

**“When things are bad, we take comfort in the thought that they could always get worse. And when they are, we find hope in the thought that things are so bad they have to get better.”**

**- Malcolm S. Forbes**

After the recent announcement of another nationwide lockdown happening this month, it is now even more imperative that as an industry, we continue to consistently review and follow advice given to us from regulators, to ensure fair treatment is given to all customers, vulnerable or otherwise.

## UK Regulatory News

### **Statement on MiFID trade reporting and position limit obligations**

On 1 October, ESMA published a statement saying that it intends to assess UK trading venues in relation to its opinions on MiFIR trade reporting and commodity derivatives position limits.

If positively assessed, they will be added to the list of venues with a positive or partially positive assessment for the purposes of those opinions with effect from the end of the EU withdrawal transition period.

This means that EU investment firms trading on these UK venues would not need to publish details of those transactions through an Approved Publication Arrangement (APA) in the EU. Commodity derivatives traded on UK venues would also not be regarded as economically equivalent OTC contracts counting towards the EU commodity derivatives position limits regime.

### **Market abuse in a time of coronavirus**

*Speech by Julia Hoggett, Director, Market Oversight, at the City Financial Global event (conference taking place virtually) on 12 October 2020.*

#### Risk Assessments

It is essential in changing times that firms identify the risks associated with the new environment in which we are all operating. The FCA undertakes regular assessments of the typologies of market abuse behaviour that they believe give rise to the greatest level of harm. The FCA have, during the crisis, refreshed this analysis to ensure that their mitigation activity is working effectively.

Julia highlighted 3 key themes from their risk assessment:

#### 1. Primary Markets

It is remarkable how well the core infrastructure and participation in the UK wholesale markets functioned as we all transitioned to a world in lock-down. The FCA's focus on markets remaining open is driven by the fundamental role they play in supporting the economy. The fundamental need for institutions to ensure that they have appropriate controls over inside information and effective information barriers is even more critical at times like these.

#### 2. Surveillance Alert Triage and Suspicious Transaction and Order Reports (STORs) in volatile markets

The dramatic increase in trading activity and volatility, particularly at the start of the crisis, in most cases leading to a surge in alert volumes across the board.

Firms and venues have managed the increased output in a variety of ways – some have been able to deal with it with some flexibility. Other firms have recalibrated or applied additional filters to their alert generation.

#### 3. Surveillance and new ways of working

The pandemic has caused a great many changes to the way we all operate. There is the need to navigate huge amounts of change over the coming months, depending on the path of the virus, and the FCA work through Return of Office models. This also requires firms to adjust the way in which they think of the range of surveillance tools available to them.

The FCA expect firms to have updated their policies, refreshed their training and put in place rigorous oversight reflecting the new environment – **particularly regarding the risk of use of privately owned devices.**

These policies should be demonstrable to the FCA and to firm's audit teams. New communication mechanisms, before they are used, should have controls in place where required and their use be approved by firm management. The regulatory obligations have not changed, the how may be changing, but the what remains the same.

### **Changes in the application of Regulation (EU) 2019/2088 on the sustainability-related disclosures**

On 30 October 2020, the European Commission published a letter from it to the chairs of the European Supervisory Authorities regarding the application of Regulation (EU) 2019/2088 on the sustainability related disclosures in the financial services sector and related technical standards.

Key points in the letter include:

- The unprecedented economic and market stress caused by the COVID-19 pandemic has necessitated an extension of the deadline for the public consultation on the draft RTS.
- The application of the Regulation is not conditional on the formal adoption and entry into force or application of the RTS as it lays down at Level 1 general principles of sustainability-related disclosures in three distinct areas. Therefore all application dates are being maintained as laid down by the Regulation with effect from 2021. Financial market participants and financial advisers subject to the Regulation will need to comply with its high level and principle based requirements from that time.
- Financial market participants must, in accordance with the applicable sectoral legislation, already consider sustainability risks in their internal processes. Product manufacturers that produce financial products that qualify under Articles 8 and 9 of the Regulation must describe in the product documentation how the levels of sustainability are achieved. In relation to transparency of adverse sustainability impacts, numerous financial market participants currently comply with the non-financial reporting requirements under Directive 2013/34/EU or adhere to international standards and might consider using that information.
- To provide financial market participants and financial advisers adequate time for implementation, the RTS will become applicable at a later stage.

### FCA welcomes Financial Services Bill

The FCA welcomes the Financial Services Bill introduced in Parliament, which will help to maintain high standards and provide greater clarity to firms.

The FCA particularly welcomes the Bill's provisions to amend the Benchmarks Regulation, which is intended to help manage and direct an orderly wind-down of critical benchmarks such as LIBOR.

The Bill also includes a number of areas of interest to the FCA, including:

- the prudential regulation of investment firms (measures relating to the Investment Firms Prudential Review)
- a new route for overseas funds to market to retail investors through the introduction of a new Overseas Funds Regime
- a new framework for our regulatory relationship with Gibraltar

### FCA bans the sale of crypto-derivatives to retail consumers

The FCA has published final rules banning the sale of derivatives and exchange traded notes (ETNs) that reference certain types of cryptoassets to retail consumers.

The FCA considers these products to be ill-suited for retail consumers due to the harm they pose. These products cannot be reliably valued by retail consumers because of the:

- inherent nature of the underlying assets, which means they have no reliable basis for valuation
- prevalence of market abuse and financial crime in the secondary market (e.g. cyber theft)
- extreme volatility in cryptoasset price movements
- inadequate understanding of cryptoassets by retail consumers
- lack of legitimate investment need for retail consumers to invest in these products

To address these harms, the FCA has made rules banning the sale, marketing and distribution to all retail consumers of any derivatives and ETNs that reference unregulated transferable cryptoassets by firms acting in, or from, the UK.

The FCA estimates that retail consumers will save around £53m from the ban on these products.

The ban will come into effect on 6 January 2021. UK consumers should continue to be alert for crypto-derivative investment scams. As the sale of derivatives and ETNs that reference certain types of cryptoassets to retail consumers is now banned, any firm offering these services to retail consumers is likely to be a scam.

### FCA bans two directors who provided false and misleading High Net Worth declarations

The FCA has today banned two directors from performing any regulated activity because of their roles in the submission of false and misleading information about customers' high net worth status.

The FCA found that Director 1 was dishonest about the high net worth status of six customers by submitting fabricated information, including fabricating figures for fictitious properties.

Between 26 February 2014 and 21 November 2014, Director 1 also dishonestly submitted 27 high net worth declarations in which he falsely claimed to have seen evidence of the customers' net worth.

In addition, in July 2013 and April 2014, Director 1 dishonestly submitted false information relating to his own financial circumstances to the SIPP provider when submitting his own applications.

The FCA found that between 6 March 2013 and 1 September 2014, Director 2 submitted 48 high net worth declarations in which he falsely claimed he had seen evidence of the customers' net worth.

Both Directors knowingly and repeatedly made these false declarations, and thereby increased the number of customers who purchased shares. This generated substantial fees and commissions from which the directors benefitted. As a result of the directors' actions, customers lost money. **Both directors lack integrity and have been banned from carrying out any regulated activities.**

### FCA secures £1.6m confiscation order against Richard Baldwin

On 5 October 2020, at Southwark Crown Court, His Honour Judge Hehir made a confiscation order against a previously convicted Money Launderer in the sum of £1,633,766. He was ordered to pay the order within 3 months or he will face a further 8 years in prison.

The confiscation order was made in the defendant's absence after he absconded from justice during his trial and conviction for money laundering in 2017. He was previously sentenced to a total of 5 years and 8 months' imprisonment for the offence as well as separate contempts of court which he admitted in 2015.

The confiscation order reflects his benefit from laundering the proceeds of a conspiracy to insider deal between October 2007 and November 2008 which also involved his co-defendants. The defendant used off-shore companies, bank accounts and false invoices and during the earlier sentencing hearing HHJ Hehir remarked that the defendant had been convicted on 'compelling evidence' of 'extremely sophisticated' money laundering. An arrest warrant has been issued for the defendant to be brought before the Court.

### FCA fines a privately owned asset management firm £873,118 for breaches of short selling disclosure rules

The FCA has fined a privately owned asset management (the Firm) £873,118 over transparency failures.

The Short Selling Regulation 2012 (SSR) sets out thresholds for when a firm is required to notify the FCA and disclose to the public details of net short positions held.

From 24 February 2017 to 5 July 2019, the Firm failed to make 155 notifications to the FCA and 153 disclosures to the public of its net short position in a regulated security. By 5 July 2019, the Firm had built a net short position equivalent to 16.85% of the issued share capital in a regulated security, which was then held by the Firm for a further 106 trading days before being notified to the FCA and disclosed to the public.

The Firm agreed to resolve this matter and qualified for a 30% discount under the FCA's executive settlement procedures. Were it not for this discount, the FCA would have imposed a financial penalty of £1,247,312 on the Firm.

This is the first time the FCA has taken enforcement action for a breach of the SSR.

### **FCA and PRA fine a subsidiary of an American investment bank £96.6m for risk management failures in connection with a Malaysian state-owned development company that has been at the centre of billion-dollar embezzlement allegations.**

The subsidiary underwrote, purchased and arranged three bond transactions for the development company in 2012 and 2013 that raised a total of US\$6.5 billion for the development company. The development company transactions were approved by global committees that the subsidiary participated in, and were booked to the subsidiary.

The development company transactions involved clients and counterparties in jurisdictions with higher financial crime risk. The subsidiary was also aware of the risk of involvement of a third party that the subsidiary had serious concerns about. The subsidiary failed to assess and manage risk to the standard that was required given the high risk profile of the development company transactions, and failed to assess risk factors on a sufficiently holistic basis. The subsidiary also failed to address allegations of bribery in 2013 and failed to manage allegations of misconduct in connection with the development company in 2015.

The FCA and PRA fines are part of a US\$2.9 billion globally coordinated resolution reached with the American multinational investment bank and its subsidiaries.

The subsidiary agreed to resolve this case with the FCA and PRA, qualifying it for a 30% discount in the overall penalty imposed by both regulators. Without this discount, the FCA and PRA would have imposed a financial penalty of £69,012,000 (US\$90,000,000) each on the subsidiary.

### **FCA assists innovative companies in tackling coronavirus challenges**

The FCA has opened application windows for two 'sandbox' services to support innovative firms tackling challenges caused by the Covid-19 pandemic.

Application windows for Cohort 7 of the Regulatory Sandbox and the pilot of a new Digital Sandbox initiative have opened this month, with an emphasis on supporting products and solutions that will assist consumers and firms affected by the pandemic.

Three key areas - preventing fraud and scams, supporting the financial resilience of vulnerable consumers, and improving access to finance for small and medium sized enterprises - have been identified as particular areas of importance for the FCA.

Cohort 7 of the Regulatory Sandbox is open to authorised and unauthorised firms as well as technology businesses that are looking to deliver innovation in the UK financial services market.

The Digital Sandbox pilot - launched with the City of London Corporation - aims to support earlier stage innovation where products and solutions are still in development and not at the stage where they are ready to be tested with consumers or in a live production environment.

### **The FCA's letter to the Treasury Select Committee (TSC) on passive servicing issues after the transition period**

The FCA's Chief Executive, Nikhil Rathi, wrote a letter on 9 October to Rt Hon. Mel Stride MP, Chair of the TSC, about UK bank closures of the current accounts of customers living in the EU after the EU withdrawal transition period.

The FCA has now told banks that they should provide timely communications with customers, ensuring that they are treated fairly and provided with sufficient notice to seek alternative arrangements.

The FCA's rules and guidance set out other requirements for banks to provide clear and timely information to customers when closing other types of account. As a minimum, The FCA expects firms' actions to be consistent with the customers' contractual rights.

### **FCA writes joint letter on Brexit with the Bank to CEOs of insurance firms and updates its website for all firms**

Jointly with the Bank of England, the FCA has written a letter to CEOs of insurance firms on the importance of being prepared for the end of the transition period, in order to minimise disruption and ensure market stability.

UK authorities have put temporary measures in place to ensure that UK households and businesses will be able to continue accessing services from EU financial institutions after the end of 2020. These measures include the temporary permissions regime (TPR) and the use of the Temporary Transitional Power (TTP).

However, some volatility and disruption to financial services, particularly to EEA-based clients and customers, could arise. UK firms are continuing to make preparations and engage with clients and customers to minimise any disruption and it is important that they continue to do so.

Final steps by individual firms are required to ensure their preparedness for the end of the transition period.

### **FCA highlights continued support for consumers struggling with payments**

The FCA is urging consumers struggling to make repayments due to the impact of Covid-19, to speak to their lenders about options available to them.

- FCA reminds consumers help is available from lenders if they are finding it hard to keep up with payments due to coronavirus (Covid-19).
- Consumers having trouble managing their debts can get free advice.
- FCA survey shows that in July 12 million UK adults had low financial resilience.
- 31% of adults have experienced a decrease in household income, with Black, Asian and Minority Ethnic (BAME) and young people more likely to be affected.
- Those with low financial resilience are more likely to fall behind on payments.

The FCA has been working with firms to ensure support is given to consumers who are in financial difficulty because of coronavirus. They recognise that the increasing local restrictions placed in recent weeks may lead to increased financial difficulty for some people.

Support will be available both to those who have previously taken a payment deferral and those who are newly in financial difficulty, considering the specific needs of vulnerable consumers. Firms should work with customers to provide support before they miss payments.

**Irish Regulatory News**

**Central Bank issues AML Bulletin on Transaction Monitoring**

On 2 October 2020 the Central Bank of Ireland (Central Bank) published the sixth issue of its Anti-Money Laundering Bulletin, focusing on transaction monitoring.

The Central Bank's bulletin highlights the importance of transaction monitoring, which the Central Bank states will continue to be a key focus area in its ongoing supervision of compliance by designated persons with anti-money laundering (AML) and countering the financing of terrorism (CFT) requirements. The bulletin sets out the Central Bank's findings following supervisory engagements across multiple credit and financial institutions, and also sets out the Central Bank's expectations with regard to the application of transaction monitoring controls.

In the course of carrying out inspections, the AML Division of the Central Bank observed certain common failings in the area of transaction monitoring.

- failure to use the business risk assessment and customer risk assessments to configure appropriate transaction monitoring controls
- insufficient testing of transaction monitoring controls, and the configuration of automated transaction monitoring controls, by second or third lines of defence
- failure by the Board and Senior Management to take appropriate measures to address weaknesses identified with the transaction monitoring process

Following on from its findings, the Central Bank outlines its expectations in relation to transaction monitoring. Firms are asked to note the following:

- In order for transaction monitoring controls to be effective, they must detect what suspicious activity looks like in the context of the firm's business activities and its specific customer profile(s).
- Transaction monitoring controls should be tailored to the firm's business risk assessment and to the customer risk assessment.
- An automated transaction monitoring solution is desirable and in many cases will be necessary. Firms should not place absolute reliance on automated solutions and employees need to be aware of the need to manually identify any transactional activity which may be suspicious.

**New Central Bank Pre-Approval Control Functions (PCF) to take effect that impact the Asset Management industry.**

The three new PCF roles that are being introduced are as follows:

- Chief Information Officer PCF-49 (under the 'General' category);
- Head of Material Business Line PCF-50 (under the 'Banking' category);
- Head of Market Risk PCF-51 (under the 'Banking' category).

Of particular relevance to the Asset Management industry will be the introduction of the Chief Information Officer PCF-49 role and the reassignment of the Designated Person PCF-39 role to the new PCF-39A to PCF-39F roles based on the management function that the relevant Designated Person is appointed to.

The FAQ outlines that those discharging the relevant Designated Person PCF-39 role who are in place on the 5 October, 2020 will not be required to obtain any additional CBI approval to continue to perform the relevant role. However, Fund Management Companies will be required to submit a list of individuals performing each of the PCF-39A to PCF-39F roles to the CBI via an "In Situ Return". This "In Situ Return" must be submitted to the **CBI by Monday 16 November, 2020**. If the person discharging the relevant PCF-39 function changes after 5 October, 2020, he/she will need to obtain the CBI's prior approval before performing this role by completing the CBI's individual questionnaire.

The CBI does not require a PCF, such as PCF-49 role, to be in existence in a regulated financial service provider ("RFSP") where one did not previously exist or where the size or complexity of an RFSP's business does not warrant it. This is for the RFSP to determine itself.

The CBI has noted in the FAQ that it is possible that an RFSP may not require a specific Chief Information Officer ("CIO") and that the role may instead be shared amongst other Controlled Functions e.g. an individual could be listed as Chief Operating Officer and CIO.

**Regulatory engagement to change in Ireland**

The way in which investment funds and other financial services firms submit information to, and engage with, the CBI is to change in light of the introduction of a new online platform.

The CBI has written to businesses in the Irish investment funds market to inform them of the things they need to do in advance of the new portal taking effect in the sector.

Actions for investment funds include nominating a 'portal administrator'. That person will be responsible for the institution's use of the portal, including the management of portal user access and privileges within their institution.

"Initially the portal will allow authorised users to view and request changes to specific institution details," the CBI said in its communication. "Over time, the portal will offer additional regulatory and statistical services, including online returns, fitness & probity applications and industry levy management. Institutions will continue to use systems such as the online reporting (ONR) system until these additional services are available via the portal."

The CBI said it would communicate further with firms about the forthcoming changes and give them at least six weeks' notice prior to opening the window for portal registration.

**The Central Bank's CP86 Day of Reckoning – What You Need to Know**

Support and Resourcing

Fund management companies need to have sufficient resources at their disposal to enable them to carry out their functions properly, taking into account the nature, scale and complexity of their business. It is the responsibility of the board to determine in the light of its particular circumstances the appropriate resourcing of these functions and to satisfy itself that responsibilities for undertaking delegated tasks are allocated accordingly.

Capacity of Designated Person

A Designated Person should have enough knowledge in the area they are managing to interrogate the information being provided to them and constructively challenge the employees or delegates.

### Risk Management

The board should adopt a risk management framework which:

- Identifies the applicable risks;
- Confirms the risk appetite;
- Identifies any appropriate risk mitigants; and
- Incorporates appropriate policies for the measurement, management and monitoring of risk, including the implementation as appropriate of any risk mitigants.

### Investment Management

The board should seek a report or presentation from the investment manager prior to the issue of the prospectus and launch of the investment fund or sub-fund (the "relevant fund" in this Part) to inform it of the investment approach the investment manager proposes to take. The board should be provided with information about at least the following matters:

- The investment objective and policies;
- Any benchmark against which the relevant fund's performance will be presented to investors and/or used in the calculation of performance fees;
- The range of assets into which it is proposed the relevant fund should invest;
- The portfolio management team's credentials for the task;
- The investment processes to be adopted by the portfolio management team;
- The type of restrictions and limitations imposed on the management of the relevant fund;
- Frequency of unit dealing;
- The investment manager's trading protocols;
- The basis on which any securities lending is undertaken;
- The extent to which it is proposed to use financial derivative instruments; and
- Processes for the management of liquidity risks

### Organizational Effectiveness

The independent director who undertakes this task will be on alert for organizational issues and will escalate these to the board.

### Board of externally managed companies

The fund management company is responsible for ensuring that it and its investment funds under management comply with regulatory obligations

### **Investment Firms – Quarterly Legal and Regulatory Update**

#### MIFID II – EUROPEAN DEVELOPMENTS

During the period 1 July 2020 to 30 September 2020, the European Securities and Markets Authority (ESMA) published an updated version of its questions and answers publication "On MiFIR Data Reporting" (Q&As on MiFIR Data Reporting). Updates made to the Q&As on MiFIR Data Reporting are noted below:

- Section 22 - Transaction reporting – Question 13 (new question added on 8 July 2020)
- Section 2 – Legal Entity Identifier (LEI) of the issuer – Question 6 (new question added 28 September 2020)
- Section 22 - Transaction reporting – Question 2 (amended question 28 September 2020)
- Section 22 - Transaction reporting – Question 13 (new question added 28 September 2020)

### ESMA

The following updates made by ESMA include:

- ESMA updates Q&As on Transparency Topics
- ESMA publish opinion on calculating market size of ancillary activity under MiFID II
- ESMA publishes two final reports reviewing key provisions of the MiFID II/MiFIR transparency regime
- ESMA provides guidance on waivers from pre-trade transparency
- ESMA updates transparency opinions for third country venues
- EBA and ESMA launch consultation to revise joint guidelines for assessing the suitability of members of the management body and key function holders
- ESMA grants option to postpone annual transparency calculations for non-equity instruments
- ESMA launched a consultation reviewing the reference data and transaction reporting obligations under MiFIR
- ESMA Publishes Final Report on Third-Country Firm Regime
- ESMA published the final report on the MiFID II/MiFIR transparency regime applicable to non-equity financial instruments

### CENTRAL BANK OF IRELAND

The following updates were made by the Central Bank of Ireland:

- Central Bank publishes statement on use of electronic signatures
- On 4 September 2020, the Central Bank Act 1942 (Section 32D) Regulations 2020 (S.I. No. 345 of 2020) (Regulations) came into operation.

### ANTI-MONEY LAUNDERING (AML) AND COUNTERING THE FINANCING OF TERRORISM (CFT)

- On 10 September 2020, the EBA published its response to the Commission's call for advice, issued 3 March 2020, on the future of the EU's AML and CFT framework. The response comprises an opinion together with a report.
- On 22 September 2020, the Criminal Justice (Money t and Terrorist Financing) (Amendment) Bill 2020 (Bill) commenced Dáil Éireann, Second Stage. The purpose of the Bill is to transpose the criminal justice elements of the Fifth EU Anti-Money Laundering Directive (AMLD 5) by amending the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 in line with AMLD 5.

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

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