FMConsult compliance solutions

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"Just walk away"

David Frost – The UK chief negotiator

The Brexit Transition period ends, 31st December 2020. In 4 months, the UK leaves Single Market and Customs Union.

The temporary permissions regime (TPR) will enable relevant firms and funds which passport into the UK to continue operating in the UK when the passporting regime falls away at the end of the transition period.

UK Regulatory News

FCA announces proposals to update Dual-regulated firms Remuneration Code

The FCA has published a consultation paper with proposals to amend its Dual-regulated firms Remuneration Code and relevant non-Handbook guidance in line with the Capital Requirements Directive V (CRD V).

The proposals aim to ensure that the FCA's remuneration regime applicable to banks, building societies and PRA-designated investment firms:

- continues to promote healthy cultures and minimise harm to consumers and markets
- remains largely consistent with the PRA's remuneration framework

All interested stakeholders are invited to provide feedback on the FCA's consultation paper by **30 September 2020**.

The PRA has also issued a consultation on implementing CRD V, including on remuneration. Both publications follow HM Treasury's recent consultation document on updating the UK's Prudential Regime before the end of the Transition Period.

Anti-Money Laundering and Counter-Terrorist Financing: Supervision report 2018-19

The Treasury appoints supervisors to monitor the Anti-Money Laundering (AML) and Counter-Terrorist Financing (CTF) compliance of businesses that are in the scope of the Money Laundering Regulations (MLRs). In order to improve the transparency and accountability of supervision and to encourage good practice, the Treasury has worked with supervisors to develop an annual report on the performance of AML/CTF supervisors. This report also fulfils the Treasury's obligation under the MLRs to ask all designated AML/CTF supervisors to provide information on their supervisory activity and publish a consolidated review of this information.

The FCA have reported that approximately 22% of firms visited were non-compliant with the regulations. The FCA supervision identified frequent breaches such as:

- inadequate client risk assessments;
- ineffective application of enhanced due diligence, leading to poor identification and monitoring of high risk customers;
- inadequate AML policy procedures; and
- the lack, or inadequacy, of AML training for relevant staff.

JMLSG publishes new Guidance

The Joint Money Laundering Steering Group (JMLSG) published two new pieces of Guidance. The Board approved text includes a new annex within Part I: Annex 5-V on Pooled Client Accounts, and a new sectoral piece within Part II: Sector 22 Cryptoasset exchange providers and custodian wallet providers. There is also a minor amendment to paragraph 5.3.53 within Part I.

Publication of Wolfsberg Group statement on Developing an Effective AML/CTF Programme

The Wolfsberg Group have published its statement on Developing an Effective Anti-Money Laundering AML/CTF Programme. This document outlines steps that Financial Institutions (FIs) can take to evolve their AML/CTF regimes to meet the key elements of an effective programme.

The group have suggested that Financial Institutions take the following steps to evolve their AML/CFT programmes:

1. Assess risk in defined priority area
2. Implement/enhance controls
3. Prioritise resources
4. Engage with Law enforcement
5. Demonstrate AML/CTF programme effectiveness

Capital Market Regulation and coronavirus

In a speech by Mark Steward, Executive Director of Enforcement and Market Oversight, titled: building market and investor confidence he stated that:

- Capital markets work well when investors have confidence that there are effective rules or standards directed to tackling distortions and unfairness.
- In cases of market abuse, investor confidence is encouraged when companies take effective internal remedial steps, such as over their governance and oversight structures. Compensation to affected shareholders will play an important part in addressing the consequences of market abuse.
- The FCA has introduced many temporary measures to address the difficulties faced by capital markets during coronavirus (Covid-19). The FCA continue to actively monitor these measures to ensure the markets continue to work well and safely bridge between pre-coronavirus and post-coronavirus worlds.

FCA consults on new rules to improve open-ended property fund structures

At present investors in these funds can buy and sell units on a frequent – often daily – basis. But the underlying property in which these funds invest cannot be bought and sold at the same frequency. This creates a liquidity mismatch.

When too many investors simultaneously redeem their investments, a fund manager may need to suspend dealings in the units of the fund because of the liquidity mismatch between the fund units and the underlying property assets.

Property fund suspensions have occurred with increasing frequency in recent years, including following Brexit and in the current coronavirus pandemic. Fund suspensions exist to protect investors in exceptional circumstances. However, the FCA has seen repeated suspensions of these funds over recent years for liquidity reasons, which suggests that there may be wider problems.

The FCA is concerned that the current structure could disadvantage some investors because it incentivises investors to be the first to exit at times of stress. This can potentially harm those who remain if the fund suspends or assets are sold rapidly due to liquidity demands.

The proposed notice period of potentially up to 180 days would allow the manager to plan sales of property assets so that it could better meet redemptions that are requested. It would also enable greater efficiency within these products as fund managers would be able to allocate more of the fund to property and less to cash for unanticipated redemptions.

The FCA will publish a Policy Statement with final rules as soon as possible in 2021. The consultation remains open to responses until 3 November 2020.

Senior Managers and Certification Regime: solo-regulated firms

The SM&CR sets a new standard of conduct in financial services, ensuring:

- greater personal accountability at all levels
- minimum standards of conduct
- staff in key jobs are fit and proper to perform their roles

The regime consists of 3 key parts: the Certification Regime, the Conduct Rules and the Senior Managers Regime.

The Certification Regime applies to employees whose role means it's possible for them to cause significant harm to the firm, its customers or the market more generally. These roles are called 'Certification Functions'. These people won't need to be approved by the FCA. Instead, firms will need to check and certify that they are fit and proper to perform their role at least once a year.

Firms should demonstrate that they are making regular, thorough and consistent assessments of the fitness and propriety (F&P) of Senior Managers and Certification Staff.

The Conduct Rules set minimum standards of individual behaviour in financial services. The Conduct Rules will apply to almost all employees who carry out financial services activities, or linked activities, in a firm. Some Conduct Rules apply to all employees, while others only apply to Senior Managers.

The Certified individuals have to have their details uploaded onto the FCA's new Directory by 9th December, unless the firm has specific reasons to utilise the COVID extension.

LIBOR transition – the critical tasks ahead of us in the second half of 2020

Edwin Schooling Latter, Director Markets and Wholesale Policy at the FCA, delivered a speech at a webinar hosted by the International Swaps and Derivatives Association where he highlighted that:

- The 4 to 6 months ahead are arguably the most critical in the transition away from LIBOR. It is time to act now.
- ISDA is now close to finalising the protocol and other documentation through which outstanding derivatives contracts which reference LIBOR can transform, more or less seamlessly, to work on the new RFRs
- The FCA has repeatedly urged market participants from all sectors – sell side, buy side, non-financial, to ensure they are ready for the end of LIBOR by adhering to the protocol that ISDA is producing.

FCA highlights concerns when credit firms allow repeat borrowing

The FCA has published the findings of a review into relending by firms that offer high-cost credit. The review, which was completed prior to the coronavirus pandemic, highlights concerns about poor practices by some firms and notes that nearly half of consumers regretted borrowing more money. As firms in this sector begin to lend again, the report sets out the FCA's expectations on how they must treat consumers.

The review found that levels of debt increased as consumers took additional credit from high-cost lenders. Some consumers said they experienced financial difficulties as a result, including missing payments and prioritising repayment of debt over other expenses.

High-cost credit customers are more likely to be vulnerable, have low financial resilience and poor credit histories.

Poor firm conduct that was highlighted included:

- poor practice in the use of online accounts and apps to encourage consumers to borrow more;
- marketing messages which emphasised the ease, convenience and benefits of taking more credit.

The FCA is concerned about the failure to balance these messages with the risks – including those that can come from taking on more debt than you can afford.

The report also calls out concerns about behaviour which suggests some customers may be trying to deal with financial difficulties through further borrowing. In these cases, the FCA expects the firm to assess whether further borrowing is in the customer's best interests. They should do this by considering the customer's overall financial situation and whether forbearance or debt advice might be more appropriate than additional lending.

Rigorous affordability assessments are key to avoiding harm in this area, and firms should ensure they are making proportionate and responsible assessments of the sustainability of borrowing.

The FCA has made a number of temporary interventions to help consumers who are under additional financial pressure due to the impact of coronavirus.

Missing Cryptoqueen: Why did the FCA drop its warning about a major Cryporcurrency scam?

In June 2016, the 'Cryptoqueen' told an audience of thousands at Wembley Arena that her new cryptocurrency, was a "Bitcoin killer" and would make early investors rich. Many in the crowd had already poured in their life savings. Many more followed. About £2bn from across the world was spent on crypto tokens from the firm, including tens of millions of pounds from British families. Then, in late 2017, she disappeared and the scheme was exposed to be a scam. There was no cryptocurrency. It was an old-fashioned Ponzi scheme.

The FCA first posted an online warning just over three months after June 2016. On or around 1 August 2017, with the scam in full momentum, the authority suddenly removed its notice and the crypto firm's promoters quickly began claiming it meant the FCA no longer considered the firm a risk.

When asked why the notice was removed the FCA reportedly claimed that the initial decision to publish the notice had been at City of London Police's request and the decision to take it down had been made "in conjunction" with the force. "*It did not appear that [the crypto firm] was carrying on any activities that required FCA authorisation*," it said. "*The FCA does not regulate crypto-assets and therefore it could not take this matter further.*"

City of London Police ultimately dropped its own investigation, citing "insufficient evidence to support criminal proceedings" but was thanked by US prosecutors for helping them convict a lawyer who had helped launder $400m (£300m) of the firm's proceeds.

High Court orders two illegal pension introducers and their directors to pay £10,715,000 restitution to consumers

In a case brought by the FCA, the High Court has ordered two companies and three individuals to pay a total of £10,715,000 in restitution to members of the public who were induced to transfer their pensions into self-invested personal pensions (SIPPs).

In a judgment dated 30 June 2020, the Court found that the two company's activities were unlawful as they had engaged in the regulated activities of arranging and advising on investments, made unapproved financial promotions through their websites, promotional material and in telephone calls to consumers and made false or misleading statements. The Court also found that the three directors were knowingly concerned in the breaches.

The Court has ordered the Defendants to pay the following sums in restitution: £10,000,000 (one of the companies), £715,000 (the other company), and two of the directors to pay £2,500,000 each and the other to pay £1,700,000.

Mark Steward, the FCA's Executive Director of Enforcement and Market Oversight said: "*The FCA will make wrongdoers financially accountable to consumers whom, as the Court recognises in this decision, '…include elderly and vulnerable citizens who have paid their due share of income tax, made sacrifices, and taken prudential decisions for their future retirement over the course of an honest working life*"

Irish Regulatory News

Central Bank publishes findings from inspection of investment firms' compliance with appropriateness test for consumers

The Central Bank of Ireland recently undertook a thematic inspection to review firms' compliance with the "appropriateness'' requirements set out in the European Union's Markets in Financial Instruments Directive (MiFID II), and on 29 June published its findings.

The inspection found evidence that a number of firms are not paying sufficient attention to the requirements, instead placing undue reliance upon 'box-ticking' to demonstrate compliance.

The Central Bank is engaging directly with those firms where issues have arisen. The Central Bank has also sent a letter to all MiFID firms, detailing the findings of the inspection together with recommendations to enhance their compliance arrangements, where relevant.

In particular they highlighted a number of weak practices including:

- Weak warnings which did not sufficiently alert the client to the risks of proceeding with the transaction/nor act as an interruption to the process.
- In certain cases, where firms employed a defined scoring system, the underlying criteria for awarding points was questionable and/or unclear.
- Appropriateness files that were not completed in full, yet the application still proceeded. For example, where a client indicated experience in a specific instrument, key experience information on trading volume and frequency was often absent or incomplete.
- Use of generic information-gathering questionnaires across a broad range of financial instruments regardless of specific features, risk or complexity

The letter issued also indicated that a Common Supervisory Action on Suitability is being undertaken in 2020.

Central Bank of Ireland communicates its expectations of investment firms when engaging in unregulated activities

On 25 June 2020, The Central Bank of Ireland (the "Central Bank") issued a letter to MiFID firms outlining its expectations of investment firms when engaging in unregulated activities.

The Central Bank is aware that some investment firms ("Firms") are offering products and services considered to be outside of the scope of regulation. Where Firms engage in both regulated and unregulated activities, there is a significant risk that clients may misunderstand the protections they are afforded when investing in unregulated products.

As a consequence, Firms must ensure they are acting fairly, professionally and in accordance with the best interests of their clients at all times and be clear in the following ways:

- When providing unregulated products or services, the regulatory status must be clearly and effectively communicated in all dealings with clients, and at every stage of the sales process.
- Include appropriate disclosures and risk warnings in a prominent position on all information provided to clients. 'Information' includes but is not limited to brochures, information memoranda, webpages and other marketing materials.
- Information should be clear about the regulatory status of the product; terminology used must not imply that the product or service is regulated where this is not the case.
- Explicitly state what investor protections are lost/not applicable when investing in a product deemed to be out of scope of regulation, including: compensation schemes, client assets protections, and recourse to ombudsman (as applicable).
- The Firm's regulatory status must not be used as a promotional tool. Firms may only use the regulatory disclosure statement in communications with a consumer where such communications relate solely to a regulated activity.
- Any information on the Firm's website related to unregulated activities should be clearly distinguished from regulated activities. Firms must have separate sections on any website it operates, for regulated activities and any other activities which it carries out.

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European Commission AML Action Plan 2020

On 7 May 2020, the European Commission adopted an action plan for a comprehensive Union policy on preventing money laundering and terrorism financing. This action plan sets out six pillars which the European Commission intends to deliver on by 2021, as follows:

- Pillar 1: Implementation of existing rules;
- Pillar 2: A single EU rulebook;
- Pillar 3: EU-level supervision;
- Pillar 4: A support and cooperation mechanism for financial intelligence units;
- Pillar 5: Better use of information to enforce criminal law;
- Pillar 6: A stronger EU in the world.

On 19 May 2020, the European Commission launched a public consultation in relation to the Action Plan, in order to gather the views of citizens and stakeholders on the actions that the Commission has identified as priorities within its Action Plan and to assist in preparing potential future initiatives to strengthen the EU's AML/CFT framework.

Ultimate Beneficial Owner (UBO) filing requirements for Irish Regulated Funds imposed

The 2020 Regulations seek to modify the 2019 Corporate Regulations, but only insofar as the 2019 Corporate Regulations apply to certain financial institutions, including Irish Collective Asset-Management Vehicles (each an "ICAV") and Unit Trusts.

In terms of their effect, the principal changes brought into effect by the 2020 Regulations can be summarised as follows:

- Those holding beneficial ownership registers for Unit Trusts are to be subject to a "greater than 25 percent ownership" or control standard in terms of assessing whether or not one or more beneficial owners exist in the context of the scheme, similar to that in place for corporate entities subject to the 2019 Corporate Regulations;
- Management Companies are allocated the obligation, in first instance, of ensuring a Unit Trust's adherence with its obligations with respect to beneficial ownership;
- The "senior managing official" framework which exists for corporate entities subject to the 2019 Corporate Regulations in default of an identifiable beneficial owner does not apply to Unit Trusts, and their Management Companies are expressly not to be subject to such an analysis, in the context of the trust, however, Trustees are stated as being amongst the classes of entity to be listed as beneficial owners (without provision being made as to whether or not the Trustee must be a natural person);
- In addition the Central Register of Beneficial Ownership of Companies and Industrial and Provident Societies a new register will be created - A Central Register of Beneficial Ownership of Irish Collective Asset-management Vehicles, Credit Unions and Unit Trusts;
- The Minister for Finance is empowered to appoint a Registrar who shall maintain the New Register;
- Entities subject to the 2020 Regulations, including ICAVs and Unit Trusts will have until 25 December 2020 to submit this information to the Register.

Enforcement Action Notice: The Governor and Company of the Bank of Ireland fined €1,660,000 and reprimanded by the Central Bank of Ireland for regulatory breaches causing loss to a client and for misleading the Central Bank in the course of the investigation

On 27 July 2020, the Central Bank of Ireland (the Central Bank) reprimanded and fined The Governor and Company of the Bank of Ireland (BOI) for five breaches of the MiFID Regulations committed by its former subsidiary, Bank of Ireland Private Banking Limited (BOIPB). BOI has admitted the breaches, which vary in length from one to ten years.

In line with its published Sanctions Guidance, the Central Bank has determined the appropriate fine to be €2,370,000, which has been reduced by 30% in accordance with the settlement discount scheme provided for in the Central Bank's Administrative Sanctions Procedure.

The Central Bank's investigation arose from a cyber-fraud incident that occurred in September 2014 (the Incident). Acting on instructions from a fraudster impersonating a client, BOIPB made two payments to a third party account totalling €106,430: one from a client's personal current account, the other from BOIPB's own funds. BOIPB immediately reimbursed the client. During a Full Risk Assessment of BOIPB in 2015, the Central Bank discovered a reference to the Incident in an operational incident log.

BOIPB had not reported the cyber-fraud to An Garda Síochána, and only did so at the request of the Central Bank over one year after the Incident.

The Central Bank's investigation found serious deficiencies in respect of third party payments, including:

- Inadequate systems and controls to minimise the risk of loss from fraud
- Inadequate governance, oversight and ongoing review of the systems and control environment
- Lack of staff training and a culture in which fulfilling clients' instructions was given primacy over security and regulatory requirements
- Lack of compliance monitoring.

The level of fine was impacted by two aggravating failures of BOIPB:

1. failure to be open and transparent
2. the excessive amount of time it took BOIPB to fully remediate the relevant deficiencies.

This case should serve to highlight to all firms the importance of ongoing vigilance in the area of cyber security. The Central Bank expects all firms to consider, identify and manage operational and cyber risks and ensure that their staff receive appropriate training tailored to the risks associated with their duties and responsibilities.

The Central Bank expects pro-active engagement from regulated entities – that extends from self-reporting through remediation and full cooperation with the investigation.

ECJ fines Ireland €2m over failure to transpose MLD4 on time

On 16 July 2020, the Court of Justice of the EU (the "ECJ") ordered Ireland to pay a fine of €2 million to the European Commission, due to Ireland's failure to fully transpose the Fourth Anti-Money Laundering Directive (EU) 2015/849 ("MLD4") on time.

Ireland is not the only country to have been fined by the ECJ for failure to implement MLD4 by the relevant deadline. The ECJ also published a decision last week, requiring Romania to pay the Commission €3m for delays in implementing the Directive.

MLD4 was published in the EU's Official Journal on 5 June 2015 and Member States were required to transpose the Directive into national law by 26 June 2017. The ECJ found that MLD4 was not finally fully transposed into Irish law until 3 December 2019.

In deciding to impose a financial penalty of €2m on Ireland the ECJ took into account the seriousness of Ireland's failure to fulfil its obligations, the length of time which the failure persisted (almost 2.5 years), and the ability of Ireland to pay a financial penalty, by reference to its GNP.

MLD5 was due to be transposed into national law by 10 January 2020, however to date Ireland has only partially transposed it into domestic legislation.

In May of this year, the European Commission sent Ireland a formal notice for having only partially transposed MLD5; this may ultimately lead to a further fine.

EU update on the Impact of Brexit on the Transfer of Personal Data to the UK

On 6 July 2020, the European Commission published a Notice to Stakeholders on the Withdrawal of the UK and EU Rules in the Field of Data Protection (the "Notice").

The Notice states that following the end of the transition period any transfer of personal data to the UK, other than that governed by Article 71(1) of the Withdrawal Agreement will not be treated as data shared within the Union.

Therefore all relevant stakeholders will need to comply with the relevant Union rules applicable to transfers of personal data to third countries (countries that are not members of the EU).

Firms transferring data may instead use:

- standard data protection clauses;
- binding corporate rules;
- codes of conduct and certification under Article 46 of the GDPR; and
- specific derogations outlined in Article 49 of the GDPR.

The Notice also provides greater detail to stakeholders in relation to a number of these safeguards.

- Binding Corporate Rules -a new approval from a competent authority of an EU Member State confirming that they provide an appropriate safeguard for international transfer of personal data will be required after the end of the transition period.
- Codes of Conduct and Certification under Article 46 of the GDPR - the approval of codes of conduct or certification by the competent supervisory authority of the UK no longer provide for appropriate safeguards after the end of the transitional period. Guidance is being prepared by the EDPR in relation to codes of conduct and certification being used as transfer mechanisms.

Article 71(1) of the Withdrawal Agreement provides that the personal data of data subjects outside of the UK, where the data was:

- transmitted to the UK or otherwise processed in the UK before the end of the transition period; or
- transmitted to the UK or otherwise processed in the UK after the end of the transition period on the basis of the Withdrawal Agreement;

will continue to be processed in the UK in accordance with the GDPR after the end of the transition period.

This provision protects data subjects whose personal data had been transmitted to the UK while the UK was still a Member State, as well as during the transition period.

New system for submitting STRs to Revenue

As a designated person you are required under chapter 4 of the Criminal Justice (Money Laundering and

Terrorist Financing) Act 2010, if you know, suspect or have reasonable grounds to suspect that a client is engaged in money laundering or terrorist financing, to report it on a confidential basis to the Financial Intelligence Unit (FIU) of An Garda Síochána and to Revenue.

The suspicious transaction report (STR) to the Financial Intelligence Unit is made using the GoAML system.

From 7 September 2020, Revenue will introduce changes on how Suspicious Transaction Reports (STRs) are submitted to them. Reporting Entities (as defined in Section 42 of the Criminal Justice Act 2010 as amended) will be required to submit all STRs to Revenue, using Revenue's Online Service (ROS) only. Revenue will no longer accept hard copy (paper) STRs from that date onwards.

To use the service, you will need:

- To be registered with Revenue Online Service (ROS) login details and have a valid ROS digital certificate;
- Your organisation's FIU registration ID (which is available on An Garda Síochána GoAML website);
- A ROS sub-user certificate for STR reporting. This can be done using the Admin Services tab available on ROS.

The Revenue website provides details of how to register and submit STRs online. Some guidance that may be useful is also attached.

Please note that you are also required to continue to make the STR to the Financial Intelligence Unit via the GoAML system.

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UK and Ireland

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

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