



Regulatory Roundup

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Issue 32



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Submissions to FSA: Two recent complaints against the FSA were upheld in the Regulator's favour

FSA and Inadequate Procedures: Concerns expressed over the adequacy of the FSA's Consumer Contact Centre procedures

AIFMD Comes Into Force: The long awaited Directive must now be transposed into national law by 22 July 2013

AIFMD & ESMA: ESMA publishes its consultation on implementing measures for the AIFMD

Prospectus Directive Update: Prospectus threshold and the 'investors' threshold will be raised

FSA and Financial Promotions: FSA releases two further publications on 'financial promotions'

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If any of the topics discussed above raise questions or a need for guidance or support, please feel free to contact [Peter Carlisle](#).

Remuneration Code – Further Guidance



Useful links:

[Guidance on Principle 12\(c\)](#)

[Regulatory Roundup 29](#)

[Regulatory Roundup 24](#)

The FSA has issued further consultative guidance on the application of the Remuneration Code (see Regulatory Roundups 29 and 24 for details of previously released guidance and a general summary of requirements respectively).

The paper is specifically on Principle 12(c), which is concerned with **guaranteed variable remuneration** (covered in SYSC 19A.3.40 to SYSC 19A.3.42). As firms will be aware, this principle **applies firm-wide** and is not restricted to ‘Code Staff’.

There seems to be general clarity on ‘sign on awards’ where a fixed award is provided to incentivise an individual to join the firm. The guidance addresses the concept of ‘buy-in’ where a firm offers to compensate a new hire for the outstanding deferred remuneration that they are **forfeiting** by joining the firm. Key to the guidance is the need to ensure that the buy out is not more generous than the award from the previous employer and it must be subject to appropriate performance adjustment as per the current SYSC 19A.3.41(1)(b).

Any firm needing to consider such a situation should bear in mind that the guidance also tells us that “the FSA does not encourage the use of buy out awards”.

A reminder to firms that the Transitional Provision in respect of remuneration structures available to firms not previously subject to the Remuneration Code (see Regulatory Roundup 29 for details) **expired on 1 July**. The effect of this is that such firms are now expected to comply with the Remuneration Code requirements in full and as appropriate to their proportionality tier.

Responses are invited by 4 August.



Submissions to FSA

FSA and Inadequate Procedures



Useful links:

[GE-L01268](#)

[GE-L01234](#)

A couple of complaints against the FSA act as a useful reminder that the onus for submission to, and receipt by, the FSA of returns, notifications etc. lies with the firm concerned.

In the first complaint, when submitting a return by GABRIEL, a firm appears to have accidentally omitted some data items. In their defence they cited an issue with GABRIEL that allows users to 'move on' without completing all the data items. The £250 penalty ('administration fee') imposed by the FSA was upheld. For those not already adopting such a practice, firms may wish to consider introducing a 'four eyes' approach when submitting items on GABRIEL (and on ONA, come to that).

The second complaint involved a firm submitting documentation by post, in this case concerning a request to cancel its Part IV permission, which was apparently not received by the FSA. The penalty for the firm in this instance was that because the cancellation request (which the firm submitted on 26 March 2010) was not received by the FSA by its year end (31 March) the firm was liable to pay FSA fees for 2010/11 even though the firm in question ceased conducting regulated activities on 31 January 2010. The lesson here is that where important documents are concerned, firms should consider using some form of 'signed-for' receipt e.g. registered post or courier or even by way of hand delivery by a representative of the firm itself.

Useful links:

[GE-L01233](#)

The previous article concerning submissions to the FSA is based upon published complaints against the FSA.

One other published complaint concerned an individual's dispute with the FSA over what was said when speaking to the Consumer Contact Centre (CCC). Although the complaint was not upheld the Complaints Commissioner expressed concerns about the adequacy of the FSA's procedures. The Commissioner makes specific recommendations including the need for the FSA to review its procedures for the retrieving of calls; the need for the FSA to take steps to improve its record keeping; and the need for the CCC to ensure the adequacy of information given to consumers.

Firms will of course be aware from SYSC 6.1.1 of the need to have adequate policies and procedures in place to ensure compliance with the regulatory system.



AIFMD Comes Into Force

AIFMD & ESMA



Useful links:

[Official Journal](#)

[AIFMD 2011/61/EU](#)

[Regulatory Roundup 15](#)

The Alternative Investment Fund Managers Directive (AIFMD) – see past Regulatory Roundups e.g. No. 15 - has taken a long time coming (the original proposal was back in April 2009) but the clock has now started ticking.

The Directive **came into force** on **21 July 2011** - the twentieth day following that of its publication in the Official Journal of the European Union. However whilst affected firms should have a basic understanding of the implications of the AIFMD, there is no immediate panic as Member States, including the UK, will have to transpose the Directive into **national law by 22 July 2013** (see Article 66 in the AIFMD). As with e.g. MiFID the impact that the Directive's requirements will have on regulated firms will be seen in the FSA Handbook as new or amended rules and guidance so expect several policy documents being issued by the FSA over the coming months.

Complyport will work with its clients that are affected by the AIFMD to ensure that they meet regulatory requirements and expectations in a timely manner. However as a (very) brief overview the Directive captures Alternative Investment Funds (**AIF**) which is **basically any collective that is not a UCITS** (although strictly speaking it doesn't directly regulate AIF but rather the Manager (AIFM)). The Directive will have limited application to AIFMs where total AIF AuM, including assets acquired through leverage, do not exceed €100M, which increases to €500M where not leveraged and with no redemption rights during a 5 year period (see Article 3(2)(a) & (b) for precise wording). Areas covered by the Directive include (but are not limited to) **marketing; reporting and disclosure; and regulatory capital** – the latter will be at least **€125K**.

Useful links:

[ESMA Consultation](#)

The European Securities and Markets Authority (ESMA – previously CESR) has published a 430+ page consultation on implementing measures for the AIFMD.

Issues addressed include 'General provisions' (e.g. organisational requirements; valuation; identification of AIF); Depositaries (e.g. liability regime; duties and functions); and Transparency and leverage (including definition and appropriate methods for its calculation). Any one keen to respond to the consultation can turn to page 242 where they will find a summary of all 72 questions. The consultation period ends 13 September 2011.



Prospectus Directive Update

FSA and Financial Promotions



Useful links:

[Regulatory Roundup 28](#)

As was mentioned in Regulatory Roundup 28 changes are proposed to the Prospectus Rules (which are contained in the PR section of the Handbook) as a result of (early) implementation of the Prospectus Directive: the prospectus threshold will be raised to €5m and the 'number of investors' threshold to 150.

The statutory instruments bringing these changes into effect have now been presented to Parliament and the measures will come into effect on 31 July 2011. The FSA will be working with HM Treasury to consult in due course on implementation of the remaining amendments.

As the UK has decided to implement these changes early (the final implementation date is 1 July 2012) firms and issuers should bear in mind that other Member States may still be following the 'old' requirements.

Useful links:

[Financial Promotions and Prominence](#)

[Financial Promotions and EIS/VCT](#)

There have been two recent publications from the Regulator on 'financial promotions'.

The first is consultative guidance on the topic of '**prominence**' i.e. making sure that important details such as risk or fees are not hidden. As will be known the section of the FSA Handbook that governs 'financial promotions' is COBS 4 - which actually covers both 'financial promotions' and 'communications'. The 'fair, clear and not misleading' requirement in COBS 4.2.1 applies to communications to both retail clients and to professional clients. The guidance provides examples of both good and bad practice.

The second is an industry update on FSA expectations when promoting **Enterprise Investment Schemes or Venture Capital Trusts**. Again the theme is 'fair, clear and not misleading' and 'balance'.



RDR: Delay Recommended

Unregulated Collective Investment Schemes



Useful links:

[RDR - Treasury Report](#)

[PS10/6](#)

[PS11/1](#)

[Andrew Tyrie letter](#)

[FSA Response](#)

The FSA's Retail Distribution Review (RDR) will have an impact on retail advisors (not just IFAs but advisers within stockbrokers, asset managers, banks etc.) in respect of commission payments (to be abolished in favour of agreed fees with clients); advice (independent or restricted); and professionalism (the benchmark qualification for advisers will be raised). The changes are intended to come into force on 31 December 2012.

Although there was approval on the plans to ban commission on advised sales and for imposing higher professional standards, MPs on the Commons Treasury Committee are calling for a delay of 12 months in implementing the RDR because of concerns that a substantial exodus of experienced advisers from the market could harm consumer choice. The purpose of the delay would be to give advisers more time to take the qualifications.

The call for a delay has ruffled a few feathers.

The FSA appear to have dismissed the suggestion of a one year delay which caused Andrew Tyrie, Chairman of the Treasury Committee, to write to Hector Sants on 20 July about the Regulator's 'unacceptable' response and advising that the Committee 'deprecate the Authority's action'. The FSA has responded to the effect that it in fact welcomes the Committee's report, which it will formally respond to by the end of September.

Those that want a refresher of the changes can see the rules on adviser charging and independent/restricted advice in Appendix 1 of PS10/6 whilst those relating to professionalism can be found in Appendix 1 of PS11/1 (although most – but not all - of the changes are now incorporated in TC).

Useful links:

[Regulatory Roundup 29](#)

[Mr A Moss](#)

[Mr P Banfield](#)

FSA actions in connection with Unregulated Collective Investment Schemes (UCIS) have featured a few times in Regulatory Roundups.

Mr P Banfield and Mr A Moss, the Directors of (and in the case of the latter also the Compliance Officer and MLRO of) an IFA firm were subject to FSA sanctions arising from advice given to clients concerning investment in UCIS products.

(cont.) 6



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Unregulated Collective Investment Schemes (cont.)



It is worth noting that it was not simply an IFA suitability issue (COBS 9) but also the **lack of sufficient knowledge** by either of them of the statutory and regulatory restrictions relating to UCIS and the **restriction on the promotion of UCIS** under section 238 of FSMA. The rules and regulations surrounding financial promotions in general, and particularly with regard to UCIS (and bear in mind even certain types of **UCITS** – as mentioned in Regulatory Roundup 29 - will be **classified as UCIS**) can be confusing and our clients should feel free to contact their usual Complyport consultant to discuss any concerns they have.

Mr Moss was subject to a prohibition order, the effect of which was to prohibit him from performing any 'significant influence function', which is basically any controlled function except for the CF30 Customer function. On the other hand Mr Banfield was prohibited from performing **any** controlled function as well as suffering a financial penalty of £10,500. Both can ask the FSA to revoke the orders if they are able to demonstrate satisfactorily that their respective shortcomings have been remedied.

Bespoke, Practical Consulting



If any of the topics discussed above raise questions or a need for guidance or support, please feel free to contact [Peter Carlisle](#)

Or for details of any other of Complyport's services, please contact [Jon Wedgbury](#)

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