select Committee for their hiring of Andrew Bailey as the new CEO of the FCA. It seems Bailey wasn't interviewed for the post because, according to Griffiths-Jones, the 4 individuals on the decision panel "knew him well or better than the last remaining candidate."
Click here for article.

FOS criticises adviser firm for trying to shift the blame for inheritance tax advice failings to customer.
Click here for article.

Court of Appeal overturns High Court ruling against IFA firm in a multi-million pound professional negligence claim. The High Court refused an adjournment request and ordered the firm to pay £1.2m in damages because the firm's director and "only feasible witness" was unable to attend the hearing due to illness. The Court of Appeal Judge said "it is apparent that the judge was wrong in that he did not adopt a 'less rigorous' approach when evaluating the sufficiency of the reason given for Mr. Robinson's non-attendance."
Click here for article.

Firm chases former ARs of failed network for PI insurance excesses in respect of compensation claims for unsuitable pension switching advice, which arose out of past business reviews by the FCA dating back as far as 2006.
Click here for article.

The Bank of England and Financial Services Act 2016 has received Royal Assent. The Bill includes measures such as holding senior managers within the financial services industry to account for failings and extending the scope of Pension Wise.
Click here for press release.

Industry warning published regarding conflicting suitability messages.
Click here for article.

Significant increase in the use of skilled person reports by the FCA.
Click here for article.

The CPS has confirmed former RBS bosses will not face criminal charges in connection with the 2008 rights issue due to insufficient evidence in relation to RBS as an institution and any of the directors or other members of senior management. In 2008, shortly after the rights issue, the bank collapsed and had to be bailed out by the UK government.
Click here for article.

FCA to visit a number of wealth managers later this year to see what action they have taken following publication of the findings from the FCA's thematic review into suitability of investment portfolios.
Click here for article.

Public Accounts Committee report confirms risk of mis-selling in the financial services sector is "substantial and continuing" and the FCA should do more to ensure customers understand the products they buy.
Click here for report.

The FCA and Complaints Commissioner reject complaint from financial adviser who asked for a refund of the increase in FSCS levy because he couldn't afford it.
Click here for article.

PS16/13: Implementation of the Market Abuse Regulation continued…

- SUP 15.10: Many of the respondents asked for additional interpretative guidance on the reporting of suspicious transactions, which was outside the scope of the consultation.
- DTR 1-3: Respondents mostly asked for more cross references and copy outs of the European legislation in the Handbook. Respondents also raised questions on the interpretation of measures made at level 1 and level 2.
- Annex 1 of LR9 (Model Code): Several respondents agreed that the Model Code is no longer compatible with EU MAR but most considered that, even though the proposal was intended to provide additional guidance for firms, it will result in an onerous two-tier system for clearance inside and outside EU MAR-closed periods.

All relevant firms will need to comply with EU MAR by 03/07/16. However, the FCA warns that some provisions (contained in chapter 3 of the PS) are dependent on finalisation of Level 2 measures and ESMA guidelines and therefore may need to be reassessed and subject to further consultation.

Click here for consultation paper.

PS16/14: Financial Services Compensation Scheme – Changes to the Compensation sourcebook: feedback on CP15/40 and final rules

In November 2015 the FCA proposed the following in CP15/40:

- an increase in the non-investment (general and pure protection) insurance mediation compensation limit from 90% to 100% for claims in relation to certain types of insurance (pure protection contracts, PII and accident and sickness insurance covering the death or incapacity of the policyholder);
- changes to the eligibility of trustees of occupational pension schemes to claim on the FSCS;
- changes to make express reference to how the compensation rules apply where a successor firm is in default or to assist the FSCS in handling claims;
- granting the FSCS discretion over whether compensation is paid as directed by the claimant rather than to the claimant directly;
- to allow the FSCS to pay compensation for shortfalls in client assets to an authorised firm that takes over the business of a failed firm rather than to each individual client;
- to permit electronic assignment of rights against the failed firm and third parties where a customer consents to this as part of the application process;
- Creation of a rule requiring firms to cooperate with the FSCS; and
- Deletion of some PRA-specific material from the FCA Handbook.

A number of respondents raised issues regarding FSCS funding and compensation limits that were outside the scope of the consultation but the FCA has confirmed it will consider these points as part of its FSCS funding review, which is due out later this year.

The FCA confirms the responses received were mostly in support of the proposals therefore they do not differ significantly from the drafted proposals.

The changes came into force on 29/04/2016 and firms are advised to ensure they have read and understood the changes, including if any FSCS exemption needs to be re-checked.

Click here for policy statement.

Industry News continued…

The Pensions Ombudsman continues to stand firm on its position that SIPP providers should not be expected to conduct comprehensive due diligence on pension investments. However, this is the opposite view to that taken by the FOS in its land-mark ruling against the SIPP operator, Berkeley Berke, which is now being reviewed by the FOS.
Click here for article.

It is reported that the FCA does not support claims from ARs of networks that principal firms are avoiding s39 of FSMA – which states the principal is responsible for the regulatory actions/omissions of its ARs – when chasing them for costs incurred in compensating customers. The recovery of redress is apparently seen as commercial matter falling within the remit of the courts.
Click here for article.

TheCityUK has published a report on how to make the UK more resilient to cyber attacks. The report contains a number of steps financial services firms can take to bolster their defences against cyber attacks.
Click here for report.

Responses to consultation paper on MAR guidelines published by ESMA.
Click here for responses.

Enforcement Actions and Prosecutions

Director of three debt management firms, David Hall, is given a 15-month prison sentence suspended for two years and 200 hours community service for fraud by abuse of position. The fraud related to a protection product costing £10 a month that would assist customers in continuing to comply with their debt management plans if their circumstances changed. However, there was no evidence that customers were aware of or had consented to the product.
Click here for press release.

ICO prosecutes former LV= employee, David Barlow Lewis, for attempting to obtain personal data from an existing LV= employee. Barlow was fined £300 and ordered to pay £614.40 in costs and a £30 victim surcharge.
Click here for press release.

Former wealth manager, Simon Beesley, who conned friends out of £278k - initially reported in last month's newsletter - has been jailed for almost three years.
Click here for article.

Senior investment banker, Martyn Dodgson, and a chartered accountant, Andrew Hind, have been convicted of conspiring to deal using inside information and been handed custodial sentences in a case brought by the FCA and conducted in partnership with the National Crime Agency. Dodgson has received a four and half year prison sentence for insider dealing, the longest ever jail term for this offence. Hind has received three and a half years. Dodgson sourced inside information through his employment and passed the information to Hind who effected secret dealing for the benefit of Dodgson and himself. Five acts of insider dealing were used by the FCA to prove the conspiracy in the following companies: Scottish & Newcastle plc (Oct 07), Paragon Group of Companies plc (Jul 087), Just Retirement plc (Oct 08), Legal and General plc (Feb 09) and BSkyB (Mar 10). The FCA estimates the pair netted £7.4m from their activities and will pursue confiscation proceedings against them.
Click here for press release.

"Culture in financial services – a regulator's perspective" by Andrew Bailey, CEO of the PRA

In his last speech as CEO of the PRA Bailey explains the importance of firm culture and confirms that it "matters a great deal to both conduct and prudential regulators." Bailey continues by highlighting that "there has not been a case of a major prudential or conduct failing in a firm which did not have among its root causes a failure of culture as manifested in governance, remuneration, risk management or tone from the top."

With regard to risk management, Bailey refers to hubris risk; the risk of blinding over-confidence where "management are so convinced of their rightness that they hurtle for the cliff without questioning the direction of travel."

Bailey confirms the role of regulators is not to define firm culture but to "tackle firms on all elements that contribute to defining culture." Bailey recognises that firm culture can be influenced by regulators, who seek:

- robust governance;
- appropriate challenge from all levels;
- prompt action in response to bad news;
- remuneration structured to incentivise the achievement of good long-term outcomes by retaining or deferring a "meaningful" portion; and
- effective risk management and internal audit processes that can identify inadequate controls and inappropriate incentives.

Bailey also talks about the role of the new Senior Managers Regime in helping firms shape culture.

In his concluding remarks Bailey outlines the importance of trust in the industry and how it is a product of good culture, and summarises the concept of culture – "it is everywhere and nowhere in firms; everywhere in the sense that it is shaped and determined by all the features of the firm – its people, organisation, reward structures etc; and nowhere because culture is not a tangible thing sitting on a shelf that can be prodded and changed of itself."

Click here for speech.

Other FCA News, Speeches and Publications

FCA Press Releases

The FCA's Regulatory Sandbox has opened to firms. The Sandbox provides "a 'safe space' in which businesses can test innovative products, services, business models and delivery mechanisms while ensuring that consumers are appropriately protected."
Click here for press release.

FCA announces Office of Financial Sanctions Implementation (OFSI) has been created within HMT to help businesses comply with financial sanctions by making sure they are properly understood, implemented and enforced.
Click here for press release.
Click here to visit OFSI website.

Following publication of the Responsible Lending Review, the FCA announces it will launch a "targeted market study in Q4 2016 focussing on the consumers' ability to make effective choices" and competition in the mortgage market. The review will look at how consumers make decisions, the impact of intermediation on consumer outcomes and the effect of commercial arrangements in the mortgage supply chain.
Click here for press release.

Enforcement Actions and Prosecutions continued…

FCA bans financial adviser, Mark Taylor, for 2 years for engaging in market abuse. Taylor bought shares on the basis of inside information that he acquired accidentally - through an email sent to all staff in error, which was immediately recalled - and then sold them after the information was made public making a profit of £3,498. Taylor had read both emails but the day after the sale contacted his broker to see if he could reverse the trade because he thought he might be guilty of insider trading. The broker declined and reported the trade to the FCA. Had Taylor not provided evidence of financial hardship, the FCA would have imposed a fine of £78,819.
Click here for press release.

Hedge fund manager sets aside £140m to cover a fine levied against its London office under the Foreign and Corrupt Practices Act in Africa following a 5-year inquiry by the US justice department and SEC into deals made in Libya and the Democratic Republic of Congo. Charges against the firm's former London boss, Michael Cohen, are also being considered.
Click here for article.

Keydata's former Compliance Officer, Peter Johnson, has been banned by the FCA for failing to act with integrity and for misleading the FSA on several occasions including in two compelled interviews with the FSA. The Final Notice reports Johnson failed to take action when warned about: unclear, incorrect and misleading financial promotions; inadequate due diligence; ineffective risk management; and inadequate disclosure of the risks to investors and advisers. Johnson also failed to make notifications regarding the products to the regulator and also failed to prevent Keydata from continuing to market and sell the products. Johnson would also have been fined £200k were it not for financial hardship.
Click here for press release.

Other FCA News, Speeches and Publications continued…

FCA Speeches

"Building societies: Facing the challenges and opportunities head on" by Jonathan Davidson, Director of Supervision – retail and authorisations at the FCA.
Click here for speech.

"Tackling the Hard Questions" by Mark Steward, Director of Enforcement and Market Oversight at the FCA.
Click here for speech.

Other Publications

- **CP16/13**: Changes to the Decision Procedure and Penalties Manual and the Enforcement Guide for the implementation of the Market Abuse Regulation
- **GC16/4**: Primary Market Bulletin No. 14
- **TR16/4**: Embedding the Mortgage Market Review: Responsible Lending Review
- **FS16/3**: Feedback Statement on competition in the mortgage sector