Kinetic Partners
A Division of DUFF & PHELPS

regulatory focus

Issue 82

A synopsis of the Financial Conduct Authority's (FCA) latest news and publications issued in February 2015.

Welcome to Kinetic Partners' latest issue of *regulatory focus*, our regulatory newsletter for the financial services community.

AIFMD Annex IV Transparency Reporting:

Further to its message on 29 January 2015, the FCA confirmed on 12 February that the issues with GABRIEL are now resolved. A number of AIFMs had experienced difficulty in submitting their data, either because they could not access the system or due to validation errors arising as a result of not having received the necessary product reference numbers (PRN) for their AIFs. The FCA has also since clarified that there is a work around for firms who have not received PRNs, which allows submission without this data. We therefore remind firms who have yet to complete their transparency reporting to do so as quickly as possible.

The FCA has also published guidance around some of the more common Annex IV validation errors. In its statement the FCA encouraged firms to log out of GABRIEL as soon as possible after completing their returns in order to ensure that the system does not experience capacity issues again.

SEC Annual filing update:

Firms which are also registered with the Securities and Exchange Commission (SEC) are required to make annual public filings as part of their on-going requirements under US regulation. The annual update of the Form ADV must take place within 90 days of the Firm's financial year end; therefore firms with a December year end are due to promptly update their details. Both ADV Part 1 and Part 2 (brochures) need to be updated for fully registered investment advisers, while Exempt Reporting Advisers (ERA) only need to update Part 1of the Form. Firms complete their reporting through the Investment Adviser Registration Depositary system (IARD) for which the passwords expire after 45 days, therefore if they have not been used recently, firms will need to apply for new passwords on the IARD system before they can submit their updates. Therefore we remind firms to plan ahead and apply for new passwords where required ahead of the submission due date. Also firms should ensure that their IARD accounts are funded properly so that the updates can be filed.

Article 22 AIFM Directive/FUND 3.3 of the FCA Handbook - AIF annual report

Under the Directive AIFMs must, for each UK/EEA AIF they manage and for each AIF they market in the EEA, make an annual report available to investors within six months of the AIF's financial year end. Along with certain other information described in FUND 3.3.5 R within the FCA Handbook and AIFMR Article 107, the annual report must contain:

- the total amount of remuneration paid by the AIFM to its staff for the financial year, split into fixed and variable remuneration, including, where relevant any carried interest paid by the AIF and;
- the number of beneficiaries; and
- the aggregate amount of remuneration broken down by senior management and members of staff of the AIFM whose actions have a material impact on the risk profile of the AIF.

Firms are therefore required to provide quantitative and qualitative information on remuneration in the AIF annual report. However, it should be noted that the AIFMD Remuneration Code applies in respect of the first full performance year as an AIFM, whilst the AIF annual report must be made available no later than six months after the AIF's financial year end. We expect that the timeframes for the introduction of these two requirements will mean that for many firms no quantitative information will be available for disclosure for the first annual AIF report that is produced. However, information of a qualitative nature setting out general information about the non-financial criteria of the remuneration polices will need to be given.

Regulatory highlights this month include:

- Feedback statement on DP14/3 - discussion on the use of the dealing commission regime
- TR15/1 Asset Management firms and the risk of Market Abuse
- CP15/5: Approach to non-executive directors in banking and Solvency II firms & application of the presumption of responsibility to senior managers in banking firms

Regulatory Update
We also provide regulatory updates on key developments as and when these arise.
For further information, including recent updates, please visit here.

- Guidance on TRUP Version 3.1
- SEC Issues Cybersecurity Risk Alert
- March 2 deadline: Annual affirmations for CFTC exemptions

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Policy Documents

Feedback Statement on DP 14/3 - Discussion on the use of dealing commission regime

19 February

The charges (dealing commission) paid by customers when investment managers execute trades and acquire external research on their behalf are worth around £3 billion a year. The FCA carried out thematic supervisory work and policy analysis of the current dealing commission regime and presented their findings in DP 14/3. The regulator invited comments on their findings to which they now respond.

The FCA's review of the dealing commission regime is set against the backdrop of the reforms that will be brought in via MiFID II. Consequently the publication of ESMA's final advice to the European Commission on the MiFID II Level 1 delegated acts on 19 December 2014 is of particular interest. The FCA has expressed its preference to make any further changes to the current use of dealing commission rules through or alongside the implementation of MiFID II reforms. However, dependent on the form and content of the final legislation, the FCA may need to consider if there will be differences in the approach for UCITS and AIFM investment management activities and if further clarification on implementing new requirements is necessary.

The FCA intends to make further changes to the rules on the use of dealing commission alongside the implementation of MiFID II reform.

The approach, set out by ESMA, in relation to research requires portfolio managers to separate the purchase of research from execution arrangements and costs. This removes the conflict of interest which exists when research is embedded in execution arrangements with individual brokers. The FCA is of the opinion that this separation will provide greater incentives on the manager to secure value for money when seeking research and for the research available to the market to increase in quality and reduce in cost.

ESMA has confirmed that the current market mechanism whereby portfolio managers receive third-party research in return for, and linked to, variable costs of execution that are passed directly to the portfolio manager's clients is a form of inducement under MiFID.

The final advice issued by ESMA includes a positive model for how research can still be paid for by portfolio managers in a way which does not constitute an inducement if either of the following applies:

1. It is paid for directly by the Firm out of its own resources, or;
2. It is paid for through a 'research payment account' funded by a specific separate charge to their client, which is agreed and disclosed upfront. The charge may be based on a research budget set by the Firm and cannot be linked to execution volumes or value.

Under option 2, clients would also receive periodic reports detailing: the total amount charged for research; how revenues from the research payment account have been used and an option to request a more detailed summary of payments made to research providers and the goods and services received.

It was noted that the requirement for brokers to price and supply research separately from the execution services provided to portfolio managers will 'ensure transparency in the market, allowing investment firms to better demonstrate their compliance with the inducement requirements and wider conflicts of interests provisions, and allow competent authorities to more easily detect any poor practices'.

The FCA are supportive of ESMA's final guidance because it is the regulator's belief that the proposal will lead to portfolio managers being directly accountable for the expenditure on third-party research and the way in which costs are passed on to their customers. This should lead to better outcomes for investors across the EU due to increased scrutiny and monitoring.

There is recognition in the ESMA final guidance that external research can be a core cost of business to a portfolio manager developing investment ideas. ESMA does not believe that research should be paid for out of transaction fees that have no correlation to the quality and value of research received and consumed.

The proposal aims to promote the transparency and competition needed to open up the research market so that independent research providers will be able to compete more easily with larger brokers. The research prices will be transparent, resulting in the focus being on quality and price.

Commission Sharing Agreements (CSA)

It was emphasised that research provided under 'bundled' execution arrangements is an inducement and MiFID II Level 1 will restrict inducements relating to portfolio management. Therefore it would appear to be inconsistent for portfolio managers to continue using CSAs which still rely on execution commissions to fund research.

The FCA's view is that some market practices and tools developed in the context of CSAs, such as software platforms to manage these accounts and investment managers who already set third party research budgets based on robust valuation processes, could be transferrable and be used to manage the new research payment accounts which ESMA proposes.

Next Steps:

- Investment managers should continue to comply with the existing rules in COBS 11.6 and act in the best interests of their clients.
- Firms should start considering how they may need to change their controls and should not wait until 2017 if changes are required. If firms act now they will be in a better position when MiFID II is implemented.
- The investment management sector should consider developing new standard documentation and processes to redefine relationships with clients, brokers and research providers. It may be better for the change to come from industry rather than develop organically at Firm level (subject to the preservation of competition).

The European Commission is considering ESMA's final technical advice on delegated acts. It is expected that the delegated acts will be adopted no later than January 2016. Member states must then adopt and publish measures in domestic law and regulations by 3 July 2016. MiFID II will apply from 3 January 2017.

The FCA intends to publish a consultation on the overall implementation of MiFID II, including inducements requirements, by late Q4 2015.

Please see here for the full feedback statement.

FS15/2 Wholesale sector competition review 2014-2015

19 February

On 19 February 2015, the FCA published FS15/2, a feedback statement on its Wholesale Sector Competition Review 2014-15. The statement highlights the importance of efficient, fair and competitive wholesale financial markets to the UK economy, and as such the need to ensure that competition is working properly in the wholesale sector. In an effort to determine the effectiveness of competition in wholesale financial markets, the FCA will be conducting a market study on investment banking and corporate banking services in the spring of 2015. These services were selected based on external feedback that competition is not working effectively in these sectors and the fact that competition issues in investment and corporate banking have not been investigated by the FCA previously.

Of particular interest to individuals working in the asset management industry will be the FCA's comment that it may conduct a market study focused on competition issues in the asset management sector and the provision of related services. The FCA believes that a market study of the purchase and provision of these services would be beneficial considering their contribution to the UK economy and their effect on the end consumers of investments and pension funds. Based on stakeholders' input received by the FCA, questions likely to be addressed include: "whether wholesale investors are able to effectively assess quality and value for money offered by asset managers", "the extent to which asset managers have incentives to negotiate the best deal for services purchased on behalf of investors" and "whether the bundling of ancillary services is in the best interests of funds and investors". Regardless of whether the FCA pursues this study, these questions have been brought to the FCA's attention and will not likely be forgotten.

Of particular interest to.... the asset management industry will be the FCA's comment that it may conduct a market study focused on competition issues in the asset management sector.

Please see here for the FCA Feedback Statement and here for the Press Release.

TR 15/1 Asset Management firms and the risk of Market Abuse

18 February

Following a thematic review of 19 asset management firms, the FCA has published its findings about how asset management firms control risks relating to market abuse. The review paid particular attention to controls around insider dealing, improper disclosure and market manipulation.

FCA's overall finding was that firms had put in place some controls to manage the risk of market abuse. It was found that only a few firms have comprehensive controls in place, whereas many firms need to conduct more work to ensure that they have effective controls to mitigate any material risk of market abuse.

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The FCA focussed on key areas that make up an effective market abuse control framework. These included:

1. how firms are able to reduce the risk of receiving but not identifying inside information and properly identifying and escalating this
2. how firms were able to control access to inside information once received
3. what pre-trade controls firms have in place to reduce the possibility of market manipulation, as well as insider dealing
4. what post-trade surveillance processes firms have in place to monitor potentially suspicious trades;
5. procedures that firms have in place to control personal account dealing
6. determining whether staff have a clear understanding of market abuse issues, focussing particularly on the provision of training

In relation to point 1 above firms generally had effective policies in place regarding wall crossing; however many policies failed to consider the point at which inside information could be received, for example during the 'sounding' process. Firms were aware of the possibility of inside information being received when conducting company-specific research, but policies covering this were informal or inconsistently applied. The FCA encourages firms to discuss concerns about the potential receipt of inside information with individuals, as without prompt identification and escalation firms are at a much higher risk of breaching the market abuse rules. Firms should consider the benefit of attending meetings where inside information may be received inadvertently against the risks involved in attending such meetings.

It was noted that the majority of firms were operating restricted lists in order to document inside information received, with most firms choosing to restrict all employees when the firm received inside information. The FCA stated that "limiting the number of people who have access to inside information to those who need to know manages the risk of improper disclosure and reduces the risk of insider dealing".

In relation to pre-trade controls many of the firms demonstrated that they had independent oversight of trades in order to have a second line of defence that would query suspicious or anomalous trades prior to trading in order to reduce the likelihood of market manipulation, as well as trade errors. The FCA commented that many firms recorded fixed telephone lines, used systems to prevent trading in restricted companies and documented the rationale for investment decisions prior to trading, all of which were controls designed to reduce market abuse.

The FCA found that only two firms had a post-trade surveillance programme that was effective in identifying market abuse. These firms also used a systematic process to identify and assess potentially suspicious trades. The FCA emphasised the critical nature of post-trade surveillance in detecting market abuse and that senior management should ensure that there are sufficient controls in place to demonstrate that market abuse monitoring is being undertaken effectively. This being said, the FCA is aware that the composition of the post-trade surveillance programme will be dependent on the size and activities conducted by firms.

All firms reviewed had personal account dealing policies in place; however not all required prior approval thus making it difficult for Compliance to prevent fund managers being able to trade ahead of the funds. Equally where prior approval was required it was found that the controls were not sufficient to prevent market abuse through front running.

All except one firm in the sample conducted training on market abuse. Where firms rely solely on on-line training, it should be effective. FCA stated that around half the firms sampled had face to face training to complement online training, which encouraged debate and a greater understanding.

The FCA will contact firms within the thematic review sample with individual feedback on improvements to be made but have made it clear that senior management in asset management firms should ensure that they are satisfied they can conduct effective mitigation of market abuse, taking into account these recent findings.

The Thematic Review's findings can be found here.

The paper presents a wider message for the industry about the responsibilities and accountability of NEDs in authorised firms.

CP15/5: Approach to non-executive directors in banking and Solvency II firms & Application of the presumption of responsibility to Senior Managers in banking firms

23 February

Following a detailed consultation across industry and stakeholders, the FCA has set its new approach to Non-Executive Directors (NEDs) and the Senior Managers Regime (SMR) in a consultation paper published on 23 February 2015 entitled "CP15/5: Approach to non-executive directors in banking and Solvency II firms & Application of the presumption of responsibility to Senior Managers in banking firms". The consultation paper affects UK banks, building societies, credit unions, PRA-designated investment firms and Solvency II firms. Although aimed at these firms, the paper presents a wider message for the industry about the responsibilities and accountability of NEDs in authorised firms.

Under the approach outlined in the consultation paper, NEDs with specific responsibilities will be subject to all aspects of the SMR. The precise roles that will be covered by the regime are as follows:

- Chairman
- Senior Independent Director
- The Chairs of the Risk, Audit, Remuneration and Nominations Committee

Individuals performing these roles will be subject to all aspects of the SMR, including regulatory pre-approval, new conduct rules implemented by the FCA and the PRA, and the presumption of responsibility. NEDs who fall outside the SMR will no longer be subject to these requirements. Within the SMR, senior executives will be expected to take accountability for the conduct of the business for which they are responsible, as they are deemed to be in a position to exercise strong influence on the business and its culture through incentives and the messages they give to staff. Martin Wheatley, Chief Executive of the FCA says that this approach "is driven by wanting to ensure firms are managed in a way that reflects good governance and promotes the right culture and behaviours. Having a narrow SMR will also allow the FCA to focus regulatory resources on those responsible for key business areas and board committees."

The FCA also includes guidance about the role and responsibilities of NEDs in the consultation paper, and consults on its approach to NEDs in Solvency II firms, which the FCA proposes to align to that being taken for deposit takers and PRA-designated investment firms.

Also included are responses to feedback to the consultation on "Strengthening accountability in banking: a new regulatory framework for individuals" published in July 2014, which included concerns that the SMR could limit the ability of relevant firms to attract high-quality NEDs and could undermine the principle of collective decision-making. The consultation paper also explains how this feedback has been taken into account in the development of the approach.

Comments on the proposals should be submitted to the FCA by 27 April 2015.

The press release can found here.

The consultation paper can be found here.

CP 15/6 Consumer Credit - proposed changes to FCA rules and guidance

24 February

The FCA became responsible for regulating the consumer credit market last year and published a Policy Statement about detailed rules for consumer credit firms in February 2014. The FCA is now consulting on the changes it intends to implement in order to address potential areas of harm to customers. It will include clarifications and amendments to ensure that the rules clearly reflect the policy intention and deal with issues raised by firms and other stakeholders. Firms can respond electronically by 6 May 2015.

This paper will be of interest to:

- Authorised firms with permissions in relation to credit-related activities, including firms with interim permissions
- Firms that are considering applying for authorisation to carry out these activities
- Trade bodies representing consumer credit firms
- Not-for-profit debt advice bodies
- Consumer organisations

Further information on the Consultation Paper can be found here and link to the Policy Statement can be found here.

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Supervision Matters

From intellectual certainty to debate - speech by Martin Wheatley, Chief Executive of the FCA

25 February

Chief Executive of the FCA, Martin Wheatley delivered a speech at the Association for Financial Markets in Europe (AFME) Annual European Market Liquidity Conference which covered a wide variety of issues including; the FCA's wholesale markets review and its approach to the sector; BoE's Fair and Effective Markets Review (FEMR); FX and MiFID II. He reflected on the last decade and commented that in 2005 the financial sector felt like it was in a state of settled tranquillity, both politically and in regulation, which with hindsight has actually been anything but tranquil for industry leaders. Wheatley states that what we have instead is an "...uncertain debate in the wholesale space, centred on conduct and the complexity of translating political principles into professional practice".

Wheatley refers to FEMR which has reached the end of its consultation period and questions how there can be a national review on what is effectively a very wide ranging and global market (in the sense that trading will move across various jurisdictions, depending on asset class). An asset class the CEO pays particular attention to is the foreign exchange market which he says is encountering similar issues to Libor. Industry engagement with policy makers has been very positive which he hopes should aid in achieving compromises since the regulator is unable to codify the limits of what is, or is not, morally acceptable practice in what he calls "conduct grey areas".

The interaction between the industry and the regulator is a useful blueprint for another looming policy area, MiFID II (effective from 2017) which will increase transparency in markets. He points to a number of policy areas: direct regulation of high frequency trading firms; subjecting market making strategies to particular obligations; testing of algorithms before their implementation; and the formalisation of the ESMA automated trading guidelines. The CEO emphasised the need for policy

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makers to remain alive to the benefits of areas like computerised trading. He expressed that regulation should be forward looking and proportionate at the same time protecting London as a place for competitive global businesses. He criticises the MiFID II transparency regime as a politically driven and "crude measure" that could impact liquidity and is wary of the consequences of the Directive and of the quantitative cap the EU is planning to impose on dark pools equity trading.

Wheatley summarises that the last ten years have provided challenges for leaders and that "out of crisis comes opportunity". The task of translating political priority into practice, balancing conduct priorities and commercial ones, will continue to be endured for the decade ahead.

The speech can be found here.

Tracey McDermott spoke about the regulator's need to set the satandards required to help protect consumers, promote competition and ensure the integrity of the market, and noted the link between the regulator and compliance professionals, promoting the similarities between the two parties, and stressing the importance of working together.

The Regulatory challenge - speech by Tracey McDermott, Director of enforcement and financial crime at the FCA

25 February

Tracey McDermott, director of enforcement and financial crime at the FCA, recently delivered a speech at Deloitte's Chief Compliance Officer Event. McDermott talked of the regulatory challenges and expectations placed on firms, and the role of compliance in meeting these challenges. The core challenge, as noted by the Director, was that of a lack of resources available to effectively monitor the 70,000 firms, 150,000 approved persons and many more non-approved individuals that operate across the industry.

McDermott referred to the industry being known for its fast moving innovation, built on a foundation of trust and confidence in the way business is conducted, prior to stating her view that in recent years, the industry's reputation has taken a hit, cultivating an environment whereby increased regulation is both expected and encouraged. The Director claimed there to be a change in societal expectations on the financial services industry and tolerance for wrongdoing, with tolerance being greatly reduced in recent years.

The Director went on to state her views on why the regulator exists, what it expects and what should be expected of it, prior to running through a number of examples that provided further context to items referenced during her speech. She spoke about the regulator's need to set the standards required to help protect consumers, promote competition and ensure the integrity of the market, and noted the link between the regulator and compliance professionals, promoting the similarities between the two parties, and stressing the importance of working together.

The need to work together was a consistent theme permeating the speech, with the regulator compared to a mirror that enables firms to look more objectively at what "normal looks like from the outside". The Director hopes that by working together, both the regulator and firms alike, will be able to ensure that the progress made in recent years is built upon and momentum maintained, even when "memories of the bad old days start to fade".

To view a full transcript of the speech, please click here.

Enforcement Matters

While Aviva Investors' policy required trades to be allocated in a timely manner, weaknesses in systems and processes meant traders could delay recording the allocation of executed trades for several hours.

FCA fines Aviva Investors £17.6m for failing to manage conflicts of interests fairly

24 February

From 20 August 2005 to 30 June 2013, Aviva Investors Global Services Limited (Aviva Investors) employed a side-by-side management strategy on various desks within its Fixed Income area whereby funds that paid differing levels of performance fees were run by the same desk.

A proportion of these performance fees were paid to traders in the Aviva Investors Fixed Income area. This form of incentive structure created a conflict of interest as these traders had an incentive to select one fund over another.

While Aviva Investors' policy required trades to be allocated in a timely manner, weaknesses in systems and processes meant traders could delay recording the allocation of executed trades for several hours. By delaying the allocation of trades, traders were able to assess a trade's performance during the course of the day and then allocate trades that benefitted from favourable intraday price movements to hedge funds paying 20% outperformance fees and trades that did not, to other long-only funds paying lower or no performance fees. This is an abusive practice commonly known as cherry picking.

This conflict of interest had been recorded in Aviva's conflicts log. Nevertheless weaknesses in systems, controls and risk monitoring went unaddressed for almost eight years, creating an unacceptable risk of trader misconduct. The firm has committed significant resources to remediating the weaknesses in its systems and controls to reduce risks associated with conflicts of interest.

Compensation of £132m has been paid to the eight funds affected.

Final notice can be found here.

Former Logica PLC Manager pleads guilty to insider dealing

26 February

On 26 March, Ryan Willmott, formerly Group Reporting and Financial Planning Manager for Logica PLC will be sentenced after pleading guilty of three instances of insider dealing.

Mr Willmott admitted dealing on the basis of inside information he obtained during the course of his employment relating to the takeover of Logica PLC by CGI Group which was publicly announced on 31 May 2012. Mr Willmott set up a trading account in the name of a former girlfriend, without her knowledge, to carry out the trading. He also admitted disclosing inside information to a family friend, who then went on to deal on behalf of Willmott and himself.

Georgina Philippou, the FCA's acting director of enforcement and market oversight, stressed that the FCA will not stand by when people take part in opportunistic insider dealing. This case proves that using fake identities does not prevent detection.

The FCA has already secured 25 convictions in relation to insider dealing and is currently prosecuting 8 others individuals.

The Press Release can be found here.

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Other Developments

New Chairs of the Financial Conduct Authority's Practitioner Panels announced

6 February

The FCA's Chairman, John Griffith-Jones, announced on 6th February, 2015 that three new chairs for the Financial Conduct Authority's independent Practitioner Panels have been appointed. The appointments come into effect from 1st April, 2015. Each appointment is for a term of two years.

Those appointed are:

FCA Practitioner Panel - Alison Brittain, Group Director of Retail, Lloyds Banking Group

FCA Markets Practitioner Panel - Robert Mass, Head of International Compliance and Global Head of Securities Division Compliance, Goldman Sachs

FCA Smaller Business Practitioner Panel - Clinton Askew, Director, Citywide Financial Partners

Ms Brittain, Mr Mass and Mr Askew will succeed Graham Beale, Paul Swann and Andrew Turberville Smith respectively.

John Griffith-Jones welcomed these appointments explaining that, considering the challenging current regulatory framework, the Panels play an important role and these new appointments will ensure that once again the Practitioner Panels will have experienced and respected voices making the case from the industry's perspective.

The FCA Practitioner Panel was established at the same time as the FCA, on 1st April, 2013. The FCA has a statutory duty to establish and consult the Practitioner Panel on the extent to which its policies and practices are consistent with its general duties. The Practitioner Panel's key remit is to represent the interests of practitioners, and to provide input to the FCA from the industry in order to help it in meeting its statutory and operational objectives in an effective manner.

The Panels maintain close links with trade associations and can include their views in its deliberations.

The Press Release can be found here.

John Griffith-Jones welcomed these appointments explaining that considering the challenging current regulatory framework, these new appointments will ensure that once again the Practitioner Panels will have experienced and respected voices making the case from the industry's perspective.

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