



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.

In September the FCA launched an ['Insight' section](#) on its website to encourage interest in the most "thought provoking highlights of its work", with content written by members of staff or by outside experts. Links to two videos under this section have been provided on page 5 of this newsletter.

The September edition of the FCA's [Regulation Round-up](#) was published. The hot topic for this month was financially vulnerable customers. Other points to note from the Round-up are:

- * October is the last month to remove the permission for advising on P2P agreements from firms' permissions without having to submit a Variation of Permission application through Connect;
- * Publication of [slides and a video](#) covering the FCA's thematic review into AR-Principal relationships in the general insurance sector;
- * The FCA's [Financial Crime Conference](#) is to be held in London on 10th November 2016.

The FCA's latest [Policy Development Update](#) was also released in September, the format of which has changed from previous editions.

Regarding MiFID II, please visit the [FCA's dedicated webpages](#) for the latest news and access to consultation papers. Specific bulletins from Gem Compliance on MiFID II/MiFIR are to follow in due course. The [minutes](#) from the last FCA MiFID II Round-table are also available.

September also saw the publication of a judgement relating to a negligent financial advice case and a consultation paper by Her Majesty's Treasury (HMT) concerning a proposed amendment to the definition of financial advice. Both of these publications have been summarised in this newsletter.

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

- * HMT Consultation: Amending the definition of financial advice
- * Court Ruling in Negligent Financial Advice Case
- * CP16/21: Quarterly Consultation Paper No. 14
- * FCA Thematic Review: Financially Vulnerable Customers
- * Other FCA Publications
- * Industry News
- * Enforcement Actions and Prosecutions

Industry News

New chairman of the Regulatory Decisions Committee – which is tasked with issuing supervisory, warning and decision notices - has suggested more lay members and consumer representatives should be appointed.

[Click here for article.](#)

Later Life Academy asks FCA to broaden Retirement Outcomes Review to include savings outside pensions, such as housing wealth, given that 85% of retirees reportedly have wealth outside of pensions.

[Click here for article.](#)

Former Keydata boss launches legal action against lawyer and law firm for advice regarding a loan to SLS Capital owner David Elias, who was apparently described as a "risk-free" businessman but his companies were found to be insolvent.

[Click here for article.](#)

Following conflicting decisions on SIPP complaints by the Pensions Ombudsman and the Financial Ombudsman Service regarding the level of due diligence SIPP providers should conduct on investments, it is reported that talks between the ombudsmen to resolve the confusion are continuing.

[Click here for article.](#)

Research conducted by insurance provider SunLife found insurance documents can contain around 19,000 words and complex terminology, which would take the average person at least 2-3 hours to read, depending on the policy type. The research indicates that policyholders are skimming the majority of the text and only reading 15% of the content. In response, SunLife has trimmed down its information documents to 4,500 words.

[Click here for article.](#)

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HMT Consultation: Amending the definition of financial advice: consultation

In August 2015 the government launched the Financial Advice Market Review (FAMR). This involved a joint review by HMT and the FCA of the regulatory framework governing the provision of financial advice and guidance, and how effective the framework was in providing consumers with access to help to enable them to make informed decisions about their finances.

The review resulted in a number of recommendations to reform the financial advice/guidance industry. One of the recommendations required the government to consult on amending the definition of financial advice in the Regulated Activities Order (RAO) to bring it in line with the European definition under MiFID, which is narrower in scope.

Under Article 53 of the RAO, for advice to be regulated it must:

- * relate to a relevant investment, which includes contracts of insurance;
- * be given to a person in their capacity as an investor or potential investor (or in their capacity as agent for an investor or potential investor); and
- * relate to the merits of them buying, selling, subscribing for or underwriting the investment (or exercising rights to buy, sell, subscribe for or underwrite such an investment).

Under MiFID, investment advice involves the provision of a personal recommendation to a customer, at their request or the firm's initiative, and comprises three elements:

- * there must be a recommendation that is made to a person in their capacity as an investor or potential investor (or in their capacity as an agent for an investor or personal investor);
- * the recommendation must be presented as suitable for the person to whom it is made or based on the investor's circumstances; and
- * the recommendation must relate to taking certain steps in respect of a particular investment which is a MiFID financial instrument, namely to buy, sell, subscribe for, exchange, redeem, hold or underwrite a particular financial instrument.

The MiFID definition is thought to be clearer and should increase the availability of financial information/guidance from reputable firms to help customers with their financial decision-making. The FCA will produce guidance for firms offering financial services to customers without a personal recommendation, which will include case studies to highlight the main considerations for firms when developing such services.

The main benefits to firms in moving the advice perimeter are lower regulatory/legal costs and being able to assist a larger number of consumers.

One key risk to consumers that could emerge is the provision of guidance services by unauthorised and unscrupulous firms. However, the regulatory restrictions, which currently exist for guidance activities relating to regulated products, will continue to apply limiting the potential commercial benefit from the provision of such services by unauthorised firms.

This consultation paper asks for views on the costs, benefits and risks associated with this change. Responses will inform the government's decision on how to proceed before it makes the necessary legislative changes.

[Click here for consultation paper.](#)

Industry News continued...

After the controversy last year in response to the Investment Association's decision to publish a list of signatories to its principles - which led to a number of fund groups refusing to sign and culminated in the Chief Executive leaving the trade body - the IA has decided it will not reintroduce the list of signatories nor the requirement for member firms to publicise their compliance with the standards.

[Click here for article.](#)

ESMA issues statement regarding its latest risk report and comments on the possible effects of the UK's decision to leave the EU.

[Click here for report.](#)

EC concludes the tax benefits granted to tech company Apple by Ireland were illegal under EU state aid rules because it enabled Apple to pay significantly less tax than other businesses. Ireland has been told it must now recover the benefits worth up to €13billion.

[Click here for press release.](#)

It is reported that an ill pension transfer client has lost out on a favourable annuity rate because of delays linked to the new pension freedom rules.

[Click here for article.](#)

ICO to hold a cybercrime webinar on 13th October at 11am.

[To register click here.](#)

FOS rejects adviser's claim that a pension transfer transaction was 'execution only' because the suitability letter referred to advice provided by the client's former advisory firm. However the new adviser claims they were merely facilitating the advice of the former firm.

[Click here for article.](#)

Oxford University's company, Oxford Risk, launches services, including profiling solutions based on the University's latest research, to help wealth managers with Know Your Client (KYC) and suitability requirements. "Oxford Risk has conducted investor risk preference research since 2011, and has been able to provide accurate, defensible and up to date indications of what suitable levels of risk map to which risk tolerance categories," said a company spokesman.

[Click here for article.](#)

The new criminal finance legislation, which is to be considered by Parliament this year, could be extended to make company bosses responsible for failing to prevent employees committing money laundering and fraud offences, as well as preventing them from facilitating tax evasion. The prime Minister has vowed to make tackling corporate crime a priority.

[Click here for article.](#)

FOS orders firm to pay £100 for incorrectly advising a customer that a call recording relevant to her complaint about the term of a life insurance policy was available.

[Click for article.](#)

Complaints Commissioner (CC) asks FCA to compensate firm over £6k for loss of business and distress associated with a mistake on its register, which suggested the firm was a suspended AR. The FCA has agreed to pay £500 for distress but is disputing the compensation for loss of business, as it does not believe the circumstances meet the CC's criteria for compensation - loss that "has directly resulted from the regulator's error".

[Click here for article.](#)

Court Ruling in Negligent Financial Advice Case

The court considered whether the defendant, Coutts and Co, breached its duty to exercise reasonable skill and care when advising the claimants, Mr and Mrs O'Hare, in relation to five investments in 2007, 2008 and 2010. The court also considered whether the parties had settled a complaint relating to the manner in which a different product was sold to the claimants for £250k. The total amount claimed was £3.3m plus interest.

The claimants are experienced business people; Mr O'Hare built up a successful chemical engineering business, which he then sold and Mrs O'Hare's background is in business administration. They also own substantial property. The claimants made investment decisions jointly and up until their involvement with Coutts had been on a relatively modest scale. After joining Coutts in 2001, they received a recommendation to invest \$3m dollars into Orbita Capital Return; \$1m of their own money and \$2m borrowed from Coutts. This led to the complaint of mis-selling.

Coutts' case was that Mr O'Hare was particularly "keen" to make the investment, which resulted from his sophistication and experience as a substantial investor and not the result of their private banker's salesmanship or powers of persuasion. Coutts argued the advice given was suitable and said the root cause of the mis-selling claims was poor performance, informed by hindsight. Coutts also pleaded a limitation defence in relation to 3 of the 5 investments.

In its judgement the Court referred to the nature of the claimant's contract "under which Coutts undertook to advise them in their personal capacity." The contract required Coutts to understand the clients needs and objectives to enable a suitable investment strategy to be developed. The contract was not limited to any particular aspect of the claimants' wealth but it did not oblige Coutts to provide a constant stream of advice and recommendations. Advice would be given "as and when agreed or as and when Coutts considered it appropriate."

Commenting on the suitability of the investment advice, the Court highlighted the lack of industry consensus about how the treatment of risk appetite should be managed by an adviser. The Court also said the Montgomery test - used in medical negligence cases; "to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment, and of any reasonable alternative or variant treatments" - is similar to the actions required by COBS rules 2.2.1(1) and 2.2.2(1)(b); rule 4.2.1(1); rule 9.2.1, 9.2.2, 9.2.3 and 9.2.6. In other words, "the extent of required communication should not depend on the attitude of the individual adviser".

The Court did not believe the claimants' were sophisticated or experienced investors, and although they were willing to take risks, the investments made by the claimants had been "relatively conservative" prior to their relationship with Coutts. However, it was stressed that the regulatory rules are there to "hold the balance between the parties fairly, giving weight both for the need to protect investors from ignorance or even from themselves *and* the need to permit ultimate autonomy to the properly informed investor to make and take responsibility for his own mistakes" - see FSMA section 5(2). It was also noted that the COBS rules do not rule out the use of persuasion to encourage more risky investing than has previously been taken. However, COBS does stress the need for full information to be given, and conflicts of interest to be properly managed."

The Judge dismissed the claim in its entirety that Coutts had persuaded the claimants to invest in riskier propositions than they had wanted to invest in, in such a way that breached Coutts' duties to them.

[Click here for judgement.](#)

Industry News continued...

A freedom of information request reveals the FCA's approach to gifts, which have included a Vietnamese Drum and a Swiss Army Knife. All gifts valued at over £30, where it would be impractical or cause offence to return, are surrendered to the Ethics Officer who decides whether it can be used, donated to charity or disposed of.

[Click here for article.](#)

Sarah Rapson, Director-General of the Home Office's Visas and Immigration Division, is to join the FCA in the autumn as Director of Authorisations.

[Click here for article.](#)

ICE Clear Europe Ltd added to list of authorised central counterparties under EMIR.

[Click here for press release.](#)

European Federation of Financial Intermediaries and Financial Advisers has developed a regulatory database to help keep advisers updated on European regulation.

[Click here for article.](#)

Financial Fraud Action UK figures suggest a financial scam was committed every 15 seconds within the first half of 2016.

[Click here for article.](#)

The FCA is reportedly considering clamping down on client-book purchases. The article mentions that the FCA's consolidator review last year, where the FCA suggested including a disclosure of any client specific fees that are ongoing and a mapping of the service from the previous adviser to the new adviser, could mean a client cannot be billed for on-going services until a new client agreement is in place.

[Click here for article.](#)

Government publishes consultation paper on the transposition of the Fourth Money Laundering Directive (4MLD) into UK legislation. 4MLD comes into force from June 2017.

[Click here for consultation.](#)

EU member states back 12-month PRIIPS delay. PRIIPS Regulation introduces a standardised pre-contractual disclosure document (the KID) for manufacturers and distributors of packaged retail and insurance-based investment products. As things stand, by 31 December 2016, all manufacturers of PRIIPS, and those advising or selling, must prepare a KID for each PRIIP.

[Click here for press release.](#)

FCA issues final notice confirming its decision to refuse an application for consumer credit permissions after the firm failed to respond to its queries on four separate occasions, thereby breaching Principle 11 – being open and co-operative with the FCA.

[Click here for final notice.](#)

FOS rules against financial advice firm for pension transfer advice provided to a terminally ill client. FOS criticised the firm's classification of the client as "experienced and sophisticated". FOS also felt the client's attitude to risk recorded by the firm was inaccurate "especially given how Mr T's illness was progressing and that he wanted to provide for his wife and daughters after his death."

[Click here for article.](#)

Government reveals pension dashboard plans and confirms the first prototype will be available by March 2017.

[Click here for article.](#)

In this CP the FCA is proposing to make changes in the following areas of its Handbook:

- * Assumptions used to calculate the total charge for credit and the annual percentage rate (APR) in the Consumer Credit sourcebook (CONC) so they are identical to those in the Consumer Credit Directive.
- * Equity release rules in the Mortgage Conduct of Business (MCOB) sourcebook to make it easier for providers to offer a type of lifetime mortgage that allows customers to choose when to stop making interest payments and switch to interest roll-up.
- * Short Form A to include of a new criminal records check question for relevant authorised persons of the Senior Managers and Certification Regime and the Senior Insurance Managers Regime.
- * Chapter 11 of prudential sourcebook IFPRU to implement the Recovery and Resolution Directive.
- * Conduct of Business (COBS) sourcebook in relation to insurer mutuals' deferred shares to enable them to be promoted to ordinary retail clients by applying the same requirements that were introduced for the promotion of deferred shares by credit institution mutual societies in 2015.

[Click here for consultation paper.](#)

FCA Thematic Review: Financially Vulnerable Customers

This review follows [TR14/3: Mortgage lenders' arrears management and forbearance](#). It started in early 2016 when an interest rate rise was considered likely. The FCA recognises that rates have since been cut, however it also notes that firms and customers need to be prepared for when rates rise, and has therefore published its findings.

Nine lending firms were involved in the review and it found that most had taken action in response to the FCA's [Occasional Paper 8: Consumer Vulnerability](#). However some work was still needed in the following areas:

- * Identification of financially vulnerable customers – some customer types had been excluded by some firms, which could lead to poor outcomes.
- * Mitigation Strategies – few firms would be able to implement suitable strategies to ensure customers are treated fairly if rates were to raise in in the near future.
- * Communications – too generic and not specific to customers' personal circumstances.
- * Management Information – was not reviewed frequently enough.

The FCA is encouraging firms to not wait to develop strategies to better serve customers' needs when rate do increase. However, it recognises that customers need to take responsibility for their finances and is therefore also encouraging customers to take their own steps to mitigate the impact of a rate rise.

[Click here for review findings.](#)

Industry News continued...

HMRC extends transitional period for VAT employer deductions on DB services by 12 months until 31st December 2017.
[Click here for article.](#)

Sunday Times reveals FCA may not impose cap on fund manager fees, as it would not necessarily stop investors paying too much.
[Click here for article.](#)

Government publishes consultation on pensions advice allowance but Treasury admits the £500 allowance may not be available to all savers.
[Click here for consultation.](#)

Landlords challenging the government's changes to tax relief on mortgage interest payments will have a court hearing in early October.
[Click here for article](#)

Enforcement Actions and Prosecutions

Former city spread betting trader, Tahseen Goni, has been given a confiscation order of £2m, ordered to pay prosecution costs of £118k and sentenced to 2 years in prison for hiding assets from his bankruptcy trustee and creditors. Goni was made bankrupt in 2010, after incurring £238k of losses on his personal trading account, but found away to continue to trade.
[Click here for article.](#)

Accountant jailed for 43 months for creating fraudulent tax returns and expense accounts, and for non-disclosure of clients' taxes.
[Click here for article.](#)

Life insurance broker given 9-month suspended prison sentence and 90 hours community service for fraud by false representation. The former broker sold fake life and critical illness policies and kept the commission fees. The fraud was uncovered by the insurance company, which reported the individual to the Insurance Fraud Enforcement Department of the City of London Police.
[Click here for article.](#)

SFO charges three former directors of Tesco for fraud connected with the firm's accounting scandal, which caused it to overstate its profits by £250m. It is reported the former finance director, managing director of Tesco UK and the commercial director are to contest the charges.
[Click here for article.](#)

FCA issues decision notice publicly censuring and banning former COO of Barclays Wealth and Investment Management (BWA), Andrew Tinney, from holding any senior management/significant influence function in relation to any regulated activity. Tinney is said to have suppressed the existence of, and made misleading statements and omissions to the firm's senior management and regulators in relation to, a highly critical report into the firm's culture. The report is said to have "expressed an opinion that BWA had pursued a course of revenue at all costs and had a culture that was high risk and actively hostile to compliance." One of the report's recommendations was to replace a number of the senior management.
[Click here for press release.](#)

Former director of Industry RE Ltd, Ian Hamilton, who conned investors out at least £13.3m, has been disqualified by the High Court. The company ran investment scams in the renewable energy sector between 2009 and 2013.
[Click here for article.](#)

Other FCA Publications

FCA publishes statement and commitment to firms regarding consumer credit authorisations.

[Click here for statement.](#)

FCA issues statement on UK's corporate bond market.

[Click here for statement.](#)

Primary Market Bulletin No. 15

[Click here to access bulletin.](#)

CP16/22 - Pension Wise standards: changes for secondary annuity market guidance

[Click here for consultation paper.](#)

FCA issues Call for Input into the post-implementation review of the FCA's Crowdfunding rules

[Click here for Call for Input](#)

CP16/23 - FCA Regulated fees and levies: Insurers' tariff data for 2017/18

[Click here for consultation paper.](#)

FS16/5: Call for Inputs on Big Data in retail general insurance

[Click here for finalised guidance.](#)

Occasional paper 22: Price discrimination and cross-subsidy in financial services

[Click here for Occasional paper.](#)

CRD IV Pillar 2 Summary and Street Testing Observations

[Click here for report.](#) - <https://www.fca.org.uk/sites/default/files/crd-iv-pillar-2-summary-stress-testing-observations.pdf>

Handbook Notice 37

[Click here for notice.](#)

FCA Speeches

“Darwin and an evolution in price discrimination” by

Peter Andrews, Chief Economist, FCA

[Click here for Speech.](#)

“Regulators should heed lessons from mishandling of Hillsborough process” by Tracey McDermott, former Acting

Chief Executive of the FCA

[Click here for speech.](#)

FCA Insights- Videos

Understanding market effectiveness – In March 2016 Nobel Laureate Joseph Stiglitz, academic and Financial Times columnist John Kay and University of Chicago Financial Professor Luigi Zingales discuss new approaches relating to the effectiveness of financial markets.

[Click here for video.](#)

Promoting competition in financial markets – In December 2015 senior economists discuss better ways of modelling and regulating financial markets while at the same time promoting competition.

[Click here for video.](#)

Enforcement Actions and Prosecutions continued...

Deutsche Bank faces fine in the US of \$14bn (or £10.6bn) for the mis-selling of mortgage-backed securities. The Bank plans to fight the fine, which significantly exceeds its \$3bn provision. The fine also places a question mark over the bank's future after it only just passed the European Central Bank's stress test in July.

[Click here for article.](#)

Former owner of Embassy Wines UK, Jonathan Piper, has been sentenced to 5 years in prison for conning investors out of £350k to fund his lifestyle, and for failing to pay tax and National Insurance on his earnings for 6 years.

[Click here for article.](#)

FCA orders payday lender to repay £34m to borrowers for failing to treat its customers fairly. The business is said to have taken money from bank accounts without permission, overcharged its customers and sent threatening letters.

[Click here for press release.](#)

Swedish telecoms operator faces \$1.4bn fine from US and Dutch authorities in settlement over allegations the company bribed officials close to the daughter of the former Uzbek president to help its entry into Uzbekistan in 2007. This would be the largest ever fine under the Foreign Corrupt Practices Act.

[Click here for article.](#)

PwC fined £2.3m by the FRC regarding audits of two sub-prime lenders. The fine relates to issuing unqualified audit opinions regarding financial statements for Cattles Plc and Welcome Financial Services Ltd.

[Click here for article.](#)

The FCA has rescinded an £80k fine against a mortgage broker, who submitted false payslips to a lender as part of a personal mortgage application, after he provided evidence of serious financial hardship. However, the FCA has upheld its decision to ban the broker from performing regulated activities.

[Click here for article.](#)

Financial adviser fined £109k and banned by the FCA for repeatedly lying about her qualifications, and for submitting fake statements of professional standing to the FCA. The adviser maintained her innocence for a considerable period of time before admitting to her misconduct in a “compelled interview” with the FCA. The fine would have been £160k had the adviser not provided evidence of serious financial hardship.

[Click here for final notice.](#)

Former LV employee, Stephen Oates, and Aisha Elliott, from a claims management company, have been charged with offences under the Bribery Act. Oates accepted a bribe from Elliott in return for confidential information. Both individuals have been bailed and will appear in Court again on the 20th October.

[Click here for article.](#)

