

REGULATION NEWS

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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's new website has been launched - <https://www.the-fca.org.uk>

The FCA's Unauthorised Business Department has asked the APCC to issue a circular to its members to remind them of their responsibilities to report any unauthorised business that they may encounter to the FCA.

The FCA's monthly [Regulation Round-up](#) was published along with the latest issue of the FCA's [Policy Development Update](#) (Issue 34).

Apart from the above, the most significant change in the last month has obviously been the outcome of the EU referendum and we have detailed below the FCA's initial statement on this and our own views at this stage.

And, the first stage of the new adviser capital adequacy rules will come into force on 30/06/16 with advisers having to hold the greater of £15k, rather than £10k, and 5% of investment business income.

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.

Email – natalia@gemcompliance.com

Website – www.gemcompliance.com

Main features

- * EU Referendum
- * FCA Research into the issue of de-risking
- * GC16/5: Proposed guidance on wind-down planning
- * CP16/15: Capping early exit pension charges
- * Industry News
- * Enforcement Actions and Prosecutions
- * Other FCA News, Speeches and Publications

EU Referendum

Following the vote on 24 June for the UK to leave the EU, the FCA has issued a statement and this is linked below. With the outcome of the referendum, this obviously raises questions regarding future financial regulation and how this may look both in the immediate short term and longer term.

Industry News

Lawyer warns that a legal fight between a network and one of its former advisers could cause changes to the AR rules including activities permitted under the AR regulations. The adviser is suing the network for £1m in losses after the network banned a discretionary investment and pension service, which previously passed compliance checks, for being too high risk. Chris Finney, who heads the financial services team at law firm Cooley says "The FCA will regard the outcome of this case as a wake-up call for principals to better check they know exactly what's going on, rather than wait for the regulator or a claimant to complain." [Click here for article.](#)

Research conducted by ratings firm FE suggests a fifth of advisers could be at risk of suitability failings by putting all a client's assets into a single investment solution. The firm said there was no evidence that this action was incorrect but suggested the regulator may think otherwise. [Click here for article.](#)

Court of Appeal supports network's decision to terminate an AR after it allowed unauthorised members of staff to complete initial fact-finds before customers were referred to an authorised financial adviser. [Click here for article.](#)

FOS upholds complaint regarding 'execution only' service regarding a SIPP and underlying investment from complainant who believes she received advice despite signing several documents explaining that she wasn't receiving advice. [Click here for article.](#)

The two-year countdown to the General Data Protection Regulation started on 25th May and the ICO has issued a statement on what guidance firms can expect. [Click here for article.](#)

ICO releases recording of subject access request webinar. [Click here for article.](#)

The FOS publishes its annual review for 2015/16. [Click here for article.](#)

ESMA issues Q&A on the application of EuSEF and EuVECA Regulations. [Click here for article.](#)

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At present we believe it is too early to give any clear guidance to clients given the steps that need to be taken regarding what form of overall structure will be in place going forward for the UK to continue to work with - but not be part of - the EU.

As soon as any clear messages from the UK government are given on this, including any different options being considered, we will keep all clients up to date with our understanding of this. This will in due course include consideration on such areas as the implementation of EU MiFID 2 which is anticipated to be implemented by January 2018.

However what is clear is that in the short term, there is no change to UK regulation, and firms should continue to comply with relevant existing UK, EU and even global regulations that currently applies to their business. And also what is clear is that regulation itself will not disappear, given that some (but not all) of what governs UK FCA rules arises from UK financial regulation, i.e the Financial Services and Markets Act but also existing EU legislation already implemented. Any changes will take at least 1 to 2 years - if not longer - to structure as to how UK regulated financial services business interact in the EU regulatory structure – and the same for non-UK firms wishing to do business in the UK.

In the meantime, if anyone has any queries or concerns on this in the short term, please do not hesitate to contact us.

[Click here for the statement.](#)

FCA Research into the issue of de-risking

In recent years, the FCA has become aware that banks are withdrawing or failing to offer banking facilities to customers in greater volumes than before. There is a perception that this is driven by banks' concerns about the money laundering and terrorist financing (ML/TF) risks posed by certain types of customer. This is known as 'de-risking'.

It has been suggested that this trend is influenced by big fines imposed on banks in recent years by regulators and prosecutors, particularly in the US, for primarily historic weaknesses in their anti-money laundering (AML) defences and for breaches of financial sanctions.

In July 2015, the FCA asked a firm of consultants, John Howell & Co Ltd (the consultants), to research the nature and scale of de-risking in the UK.

The FCA has now published the consultants report. Overall, the report finds that:

- Since the global financial crisis, banks have been faced with higher capital requirements and higher liquidity thresholds as well as greater enforcement by regulators and prosecutors. This has caused banks to deleverage, and has also created a tougher environment in which to maintain profitable relationships. As a result, many banks have undertaken a strategic review of their business and functions, often choosing to focus on their 'core' business.
- Some banks are closing accounts for money transmission services, pawnbrokers, fintech companies, and charities operating in geographical areas perceived to present greater ML/TF risks. De-risking seems to affect small businesses more than large ones.
- Banks appear to weigh up a variety of benefits and costs of maintaining an account that are not always related to the financial crime risks the customer might pose. These include specific customer considerations such as the assessment of the credit risk presented by the potential customer and the prospective profitability of a relationship. There are also broader business considerations driven by strategic business decisions, increased capital requirements, or overall compliance costs.
- While the impact of de-risking on individuals or businesses can be acute, numbers of de-risking decisions are small compared to the overall closure rates of bank accounts.

Industry News continued...

ESMA publishes Q&A on the provision of CFDs and other speculative products to retail investors under MiFID.

[Click here for article.](#)

ESMA publishes Q&A on the application of AIFMD.

[Click here for article.](#)

ESMA publishes final report on draft technical standards under the ELTIF Regulation.

[Click here for article.](#)

FCA's interim CEO, Tracey McDermott, is awarded CBE in the Queen's 90th birthday honours list.

[Click here for article.](#)

A judge has ruled in favour of former Deutsche Bank trader, Christian Bittar, who claims he was unfairly identified in a final notice against the bank last year, to have his civil claim heard before his criminal trial begins in September 2017.

[Click here for article.](#)

Pensions consultancy firm, Xaffinity, reports that scammers could be linked to 11% of pension transfer requests.

[Click here for article.](#)

FOS upholds complaint and orders redress payment of £65k after an adviser requested a £250k withdrawal from an investment bond based on an email supposedly from the clients. It turned out the clients' email address had been hacked and fraudsters had sent the email. Zurich twice questioned the back account details provided for the withdrawal and asked the adviser to confirm they were correct, which the adviser did by referring to the emails and the money was transferred. When it was established the email was not from the clients the police were contacted and £185k was recovered, which Zurich put back into the bond. Commenting on the adviser, the ombudsmen said: "As a professional in the financial services industry, I think he should be aware of the possibility of fraud and how this can be achieved and prevented. He had a long-standing relationship with Mr and Mrs B [the clients] and could have called them."

[Click here for article.](#)

Industry survey reports that only half of advisers are confident their clients understand the advice they have given them.

[Click here for article.](#)

FOS upholds complaint that firm's charges were unfair, unclear and not proportionate to an investment because the suitability letter had a different risk profile to the one identified in the fact find, not because the firm had done anything wrong in the way that it explained its charges. The firm has been instructed to compare the performance of the client's investment with that of the benchmark and pay the difference between the fair value and the actual value of the investment, plus interest.

[Click here for article.](#)

Complaints Commissioner slams FCA for failing to properly investigate reports that unauthorised individuals were giving advice about investments.

[Click here for article.](#)

- The consultants' research found instances where closure of an account had an impact on the customer, creating stress and inconvenience in having to secure alternative arrangements or make changes to the way they do business. This was compounded when there was a lack of communication from banks when closing an account or rejecting an application for an account.

The FCA considers that the report demonstrates is that de-risking is the result of a complex set of drivers and that therefore there is not one single solution to resolve any negative impacts of this. They consider that it is important that banks retain flexibility in setting up appropriate systems and controls to ensure they comply with legislation as well as in making commercial decisions on whether to provide banking facilities that are consistent with their tolerance of risk. However, banks should not use AML as an excuse for closing accounts when they are closing them for other reasons.

The FCA has published an Occasional Paper that deals with the reasons for access barriers and financial exclusion. This will aim to stimulate ideas and foster a culture of access and inclusion throughout retail financial services.

In addition to this the FCA will continue to work with the banking industry to lessen the damaging effects of de-risking without constraining banks' commercial freedom. This includes, for example, continuing to work on:

- Improving the way in which firms identify money laundering risk
- Taking steps to foster innovation and reduce cost in AML compliance
- Delivering a global response to de-risking
- How banks communicate with their customers
- Improving effectiveness of AML supervision.

[Click here for report.](#)

GC16/5: Proposed guidance on wind-down planning.

The FCA is consulting on guidance entitled 'The FCA's approach to wind-down planning', for firms to consider how they could close down their regulated business in an orderly manner, including under stressed conditions.

This does not impose at this stage an obligation on firms to create wind-down plans, but gives guidance on a logical approach for firms that have decided to engage in such planning.

Wind-down planning is a process by which the governing body of a firm:

- identifies the steps and resources it needs to wind down its business, especially in a resource-stressed situation and
- evaluates the potential risks and impact of a wind-down and considers how to mitigate them.

The FCA believes there are three important assessments that a firm is likely to include as part of effective wind-down planning:

- Impact assessment: who will be affected by the wind-down if it happens?
- Operational analysis: what steps would need to be taken during the wind-down process?
- Resource assessment: what resources would be needed to complete the steps identified in the operational analysis?

The FCA has noted that there are two areas in particular that many firms have tended to overlook:

- An effective communications plan can help to deliver a more effective wind-down process and ensure appropriate and timely action from all key stakeholders.
- If a firm is part of a larger group, its wind-down plan will often be affected by the availability or the withdrawal of group financial support, processing capabilities and shared staff and facilities. If the entity has been relying on support and services from the wider group, then it is prudent to consider if these resources would still be available during the wind-down.

Industry News continued..

Barrister claims that a High Court judgement that rejected a claim brought against Barclays by a property investment business over the sale of interest swaps, failed to take into account MiFID and then FSA. The judge is said to have placed emphasis on the "execution only" nature of Barclays role, however the barrister points out that execution-only sales of interest rate swaps had been banned under article 19 of MiFID and the FCA's COBS Sourcebook by the time the transaction took place.

[Click here for article.](#)

Former network Chief Executive, Charlie Palmer, who was fined almost £87k by the FCA in December 2010 for an inadequate risk management framework that gave ARs and regulated advisers a high level of flexibility and freedom in how they operated, will not have his case against the FCA heard until next year. Palmer claims he did not break any rules or guidance. However, the FCA believes the model operated by Palmer's firm increased the possibility that the network would be unaware of, or unable to prevent, ARs and registered individuals from giving unsuitable advice or selling unsuitable investments.

[Click here for article.](#)

Supreme Court's decision, which apparently made no reference the statutory requirement that prospectuses should be accurate and contain all the information investors need to make an informed decision, to back Lloyds in a bond issuance case should cause the FCA to revisit the rules for prospectuses. The investment terms of the more than £3bn of high income-paying bonds, meant that Lloyds could redeem the 'enhanced capital notes' early at face value, as they no longer counted towards the bank's capital buffer. However, investors believed the bonds were worth more than the par value and the terms did not allow for them to be called in early.

[Click here for article.](#)

The FCA is to receive a 'grilling' in relation to the RDR following the publication of the Heath report which provides some feedback, not all considered positive, on the impact of the implementation of the Retail Distribution Review in December 2012.

[Click here for article.](#)

The FCA has said that it is investigating the now collapsed Ethical Forestry companies which have left over 3,000 investors uncertain about their investments.

[Click here for article.](#)

Firm told to pay redress to complainant for pension mortgage advice given in 1994, despite it being calculated that the mortgage costs were significantly less than the repayments costs would have been. This is because the FOS believes the complainant didn't understand how the pension was to repay the mortgage and therefore should be compensated for the advice.

[Click here for article.](#)

Enforcement Actions and Prosecutions

Abdul Aziz Patel, a chartered accountant and financial adviser, sentenced to 4 years in prison for stealing £107k of tax by hiding it in a variety of accounts including some in the name of his children.

[Click here for press release.](#)

This document is not intended to replace or reinterpret any exercises that firms currently undertake as part of the ICAAP. However, firms may wish to take account of it in their ICAAP considerations.

[Click here for consultation document.](#)

CP16/15: Capping early exit pension charges

In January 2016 the Chancellor announced that the government would introduce legislation to place a new duty on the FCA to cap early exit charges in certain pension contracts. This is primarily arising out of previous pensions freedoms that have been introduced.

This Consultation Paper (CP) sets out the FCA's proposals on the application and level of a cap – and the changes to Handbook rules – that the FCA believe are required to discharge this duty.

The primary legislation defines early exit charges and the purpose of the cap and the duty is narrowly focused on these charges.

This consultation does not cover other charges that firms may apply during the lifetime of a pension policy or any other issues regarding charges on other products.

The proposals will most directly impact on:

- consumers with pensions savings who would incur an early exit charge for accessing the pension freedoms
- providers of personal and stakeholder pensions – including operators of self-invested personal pensions

Separately, the Department for Work and Pensions (DWP) is consulting on a cap on early exit charges in occupational pension schemes.

The main basis of consultation is a cap of 1% on charges for early exit on existing pensions and a cap of 0% in respect of new contracts once the legislation and rules are made. This will be based on the members policy value at exit.

Feedback is requested by 18 August 2016. A policy statement is expected in autumn 2016, with a view to these rules coming into force on 31 March 2017.

[Click here for consultation paper.](#)

Other FCA News, Speeches and Publications

FCA Press Releases

- [FCA reports that over 55s are at heightened risk of investment fraud.](#)
- [FCA welcomes publication of the first part of the Bank for International Settlement's Global FX Code.](#)
- [FCA sends email to all firms carrying out currency transfer services regarding potentially misleading marketing.](#)
- [FCA announces appointment of Megan Butler as permanent Director of Supervision – Investment, Wholesale and Specialists.](#)
- [FCA welcomes Competitions and Market's Authorities proposed remedies for the retail banking sector in order to increase competition.](#)
- [The FCA has announced the establishment and membership of the Financial Advice Working Group as part of the FAMR \(Financial Advice Market Review\).](#)
- [FCA signs Women in Finance Charter.](#)

FCA fines CT Capital Ltd almost £2.4m for failings in relation to PPI complaint handling. The firm failed to put complaint-handling processes in place, which meant customers missed out on redress payments.

[Click here for press release](#)

Former waste disposal employee prosecuted and fined for emailing details of 957 clients to his personal email address before leaving the firm to start a new role at a rival company.

[Click here for article.](#)

Leave.Eu fined £50k by the ICO for sending 500,000 texts urging people to support its leave campaign without the recipients' consent.

[Click here for press release.](#)

FCA bans Mark Kelly and Patrick Gray of PCD Wealth and Pensions Management for lacking integrity. Between 2008 and 2010 the firm investing nearly £24m of customers' funds in potentially unsuitable investments and for failing to declare the fees being received from a number of these investments. The FCA is unable to fine the individuals because they weren't approved persons at the time but has confirmed further investigations are continuing.

[Click here for press release.](#)

Other FCA News, Speeches and Publications

FCA Speeches

“[Innovation and Improving Outcomes](#)” by Christopher Woolard, FCA's Director of Strategy and Competition.

This speech was delivered at the Global Digital Banking Conference on 16th June in London. The speech focused on the FCA's current actions on increasing innovation and specifically Project Innovate. It also covered the recent implementation of the Regulatory Sandbox, and the FCA Advice Unit considering automated advice models. It also covered RegTech i.e how technology could offer solutions to regulatory issues.

Other Publications

- **CP16/14:** UCITS V Level 2 Regulation, SFTR and consequential changes to the Handbook
- **Occasional Paper No. 17:** Access to Financial Services in the UK
- **Primary Market Bulletin No. 15**
- **PS16/15:** Feedback on CP15/33 - Consumer credit: proposals in response to the CMA recommendations on high-cost short-term credit
- **Occasional Paper No. 18: Market-Based Finance:** Its Contributions and Emerging Issues
- **CP16/16:** Minor Handbook changes related to mortgage borrowers with a payment shortfall -

