Regulatory Roundup

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Senior Managers and Certification Regime

Of relevance to

All Firms

Useful links

https://www.fca.org.uk/publication/guidance-consultation/gc18-04.pdf

Senior Managers and Certification Regime – Proposed Guidance on Statements of Responsibilities for FCA firms

The Financial Conduct Authority ("FCA") is extending the Senior Managers and Certification Regime ("SM&CR") to all FSMA authorised firms on 9 December 2019. Under the new regime, all senior managers must have a Statement of Responsibilities and additionally, firms that qualify as 'enhanced firms' under SM&CR must have a Statements of Responsibilities Map.

The FCA is currently consulting on guidance for FCA solo-regulated firms preparing for the SM&CR and has published proposed guidance to give such firms practical assistance and information on preparing Statements of Responsibilities and, for enhanced scope firms, Statements of Responsibilities Maps.

The FCA consultation is open until 10 December 2018.

https://www.fca.org.uk/publication/guidance-consultation/gc18-04.pdf

Although the SM&CR does not come into force until December 2019, firms should start to consider senior management roles and responsibilities of such persons.

Amendment to Level 2 Requirements on Depositaries of AIFs and UCITS

Of relevance to

AIFMS depositaries and UCITS

Useful links

https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018R1618&from=EN

Two new regulations have been published amending the current Level 2 requirements on depositaries of Alternative Investment Funds ("AIFs") and Undertakings for Collective Investments in Transferable Securities ("UCITS") schemes.

The amendments will take effect from 1 April 2020.

The changes brought about by the two new regulations apply to depositaries of AIFs and UCITS when delegating their safekeeping functions to a third party custodian. Whilst the regulations will not have a direct impact on AIF managers or UCITS managers, those managers will need to consider whether any changes are necessary to their existing depositary agreements to reflect the new obligations imposed.

The changes will apply to UK depositaries even in the event of a hard Brexit. By virtue of the European Union (Withdrawal) Act 2018, if there is no agreed deal with the EU and the UK, both the AIFMD and UCITS Level 2 Regulations will form part of UK law after the UK exits the EU.

At a high level, the changes involve reconciliations and contractual details.

With regard to reconciliations, the frequency of reconciliations is to be conducted as "often as necessary" and determined by reference to (i) the normal trading activity of the fund (AIF or UCITS); (ii) any trade occurring outside the normal trading activity; and (iii) any trade occurring on behalf of any other client whose assets are held by the third party in the same financial instruments account as the assets of the fund (AIF or UCITS).

Contractual details between depositaries and third party custodians are to be enhanced with guarantees inserted as to the provision of information and inspection and access to the sub-custodian's records and accounts.

Commission Delegated Regulation (EU) 2018/1618 which amends the safekeeping provisions of Delegated Regulation (EU) No. 231/2013 (the AIFMD Level 2 Delegated Regulation).

https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018R1618&from=EN

Commission Delegated Regulation (EU) 2018/1619 which amends the safekeeping provisions Delegated Regulation (EU) 2016/438 (the UCITS Level 2 Delegated Regulation).

https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018R1619&from=EN

Maintaining Market Confidence: An update on Brexit

Of relevance to

All Firms

Useful links

https://www.fca.org.uk/print/news/speeches/maintaining-market-confidence-update-brexit

Nausicca Delfas, Executive Director delivered a speech concerning the preparations being taken by the FCA prior to Brexit. Key points to note from the speech include:

- In line with the Government approach, with regards to the proposed changes to the FCA Handbook and Binding Technical Standards, the FCA does not propose substantive policy changes. The FCA have said that the changes will be consequential, “for example, removing references to the EU institutions and replacing them with the UK equivalent”.

- The FCA is taking the baseline view that the FCA rules “must treat the EU as a third country” although there are some cases where this view has been derogated from. The FCA gives the example of UK UCITS (which in some cases make a distinction between investments in EEA assets and investments in the rest of the world). Treating EEA states as third countries could have caused disruption for some funds, and for investors. In the FCA’s consultation, it was therefore proposed to allow UK UCITS schemes to keep the same freedom to invest in EEA assets as they do now.

- Further guidance has been given in relation to the Temporary Permissions Regime which the FCA has stated has had over 1,300 firms and funds express an interest in joining (see below).

- The speech refers to the risks identified by the Bank of England’s Financial Policy Committee relating to the transfer of personal data between the UK and the EU becoming more restrictive therefore impacting the ability of UK and EU households and businesses to access services from, and continue contracts with, financial services firms in the other jurisdictions.

- The UK Government has stated that in a no-deal scenario it will find the EU regime adequate, which will facilitate transfers of data from the UK to the EU. The FCA has stated however that it urgently needs similar action from EU counterparts.

- The speech also refers to the negotiation of Memorandums of Understanding between the EU and the FCA to support cross border supervision of firms. It is understood that those Memorandums are currently being negotiated be ready for a no-deal Brexit.

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Maintaining Market Confidence: An update on Brexit

- The speech references that work undertaken to onshore the EU rulebook demonstrates that "the UK will have the most equivalent framework to the EU of any country in the world".

- The speech outlines what firms should be considering to be ready for a no-deal Brexit.

Link to the FCA Speech:

https://www.fca.org.uk/print/news/speeches/maintaining-market-

Brexit: The Temporary Permissions Regime

Of relevance to

Incoming EEA firms and funds

Useful links

https://www.fca.org.uk/publication/consultation/cp18-29.pdf

https://www.fca.org.uk/brexit/temporary-permissions-regime

The Temporary Permissions Regime ("TPR") will enable relevant firms and funds which passport into the UK to continue operating in the UK if the passporting regime comes to an end when the UK leaves the EU.

If there is no transition period, when the UK withdraws from the EU, the UK will become a 'third-country' in relation to the EU and EEA firms will no longer be able to passport into the UK.

As such, EEA firms may need to seek authorisation in the UK to continue to access the UK market. Similarly, EEA investment funds will also need to seek UK recognition to continue to market in the UK.

Under the TPR, EEA firms currently passporting into the UK which notify the FCA will be deemed to have permission under Part 4A of the Financial Services and Markets Act 2000 (FSMA) on a temporary basis. The scope of the permission will reflect the scope of a firm's passporting permission pre-Brexit.

Separate legislation will enable EEA investment funds to continue to be marketed in the UK during the regime and details of this will be published in by the FCA in due course.

If required, the TPR will come into force when the UK leaves the EU on 29 March 2019 at 23:00. The FCA expects the TPR will be in place for a maximum of three years within which time, investment firms and investment funds will, if required, be required to obtain authorisation or recognition in the UK.

The following firms will be able to use the TPR:

- Firms which have passports under Schedule 3 of FSMA in place before exit day, including firms with top up permissions;
- EEA firms under Schedule 4 of FSMA which qualify for authorisation before exit day, including firms with top-up permissions;
- Electronic money and payment institutions which are exercising their passporting rights under the Electronic Money Directive (EMD) or Payment Services Directive (PSD2) before exit day.

The following funds can use the TPR:

- UCITS schemes;
- Alternative Investment Funds (including EuVECAs, EuSEFs, ELTIFs and AIFs authorised as MMFs)

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Brexit: The Temporary Permissions Regime

Firm Notification

Firms which have passports under Schedule 3 to FSMA or Treaty firms under Schedule 4 to FSMA will need to notify the FCA that they wish to use the TPR. Notifications need to be submitted via the FCA's Connect system between 7 January 2019 and 28 March 2019.

Firms of the same type with a top-up permission also need to notify the FCA, in the same manner, that they wish to use the TPR to ensure that the part of their permission that relies on passporting continues.

Once the period in which notifications can be made ends, firms that have not submitted a notification will not be able to use the TPR.

Fund Notification

The FCA expects that the TPR will work in a similar way for investment funds, with fund managers notifying the FCA of which funds they want to continue to market in the UK. The FCA expects to start accepting notifications from 7 January 2019 up to and including the 28 March 2019.

https://www.fca.org.uk/publication/consultation/cp18-29.pdf

https://www.fca.org.uk/brexit/temporary-permissions-regime

ESMA Temporary Product Intervention Measures on the marketing, distribution or sale of CFDs

Of relevance to
CFD Providers

ESMA has updated its Q&As in this area and has included a new section relating to the prominence of risk warnings.

Guidance given by ESMA states that "The risk warning shall be in a layout ensuring its prominence, in a font size at least equal to the predominant font size and in the same language as that used in the communication or published information".

The ESMA guidance continues by reminding firms that information addressed to, or disseminated in such a way that it is likely to be received by a retail client must give a fair and prominent indication of any relevant risks when referencing any potential benefits of an investment service or financial instrument.

In the context of internet-based marketing, giving prominence to the risk warning implies that it is displayed on the relevant webpages in a way that would signal that the message is of importance and makes it unlikely that a client or a prospective client would not notice it. It should attract attention, for instance, by virtue of its size or position on the webpage.

In deciding whether a particular risk warning is 'prominent', firms should consider the target audience, the characteristics of CFDs and the likely information needs of the average recipient of the communication.

ESMA provides guidance as to examples of good practice that will indicate firms have given sufficient prominence to a risk warning. These include:

- Warnings are shown using easily readable font styles (at least in the predominant font size of the respective communication with letters displayed in a discernible font colour) across a neutral background.
- The size of the warning occupies a noticeable portion of the text displayed, taking into account the content, size and orientation of the communication as a whole.
- Warnings are contained within their own distinct border, drawing the reader's attention to them.
- In the context of web pages, warnings remain fixed on the screen even when the customer scrolls up and down respective web page.
- Warnings are repeated on linked pages further into the website product chain.
- In other communications than web pages, warnings are clearly stated within the main body of the communication.

Firms offering CFDs should review their marketing materials to ensure risk warnings are given sufficient prominence.

Notice of ESMA's Product Intervention Renewal Decision in relation to CFDs

Of relevance to
CFD Providers

On 23 October 2018, the European Securities and Markets Authority ("ESMA") adopted a Decision under Article 40 of Regulation (EU) No 600/2014 to restrict the marketing, distribution or sale of Contracts for Difference ("CFD") to retail clients. The Decision renews and amends ESMA Decision (EU) 2018/796.

Under Article 2 of the above, the marketing, distribution or sale to retail clients of CFDs is restricted to circumstances where at least all of the following conditions are met:

(a) the CFD provider requires the retail client to pay the initial margin protection;

(b) the CFD provider provides the retail client with the margin close-out protection;

(c) the CFD provider provides the retail client with the negative balance protection;

(d) the CFD provider does not directly or indirectly provide the retail client with a payment, monetary or excluded non-monetary benefit in relation to the marketing, distribution or sale of a CFD, other than the realised profits on any CFD provided; and

(e) the CFD provider does not send directly or indirectly a communication to or publish information accessible by a retail client relating to the marketing, distribution or sale of a CFD unless it includes the appropriate risk warning specified by and complying with the conditions in Annex II.

Firms that offer CFDs should ensure that the above provisions are all in place.

FCA statement on the launch of the Cost Transparency Initiative

Of relevance to

All Firms

Useful links

https://www.fca.org.uk/firms/institutional-disclosure-working-group

https://www.plsa.co.uk/Policy-and-Research-Investment-Cost-Transparency-Initiative

The Cost Transparency Initiative ("CTI") was launched on 7 November 2018.

The CTI is an independent group aiming to improve cost transparency for institutional investors with the responsibility for progressing the work already undertaken by the Institutional Disclosure Working Group ("IDWG") which was set up by the FCA as part of its Asset Management Market Study.

The CTI is supported by Pensions and Lifetime Savings Association, Investment Association and Local Government Pension Scheme Advisory Board and was recommended as part of the IDWG's report to the FCA on 15 June 2018.

The FCA has stated that the main focus of the IDWG was on the provision of helpful information to assist institutional investors by detailing what costs they are paying. It has not focused specifically on creating a method of delivering compliance with MiFID and other requirements. However, the IDWG templates have been designed to be aligned with the relevant disclosure obligations in MiFID II. So, while firms must continue to ensure that they individually meet all relevant regulatory requirements, if these templates are completed in a comprehensive and accurate way, including all costs and associated charges, the information in the templates should assist firms in meeting those requirements.

Details of the IDWG can be found at the following FCA link:

https://www.fca.org.uk/firms/institutional-disclosure-working-group

Details of the CTI, and relevant templates, can be found at the CTI link:

https://www.plsa.co.uk/Policy-and-Research-Investment-Cost-Transparency-Initiative

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