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Important for all firms – changes to the definition of Eligible Complainant to encompass some elective professionals.

Following the feedback received on Consultation Paper 14/30 (Improving complaints handling) issued in December 2014, FCA issued Policy Statement PS15/19 setting out changes to the DISP handbook which includes a change to the definition of an 'Eligible Complainant' following the implementation of the Alternative Dispute Resolution Directive.



The definition of an eligible complainant includes "A consumer is a natural person acting for purposes outside his normal trade, business or profession" i.e. an individual. Therefore, on the face of it both retail individuals and elective professional individuals would be consumers and eligible to make complaints to the Financial Ombudsman Service (FOS). DISP 2.7.9(2) however excludes professional clients from the definition of an eligible complainant.

A new rule (DISP 2.7.9A) overrides DISP 2.7.9(2) so as to broaden the "consumer" glossary definition to include an individual who is an elective professional. Therefore, a professional client who is an individual and acting outside his trade, business, craft or profession, will be an eligible complainant for the purposes of the FOS.

The term 'eligible complainant' also applies to an investor in an Alternative Investment Fund where the respondent is the AIFM.

The new regime applies from 9th July 2015 and only to complaints made from this date. We recommend that firms who are currently FOS exempt for the purposes of fees should consider whether the change impacts their exempt status and whether notification to the FCA is required.

Important for CRD IV firms - Remuneration guidelines - CRD

IV

In our March newsletter we advised that the European Banking Authority (EBA) issued a consultation paper seeking to clarify how firms and regulators should interpret the remuneration rules in CRD IV.

Remuneration guidelines issued by the Committee of European Banking Supervision (CEBS) the EBA's predecessor allowed the concept of proportionality whereby certain remuneration principles could be disapplied where a firm can show it is proportionate to do so given its size and complexity.

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Important for CRD IV firms - Remuneration guidelines - CRD

IV cont.

These were the principals of deferral whereby at least 40% of variable remuneration should be deferred over a minimum 3 year period, 50% payment of variable remuneration should be by way of retained units, shares or other instruments, instruments to be held for a minimum period and the principal of performance adjustment (i.e. clawback).

The EBA are of the view that the concept of proportionality is not consistent with the CRD IV rules and therefore none of the remuneration principles can be disapplied regardless of the firm's size.

The Alternative Investment Management Association ("AIMA") has published its response to the EBA consultation paper. AIMA strongly disagrees with the EBA's interpretation of the proportionality principle and encourages the EBA to retain the possibility for firms to neutralise certain provisions of the remuneration principles, on a case-by-case basis, where it is proportionate for them to do so. The EBA Consultation and summary of responses can be found here

http://www.esma.europa.eu/regulation-and-policy/remuneration/guidelines-on-sound-remuneration-policies/-/regulatory-activity/consultation-paper/1002371#responses_1002371

Important for UCITS managers - Remuneration guidelines – UCITS V and AIFMD

Following on from the above, ESMA has issued a consultation paper on remuneration guidelines relating to UCITS V. ESMA has been charged with drawing up guidelines to be aligned to the extent that this is possible with the remuneration guidelines

The consultation paper retains the principle of proportionality in line with the AIFMD remuneration guidelines as implemented by FCA under SYSC 19B – AIFM Remuneration Code. Therefore, the consultation paper allows firms to disapply the need to have a remuneration committee and allows firms to disapply the concepts of deferral whereby at least 40% of variable remuneration should be deferred over a minimum 3 year period, 50% payment of variable remuneration should be by way of units in the UCITS concerned, units should be held for a minimum period and the principal of performance adjustment (i.e. clawback).

This is in stark contrast to the EBA's views on proportionality in the context of CRD IV firms (see above).

Firms subject to both the AIFMD and BIPRU Remuneration codes only need to demonstrate compliance with the former. There is no such provision for firms who are also subject to the IFPRU Remuneration Code. The ESMA consultation paper considers how different sectoral remuneration principles (CRD IV, AIFMD and UCITS Directive) could be applied and proposes that firms have the choice of either applying remuneration regimes on a pro rata basis based on objective principles or simply applying those principles which are effective at discouraging excessive risk taking and aligning the interest of the relevant individuals at the firm with the interests of investors in the funds they manage.

http://www.esma.europa.eu/system/files/2015-1172_cp_on_ucits_v_aifmd_remuneration_guidelines.pdf

Important for Firms with passports - FCA Connect System

As from the end of July 2015, firms can now submit outward EEA passporting applications via Connect instead of ONA.

Important for all firms - FCA publishes its fees and levies for 2015/16

FCA has published the final fee rates for 2015/16 following on from the consultation paper issued in March.

The annual funding requirement has increased by 7.9% to £481.6m compared to last year. The new final rates have been uploaded to the FCA's Fee Calculator on the website. Firms will receive their invoices for the year shortly, if not already received.

<http://www.fca.org.uk/news/ps15-15-fca-regulated-fees-and-levies>

Important for hedge fund managers - FCA publishes latest Hedge Fund Survey

The FCA has published its latest Hedge Fund Survey aimed at presenting "an aggregated picture of industry activity in the UK, illustrating key trends and risks".

The data was obtained from 52 management firms reported as at September 2014 covering \$418 billion managed in 132 non-UK domiciled funds. The firms surveyed manage \$265 billion out of the UK. Highlights include:

- Hedge funds constituted the third largest alternative investment, behind 'real estate' and 'private equity'
- Long/Short Equity and multi strategy are the most popular (40% of the total number of funds in the sample)
- Leverage is primarily obtained in the form of derivative positions (i.e. synthetic leverage) particularly interest rate derivatives. Some 20% of funds do not use financial leverage. Those that do favour secured and collateralised borrowing
- Execution on regulated exchanges makes up 68% of the securities transaction volume but only 60% of derivatives volume, meaning a significant number of transactions are executed on a bilateral or OTC basis.
- The Cayman Islands remains the largest domicile of funds (69%), with Ireland in second place with a 10% share.
- Institutional investors are the largest segment of investors (43%) with funds of funds having fallen to 20%.

<http://www.fca.org.uk/static/documents/hedge-fund-survey.pdf>

Important for managers of UK limited partnerships - Limited

Partnership Act 1907 - HM Treasury proposed reforms

HM Treasury has issued a consultation paper and a draft Legislative Reform (Limited Partnerships) Order 2015 setting out proposed changes to the above Act which will apply only to UK LP's that are unauthorised collective investment schemes; typically private equity and venture capital funds.

Proposed changes are intended to ensure that the UK limited partnership remains the market standard structure for European private equity and venture capital funds as well as many other types of private fund.

Newly formed private fund limited partnerships ("PFLP") will be appropriately designated at the point of registration. Existing LP's have the option of becoming designated as private fund LP's within the first year of the changes coming into effect. Limited Partners will;

- Not be under an obligation to contribute any capital or property to the PFLP
- Be able to undertake certain activities without being regarded as taking part in the management of the partnership business and therefore becoming liable for any of its debts or obligations. Be able to wind up the PFLP in the absence of a general partner without obtaining a court order to do so.

To register as a PFLP, the fund must obtain a signed certificate from a solicitor confirming all PFLP conditions have been met.

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/447458/Proposal_on_using_LRO_for_LimPart_condoc.pdf

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/447428/Draft_LRO_Stat_Instr..pdf

Important for all firms – the FCA publishes new criteria for enforcement investigations

The FCA has published new referral criteria for enforcement investigations.

The publication of the updated criteria follows a review of the enforcement decision making process at the FCA and the PRA that was published by HM Treasury in December 2014. The FCA has numerous measures at its disposal including fines, bans and suspensions, when the misconduct of an individual or firm is proven.

When deciding whether to refer a firm or individual to its enforcement division for a formal investigation, the FCA considers the three overarching questions:

1. Is an enforcement investigation likely to further the FCA's aims and statutory objectives?
2. What is the strength of the evidence and is an enforcement investigation likely to be proportionate?
3. What purpose or goal would be served if the FCA were to take enforcement action in this case?

In addition to the publication of the new referral criteria, the FCA also provided additional detail on how it determines which regulatory response is most suitable for a given case. The FCA highlighted that its determination process involves considering whether a referral for an enforcement action is appropriate prior to a final decision being made by senior staff. There are other tools at the FCA's disposal which it can use instead (or in conjunction with appointing enforcement investigators) such as skilled person reports and agreeing with firms what action the FCA want them to take through regular supervisory correspondence.

<https://www.fca.org.uk/news/fca-publishes-new-referral-criteria-for-enforcement-investigations>

Important for all asset management and broking firms - FCA consults on extending the Certification Regime to wholesale market activities

FCA has published final rules, effective from March 2016, to make those in the banking sector more accountable and to improve standards across the industry.

The **‘Senior Managers regime’** focuses on individuals who hold key roles and responsibilities in relevant firms and is designed to ensure senior managers can be held accountable for any misconduct that falls within their areas of responsibilities.

The **‘Certification Regime’** applies to other staff who could pose a risk of significant harm to the firm or any of its customers (for example, staff who give investment advice or submit to benchmarks). Firms will need to put in place procedures for assessing the fitness and propriety of these staff, for which they will be accountable to the regulators.

The Conduct Rules set out a basic standard for behaviour that all those covered by the new regimes will be expected to meet.

At the same time as making these final rules, FCA are consulting on extending the Certification Regime to individuals involved in wholesale activity, such as traders. The change is designed to expand the certification regime to ensure that individuals working in wholesale markets in relevant firms who could pose significant harm to the firm or its customers are subject to the new accountability rules. See Consultation Paper CP15/22

The Certification Regime would be extended to apply to ‘individuals dealing with clients’ and ‘algorithmic traders’ in addition to individuals performing the Significant Management function, proprietary traders, material risk takers and managers of Certified Persons who would all come under the proposed Certification Regime.

<https://www.fca.org.uk/news/fca-publishes-final-rules-to-make-those-in-the-banking-sector-more-accountable>

Important for firms that are subject to the AIFMD – the FCA publishes a Q&A document containing important information for AIFMD Annex IV transparency reporters

FCA has published a further set of Q&As providing firms with further guidance on AIFMD Annex IV Reporting.

The aim of the latest Q&As is to highlight misinterpretations and inconsistencies and also provide more information on GABRIEL functionality. Key points to note are;

- European Securities and Markets Authority (“ESMA”) has already provided guidance on which fields are mandatory, conditional or optional. There has been some confusion as to whether firms need to answer those questions marked optional. FCA confirmed that these should be completed if the AIFM has information to report in relation to that particular question.
- The FCA has provided tables confirming how firms should answer the questions on registration status, AIF reporting and filing content code (based on the ESMA guidance on these matters).
- Currency rates should be reported as base currency to one Euro.
- Leverage should be expressed as a percentage rather than a ratio.
- Nil returns to mandatory questions are permitted but may indicate that the AIFM is not in compliance with the Directive.

The FCA encourages firms to use the assumptions field, as this helps the FCA determine how firms are interpreting questions. The FCA will be reviewing the assumptions and will have discussions with ESMA should this be required.

<https://www.fca.org.uk/your-fca/documents/aifmd-submitting-data-q-a>