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Regulatory Roundup
October 2015
Issue 69

In Brief:

Extension of Senior Managers Regime and Certification Regime: HM Treasury proposal

Regulatory References: CP15/31 proposes the introduction of new SYSC Chapter 22

Whistleblowing: Whistleblowers' champion proposed

AIFMD Passport Extension - Second Round: Steven Maijoor advises a second round of non-EEA country assessments will take place

AML – UK Risk Assessment: HM Treasury publishes first money laundering and terrorist financing NRA

Disclosure Requirements: FCA publishes "Smarter Consumer Communications: Removing ineffective disclosure requirements in our Handbook".

UCITS V: HM Treasury Consultation: HM Treasury publishes consultation on UCITS V

Money Laundering – Due Diligence Risk Factors: European Supervisory Authorities publish joint consultation paper

Common Reporting Standards – FATCA: International Tax Compliance Regulations 2015 in force

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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.

Extension of Senior Managers Regime and Certification Regime

Useful links:

HMT: Extension of SMR & CR

Presumption of Responsibility

CP15/31

PS15/21

CP15/22

Financial Services Bill

Firms should be aware that on 15 October HM Treasury issued a policy paper advising that:

- the Government considers it appropriate to **extend** the **Senior Managers Regime** (SMR) and the **Certification Regime** (CR) to **all financial firms** and

- to replace the 'presumption of responsibility' for senior managers with a 'duty of responsibility' i.e. the burden will be upon the regulators to prove that a senior manager has failed to take reasonable steps to prevent regulatory breaches in their area of responsibility.

The Treasury paper advises that the **extended regime** should come into operation '**during 2018**'.

Those requiring further information on the SMR and the CR can refer to e.g. **CP15/22** and **PS15/21** (note that **CP15/31** includes amendments to the then proposed rules).

By way of background, the principle of 'accountability' will be strengthened next year (**7 March**) when the SMR and the CR come into being. The regimes will be applicable to every '**relevant authorised person**' which, in its simplest form, is **either:**

- a firm with permission to accept deposits **or**

- an investment firm that has permission for **dealing in investments as principal** and when carried on by it that activity is a PRA-regulated activity.

Each senior manager will have a 'statement of responsibilities' (SUP 10C.11) which must be consistent with the firm's 'management responsibilities map' which is required under SYSC 4.5.9. The regime operates on a '**presumption of responsibility**' i.e. where a firm incurs a regulatory breach, the relevant **senior manager** can be **fined** unless they satisfy the FCA that they took reasonable steps to avoid the breach.

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Extension of Senior Managers Regime and Certification Regime (continued)

The CR will apply to individuals that do **not** fall under the SMR but whose roles are deemed capable of causing 'significant harm' to the firm or its customers; the Handbook refers to 'FCA-specified significant-harm functions' – see table in SYSC 5.2.30. Such employees will not be able to undertake any of these functions unless **the firm** has issued the individual with a 'certificate' – which will be valid for 12 months – stating that it is satisfied that said individual is fit and proper to perform the function.

Under this new framework the code of conduct as enshrined in **APER** will **cease** to apply to employees of **relevant authorised persons** and instead a new code of conduct (**COCON**) will apply. The new code will apply to both those subject to the SMR (**SUP 10C** - the table in SUP 10C.4.3 specifies the FCA-designated senior management functions) and those subject to the CR (**SYSC 5.2**). COCON will not be restricted to only approved persons e.g. it will capture those with significant responsibility for a 'significant business unit'. Note that from 7 March **2017** COCON will be extended to apply to virtually **any employee** of a relevant authorised person. The only exceptions will be those employees who perform functions listed in COCON 1.1.2(2) such as 'audio visual technicians' or 'vending machine staff' etc.

For the avoidance of doubt APER ("approved persons"), and not COCON, will for now continue to apply for other firms.

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Regulatory References

Useful links:

CP15/31

In its current format the FCA Handbook (SUP 10A.15) addresses a firm's obligation to provide "all relevant information" regarding an ex (or soon to be ex) employee when requested by his/her potential new employer. A recently published **joint** Consultation Paper (CP15/31 – or in PRA terms CP36/15) proposes changes to the regime.

CP15/31 proposes the introduction of new **SYSC Chapter 22** 'Regulatory References' and which will be referenced in both SUP 10C (for 'relevant authorised persons') and SUP 10A (for firms that are not 'relevant authorised persons'). Whilst largely addressed to relevant authorised persons, some elements will be applicable to **all** firms. As such, firms should ensure that their **HR functions** are aware of the proposed changes.

For further information on the **relevant authorised person** regulatory framework please see the article 'Extension of Senior Managers Regime and Certification Regime' in this Regulatory Roundup although, in its simplest form, a relevant authorised person is either:

- a firm with permission to accept deposits **or**
- an investment firm that has permission for **dealing in investments as principal** and when carried on by it that activity is a PRA-regulated activity.

For the record, SUP 10A will cover approved persons in appointed representatives of relevant authorised persons.

SYSC 22 introduces the concept of a **full scope regulatory reference firm**, a term which not only captures the above mentioned 'relevant authorised person' but also a Solvency II firm and a large non-Directive insurer. When such a firm is considering permitting or appointing someone to perform a controlled function it must 'take reasonable steps' to obtain appropriate references from that person's current or previous employers covering the past **six years** (SYSC 22.2.1). The corresponding obligation, on all firms, to **provide** references is in SYSC 22.2.2 - note that where the firm providing the reference is a full scope regulatory reference firm then the information disclosed must be in accord with SYSC 22.2.5, **regardless** of whether or not the firm requesting the reference is a full scope regulatory reference firm. A **template** (see SYSC 22 Annex 1R) has been developed for use by a full scope regulatory reference firm ("should use") even if the firm requesting the reference does not specifically ask it to use such a template.

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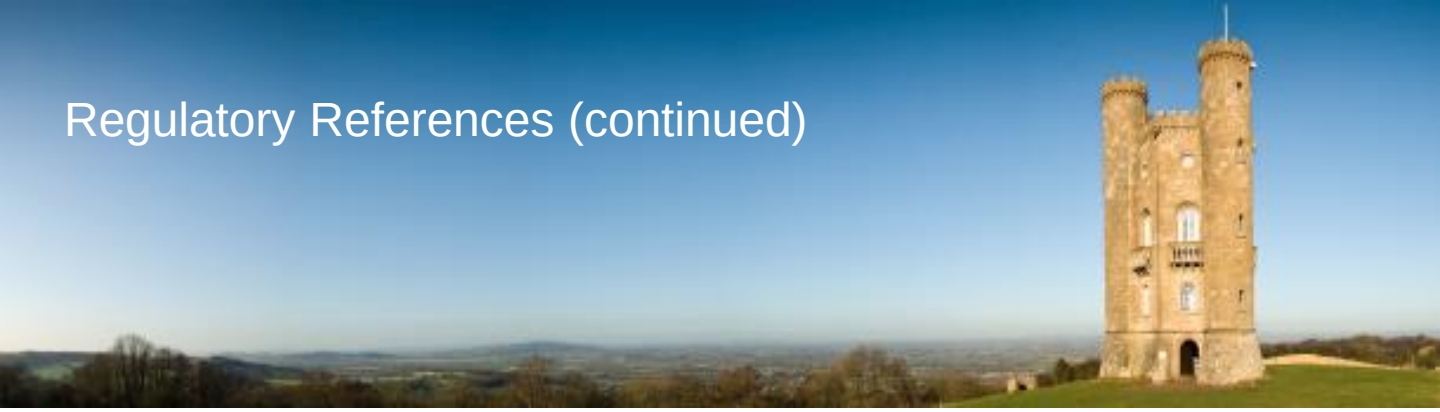
Regulatory References (continued)



The FCA provides **guidance** (SYSC 22.3.10 – 11) on some of the factors **which the FCA** considers full scope regulatory reference firms should take into account when determining whether older breaches may still be relevant; the section explains that **other firms** may find this useful as a guide.

Full scope reference firms should note that there is an obligation to **revise references** which have previously been given in certain circumstances (SYSC 22.2.6).

It is expressly prohibited for **any** firm to enter into any arrangements or agreements with any person that limit its liability to disclose information under SYSC 22 (SYSC 22.3.14).

Firms are reminded that any firm supplying a reference in accordance with SYSC 22 owes a duty under general law to its former employee and the recipient firm to exercise due skill and care in the preparation of the reference.

The consultation period ends 7 December 2015.

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Whistleblowing

Useful links:

PS15/24

FCA: Whistleblowing

Solvency II Firms: Whistleblowing

SYSC 18 promotes, in the sense that it contains guidance rather than rules, the use of the Public Disclosure Act 1998 in making protected disclosures ('**whistleblowing**'). SYSC 18.2.2 specifically encourages firms to adopt internal procedures which will encourage workers with concerns to whistleblow internally about matters which are relevant to the functions of the FCA (or PRA). This is reinforced under SYSC 18.2.3 in which the FCA reminds everyone that it would regard as a serious matter any evidence that a firm had acted to the detriment of a worker who had blown the whistle and could call into question the fitness and propriety of the firm (or relevant members of its staff).

The FCA published a background note on whistleblowing in February which may be of interest. As well as explaining the internal whistleblowing process it reveals that the Regulator received **1,376** notifications under the regime in 2014; the note also provides an outline of some sample cases.

The FCA recently published PS 15/24 'Whistleblowing in deposit-takers, PRA-designated investment firms and insurers' ('**relevant firms**'). As suggested by its title, the application of the rules therein are restricted to such relevant firms whilst **other firms** – which will be the vast majority of firms falling under the remit of the FCA – can look upon them as **non-binding guidance**. Note that deposit-takers with assets of £250m or less ('**small deposit taker**') will not be required to apply these requirements.

SYSC 18.4 (a new section) introduces the concept of a **whistleblowers' champion**. The role of such an individual (the FCA **guidance** expects that a firm will appoint a non-executive director where one exists – however it is a **rule** that an insurer appoints a director or senior manager) will be to ensure and oversee "the integrity, independence and effectiveness of the firm's policies and procedures on whistleblowing", together with the protection of whistleblowers from being victimised. The role also requires the need to prepare and make a **report**, at least **annually**, to the firm's governing body on the effectiveness of its whistleblowing systems and controls.

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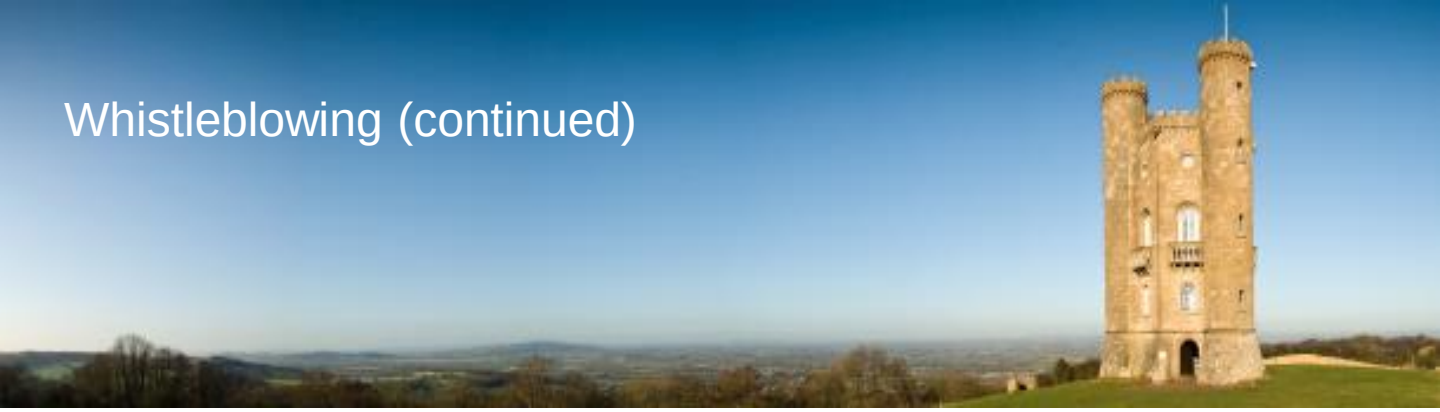
Whistleblowing (continued)



SYSC 18.1, which must rank as one of the shortest sections in the Handbook, will be overhauled. Whilst it will still apply to 'firms', for the **purposes of SYSC 18** a 'firm' specifically means every '**relevant authorised person**' (except for a small deposit taker) which in its simplest form is **either** a firm with permission to accept deposits **or** an investment firm that has permission for **dealing in investments as principal** and when carried on by it that activity is a PRA-regulated activity and a UK Solvency II firm**. Other firms** that do not fall within this specific meaning may adopt the rules and guidance as **best practice** and in a manner that reflects its size, structure and headcount.

SYSC 18.2 will be deleted and replaced by SYSC 18.3 which concerns internal arrangements, including training. The FCA's views on the **protection of whistleblowers** (see introductory paragraph above) remains and applies to **all firms** in the accepted sense by virtue of SYSC 18.1.1A (2).

The new requirements come into force in two tranches.

The requirement to assign responsibilities to a whistleblowers' champion takes effect from **7 March 2016** (this date coincides with the implementation of the **Senior Managers Regime** – see 'Regulatory References' article for further information) with the remaining requirements needing to be in place by **7 September 2016**. Between these two dates the whistleblowers' champion will be responsible for overseeing the steps the firm takes to prepare for the new regime.

Before other firms breathe a sigh of relief that they do not fall within the full scope of the new regime, they should note from para 1.18 (page 7) of PS15/24 that once the new rules have been in effect long enough to assess their effectiveness, the FCA will consider whether similar requirements should be applied to other firms such as "**stockbrokers, mortgage brokers, insurance brokers, investment firms and consumer credit firms**".

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AIFMD Passport Extension: Second Round

Useful links:

[Regulatory Roundup 66]

[Steven Maijoor]

It will be recalled that in July ESMA published its advice (2015/1236) on the application of the AIFMD passport to non-EEA AIFMs and AIFs. At the time ESMA only issued its advice in respect of six non-EEA countries: Jersey and Guernsey were a 'yes', Switzerland was a 'yes, provided' whilst Hong Kong, Singapore and the US were 'not just now' – see Regulatory Roundup 66 for further details.

A recent speech by Steven Maijoor, ESMA Chairman, advises that a second round of non-EEA country assessments will take place (albeit with no firm commencement date) in respect of:

- Cayman Islands
- Isle of Man
- Bermuda
- Australia
- Canada
- Japan

Hong Kong, Singapore and the US haven't been forgotten about as the speech confirms that they will continue to be assessed.

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AML: UK Risk Management

Useful links:

HMT: UK Assessment

Regulatory Roundup 64

HM Treasury has published the first money laundering and terrorist financing (AML/CTF) **national risk assessment** (NRA). It may be recalled that earlier this year it published a supervision report on AML/CTF for 2013-14 – see Regulatory Roundup 64.

Chapter 6 concerns the 'regulated sector'; for the purposes of the paper this term refers to all the entities subject to the Money Laundering Regulations 2007 so will capture e.g. estate agents and casinos as well as financial institutions. It probably will not be surprising to learn that '**Banking**' – under which heading we also find '**private and wealth management**' – is assessed as a **high risk** for money laundering and medium for terrorist financing. In contrast, the 'money service business' (which will include **money remitters**) has the opposite rating i.e. medium risk for money laundering but high risk for terrorist financing. **E-money** firms are not covered in chapter 6 but instead appear in a chapter devoted to 'new payment methods' and are assigned a medium/low rating for AML/CTF.

The NRA reveals that the collective knowledge of UK law enforcement agencies, supervisors and the private sector of money laundering and terrorist financing risk is "not yet sufficiently advanced". The government has already committed to publishing an Anti-Money Laundering Action Plan, the priorities of which will include plugging intelligence gaps and addressing identified inconsistencies in the supervisory regime.

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Disclosure Requirements

Useful links:

CP15/32

Regulatory Roundup 61

The FCA's commitment to create a sustainable regulatory framework – and recognition that overloading consumers with information that may be complex and poorly presented can lead to people making poor decisions – is behind the publication of **CP15/32** "Smarter Consumer Communications: Removing ineffective disclosure requirements in our Handbook".

Its title very much sums up the proposals in this relatively short (38 pages cover to cover) consultation paper which will have the benefit of reducing "the regulatory burden on certain firms without impacting consumer protection".

COLL 4.5 currently requires an **authorised fund manager** (AFM) e.g. the ACD of a UCITS to prepare a twice-yearly '**short report**' and which must be **submitted** to all unit holders. The AFM also has an obligation to produce a '**long report**' although, in contrast with the short report, it only has to be **made available** to unit holders on request. The original intention behind the introduction of the short report (way back in 2004) was because the then FSA believed that most retail investors found the annual manager's report difficult to understand. Based upon feedback, the FCA is of the opinion that the short report does not serve its purpose and it is proposed to remove reference to it in COLL (although the revised wording in COLL 4.5.2 still only requires an AFM to 'make available' the long report).

A year after the introduction of the short report the FCA introduced the 'Consumer Friendly Principles and Practices of Financial Management' (**CFPPFM**) to provide both potential and existing with-profits policy holders with "clear and understandable information about with-profits policies". Feedback suggested that few consumers read the document and, ironically, found it difficult to understand. It is proposed that the need to prepare and issue a CFPPFM is also removed from the Handbook (COBS 20). CP 15/32 reminds us that on 31 December 2016 the requirement to provide Key Information Documents (**KID**) for Packaged Retail and Insurance-based Investment Products (**PRIIPs**) comes into force which will help to improve transparency – see Regulatory Roundup 61 for further information.

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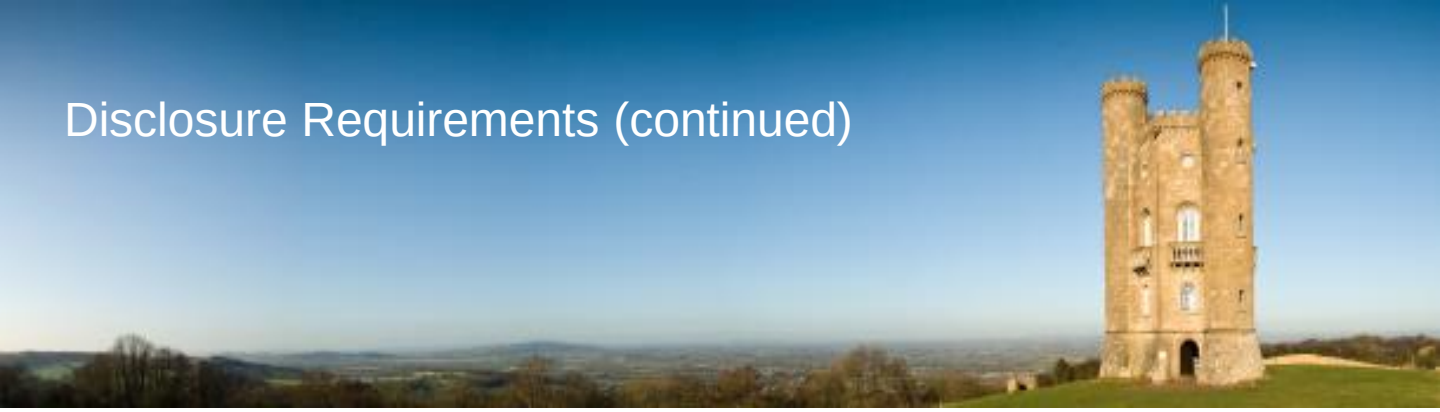
Disclosure Requirements (continued)



The final disclosures that will go the same way as those above are the Initial Disclosure Document (**IDD**), the Combined Initial Disclosure Document (**CIDD**) and the Services and Costs Disclosure Document (**SCDD**). Strictly speaking it is no longer a requirement to give out the IDD and CIDD but the templates have remained as guidance with reference to them. The SCDD, so the FCA believes, leads to duplicated information to consumers and firms, adopting a tick-box approach in the delivery of disclosures. Suitable amendments will be made to the Handbook e.g. the reference to the SCDD in COBS 6.3 in relation to packaged products etc.

Full details of all proposed Handbook amendments can be found in Appendix 1 of CP15/32.

Comments are invited by 18 December 2015.

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UCITS V: HM Treasury Consultation

Useful Links:

UCITS V: Draft SI

UCITS V: HMT Consultation

Regulatory Roundup 68

In September the FCA published it consultation paper (CP 15/27) on the implementation of UCITS V – see Regulatory Roundup 68 for further details.

HM Treasury has now published a consultation on UCITS V together with a draft Statutory Instrument "The Undertakings for Collective Investment in Transferable Securities Regulations [2016]".

Although implementation of UCITS V will be achieved through changes to the Handbook, changes to UK legislation e.g. FSMA will also be required.

Comments are invited until **17 December 2015**.

As mentioned in the Regulatory Roundup 68 article, Member States have to transpose the Directive into national law by **18 March 2016**.

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Money Laundering: Due Diligence Risk Factors

Useful Links:

Joint CP: Risk factors Guidelines

Joint CP: Supervision Guidelines

2015/849

Under Article 17 ('**simplified due diligence**') and Article 18(4) ('**enhanced due diligence**') of the fourth Money Laundering Directive (2015/849), the European Supervisory Authorities (ESAs) are required to issue **guidelines** to both firms and competent authorities on the risk factors to be taken into consideration when applying the required due diligence.

The three ESAs (ESMA, EBA and EIOPA) have now published a joint consultation paper on simplified and enhanced customer due diligence guidelines.

These guidelines come in two parts;

- Title II is generic and applies to **all firms** and addresses, for example, specific enhanced due diligence that firms must apply where a customer is a PEP.

- Title III is firm specific and contains guidelines for **money remitters**, **investment managers**, **wealth management** etc.

The ESAs have also published a separate joint consultation paper as required under Article 48(10), although this one is aimed at the competent authorities on the characteristics of a risk-based approach to supervision and the steps to be taken when conducting supervision on a risk-sensitive basis.

Comments on both papers are invited by **22 January 2016**.

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Common Reporting Standards: FATCA

Useful Links:

[SI 2015/878]

[OECD CRS]

[2011/16]

[HMRC: FATCA Nil Returns]

[HMRC: AEIM Guidance Notes]

[HMRC: FATCA Guidance Notes September 2015]

The International Tax Compliance Regulations 2015 (**SI 2015/878**) came into force in April this year which capture:

- The OECD's Common Reporting Standards (CRS)
- The Directive on Administrative Cooperation (DAC) (**2011/16**) which implements the CRS in the EU
- The UK's FATCA Agreement with the US

The effect will be to place obligations on financial institutions to exchange information on reportable accounts to other jurisdictions.

The concept will already be familiar to firms subject to HMRC's FATCA obligations as well as the defined terms (CRS pages 29 and on) such as '**Financial Institution**', '**Reporting Financial Institution**', '**Reportable Account**' etc. Having said that, a UK entity should in the first instance refer to SI 2015/878 for clarification of due diligence requirements, meaning of a reportable account etc, albeit that they will be referred back to the various agreements above.

With around 90 p**articipating jurisdictions** for the purposes of the CRS (see Schedule 1 of SI 2015/878) the agreement stretches further afield than the US (FATCA) and the EU (DAC) e.g. countries such Brunei Darussalam, Cayman Islands and Korea are CRS participants.

Aside from the existing FATCA requirements, the Regulations in respect of the DAC and the CRS have effect from 1 January 2016 in that the **first reporting year** for the latter two is the **calendar year** of 2016 (with a reporting deadline of **31 May** in the following year).

HMRC has produced (draft) Guidance Notes (AEIM – Automatic Exchange of Information Manual) on the exchange of financial account information. The Guidance is directed at HMRC staff but will also be of use to financial institutions. HMRC has also updated its **FATCA Guidance Notes**, although sections of it have been incorporated into the AEIM. The table commencing on page 179 of the FATCA Guidance sets out what has, and what hasn't, been incorporated.

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If you are using the text search for more than one word or a consecutive phrase the use of " " will help speed your search e.g. a search for "regulatory fees" will ensure that only articles that contain that term are found (rather than articles containing the words 'regulatory' and/or 'fees').

Please note that there is a small time-delay between the publication of the latest Regulatory Roundup and its availability in the searchable archive.

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