FMConsult compliance solutions

# 2020 Regulatory Bulletin Issue 10

***"Education is the passport to the future, for tomorrow belongs to those who prepare for it today"***
***- Malcolm X***

With certain Lockdown Restrictions being lifted and a Vaccine confirmed, the FCA are beginning to look to the future and what needs to be done to improve and protect the industry. The end of the Brexit transition period is fast approaching and Firms must ensure they are prepared for the new rules and regulations that will be in place next year.

## UK Regulatory News

### Facing the future – challenges and priorities for the FCA

Speech by the FCA's CEO, Nikhil Rathi, given at the Address to the City Regulators, Mansion House.

The FCA does expect a significant number of firms to fail in the months ahead, and while they cannot intervene to stop them from failing, they will ensure that where this happens, the resulting harm and loss to their customers and the wider financial system is kept to a minimum.

Rathi then went on to say how the FCA has also kept their focus on readiness for the end of the transition period after the UK's departure from the European Union. The FCA has "*continued to work to minimise disruption" and "remain committed to upholding high international standards and to maintaining open markets*".

Next year the FCA will also be looking at the future regulatory framework and how they balance the need for regulators to have enough flexibility to act quickly while maintaining proper democratic oversight of their work.

The FCA believe that the next four to six months are arguably the most critical period in the transition and the time to act is now.

Market participants from all sectors need to ensure they are ready for the end of LIBOR.

The FCA reflected that with these immediate challenges gathered around us, there is a risk we lose sight of long running issues reshaping financial services, such as:

- Generation gap in terms of wealth & opportunity;
- increasing pressure on the financially vulnerable, stretched or distressed;
- the growth of big data, machine learning and artificial intelligence posing new ethical and regulatory questions along with great potential for innovation; and
- in a sustained period of low interest rates, shifting consumer incentives towards high risk investment opportunities at a time when consumers are bearing more of the responsibility for their own investment decisions

Rathi then went on to speak about how addressing these issues require a transformation of the FCA: "*and the way that we work will underpin all of our efforts – maximising our use of data and technology, making the FCA more diverse so that we can bring a full range of perspectives and ideas to our work, and using the lessons of this extraordinary year to build on the best elements of our organisational culture*".

### Joint statement on the implementation of prudential reforms in the Financial Services Bill

The HM Treasury, the Prudential Regulation Authority (PRA) and the FCA issued a joint statement on the implementation of prudential reforms contained in the Financial Services Bill.

In their announcement they indicated that the target implementation date for the bill is 1 January 2022.

The bill itself continues its progress through Parliament, and when enacted will introduce the UK's Investment Firms Prudential Regime (IFPR) and those Basel 3 reforms which make up the UK equivalent to the outstanding elements of the EU's 2nd Capital Requirements Regulation.

This follows feedback from industry in relation to these specific proposals and in response to the most recent Regulatory Initiatives Grid (September 2020), where industry raised concerns about the general volume of regulatory reform in 2021. HM Treasury will ensure the relevant secondary legislation is in place in good time, and the regulators will endeavour to provide industry with as much sight of the final rules as possible ahead of this date, to support effective implementation.

### FCA responds to Chancellor's statement on future of UK financial services

Nikhil Rathi, said: '*The UK is a global financial centre with high regulatory standards; the statement by the Chancellor sets out important steps to ensure that it will remain one'*.

The FCA believes effective and efficient financial regulation enables strong trading relationships and open financial markets, which bring real benefits to economies as well as investors and consumers. They will continue working with the Government and the Bank of England to deliver on the measures announced this month: advancing work to support well-functioning capital markets, enable greater investment in long term assets, ensuring the sector contributes to the move towards a low-carbon economy and encourage responsible innovation in finance.

The FCA have published further information for financial services firms on the equivalence decisions outlined by the Chancellor.

### Statement on certain FCA work in light of coronavirus and changing market conditions

During the pandemic the FCA have been clear that they remain committed to ensuring that consumers are protected and firms treat their customers fairly. The FCA have introduced a number of measures to ensure firms are clear on their responsibilities, particularly where their customers are vulnerable.

In the FCA's Feedback Statement on Duty of Care and potential alternative approaches the FCA committed to reviewing how they apply the regulatory framework, particularly the Principles for Businesses, and that they would focus on how new or revised Principles could strengthen and clarify firms' duties to consumers.

In January 2020, the FCA published a consultation paper (CP20/1) setting out proposals to simplify and improve competition in the cash savings market by introducing a Single Easy Access Rate (SEAR). The consultation was due to close in April 2020. Due to the impact of coronavirus the FCA have extended the consultation period to 15 December 2020.

The FCA's Investment Platforms Market study (2018/19) found that while the market works well overall, there were areas where it could work better. One of these areas was the barrier created by exit fees when consumers try to switch to a platform that better meets their needs.

The FCA announced in Policy Statement 19/29 that they would consult on restricting platform exit fees in Q1 2020. However, this was delayed due to coronavirus, with an intention to consult in Spring 2021; The FCA have now decided to stop work on this consultation.

## FCA announces benefits of new data collection platform RegData

RegData will replace Gabriel as the FCA's data collection platform. The FCA identified 3 key areas for improvement in Gabriel, for which they have made initial enhancements in RegData.

1. Increased speed in accessing and using the system:
   - Increased speed and faster navigation
   - Support across the platform – It will be easier to find information within RegData and on the FCA website.
   - New online resources
   - Single sign-on between Connect and RegData
2. Improvements to the layout of a firm's schedule and submission history:
   - An intuitive layout
   - Finding draft, past, due or overdue data items
3. Better guidelines when making data submissions and enhancements to the data validation feature:
   - Helpful messaging and clearer error flags
   - Step-by-step and smarter validation
   - Form navigation and auto-save

The FCA are moving firms and their users to RegData in groups to minimise impact on firms. Firms' moving dates are determined by their reporting requirements. All users must register for RegData ahead of their move by logging in to Gabriel and completing the one-time registration when prompted. Until they are moved, firms should continue reporting via Gabriel using their existing Gabriel login details.

## FCA to announce further proposals to support consumer credit borrowers impacted by coronavirus

Following the announcement of the latest Government restrictions in response to the coronavirus outbreak, the FCA will propose updates to their temporary guidance on personal loans, credit cards, motor finance, rent to own, buy-now pay-later, pawnbroking and high-cost short-term credit to support consumer credit customers affected by coronavirus.

To support those financially affected by coronavirus, the FCA will propose that consumer credit customers who have not yet had a payment deferral under the FCA's July guidance can request one. This could last for up to 6 months unless it is obviously not in the customer's interests. Under the FCA's proposals borrowers who are currently benefitting from a first payment deferral under the FCA's July guidance would be able to apply for a second deferral.

Consumer credit customers who have already benefitted from payment deferrals and are still experiencing payment difficulties should speak to their lender to agree tailored support.

## FCA warns firms to be responsible when handling client data

The FCA noted on 18/11/2020 that the current economic climate is changing the way many firms operate and may cause some to leave the market or merge with other firms. When this happens, firms must make sure they lawfully process and transfer client data.

Principle 3 in requires firms to organise and control their affairs responsibly and effectively, with adequate risk management systems.. Before transferring clients' personal data, firms should consider whether this is fair to and in the interests of their clients (Principle 6). Firms should also pay due regard to the information needs of their clients and communicate with them clearly and fairly (Principle 7).

Data protection legislation (GDPR) requires firms to provide information to clients clearly setting out 'privacy information', which includes the purposes for which they are collecting or processing client data, and individuals' rights when their data is processed (see ICO Right to be informed page).

Firms should generally ensure they maintain a record of how and why they process, share and retain personal data. The ICO provides guidance on documentation and guidance on records management and security expectations. Firms should also record the lawful basis for processing data. If they are processing data based on consent, they should maintain an effective audit trail of how and when consent was given.

The FCA will act where they identify breaches of relevant parts of the FCA Handbook. Firms that intend to transfer or receive personal client data must be able to demonstrate how they have considered the fair treatment of consumers and how their actions comply with GDPR and privacy laws.

At the end of the Brexit transition period the GDPR provisions will form part of retained EU law, with amendments made by DP exit regulations under the European Union (Withdrawal) Act 2018. The DPA 2018 and PECR will continue to apply, alongside the GDPR. There will be some amendments to ensure they work in a UK-only context – see the ICO guidance, which is regularly updated.

## Is Brexit Green? A UK Roadmap towards Mandatory Post-Brexit Climate-Related Disclosures

Tackling climate change is not a new initiative in the UK. Indeed, the UK was one of the first countries worldwide to endorse the recommendations of the Task Force for Climate-related Financial Disclosures (TCFD) – aimed at ensuring climate-related risks and opportunities are priced into financial decision-making, and its 2019 Green Finance Strategy outlined an expectation that all UK listed issuers and large asset owners would be making disclosures in accordance with the TCFD's recommendations by **2022**.

On 6 March 2020, the FCA issued a consultation paper outlining new climate-related disclosure requirements for premium listed issuers and consulting on guidance on existing obligations set out in EU legislation.

On 9 November 2020, HMT published an Interim Report of the UK's Joint Government-Regulator TCFD Taskforce (the report) and a roadmap (the roadmap) that provide an outline of the UK's ambitions on climate change mitigation.

The Roadmap sets out an indicative path for the introduction of regulatory rules and legislative requirements over the next five years, with most action occurring during the first three years.

The Roadmap sets out a strategy for seven categories of organisation:

1. listed commercial companies;
2. **UK-registered companies;**
3. banks and building societies;
4. insurance companies;

5. **Asset managers;**
6. life insurers; and
7. FCA-regulated pension schemes and occupational pension schemes.

### FCA statement on the share trading obligation ("STO")

The FCA believes in open markets and global competition between trading venues to promote efficient trading in financial instruments. They believe in companies' freedom to choose where to raise capital and trade their securities, regardless of the currency of their securities.

Mutual equivalence between the UK and EU should be easy to agree and remains the best way of dealing with overlapping STOs.

The FCA considers the ISIN or currency that a share carries and trades in does not and should not determine the scope of the STO. Any restriction on the trading of shares based on currency does not reflect the multicurrency nature of global capital markets and limits the ability of firms to best use global capital markets to support economic activity.

The FCA will use the Temporary Transitional Power (TTP) to allow firms to continue trading all shares on EU trading venues and systematic internalisers (SIs) where they choose to do so, and where the regulatory status of those venues and SIs permits such activity. Before the end of the transition period the FCA will publish a transitional direction to give effect to this.

### The business of social purpose

Speech by Jonathan Davidson, Executive Director of Supervision – Retail and Authorisations, given at the 6th Annual Culture and Conduct Forum.

"*culture remains a key area of focus for the FCA*."

Mr Davidson said that during the coronavirus (Covid-19) crisis, financial services firms have supported consumers, and been part of the solution rather than the problem, providing an opportunity to rebuild trust in financial services moving forwards.

While coronavirus might be the most immediate challenge firms are facing, it isn't the only one – the need to break barriers around diversity and inclusion, and climate change and sustainability are key challenges that also require urgent attention.

Firms with healthy cultures – cultures that are purposeful, safe, and support environments that are diverse and inclusive – will be better placed to tackle these challenges.

The financial services industry has the opportunity to make real progress, driven by social purpose.

"*The financial services sector has reached a tipping point in the journey to healthy, purposeful, safe, diverse and inclusive cultures that create healthy returns for shareholders. The question is how can we, together, tip the balance?"*

The FCA are planning to restructure to integrate the supervision and policy functions to take a holistic view and approach to the challenge of making financial markets work better.

### FCA commences High Court proceedings over unauthorised collective investment schemes

The proceedings, which allege that the defendants carried out unauthorised activity in relation to the operation and/or promotion of collective investment schemes, will seek injunctions and restitution for investors.

The unauthorised schemes were established and operated by two of Defendant 1's companies which are currently in administration. None of the promotional material was approved by an authorised person.

Prior to the administrations, between them the two companies owned 13 care homes in the North East of England. They sold, or claimed to sell, investments in rooms in these homes, as well as in a further 3 homes which were not owned by either companies. A total of approximately £50 million has been invested across these homes since 2016.

A number of misleading statements and/or impressions were given to investors about the financial sustainability of the schemes. These included an unrealistic level of return of between 8% and 10% a year.

Shortly before placing the two companies into administration, Defendant 1 moved £1.8 million, substantially all of their funds, into a newly established bank account, leaving the two companies without any funds. The FCA also alleges that Defendant was knowingly concerned in the activities of the companies and that Defendant 2, the sole Director of one of the companies, is knowingly concerned in the activities of it.

### FCA bans three individuals from working in the financial services industry for non-financial misconduct following findings that they are not fit and proper

Each of them had been convicted of serious non-financial indictable offences while working in the financial services industry. Mark Steward, Executive Director of Enforcement and Market Oversight, said:

*'The FCA expects high standards of character, probity and fitness and properness from those who operate in the financial services industry and will take action to ensure these standards are maintained.'*

Defendant 1 was a financial adviser at an authorised firm. In July 2018, Defendant 1 was convicted of serious criminal offences involving the making, possession and distribution of indecent images of children. These offences were committed whilst Defendant 1 was an approved person. Defendant 1 was sentenced to five years' imprisonment, ordered to sign the sex offenders register indefinitely, and included in the list of individuals barred from working with children or vulnerable adults.

Defendant 2 was the sole director and shareholder of an authorised financial advice firm with permission to conduct designated investment business and insurance distribution.

In September 2018, Defendant 2 was convicted of voyeurism, contrary to the Sexual Offences Act 2003. Defendant 2 had surreptitiously observed and video recorded his tenant having a shower without their consent. He committed the offence whilst he was an approved person. Defendant 2 was sentenced to nine months' imprisonment suspended for 18 months, required to complete 100 hours of unpaid work and 25 days of rehabilitation activity, and required to sign the sex offenders register.

Defendant 3 was a director and shareholder of an authorised financial advice firm with permission to advise on pensions, mortgages and investments. In April 2018, Defendant 3 was convicted of sexual assault, engaging in controlling and coercive behaviour and an offence contrary to the Protection from Harassment Act 1997. These offences were committed whilst he was an approved person. Defendant 3 was sentenced to seven years' imprisonment and required to sign the sex offenders register.

### FCA fines an FX options broker £3.44 million for market misconduct

Between 2008 and 2015, brokers at the Firm carried out the practice of 'printing' trades. This involved brokers communicating to their clients that a trade had occurred at a particular price and/or quantity when no such trade had actually taken place. The brokers, across multiple broking desks, did this openly and over a prolonged period. Printing trades sought to encourage clients to trade when they might not have done, to generate business for the Firm. As such, the Firm did not observe proper standards of market conduct. Furthermore, the Firm did not react to warning signs that printing might be taking place or act to address the risk of it, and so failed to act with due skill, care and diligence.

Neither were there any records to evidence the practice which, in turn, meant the investigation had to establish the existence of a practice that was opaque and unrecorded in any of the Firm's records. The Firm also had shortcomings in its oversight and compliance arrangements to detect and counter the risk of brokers providing price or quantity information on the basis that it was based on actual trades when these had not taken place.

The FX Firm agreed to resolve this case with the FCA, thereby qualifying for a 30% discount to the overall financial penalty imposed. Without this discount, the FCA would have imposed a financial penalty of £4.92 million.

## Irish Regulatory News

### Central Bank reports on MiFID Best Execution thematic inspection

On 10 November 2020, the Central Bank of Ireland (CBI) released its findings from the recent inspection of MiFID firms' compliance with best execution requirements in the format of a "Dear CEO Letter".

The review focussed on the effectiveness of these best execution frameworks, including the associated governance processes. The CBI's main finding was an overarching failure across firms to demonstrate how they were complying with best execution requirements.

The CBI found that that there was insufficient governance around best execution monitoring. It is expected that MiFID firms will implement the following in relation to best execution:

1. Clear decision-making processes, including a mechanism for senior personnel to review and challenge escalated results of execution monitoring and for the results of any review to be fed back into execution policies and procedures.
2. Evidence of Board and/or committee oversight and challenge of best execution activities.
3. A documented and detailed compliance monitoring programme that covers best execution activities, is more than a 'tick-box' exercise and has been approved by the Board.
4. Maintenance of error logs for both internal and external errors where a third-party provider has been appointed.

The Central Bank also recommends that firms:

1. Establish a core list of over the counter ("OTC") instruments and ensure it is updated as necessary.
2. Maintain an inducement policy and gift/hospitality log to capture gifts or inducement for staff.
3. Obtain client consent as part of the onboarding process.
4. Maintain a Board-approved record-keeping policy that clearly identifies how the firm records initial and subsequent orders from clients intended to result in transactions or that relate to client orders. These records should be maintained for the mandated time periods and permit a full audit trail.

The Central Bank **requires all firms to consider the contents of the Letter and review their best execution frameworks and processes against its findings and the good practices set out in the Appendix to the Letter.** Where gaps/weaknesses are identified, firms are expected to immediately develop and implement actions to mitigate any risk to customers.

### The Central Bank of Ireland reports on compliance with the Fitness and Probity Regime

On 17 November 2020 the CBI reported its view findings and observations on Regulated Financial Service Providers' compliance with the Fitness and Probity Regime.

The Central Bank expects that **all firms will take appropriate action to review their F&P frameworks and address the significant issues set out in the Letter**. Evidence of this review should be able to be produced to the Central Bank upon request.

## Central Bank welcomes EU Commission announcement of temporary UK equivalence decision for the Central Securities Depository Regulation until 30 June 2021

The recent announcement is another important action aimed at ensuring the Irish capital markets do not face disruption at end December 2020 when the UK's transition period ends.

The temporary equivalence decision is a key milestone and allows the European Securities and Markets Authority (ESMA) commence the formal recognition process of Euroclear UK & Ireland (EUI). The process is necessary to provide the basis for Irish issuers' securities to continue to be issued and settled through the CREST system, operated by EUI, for a time-limited period until the migration to the alternative EU-based CSD is complete.

Euroclear Bank Belgium has been selected as the preferred long-term CSD solution for the Irish market. The CBI acknowledges and continues to monitor the work being undertaken by the project team and wider market participants, to facilitate the Irish market migration to the EU based CSD. However, the Central Bank highlights again the need for the whole industry to maintain momentum as it enters the final phase of this complex, multi-year migration project. The Central Bank expects industry to continue to work to ensure successful migration by the agreed March 2021 timeline. The temporary equivalence timeline of June 2021 provides a contingency for potential unforeseen events.

## Small and medium-sized enterprises play a vital role in the Irish economy and will be central to Ireland's economic recovery – Deputy Governor, Ed Sibley

Despite unprecedented fiscal and monetary interventions to cushion the effects of the pandemic, SMEs are currently operating in a very difficult and uncertain environment.

The Central Bank is focused on ensuring appropriate supports are available for SMEs and expects lenders to provide individually-tailored supports to SMEs, including interim supports where the impact is likely to be temporary and other more permanent solutions where appropriate.

In addition to the impact of COVID-19, SMEs are facing risks and challenges associated with the ending of the Brexit transition period.

Speaking at a Small Firms Association Webinar, Deputy Governor of the Central Bank, Ed Sibley highlighted the vital role played by small and medium-sized businesses in the Irish economy. He also set out the Central Bank's observations as to the effects of the pandemic on these businesses, including:

- SMEs are facing considerable financial strain in the current pandemic relative to larger businesses and households
- The shock to SME turnover has been large and is creating significant cash-flow challenges in some sectors
- Most SMEs have continued to access finance but new lending has declined
- There are challenges for SMEs which do not have an existing banking relationship or have greater indebtedness
- System-wide payment breaks offered by lenders provided important relief for many SMEs and individually-tailored solutions are now required from lenders
- A significant issue for some SMEs has been the extent to which insurance policies cover the business disruption caused by COVID-19.

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- Dublin also provides Fund UCITS IV Reporting, MLRO and Company Secretarial Services.
- Related Training

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