

Newgate News



July 2020

The role of investment managers in the post Covid-19 recovery

Christopher Woolard, Interim Chief Executive at the FCA, delivered a webinar hosted by the Investment Association discussing the following key topics:

- Trying to build a bridge across the economic aspects of the Covid-19 crisis to ensure that as many consumers and firms can come through the other side in the best shape possible;
- A consultation later this summer on finding a way in which funds could safely transition to a structure in which liquidity promises to investors are better aligned with the liquidity of fund assets;
- A review of the FCA rulebook, focusing less on tick box compliance and more on promoting outcomes that serve the public interest.

The FCA will also be ensuring that post Covid-19 recovery is targeted in the right places and invite feedback on whether some types of issuers are unlikely to be served by public or private markets over the period of crisis into recovery.

<https://www.fca.org.uk/news/speeches/role-investment-managers-post-covid-19-recovery>

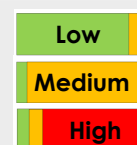
Newgate's advice: Please continue to work collaboratively with the FCA in accordance with expectations under the Principles for firms. If you receive any surveys or Dear CEO letters that make clear the FCA are expecting a response from you by a certain timeframe, please reach out to your Newgate consultant who can assist.

Impact:



- Guidance on AI and data protection
- Alert for firms using Digicert SSL certificates
- FCA consults on new rules to open-ended property fund structures
- FCA sets out views on ESAS
- New guidance to help vulnerable customers
- FCA seeks views on SM&CR deadlines
- Enhanced Financial Services Register
- FCA opinion: a post Covid-19 recovery
- FCA opinion: 'Building A financial regulatory system for the UK'
- EIPOA Guidelines on outsourcing to cloud service providers
- Schrems II judgement
- FCA confirms MoUs

Impact assessment key:



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

The FCA is consulting on proposals to reduce the potential for harm to investors from the liquidity mismatch in open-ended property funds. The new rules as proposed would require investors to give notice – potentially of up to 180 days - before their investment is redeemed. The FCA welcomes any feedback and is particularly keen to hear suggestions for alternative measures that might achieve the same outcome.

The FCA will publish a Policy Statement with final rules in 2021. The **consultation remains open to responses until 3 November 2020**. The FCA also continues to engage with other stakeholders on considering new initiatives within the regulatory framework that would facilitate investments in long-term assets.

Newgate's advice:

- The proposed notice period would allow fund managers to plan sales of property assets so that it could better meet redemptions that are requested.
- It would also enable greater efficiency within these products as fund managers would be able to allocate more of the fund to property and less to cash for unanticipated redemptions.
- Newgate shall continue to monitor developments on this consultation and update firms accordingly.

<https://www.fca.org.uk/news/press-releases/fca-consults-new-rules-improve-open-ended-property-fund-structures>

<https://www.fca.org.uk/news/statements/approved-persons-regime-coronavirus-expectations>

Impact:



Guidance on AI and data protection

The ICO's recently published guidance helps organisations mitigate the risks arising from a data protection perspective, explaining how data protection principles apply to AI projects without losing sight of the benefits such projects can deliver.

The ICO's guidance details a framework for auditing AI, focusing on best practices for data protection compliance. It comprises:

- Auditing tools and procedures that the ICO will use in audits and investigations.
- Detailed guidance on AI and data protection.
- A toolkit designed to provide further practical support to organisations auditing the compliance of their own AI systems.

<https://ico.org.uk/for-organisations/guide-to-data-protection/key-data-protection-themes/guidance-on-ai-and-data-protection/>



Newgate's advice:

- At the core of the guidance is the importance of considering data protection at an early stage. Guidance focuses on specific risks and controls to ensure your AI system is compliant with data protection law.
- Your DPIA process should incorporate measures to comply with your data protection obligations generally, as well as conform to the specific standards in this guidance. Please contact Newgate for practical ways to incorporate ICO guidance into your policies, risk assessments and compliance reviews.

Impact:





The Schrems II judgment of the Court of Justice and the future of data transfer regulation

On July 16th 2020, the Court of Justice of the European Union (CJEU) issued its decision in the case of Data Protection Commission vs. Facebook Ireland, Schrems. That decision invalidates the European Commission's adequacy decision for the EU-U.S. Privacy Shield Framework, on which more than 5,000 U.S. companies rely to conduct trans-Atlantic trade in compliance with EU data protection rules.

The decision upholds the validity of standard contractual clauses, it requires companies and regulators to conduct case-by-case analyses to determine whether foreign protections concerning government access to data transferred meet EU standards.

The CJEU found that the European Commission's adequacy determination is invalid because:

- U.S. surveillance programs, which the Commission assessed in its privacy shield decision are not limited to what is strictly necessary and proportionate as required by EU law, thereby not meeting requirements under EU law; and
- EU data subjects lack actionable judicial redress and do not have a right to an effective remedy in the U.S.

<https://europeanlawblog.eu/2020/07/17/the-schrems-ii-judgment-of-the-court-of-justice-and-the-future-of-data-transfer-regulation/>

Newgate's advice:

- *EU Data Protection Authorities are expected to take a closer look at companies exporting personal data outside the European Economic Area (EEA).*
- *It is currently unclear whether a grace period for enforcement will be granted, companies that were relying on the EU-U.S. Privacy Shield for data transfers to the U.S. should implement suitable alternative safeguard mechanisms.*
- *Data Protection Officers/Contacts must now assess their trans-Atlantic and global data transfers considering the court's ruling. Companies relying on the Privacy Shield will need to look for an alternative legal basis to enable transfers under GDPR.*
- *In doing so, they should recall that existing commitments to the Privacy Shield remain enforceable by the U.S. Federal Trade Commission.*
- *Please reach out to your Compliance Consultants for further assistance.*

Impact:



EIOPA Guidelines on outsourcing to cloud service providers

- On 6 February 2020, the European Insurance and Occupational Pensions Authority (EIOPA) published final Guidelines on outsourcing to cloud service providers for insurance and reinsurance undertakings ('the Guidelines').
- The FCA has notified EIOPA that the Guidelines are not applicable to regulated activities within the UK's jurisdiction, as they will enter into force on 1 January 2021, after the EU withdrawal transition period is expected to end.
- The FCA will continue to apply the FCA FG16/5 Guidance for firms outsourcing to the cloud and other third-party IT services in the UK, first published in 2016 and last updated in September 2019. The FCA will keep this guidance under review and, where appropriate, consult to update this to ensure it remains consistent with relevant

international standards.

Newgate's advice:

Newgate will continue to monitor any further developments made by the FCA to their FG16/5 guidance to ensure your firms continues to meet any outsourcing to the cloud and third-party IT services requirements.

<https://www.fca.org.uk/news/statements/eiopa-guidelines-outsourcing-cloud-service-providers>

<https://www.fca.org.uk/publication/finalised-guidance/fg16-5.pdf>

Impact:



Newgate's advice: You are reminded to ensure that you have assessed the impact on the firm and its clients/customers where Brexit is concerned, and have plans in place (where necessary) to ensure the firm is ready for business activity and continuity after the transition period ends.

Impact:



FCA confirms MoUs with ESMA and EU securities regulators

On 1 February 2019, the FCA announced the agreement of Memoranda of Understanding (MoUs) with the European Securities and Markets Authority (ESMA) and EU regulators covering cooperation and exchange of information in the event the UK left the EU without a withdrawal agreement. As EU law continues to apply in the transition period, these MoUs were not required to take effect.

The FCA, ESMA, and EU national securities regulators, confirm that these MoUs remain relevant and appropriate to ensure continued good cooperation and exchange of information. The MoUs will come into effect at the end of the transition period, which is set to expire on 31 December 2020.

<https://www.fca.org.uk/news/statements/fca-confirms-mous-esma-and-eu-securities-regulators>

Nausicaa Delfas discusses building a financial regulatory system for the UK in the 'new era'

In a speech delivered by Nausicaa Delfas, Executive Director of International, the future of financial regulation from the FCA's perspective has been discussed. Key highlights from her speech:

- The 'new era' will be defined by developments brought about by Brexit, Covid-19, and technological and societal changes;
- On Brexit, the FCA will continue to prepare for a range of scenarios, to be ready for the end of the year; Regarding Covid-19, the FCA's agenda is moving from crisis response to supporting economic recovery;
- Non-banks will be critical in enabling recapitalisation to promote growth and recovery from the pandemic.

The FCA have begun to prepare for the end of the transition period, for example:

- In partnership with the Government and the Bank of England, the FCA are ensuring that there will be a robust legal regime on day 1 by onshoring EU law to the UK statute book and FCA rule book.
- Introduced arrangements for temporary permission that will allow EEA firms to continue providing services and EEA funds to continue to be marketed in the UK once passporting ends, provided that the relevant notifications are made. **The FCA reopens the notification window on 30 September 2020.**
- Providing technical advice to the Treasury on the assessments of equivalence between the UK and the EU.
- The FCA are also providing technical support to the UK Government in its trade negotiations with the EU and non-EU countries.

<https://www.fca.org.uk/news/speeches/building-financial-regulatory-system-suitable-uk-new-era>

Newgate's advice: From 2021, EEA firms (which no longer includes the UK) will be contacted by the FCA to apply for permanent authorisation to replace their temporary permission.

This is on the premise that such firms utilised the FCA's TPR. For UK firms, the Temporary Transitional Power outlines which onshoring changes firms will have to comply with from 1 January 2021 and which ones they will have until March 2022 to implement.

Please ensure that you are aware of any requirements/ applications to be made (Newgate can assist you with this) before the reopening of the TPR notification window on the 30 September 2020.



Impact:



Alert for firms using Digicert SSL certificates

Impact:

A significant number of changes to SSL digital certificates provided by Digicert took place on the 11th July 2020.

<https://www.fca.org.uk/news/statements/alert-firms-using-digicert-ssl-certificates>

Newgate's advice:

- Consider passing this message on to the CISO/CTO/CIO as appropriate. It may also be prudent to check with any important suppliers or third parties. More information on the impact can be found using the following link - <https://knowledge.digicert.com/alerts/DigiCert-ICA-Replacement>

New guidance to help firms do more for vulnerable consumers

The FCA has set out new best practice guidance for firms to do more to protect vulnerable consumers.

Following the first phase of consultation in July 2019, the FCA found many examples of good practice and firms thinking carefully about their customers and potential vulnerability. However, the FCA is also aware of cases where vulnerability is either not considered by firms or positively exploited for gain.

The guidance aims to provide a framework that allows all firms to accurately assess whether they are treating vulnerable consumers fairly, ensuring consistency across the financial services sector.

Alongside the draft guidance the FCA has also published research on vulnerable consumers' experiences of dealing with financial services firms.

The research, which includes 21 in-depth case studies of consumers displaying a range of indicators of vulnerability, highlights four key themes for firms:

- Recognising vulnerability and understanding customers' needs;

- The value of sympathy;
- The importance of empowered and knowledgeable staff; and
- Meeting vulnerable consumers' communication needs.

Newgate's advice: Newgate intend on providing an updated Vulnerable Customers Policy for firms requiring this which shall also cover how firms should be monitoring customer vulnerability and treating them fairly.

<https://www.fca.org.uk/news/press-releases/new-guidance-help-firms-do-more-vulnerable-consumers>



Impact:

FCA seeks views on extending the implementation deadlines for the Certification Regime and Conduct Rules

In June, the Treasury agreed to delay the deadline by which firms must have first assessed the fitness and propriety of their Certified Staff until 31 March 2021. The FCA has since published a consultation paper on making changes to its rules following the extension to the deadline by which FCA solo-regulated firms need to have implemented the Certification Regime.

To ensure other SM&CR deadlines remain consistent and to provide extra time for firms that need it, the FCA is consulting on extending the deadline for the following requirements from 9 December 2020 to 31 March 2021:

- the date the Conduct Rules come into force;
- the deadline for submission of information about Directory Persons to the FS Register; and
- changing references in the rules to the deadline for assessing Certified Persons as fit and proper (which has been agreed by the Treasury).

Newgate's advice: Newgate would encourage our clients to stick to the initial deadline, unless there were extenuating circumstances preventing this. Please contact your Newgate consultant who can explain and/or assist with the steps required to adhere to the initial 9 December 2020 deadline.

<https://www.fca.org.uk/news/press-releases/fca-seeks-views-extending-implementation-deadlines->

Impact:



FCA launches enhanced Financial Services Register

The FCA has replaced its existing Financial Services Register with an enhanced Financial Services Register on the 27th July 2020. To supplement this, the FCA also plans to add a directory of certified and assessed persons to the Register later this year.

The FCA has since reported attempts to create fake versions of the FCA Register that do not use the official www.thefca.net, the full article can be found at the following link and includes helpful guidance on avoiding scams: <https://www.fca.org.uk/news/statements/fake-financial-services-register-website>.

Newgate's advice: Please ensure that you have reviewed your firm's profile on the new and enhanced Financial Services Register to ensure that the information remains accurate. Please reach out to your Newgate consultant if you have identified any discrepancies and we would be more than happy to assist.

<https://www.fca.org.uk/news/news-stories/fca-launch-enhanced-financial-services-register>/<https://www.fca.org.uk/news/press-releases/fca-launches-enhanced-financial-services-register-protect-consumers>



Impact:



FCA sets out views on Employer Salary Advance Schemes

Employer Salary Advanced Schemes (ESAS) are commonly promoted as an alternative to high cost credit and have a broadly similar economic effect. While most of these schemes do not fall under the FCA's regulation, as they do not meet the definition of credit under legislation, given the similarities with some credit products the FCA have set out their views to help employers, employees and scheme providers to make informed decisions.

Newgate's advice:

- Be mindful of any indications that employees using ESAS bring into question their fitness and propriety as either Senior Managers and/or Certification Function holder (from a financial soundness perspective), due to the frequency employees are drawing down salary under the scheme.
- Firms that are providing ESAS should not be compromising the firm's ability to meeting their expenses from a cash flow/liquidity perspective.
- When introducing staff to such schemes, firms should highlight the limitations of a salary advance and signpost the Money Advice Service website as a suggestion if your employee needs debt help or access to more holistic financial advice.
- Firms could also provide contact details of debt charities, such as Citizens Advice and Stepchange. It is also important to reiterate that such schemes tend to be unregulated.

<https://www.fca.org.uk/news/statements/fca-sets-out-views-employer-salary-advance-schemes>

Impact:



Employers should consider:

- The advantages, and the potential risks, when offering ESAS to their employees. This includes matters such as the build-up of charges where the product is used repeatedly where employees might become dependent on the scheme; and
- The limitations of ESAS, such as the short-term nature of the relief. The product will not itself resolve an employee's wider financial problems.
- For employees with limited options, there are potential risks. An example of how risks could be mitigated is that employees could be provided with periodic notifications where there is an accumulation of transaction charges.

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