



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.

October has been a busy month for FCA publications and speeches. The FCA's Chief Economist Peter Andrews gave a speech entitled '[Culture in UK Banking: Regulatory Priorities](#)'. In his speech Andrews describes what good culture means and suggests there could be a case for fining individuals rather than firms as it "makes the risks more 'personal' to other people who might be tempted by non-compliance."

The October edition of the FCA's [Regulation Round-up](#) was published. This month the FCA highlights the publication of two papers, as part of its Smarter Consumer Communications initiative, which looks at what and how key information is presented to customers. [PS16/23](#) includes feedback to its October '15 consultation paper in which the FCA proposed the removal of ineffective disclosure requirements, such as the IDD under ICOBS and the short report for investors in retail authorised funds. The FCA has decided to proceed with its original proposals.

The FCA's latest [Policy Development Update](#), as of 7th October 2016, was also released.

Regarding MiFID II, the FCA has issued a third consultation paper and has announced plans to hold a series of workshops and events for firms seeking authorisation/variation of permission for new permissions under MiFID II. For the latest on MiFID II visit the FCA's dedicated [webpage](#).

The FCA's [Live and Local](#) programme continues with 6 regions still to go and [complaints data](#) for the first half of 2016 has been published. The data shows a 2.6% reduction in complaint numbers compared to the previous 6 months (second half of 2015). The upheld rate has increased by 3% in comparison to the previous 6 months and there has also been a slight reduction (less than 1%) in redress paid for the same period.

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 – emma@gemcompliance.com
Website – www.gemcompliance.com

Main features

- * CP16/29 - Markets in Financial Instruments Directive II Implementation – Consultation Paper III
- * Series of Feedback Statements Concerning Statements of Responsibilities and Responsibilities Maps under the SM&CR
- * PS16/22: Strengthening Accountability in Banking and Insurance: Regulatory References Final Rules CP16/21: Quarterly Consultation Paper No. 14
- * DP16/4 Overall Responsibility and the Legal Function FCA Thematic Review: Financially Vulnerable Customers
- * FCA Speech - A More Effective Approach to Combatting Financial Crime
- * Other FCA Speeches
- * Other FCA Publications
- * Industry News
- * Enforcement Actions and Prosecutions

Industry News

HMRC wins tenth tax avoidance case against NT Advisors. The latest scheme involved a series of circular payments with no genuine commercial purpose to generate tax deductions. HMRC's Director General of Enforcement and Compliance, Jennie Granger, said: "HMRC has a 100 per cent success record against NT Advisors in the courts. If you are currently using one of their schemes, or any other avoidance scheme, we will help you get out if you get in touch with us."

[Click here for article.](#)

FOS rules that network should compensate a customer of an appointed representative, which defrauded them out of cash using a fake property portfolio. However, the network has argued that because the purpose behind the investment advice was fraud it is outside the scope of the network's responsibility.

[Click here for article.](#)

FCA joins forces with Cambridge University to research equity crowdfunding and peer-to-peer lending platforms. The research will focus on:

- * The make-up of the crowdfunding investor population;
- * How risks are assessed and how information provided by fundraisers is used;
- * The types of investment being competed for; and
- * How due diligence is conducted.

[Click here for article.](#)

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CP16/29 - Markets in Financial Instruments Directive II Implementation – Consultation Paper III

The FCA begins its third MiFID II consultation paper by stating that “firms must continue to abide by their obligations under UK law, including those derived from EU law, and continue with implementation plans for MiFID II and other pieces of EU financial services legislation that are due to come into effect in the UK”.

The third CP is split into two parts with part 1 focussing on conduct matters and part 2 covers other issues not previously consulted on. A summary of the proposals, as set out in the CP, is provided below.

Part 1 Conduct of Business Proposals:

- * Inducements, including adviser charging –
 - Splitting core inducement rules for MiFID, third country business and Article 3 firm business from other non-MiFID designated investment business until Insurance Distribution Directive (IDD) measures are implemented.
 - Retaining existing domestic adviser charging rules in COBS 6.1A and 6.1B, and transposing MiFID II's new inducement bans into the new COBS 2.3A.
 - Transposing but not extending the MiFID II inducement ban for investment advice/portfolio managed services for professional clients.
 - Extending the MiFID II inducement ban for retail investment advisers/portfolio management service providers.
 - Applying the MiFID II inducement rules to article 3 firms.
- * Inducements and research –
 - Replacing existing use of Dealing Commission rules in COBS 11.6 with a new section in COBS 2 to transpose the MiFID II rules.
 - Extension of MiFID II rules to firms carrying out collective portfolio management, which includes UCITS management companies and Alternative Investment Fund Managers (AIFMs), but who are not subject to MiFID II.
- * Client categorisation – introducing criteria to enable local authorities (and local authority pension schemes) to be classified as elective professional clients rather than retail client status.
- * Disclosure requirements – Implementing the wide variety of disclosure requirements in MiFID II, e.g. information about the firm and the products it sells, disclosure of costs and charges and the provision of periodic reports to clients.
- * Independence – Applying the MiFID II independence standard for personal recommendations to recommendations relating to MiFID financial instruments, structured deposits and retail investment products for UK-based retail clients.
- * Suitability –
 - Updating the current suitability rules in COBS 9 with the changes required by MiFID II for MiFID business and Article 3 firms carrying on MiFID business.
 - Retaining the current COBS rules for non-MiFID business pending consultation on implementation of the IDD.
- * Appropriateness – Applying the appropriate test in MiFID II, including the way in which the test operates, to MiFID business only.
- * Dealing and managing –
 - Changing existing rules to implement the new MiFID II standards across best execution, client order handling, personal transactions and requirements for investment firms underwriting and placing.
 - Applying the MiFID II enhancements to the best execution rules for firms carrying out collective portfolio management who are not subject to MiFID II, with some selected exceptions.
- * Investment research – Transposing the MiFID II rules into a single chapter in COBS.
- * Other conduct issues –
 - Applying the requirement for a written basic agreement to professional clients of MiFID business. Detail is also provided regarding the contents of these agreements.
 - Changes to improve clarity for firms carrying out collective portfolio management activity in the COBS specialist regimes chapter.

(Continued on page 3, right-hand column)

Industry News continued...

High Court comments on 'by way of business' test under FMSA. The case - *Newmafruit Farms Ltd and others v Alan Pither and others* [2016] EWHC 205 (QB) – is to go to trial but the court said that whether or not a loan was provided could already be decided in respect of one isolated case of lending by a company, such as *Newmafruit Farms Ltd*, a family-run fruit farm. According to the court, “the 'by way of business' test in section 22 [of FSMA] could be satisfied by an activity undertaken on an isolated occasion” as it is not the intention of the test for the relevant activity itself to represent a business. In other words, the borrower only needs to show the relevant activity was carried out 'by way of business' by the firm in the course of its business as a fruit farm.
[Click here for judgment.](#)

Industry calls for “clear and consistent language to describe investment risk” to avoid differing interpretations by investors.
[Click here for article.](#)

PRA and FCA target buy-to-let lending standards.
[Click here for article.](#)

ESMA consults on future rules for financial benchmarks.
[Click here for consultation.](#)

ESMA publishes draft guidelines on MiFID II product governance and investor protection.
[Click here for draft guidelines.](#)

Updated Q&A under AIFMD published by ESMA.
[Click here for updated Q&A.](#)

Latest FOS newsletter includes article on the Ombudsman's approach to awarding interest.
[Click here for latest FOS newsletter.](#)

Citywire Compliance comments on the regulatory risk Compliance Officers face with reference to five key fines from 2015 totalling £335k against individuals with compliance responsibility.
[Click here to access newsletter containing article.](#)

Guidance on transaction reporting, order record keeping and clock synchronisation under MiFID II published by ESMA.
[Click here for guidance.](#)

New MiFID II/MiFIR Q&A published by ESMA.
[Click here for updated Q&A.](#)

Government to combine the functions of the Money Advice Service, the Pensions Advice Service and Pension Wise into a single financial guidance body.
[Click here for article.](#)

Court rules that pensions are protected in the event of bankruptcy.
[Click here for article.](#)

FCA's Andrew Bailey comments in the Guardian Newspaper on firm culture following implementation of the Senior Managers Regime. A review by the regulator has found evidence of overlapping/unclear allocation of responsibilities and sharing of responsibility amongst more junior staff. Bailey comments that “this goes against the intention of the Senior Managers and Certification Regime and should not continue”. Bailey also confirms the regime will be extended to all firms in 2018.
[Click here for article.](#)

Part II – Other matters

- * Product Governance – Implementing the product governance provisions in MiFID II as rules for firms engaged in MiFID business and as guidance for non-MiFID firms, which manufacture or distribute MiFID products.
- * Knowledge & competence requirements – Amending the Training and Competence (TC) sourcebook and Senior Management Arrangements, Systems and Controls (SYSC) to reflect the European Securities and Markets Authority (ESMA) guidelines on knowledge and competence.
- * Recording of telephone conversations and electronic communications (taping) –
 - Updating of current taping rules with the changes required by MiFID II.
 - Discretionary investment managers would be fully subject to the requirement to tape
 - Applying the taping requirement to corporate finance business.
 - Extending the taping requirement to Article 3 firms but the FCA is welcoming other proposals to address consumer protection concerns in this area.
- * Supervision (SUP), authorisation and approved persons – Introducing a new Form A to provide information on a firm's organisational structure and management body. Updated forms are to be in place by early 2017.
- * Perimeter guidance – Introducing new guidance on scope changes in MiFID II, including: foreign exchange derivatives; emission allowances; commodity derivatives and exemptions for professional firms; and commercial firms trading commodity derivatives.
- * Consequential changes to the Handbook – Consequential amendments to the Handbook and updates to some references in the prudential rules.

Feedback is requested by 4th January 2017, except for proposals for SUP, authorisation and approved persons, which is requested by 31st October 2016. The FCA will consider feedback and publish a combined policy statement confirming final rules for MiFID II in the first half of 2017.

Gem Compliance will provide a more detailed review of this consultation paper as part of its series of MiFID II briefing notes, which are to be published in due course.

[Click here for consultation paper.](#)

Series of Feedback Statements Concerning Statements of Responsibilities and Responsibilities Maps under the SM&CR

The FCA has issued four feedback statements – each specific to a particular industry sector covered by the Senior Managers and Certification Regime (SM&CR) – following its review of the Statements of Responsibilities (SoRs) and responsibilities maps, which accompanied grandfathering applications from firms currently in scope.

The FCA reports that most firms had made a considerable effort in preparing for the regime, as they had identified Senior Managers and allocated Senior Manager Functions (SMFs) and responsibilities. However a number of firms aren't meeting the FCA's rules and guidance.

All SM&CR firms are asked to consider the feedback relevant to their sectors and, where revisions are necessary, submit revised documents. Firms are also reminded of the need to complete and submit Form J where there are significant changes to the responsibilities of a Senior Manager.

[Click here for feedback statements.](#)

Industry News continued...

ESMA publishes Q&A regarding the offering of speculative products to retail investors.

[Click here for Q&A.](#)

Former FSA Chair, Lord Turner, u-turns on previous warning that peer-to-peer lending would lead to a mis-selling scandal.

[Click here for article.](#)

A senior associate at the FCA told the Legal and General Mortgage Club that 38% of mortgage files reviewed were so unclear the FCA couldn't tell if the advice was suitable or not. However, the senior associate did say that 'a conversation may have taken place but it wasn't documented'. The FCA's upcoming mortgage market study was also mentioned and areas of focus include the borrower's ability to shop around and the commercial relationships across the sector.

[Click here for article.](#)

FCA tells pension providers to review all non-advised annuity sales since 2008 after finding significant concerns with follow-up conversations between firms and consumers. Although firms provided enough information throughout the sales process to enable the customer to make an informed decision, the FCA feels sales processes and customer communications could be improved and to ensure key messages regarding enhanced annuities are repeated.

[Click here for article.](#)

ESMA issues guidelines on sound remuneration practices under the UCITS Directives and AIFMD.

[Click here for UCITS guidelines](#) and [AIFMD guidelines](#).

It is reported that Lloyds whistleblower, Ian Taplin, who first notified the FCA in 2012 of the firm's wrongdoing in respect of life insurance contracts, has the support of Teresa May. Taplin reported Lloyds for offering poorer customers more expensive life insurance products from a restricted range with up to 40% difference between the cost of the best contract available to high net worth individuals and the standard contract offered to poorer customers. Prime Minister, Teresa May, is also Taplin's local MP, and confirmed to Taplin that she had written to the FCA's CEO, Andrew Bailey, in April regarding the matter.

[Click here for article.](#)

Ombudsman upholds complaint against financial adviser for failing to use details of the complainant's original pension provider – which the adviser couldn't provide advice on - to ascertain whether a new plan with the adviser's firm would be suitable. The Ombudsman said: "So even if the adviser couldn't tell Mrs S [the complainant] to re-start her contributions (which he would have found out she was able to do), he could suggest she speak to her PPP provider herself or speak to an adviser who could give that advice." The client did not suffer any loss, so only £150 was awarded for the trouble and upset caused.

[Click here for article.](#)

ICO publishes new Privacy Notice Code of Practice.

[Click here for publication.](#)

Simon Majjoo, Chair of ESMA, delivers speech about the application of the AIFMD passport to non-EU AIFMs and AIFs.

[Click here for speech.](#)

ESMA issues Q&A on the application of the UCITS Directive.

[Click here for Q&A.](#)

PS16/22: Strengthening Accountability in Banking and Insurance: Regulatory References Final Rules

Following a joint consultation by the PRA and FCA in October 2015, the FCA has published its final rules on regulatory references, which come into force on 7th March 2017.

The statement is split into sections: section 2 affects firms already caught by the Senior Managers and Certification Regime (SM&CR) and the Senior Insurance Managers Regime (SIMR); and section 3 is of interest to all authorised firms.

There are no substantial changes for firms that are not banks or insurers, apart from the requirement to request references for the last six years rather than the last five, although there is no time limit for matters of serious misconduct. Firms should read the relevant sections of the policy statement to check for any other areas of potential impact.

In summary, all authorised firms will be required to:

- * Provide a reference upon request in relation to candidates applying for any of the following roles: SMFs, SIMFs, CFs, Certification Functions, Key Function Holders and Notified NEDs;
- * Provide the reference within six weeks of the request;
- * Include all relevant information in the reference for the last six years; and
- * Disclose all instances of conduct that is deemed serious regardless of how much time has elapsed.

The Policy Statement also includes guidance for all authorised firms on: agreements preventing disclosure of information: a firm's duty to investigate allegations; relevant policies and procedures; and record keeping requirements.

In addition, banks and insurers will be required to:

- * Request references for the last six years;
- * Include mandatory information from the six years;
- * Provide the reference using a prescribed template; and
- * Update the current employer with any new information that comes to light during any notice period served between providing a reference and the individual leaving a firm, and, for ex-employers, six years from the date the individual left the firm.

The FCA will consider whether to widen the scope of the full regulatory reference rules once the SM&CR is in place for all authorised firms and their ARs.

A template reference is included in the Policy Statement, along with amended sections of the different types of Form A.

[Click here for policy statement.](#)

DP16/4 Overall Responsibility and the Legal Function

Following the implementation of the SM&CR in the banking sector in March this year, the FCA is now considering whether or not the legal function should form part of the regime.

One of the main principles of the SM&CR is that a particular Senior Manager must have 'overall responsibility' for each area of the firm's business, but firms have expressed that it was not clear how 'Senior Management Function (SMF) 18 – Other Overall Responsibilities' applies to the legal function, with some firms deeming capture of the legal function by the SM&CR as inappropriate.

Stakeholders are now invited to provide feedback as to whether the legal function should be included in the SM&CR. The deadline for responses is 9th January 2017.

[Click here for discussion paper.](#)

Industry News continued...

Financial advisers, accountants and solicitors could face a £3,000 penalty from HMRC if they fail to send letters to UK clients with offshore accounts, in which are held money or other assets, by 31st August 2017. The letter instructs clients to ensure their UK tax affairs are up-to-date and states, "the tax world is becoming more transparent", and closes with, "come to us before we come to you".

[Click here for article.](#)

Standard Life reveals it has been instructed by the FCA to "conduct a review of all non-advised annuity sales from July 2008 to identify whether our customers received sufficient information about enhanced annuities to make the right decisions about their purchase."

[Click here for article.](#)

Scottish government publishes draft bill on a second independence referendum and the consultation period will run until 11th January 2017.

[Click here for article.](#)

Inheritance tax loophole discovered, which could mean pensions, in some cases, being treated as part of a client's estate.

[Click here for article.](#)

FOS orders adviser to compensate execution-only pension transfer client. The complainant – who had worked in financial services from the 1980s to 2001 in senior management roles – admitted the adviser had made it clear he wasn't receiving advice but the complainant thought the fact that he was dealing with an adviser would have provided him with some protection regarding the security of the investment. However, the Ombudsman thought the evidence presented by the provider that the transaction was execution-only was not sufficiently clear.

[Click here for article.](#)

Brexit lobby group launches and aims to offer objective research on the issues that could emerge as the UK negotiates its exit. The Financial Services Negotiation Forum (FSNF) includes industry practitioners and policymakers from both the Leave and Remain camps.

[Click here to access the FSNF website.](#)

ESMA issues guidelines on the delay in the disclosure of information.

[Click here for guidelines.](#)

Criminal Finances Bill has been presented to Parliament. The Bill is said to be one of the most significant changes to the UK's anti-money laundering and terrorist finance regime in more than 10 years. Key proposals include: increasing the moratorium period during which SARs are investigated; giving the NCA new powers for requesting information from regulated companies; and new corporate offence for failing to prevent the facilitation of tax evasion by staff.

[Click here for draft Bill.](#)

Speech by Verena Ross, Executive Director of ESMA entitled "Regulatory and supervisory developments, the challenges ahead – a European perspective".

[Click here for speech.](#)

Enforcement Actions and Prosecutions

Alex Hope - convicted in Jan 2015 of defrauding investors of significant sums, and before that, pleaded guilty to operating a collective investment scheme without authorisation – has been sentenced to 603 days in prison for only paying £1,000 of a £167k confiscation order.

[Click here for FCA press release.](#)

FCA Speech - A more effective approach to combatting financial crime

by Megan Butler, FCA's Executive Director of Supervision - Investment, Wholesale and Specialists

Butler reassured firms that the FCA is listening to the industry's concerns about the effectiveness of Suspicious Activity Reports (SARs) and informed the audience that law enforcement agencies place a great deal of value on the intelligence gleaned from basic information (e.g. names, phone numbers and addresses).

Butler outlined the FCA's thoughts on technology to improve AML processes and flagged the Criminal Finances Bill and the Finance Bill as two developments on their radar.

Key points for firms are:

- * The FCA doesn't want firms to take a 'tick-box' approach to financial crime compliance.
- * Instead of firms asking whether an approach is 'doable' they should be asking whether it is the right approach to take.
- * The FCA's guidance on anti-bribery and corruption controls remains current.
- * "Firms need to be vigilant and challenging and not just compliance process 'form over substance' focused."

[Click here for full speech.](#)

Other FCA Speeches Publications

- * Balancing regulatory objectives in the dynamic consumer credit market by Jonathan Davidson, FCA's Director of Supervision – retail and authorisations
[Click here for speech.](#)
- * Getting Regulation Right by FCA's Christopher Woolard, Director of Strategy and Competition
[Click here for speech.](#)
- * Our approach to cyber security in financial services firms by Nausicaa Delfas, FCA's Director of Specialist Supervision
[Click here for article.](#)
- * The FCA's role in promoting innovation by Christopher Woolard, FCA's Director of Strategy and Competition
[Click here for full speech.](#)

Other FCA Publications

- * [Market Watch 51](#)
- * [CP16/27](#) - Applying our conduct rules to all non-executive directors in the banking and insurance sectors
- * [CP16/28](#) - Remuneration in CRD IV firms: new guidance and changes to Handbook
- * [CP16/26](#) - Guidance on the duty of responsibility: amendments to the Decision Procedure and Penalties Manual
- * [CP16/25](#) - Whistleblowing in UK branches of overseas banks
- * [CP16/30](#) - Transaction cost disclosure in workplace pensions
- * [H1 2016 Complaints Data](#)
- * [FCA Code of Conduct](#) for Non-executive Directors
- * [FCA Infographics](#) - Building an Inclusive Culture
- * [TR16/7](#) - Thematic Review: Review of annuity sales practices -
- * [MS15/1](#) - Investment and corporate banking market study
- * [CP16/31](#) - Investment and corporate banking: prohibition of restrictive contractual clauses
- * [GC16/6](#) - The fair treatment of mortgage customers in payment shortfall: impact of automatic capitalisations
- * [TR16/8](#) - Packaged bank accounts
- * [FS16/10](#) - Smarter Consumer Communications
- * [PS16/23](#) - Smarter Consumer Communications: Removing ineffective disclosure requirements in our Handbook

Enforcement Actions and Prosecutions continued...

FCA instigates criminal proceedings against former Portfolio Manager at Blackrock Investment Management (UK) Ltd, Mark Lyttleton, who is charged with three counts of insider dealing in relation to equities trades and a call option in 2011.

[Click here for FCA press release.](#)

FCA fines Aviva Pension Trustees UK Limited and Aviva Wrap UK Limited £8.2m for failings in its oversight of its outsourced providers in relation to the protection of client assets.

[Click here for FCA press release.](#)

ICO fines TalkTalk a record £400k for security failings that allowed unauthorised access to customer data and which could have been prevented by implementing basic cyber security measures.

[Click here for more information.](#)

FCA fines Bangladeshi bank Sonali - which is 51% owned by the Bangladeshi government – £3.2m (with early settlement discount) and temporarily bans it from accepting new clients after the regulator found 'serious and systemic' weaknesses across 'almost all levels' of the bank's money laundering processes. The bank had also failed to act on previous warnings from the FCA. The firm's former MLRO, Steven Smith, has also been fined £17,900.

[Click here for FCA press release.](#)

FCA bans two directors of an unregulated property investment scheme called Arck, from performing any function in financial services, after being charged by the Serious Fraud Office for forgery and fraud offences.

[Click here for article.](#)

Former director of pay day lender, Wage Payment and Payday Loans Limited, Andrew Hart, has withdrawn his appeal against his ban to the Upper Tribunal and the FCA has now withdrawn the firm's interim permission because it could not satisfy resourcing requirements, as Hart was the sole director of the firm. The enforcement case was originally published in July and reported that Hart had failed to address 'unfair and improper practices at the firm. The FCA's director of enforcement, Mark Steward, said there was "no place" for those "who lack the requisite integrity and competence to ensure customers are treated fairly and all relevant regulatory obligations are met".

[Click here for article.](#)

Supreme Court rules against arguments put forward by HMRC to justify the release of confidential information, by a senior official, regarding the film production partnerships operated by Ingenious. It is reported that HMRC justified the disclosure by suggesting its purpose was to foster good relations with the media.

[Click here for article.](#)

Tribunal upholds FCA decision to ban Somerset Asset Management's Tariq Carrimjee - who was also responsible for compliance oversight and money laundering reporting at the firm - from holding the CF 10 and CF 11 functions, after he failed to spot and report attempted market abuse.

[Click here for FCA press release.](#)

FCA issues statement regarding PacNet Group – of which two companies are FCA authorised payment institutions - following the decision by the US Department of the Treasury to designate the PacNet Group as a 'significant transnational criminal organisation'.

[Click here for FCA press statement.](#)