

## February 2019 - Issue Highlights

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## Important information for all firms: Concerning all things Brexit

### What's expected of firms and other regulated persons

The Treasury have published a draft legislation to enable the FCA and the Bank of England/Prudential Regulation Authority (PRA) to temporarily make transitional provisions in the case the UK leaves the EU without an agreement in place. The FCA wants to ensure firms prepare now to meet the changes to their UK regulatory requirements and continue to comply with their regulatory obligation post-exit for a temporary period.

The FCA also highlighted areas where firms are expected to undertake reasonable steps to comply with the changes to their regulatory obligations by the exit day, 29 March 2019. These include:

- MiFID II transaction reporting
- EMIR reporting obligations
- Issuer rules
- Contractual recognition of bail-in
- Short selling notifications
- Use of credit ratings for regulatory purposes
- Securitisation

The FCA recognise the scale and complexity of some of these areas. The FCA confirmed that if firms have taken reasonable steps to prepare to meet these new obligations by the exit day, the FCA will not be taking a strict liability approach in taking any enforcement action against firms straight away.

<https://www.fca.org.uk/news/statements/brexit-what-we-expect-firms-now>

## FCA Briefings for Regulated Firms

The FCA have confirmed that they will be hosting two briefings for regulated firms in preparation for the UK leaving the EU. The aim is to ensure a smooth transition as the UK prepares to leave the EU. The priority being that all firms are ready for 29<sup>th</sup> March 2019. The briefings are an attempt to give a clear understanding of their approach to managing Brexit.

The sessions will be run by Nausicaa Delfas, Executive Director of International, who will explain how the FCA are prepared for Brexit, their expectations of firms and will also include a panel Q&A session where any concerns can be discussed. The sessions are aimed at senior level staff and the FCA are encouraging smaller firms to attend.

The events will take place on:

- 11 March – Central London with live webcast
- 14 March – Edinburgh with live webcast

You can find out more and register using the following [link](#).

<https://www.fca.org.uk/news/news-stories/brexit-briefings>

## How Newgate can help?

The FCA and other regulatory bodies have ramped up their efforts leading up to Brexit exit date, 29 March 2019. Should you have any queries concerning the fast-approaching Brexit, please contact us.

## Important information for all firms: Guidance on GDPR and the requirement for EU representative

The ICO have provided guidance on GDPR and the need for EU a Representative. This applies if you are a UK-based controller or processor:

- without any offices, branches or other establishments in the EEA;
- you are offering goods or services to individuals in the EEA or monitoring the behaviour of individuals located in the EEA.

This does not apply if you are an EU-based controller or processor with one or more offices, branches or other establishments in the EEA; or you do not offer goods or services to individuals in the EEA and you do not monitor the behaviour of individuals located in the EEA.

If you fit within the above criteria you will still be required to comply with the EU GDPR which requires you to appoint a representative within the EEA. The representative should be set up in the EU or EEA state where the individuals whose personal data you are processing are located and may be an individual, a company or an organisation who are able to represent you of your obligations under the EU GDPR. (e.g. a law firm, consultancy or private company).

Details of the representative must be made available to the EEA based individuals which can be done by:

- including details in your privacy notice;
- including in the upfront information provided to individuals;
- publishing on your website.

A representative does not affect your own responsibility or liability under the EU GDPR and the terms of your relationship with the representative must be in writing.

<https://ico.org.uk/for-organisations/data-protection-and-brexit/data-protection-if-there-s-no-brexit-deal/the-gdpr/european-representatives/>

## Important information for all firms: Banking leaders share their insights on adopting the Senior Managers and Certification Regime

Senior Leaders from four financial firms have given feedback on their experiences adapting to the Senior Managers and Certification Regime (SM&CR) since it came in play for banks in March 2016.

Dame Jayne-Anne Gadhia, former Chief Executive, Virgin Money, describes the SM&CR as effectively 'structuring the way in which boards and senior managers should have been behaving all along'. She adds: 'I think it's really important to understand the essence of the Senior Managers Regime, which isn't trying to trip us up, it isn't trying to end up with everyone in prison - it's actually to make sure that everybody does understand what's asked of them, does understand the job that they're supposed to do and can deliver on it to the best of their ability'.

Jon Symonds, Deputy Group Chairman, HSBC, describes the SM&CR as 'a clear framework that is relatively simply defined on pretty much one page per person that really defines how the organisation knits together'. Liz Nolan, Chief Executive Officer of EMEA, State Street, says the SM&CR has 'helped us to drive better individual accountability through transparency, clarity and support'. Vis Raghavan, Chief Executive Officer of EMEA, J.P. Morgan, says: 'The one key piece of advice which I would absolutely leave with somebody else who is adopting it is - this has got to be owned and led by the business, so you cannot delegate it to HR or compliance or any other kind of function'.

The video is available on the FCA website and provides advice to firms adopting SM&CR in 2019.

<https://www.fca.org.uk/news/press-releases/banking-leaders-share-their-insights-adopting-senior-managers-and-certification-regime>

### How Newgate can help?

Newgate has developed a Readiness Assessment gap analysis tool which will map your firm's framework against SM&CR requirements. We also offer an on-site firm visit to get clients up to speed on SMCR requirements. Please contact us for more information.

## Important information for all firms: FCA approach to MiFID transparency calculations

ESMA have released a statement outlining the use of UK databases and the performance of MiFID calculations in case of a no-deal Brexit.

The FCA welcome the statement and believe that ESMA take a pragmatic approach, outlining how MiFID II will operate in the EU27 and taking into consideration that calculations revert to a period which included UK data. In a nutshell, they have agreed that in the scenario that the UK leaves the EU without a withdrawal agreement the FCA will no longer send UK trading data to ESMA.

<https://www.fca.org.uk/news/statements/fca-approach-mifid-transparency-calculations>

## Important information for Asset Managers: FCA publishes its second set of rules following their Asset Management Market Study

Following on from the FCA's Asset management Market study they have set out to tackle the issues resulting from the review. One of the areas that the study highlighted is that there is weak price competition which meant that there are lower returns for savers, pensioners and other investors.

To act on the issues the FCA introduced their first set of new rules, in April 2018, to ensure fund managers perform as agents of investors in their funds. Their most recent rules and guidance was released in February 2019 and is designed to help consumers understand more how their money is being managed.

As stated by the FCA the new rules and guidance sets out:

- how fund managers should describe fund objectives and investment policies to make them more useful to investors;
- require fund managers to explain why or how their funds use benchmarks or, if they do not use a benchmark, how investors should assess the performance of a fund;
- require fund managers who use benchmarks to reference them consistently across the fund's documents;
- require fund managers who present a fund's past performance to do so against each benchmark used as a constraint on portfolio construction or as a performance target; and
- clarify that where a performance fee is specified in the prospectus, it must be calculated based on the scheme's performance after the deduction of all other fees.

Christopher Woolard, the FCA's Executive Director of Strategy and Competition, commented: 'We're working to make competition work better in the asset management market and protect those least able to actively engage with their investments. Today's remedies build on those we've already

introduced and will make it easier for investors to choose the best fund for them and help them achieve their investment objectives'.

In response to Consultation Paper (CP) 18/19, the FCA have this month released the Policy Statement: [Consultation on further remedies – Asset Management Market Study](#). The Policy Statement summarises the feedback that the FCA received and their responses. It also sets out the final rules and guidance.

## Important information for all MIFID firms: TISA – Released Product Governance – Approach to Implementation for Distributor Reporting

TISA have recently released a [MiFID II Product Governance – Approach to Implementation for Distributor Reporting](#). The guide outlines the obligations on distributors and product manufacturers and their responsibilities throughout the distribution chain to ensure that client's needs, characteristics and objectives are being met with the financial instruments. Investment firms are also required to ensure that the financial instruments are distributed to the identified market and periodic reviews are undertaken of the identification of the target market and the performance of the products which they offer.

The guide sets out the obligations in full, it highlights a good practice approach to the industry and is relevant for product manufacturers, end distributors and intermediary distributors. The Guide has been developed jointly by TISA and the Personal Investment Management and Financial Advice Association (PIMFA), and includes input from TISA MiFID II Upstream Reporting Working Group, which includes Investment Association (IA) and Financial Inclusion Data Working Group (FIDWG) as well as members of the European Working Group (EWG).

<http://www.tisa.uk.com/downloads/Product%20Governance%20Distributor%20Reporting%20Guide%20November%2027%202018%20final.pdf>

## Important information for all firms: FCA Release consultation paper CP19/4 regarding SM&CR and feedback to DP16/4

The FCA have released Consultation Paper CP19/4: Optimising the Senior Managers & Certification Regime and feedback to DP16/4 – Overall responsibility and the legal function. The paper is a response to the proposed SMCR changes and is intended to provide extra clarity in some areas and help firms adjust to the SM&CR. In particular, the FCA has confirmed the legal function will not be caught under the Senior Managers regime; and will instead be caught as certification staff.

The consultation paper applies to:

- firms subject to the banking SM&CR (“banking firms”)
- insurers

- FCA solo regulated firms authorised under FSMA
- EEA and third-country branches

The paper summarises the proposals in the Consultation Paper and addresses the following areas:

1. Clarifying the application of the SM&CR to the Legal Function
2. Amending the intermediary revenue criteria for the Enhanced tier
3. Amending the scope of the Client Dealing Function
4. Including the Systems & Controls Function in the Certification Regime
5. Applying Senior Manager Conduct Rule 4 to non-approved executive directors at Limited Scope firms
6. Minor changes to its regulatory forms and Handbook

<https://www.fca.org.uk/publications/consultation-papers/cp19-4-optimising-senior-managers-certification-regime-and-feedback-dp16-4>

## Important information for all firms: FCA Speech on the Market Abuse Regulation

Julia Hoggett, Director of Market Oversight at the FCA gave a speech on the Market Abuse Regime. The aim of the speech was to help regulated firms enhance the manner in which they conduct business to focus on the identification of conduct risk, ensuring that staff within regulated firms are responsible for managing the conduct of their business; and the nature of the support (including systems and controls) that firms put in place to improve the conduct of their business.

Julia highlighted a number of areas:

- Compliance with MAR requires a whole series of situational judgements to be made.
- A regulatory system that relies on controls that work by detecting when an event has happened, will never be as effective as a system that also helps ensure that misconduct does not happen in the first place. Whilst it is important that both regulators and participants have controls to detect suspicious behaviour, it is critical that we consider how we protect the market from such behaviour occurring on our watch in the first place.
- Firms need effective risk assessments and must consider for themselves the manner in which their systems and controls evolve as the risks within their businesses evolve.
- Control of information leaving a firm is as important as control of information moving within a firm.
- Firms need to take responsibility to ensure staff understand the consequences of unlawful behaviour and must be vigilant to ensure it is not happening within their walls. Greater awareness of the risks of market abuse is needed.
- Access controls, surveillance capabilities and general mindset in investment banking and advisory platforms is not yet as evolved as it should be.

- There is still more for the industry to do to improve its capacity to carry out surveillance for market manipulation.

<https://www.fca.org.uk/news/speeches/market-abuse-requires-dynamic-response-changing-risk-profile>

## Important information for all managers of collective investment schemes: Risk Management services – Article contribution by RiskCap International

For fund managers looking for risk management services, RiskCap International can provide a full risk management service. Under AIFM and UCITS Directives, a fund manager can delegate their risk management function to a 3rd party, so allowing you and your team to fully concentrate on managing the fund whilst also saving you unnecessary expenditure. RiskCap International's services can be tailor-made to suit your current or future needs as it is open and flexible. It would be worth meeting the London based Director, Charles Cantlie, just to hear what services the firm can offer. Remember, when it comes to risk management, regulators and investors are demanding greater transparency and increased accountability from firms.

Further details can be found on their website, should you need further information please contact one of their consultants. <https://riskcap.com/>

## Important information for all firms: No Deal Brexit – Marketing EEA UCITS Funds in the UK – Article contribution by Wedlake Bell LLP

The Treasury have published The Collective Investment Schemes (Amendment etc.) (EU Exit) Regulations 2019 ("CIS Exit Regs") to put in place provisions for UCITS funds should the UK not enter into a withdrawal agreement with the EU ("No Deal").

Part 6 of the CIS Exit Regs would be the legal basis for the temporary permissions regime ("TPR") which would allow the continued marketing of EEA UCITS funds into the UK following No Deal. The TPR would last for three years with the Treasury having the power to extend it in certain circumstances, for not more than 12 months.

Should there be No Deal, and a TPR application has not been made, then following what is currently planned to be 29 March 2019 ("Exit Day"), EEA UCITS would no longer be eligible to be marketed into the UK. The relevant EEA UCITS would need to be considered either under the UK's National Private Placement Regime ("NPPR") (by notifying the Financial Conduct Authority ("FCA")) or by the making of an application for recognition under Section 272 of Financial Services and Markets Act 2000 ("FSMA") depending on whether the EEA UCITS was to be marketed to professional investors or retail investors.

The CIS Exit Regs require that any operator of an EEA UCITS that wishes to continue to market that EEA UCITS in the UK following Exit Day, must notify the FCA of this intention using FCA Connect, prior to Exit Day. Regulation 63 of the CIS Exit Regs, contains details of the conditions that the EEA UCITS must have satisfied in order to apply for temporary permissions. The granting of temporary permissions would enable the EEA UCITS to be treated as a recognised scheme under regulation 62 of the CIS Exit Regs after Exit Day. To avoid any issue, notification should be made for each and every sub-fund that is to be marketed in the UK under the TPR. It should be noted that any TPR permissions will be limited in scope to those regulated activities a particular EEA UCITS was permitted to carry on by virtue of the UCITS Directive before Exit Day.

The provision of information to the FCA by the operator of any EEA UCITS during the TPR will continue as usual, with the FCA requiring operators to continue to comply with duties imposed on them under the UCITS Directive.

The FCA has recommended that operators of EEA UCITS should specify in all communications if they are utilising the TPR and provide full disclosure to investors of any potential implications this may have for them.

During the TPR period, the FCA will have the power to direct EEA UCITS to make an application for authorisation in the UK. Where such application is successful the EEA UCITS will immediately become fully UK authorised and leave the TPR. If an EEA UCITS does not apply, or the application is refused by the FCA, then the EEA UCITS may have its temporary permissions cancelled.

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