



# Regulatory Roundup – 26 July 2010

## Issue #17



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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](#).



## Quarterly Consultation Paper



### Useful Links:

[Quarterly Consultation Paper no.25](#)

[http://www.fsa.gov.uk/pubs/cp/cp10\\_15.pdf](http://www.fsa.gov.uk/pubs/cp/cp10_15.pdf)

[Addendum](#)

**The FSA has published Quarterly Consultation Paper CP10/15 ('QCP') which contains proposed changes to various parts of the Handbook.**

It is not the best composed paper as not only does it already come with an addendum but the proposed changes to the approved persons regime in SUP that should be in Appendix 12 of the QCP turn out to contain changes to the FSA003 ('Capital adequacy') and supporting completion guidance notes.

The consultation period ends 6 September (except for the proposed changes to the liquidity regime where the closing date is 13 August).



## Changes to SUP 16



### Useful Links:

[Quarterly Consultation](#)

[Paper no.25](#)

[http://www.fsa.gov.uk/pubs/cp/cp10\\_15.pdf](http://www.fsa.gov.uk/pubs/cp/cp10_15.pdf)

[Addendum](#)

[Regulatory Roundup #6](#)

**The FSA have proposed four small changes to data item FSA003, improving the data reported by firms to the FSA.** The amendments are relevant to all firms subject to the Capital Requirements Directive.

Changes made to SUP 16 Annexes 24R (Data items) and 25G (Guidance notes) can be found in Appendix 12 (ignore the erroneous face sheet to Appendix 12) of the QCP. Fields titled 'capital planning buffer', 'draw down of capital planning buffer', 'surplus/(deficit) total capital over ICG and capital planning buffer' and 'surplus/(deficit) general purpose capital over ICG and capital planning buffer' are added into FSA003. These support Handbook changes that were proposed in CP09/30 ('Capital Planning Buffers', see Regulatory Roundup #6) which sets out the details on the intended separation of the individual capital guidance (ICG) and capital planning buffer (CPB), and the severance of the CPB and the financial adequacy rule (GENPRU 1.2.26R). The overall aim of the four changes is to clarify that the CPB is a separate amount from the ICG and that 'the CPB can be drawn down during adverse external circumstances'.

For those interested in other data item changes, the FSA include proposals relevant to FSA015 (sectorial information, including arrears and impairment), FSA044 (analysis of assets and deposits by maturity band – see article on BIPRU 12) and the Retail Mediation Activities Return within the QCP.



## A technical correction to CF29 applicability



### Useful Links:

[Quarterly Consultation](#)

[Paper no.25](#)

[http://www.fsa.gov.uk/pubs/cp/cp10\\_15.pdf](http://www.fsa.gov.uk/pubs/cp/cp10_15.pdf)

### [Addendum](#)

**Following the FSA's recent review of the Handbook they propose correcting a technical error in SUP 10.9.1R that sets out the types of firm where the significant management function (CF29) applies.** Generally CF29 is used for larger firms where an individual is not a member of the governing body, such as a Director, but does however exercise significant influence in the firm's affairs, such as being a head of a business unit.

SYSC 2.1.1R (which requires firms to have clear and appropriate apportionment of responsibilities) was used as a cross reference in the rules setting out the application of CF29. SYSC 2 ceased applying to MiFID or CRD firms following those respective Directives' implementation. These firms were subject to the new provisions of SYSC under what is known as the common platform approach as set out in SYSC 4-10. This common platform approach was extended to most other firms, for which SYSC 2 also ceased to apply. Currently and from a technical standpoint therefore, according to the FSA, the application of CF29 has been carved out for the majority of firms subject to the common platform so that it currently applies to those generally smaller firms covered by SYSC 4.4. The carve out has not been deliberate and the FSA state that even the CP06/15, ('Reforming the Approved Persons regime') which introduced CF29, clearly states that it will apply to both MiFID and non-MiFID firms in the future. Consequently the FSA believe that most firms will be unaware of the issue and will have been operating in line with stated policy intention.

The FSA have proposed to insert a reference to SYSC 4.1.1R into SUP 10.9.1R to bring the Handbook in line with stated policy intention, correcting this technical error.

(cont.)

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# A technical correction to CF29 applicability (cont.) BIPRU 12 – Liquidity Standards



## Useful Links:

[Quarterly Consultation](#)

[Paper no.25](#)

[http://www.fsa.gov.uk/pubs/cp/cp10\\_15.pdf](http://www.fsa.gov.uk/pubs/cp/cp10_15.pdf)

[Addendum](#)

(cont.)

In keeping with the odd construction of this paper the amendments to SUP for the CF29 technical correction are found in Appendix 10 (which is supposed to concern amendments to FSA015) and not in Appendix 12 ('proposed changes to the approved persons regime in the Supervision manual' – which actually contains details of changes to FSA003).

**As you will know, BIPRU 12.1 – 12.4 (and 12.8 where relevant) applies to all BIPRU firms, whilst the remaining BIPRU 12 chapters only apply to ILAS BIPRU firms (limited scope and limited activity BIPRU firms are not ILAS firms; full scope BIPRU investment firms that meet the exemption in BIPRU 12.1.4 are also excluded from the definition of an ILAS BIPRU firm).**

There are some minor changes to BIPRU 12.3 ('Liquidity risk management') and BIPRU 12.4 ('Stress testing and contingency funding'), although based upon the table in 4.71 they do not result in substantive changes. Changes are also proposed to BIPRU 12.6, although these will only be relevant to firms that adopt the simplified ILAS approach. Elsewhere the FSA044 ('Analysis of assets and deposits by maturity band') will be phased out.

The proposed changes to BIPRU (and to SUP 16 guidance notes on the completion of relevant FSA returns) can be found in Appendix 4 of the QCP.



## Managing investments and the Stewardship Code



### Useful Links:

[Stewardship Code](#)

[Stewardship Code Implementation](#)

[Regulatory Roundup #15](#)

**There is a proposal to amend COBS 2.2 ('Information disclosure before providing services') for a firm, when it is managing investments for a professional client (that is not a natural person), to disclose its commitment to the 'Stewardship Code' (venture capital firms will be excluded from the proposed requirement).** The proposal stems from the Walker Review on Corporate Governance. Although the Stewardship Code aims to enhance the quality of engagement between institutional investors and companies, the Code is addressed in the first instance to firms who manage assets on behalf of institutional investors. Note that the proposals will apply to *all* asset managers, although it is accepted that not all firms will engage the Code e.g. because the business model is one of active trading or smaller institutions may feel it disproportionate (there is a "comply or explain" approach).

The Financial Reporting Council (FRC) has taken responsibility for the Stewardship Code – which is basically the code issued by the Institutional Shareholder Committee last November with a few minor amendments. It may be recalled that the FRC also has ownership of the UK Corporate Governance Code (see Regulatory Roundup #15); the FRC see the latter and the Stewardship Code as being complementary. The Code itself consists of 7 Principles e.g. having a clear policy on voting and not automatically supporting the board (Principle 6) and a robust policy on managing conflicts of interest (Principle 2).

The FRC is encouraging all institutional investors to publish by the end of September 2010 a statement on their website to the extent they have complied with the Code and to notify the FRC when they have done so.

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## Managing investments and the Stewardship Code (cont.)



### Useful Links:

(cont.)

[Stewardship Code](#)

[Stewardship Code Implementation](#)

The links will take you to the Code and Code implementation document. Chapter 5 of the QCP concerns the Stewardship Code and Appendix 5 covers the (fairly modest) rule changes.

[Regulatory Roundup #15](#)

[Quarterly Consultation Paper no.25](#)  
[http://www.fsa.gov.uk/pubs/cp/cp10\\_15.pdf](http://www.fsa.gov.uk/pubs/cp/cp10_15.pdf)

[Addendum](#)



## CASS



### Useful Links:

[Quarterly Consultation](#)

[Paper no.25](#)

[http://www.fsa.gov.uk/pubs/cp/cp10\\_15.pdf](http://www.fsa.gov.uk/pubs/cp/cp10_15.pdf)

[Addendum](#)

### The FSA has proposed changes to CASS 6 & 7, 'Custody Rules' and 'Client Money Rules' respectively.

The FSA believe that the only types of firm that these changes will impact upon are **spread betting** and **CFD providers** which use certain provisions to remove retail clients' monies from client money protection.

The 'title transfer collateral arrangements' (TTCA) rules in CASS 6 & 7 mean that neither the custody rules nor the client money rules apply when a client transfers full ownership of a safe custody asset or client money to a firm to cover future, actual or contingent obligations.

The proposal is that these sort of arrangements will not be allowed in respect of retail clients. As such, firms currently using TTCA with retail clients will either have to consider the feasibility of re-categorising them as elective professionals or else retain them as retail clients and segregate their money and assets accordingly in line with the requirements of CASS 6 & 7. Such firms will also have to consider whether there is any restriction on holding client money on their Part IV permissions.

The FSA also comment (s8.18) that some spread betting and CFD providers are incorrectly using the 'money due and payable to the firm' provisions (see CASS 7.2.9) inappropriately.

The proposed new rules can be found in Appendix 8 of the QCP.



# Unofficial guidance on the Bribery Act

## Father & son



### Useful Links:

[Government press release](#)

[Transparency  
International Guidance](#)

[Regulatory Roundup #13](#)

[Final Notice Jeremy](#)

[Final Notice Jeffery](#)

**Following on from Regulatory Roundup #13 which covered the Bribery Act, the Government has recently released a press statement about the delay in the publication of the Bribery Act guidance.** The corporate offence (of up to 10 years imprisonment and unlimited fine) for failing to prevent bribery can only enter into force after the guidance is released, which was supposed to be on 1 July 2010. The guidance will now be published in the New Year following a consultation period commencing in September which should give some time for familiarisation, and it is expected the Act will come into force in April 2011. However, anti-corruption NGO Transparency International UK has published detailed guidance (over 250 pages worth in all which includes case studies) to help companies meet the requirements. The checklist provided with this guidance might be helpful in anticipation of the official guidance.

**Father and son Jeffery and Jeremy Burley have been handed out financial penalties by the FSA for market abuse.**

Whilst people tend to co-operate with the FSA during an investigation (and indeed in this case both settled early and qualified for the FSA's 30% discount), the Final Notice in respect of Jeremy Burley is unusual as it mentions that his lack of co-operation was taken into account when deciding on the action to be taken and the penalty imposed. In this case the father and son were being fined for dealing on information in relation to Tower Resources' first oil well in Uganda. The information indicated that the drilling looked unlikely to produce oil and that the exploration of a second well was unlikely to proceed.

As a result Jeremy Burley was given a comparatively hefty total financial penalty of £144,200 which included a disgorgement of £21,700, the proceeds from his trading. Jeffrey Burley, on the other hand, did co-operate and did not personally benefit from the market abuse. Nevertheless he was also subject to a financial penalty (£35,000).



## EU short selling update Client categorisation



### Useful Links:

[CESR](#)

**CESR has issued an update to its September 2008 statement on short selling.**

The revised document will provide either statements or the links to the statements by Members on current short selling rules.

[CESR paper](#)

**Following an approach from the European Commission, CESR is consulting on aspects relating to client categorisation as currently set out in MiFID (which in turn is reflected in COBS 3, 'Client categorisation').**

As you will know, COBS 3.5.2 lists those entities which a firm can classify as a per se professional client. As such, no further assessment on the client's knowledge or understanding etc. is required, which contrasts with the 'qualitative' and 'quantitative' tests needed for elective professional clients. The CESR paper suggests that per se professional clients may not always be as sophisticated as is presumed and do not necessarily always understand the risks involved in complex instruments. Amongst the questions posed in the consultation is whether there is a need to assess the knowledge and experience of at least some of the entities, that currently qualify as per se professionals, before they can be considered to be professionals.

The consultation closes on 9 August.



## Non-US managers face dual registration



### Useful Links:

[The H.R. 4173 'Restoring American Financial Stability Act of 2010' \(jump to Title IV\)](#)

**The US President has this week signed the H.R. 4173 'Restoring American Financial Stability Act of 2010' (which can be found via the link).**

Contained within 'Title IV-- Regulation of Advisers to Hedge Funds and Others' (see section 401) 'The Private Fund Investment Advisers Registration Act of 2010' can be found. These provisions modify the Investment Advisers Act 1940 (the '1940 Act') which sets out the requirements for registration with the SEC. The changes take effect 12 months from the President signing H.R. 4173. One effect of the Act will be that many non-US investment advisors will need to register with the SEC.

Under the amendments to the term 'foreign private advisor' in the 1940 Act, which forms the criteria for exemption from registration, the definition criteria will now include an investment advisor who 'has, in total, fewer than 15 clients and investors in the United States in private funds advised by the investment adviser'. If a non-US asset manager has no place of business in the US, neither holds itself out generally to the public in the United States as an investment adviser nor advises registered investment companies or registered business development companies, has aggregate AUM attributable to US clients of less than \$25m and has fewer than 15 US clients or investors then under the Act SEC registration would be not required. Non-US managers now face being required to conform to dual registration if they do not qualify for an exemption from registration.

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## Non-US managers face dual registration (cont.)



### Useful Links:

[The H.R. 4173 'Restoring American Financial Stability Act of 2010' \(jump to Title IV\)](#)

[Regulatory Roundup #11](#)

[Regulatory Roundup #7](#)

[Regulatory Roundup #5](#)

(cont.)

Previous versions had not been clear on whether the '15 clients' included just the client(s) of the investment advisor - the fund - or the client(s) of that fund – the investors within the fund (see Regulatory Roundup #11, 7 & 5 for previous analysis). The lack of clarity over the definition of client for registration requirement purposes has therefore now been addressed by the inclusion of the word "investor" which the SEC would have power to define at a later date. However, the SEC will still have no power to define the word 'client' for the purposes of paragraphs (1) and (2) of section 206 of the 1940 Act (see section 406 of H.R. 4173 for these amendments), the antifraud provisions of the 1940 Act. On the same issue of definitions, the exemption for 'venture capital fund advisors' is present but the term is to be defined within a year from enactment by the SEC.

For US investment advisers, registration would not apply provided they have AUM in the US that is under \$150m and if the investment advisor acts solely as an adviser to private funds (as per section 408 of H.R.4173). It is not entirely clear whether non-US advisors who do not qualify for the exemptions from registration as a foreign private advisor may benefit from this exemption or if this threshold applies per fund managed or per fund manager.



## Financial Crime Newsletter



### Useful Links:

[Financial Crime Newsletter](#)

[Regulatory Roundup #15](#)

[Regulatory Roundup #13](#)

**The FSA has published its first Financial Crime Newsletter of the year, and the first since Margaret Cole took over responsibility for this area following the retirement of Philip Robinson.**

Readers are left in no doubt that despite the changes to the regulatory system, the FSA will continue with its commitments that were highlighted in the current Business Plan – including addressing financial crime issues through enforcement activity and increasing intensive supervision of regulated firms.

The Newsletter encourages firms to review 'The Small Firms Financial Crime Review' published in May which arose from a thematic review – see Regulatory Roundup #15 for further details. There is also reference to the Bribery Act 2010 and a reminder to us that the Government will publish non-statutory guidance on what will constitute 'adequate procedures' by firms to prevent such conduct. See Regulatory Roundup #13, and the Unofficial guidance on Bribery Act article above for further details.

One interesting item in the Newsletter (page 5) concerns firms with digital photocopiers which have hard disk drives that saves the details of all information put through the machine. This could include a large quantity of personal information (possibly including images from the last office party which would allow individual persons to be identified) and therefore needs to be taken into consideration when disposing of hardware.



## Remuneration



### Useful Links:

[European Parliament Press Release – see the links at the bottom of this linked page for the FAQs covering hedge fund applicability](#)

[Consolidated text as of July 7 2010](#)

[‘Report on national implementation of CEBS High-level principles for Remuneration Policies June 2010’](#)

**Following the article covering remuneration in Regulatory Roundup #16, the European Parliament voted on 7 July to amend elements of the Capital Requirements Directive (CRD3) impacting upon remuneration.** The proposed rules are far wider in scope than the FSA’s existing remuneration policy (SYSC 19). According to the European Parliament’s FAQs on the CRD3, ‘Hedge funds as such will be subject to separate legislation - the alternative investment fund managers directive - which is currently under negotiation. Hedge Fund managers who are investment firms as defined by the markets in financial instruments directive are covered, although the text makes it clear that these rules should be applied proportionately to investment firms’.

The proposed rules include for the deferral of at least 40% of variable remuneration over 3 to 5 years and a substantial portion of variable remuneration must consist of shares or share linked instruments. Upfront cash bonuses will be capped at 30% of the total bonus and to 20% for ‘particularly large bonuses’.

Subject to approval by the Council the rules on bonus provisions will then take effect in January 2011 (and those on capital requirements provisions no later than 31 December 2011). Interestingly, Parliament is calling for remuneration principles to be extended to cover all companies listed on stock exchanges in a non-legislative resolution (see the European Parliament press release link).

The Committee of European Banking Supervisors Report on high-level principles for Remuneration Policies, that was published in June 2010 (see link) states that further guidance will be published ahead of the CRD3 implementation. The FSA have planned a review of their remuneration code and are considering the impact on the current Remuneration Code in SYSC 19.



## Transaction reporting update



### Useful Links:

[Market Watch 35](#)

[Regulatory Roundup #11](#)

**Following a series of FSA actions relating to transaction reporting failures, many firms will have revisited their own transaction reporting procedures to ensure that they satisfy regulatory requirements.** Portfolio managers that have been relying on the exemption in SUP 17.2.2G may have been concerned as to the level of due diligence expected of them in order to benefit from the exemption.

Market Watch 35 has a section devoted to transaction reporting including the exemption mentioned above. The FSA confirms that a portfolio manager relying on the exemption only needs to satisfy itself that the broker is a MiFID investment firm and that “the portfolio manager is not required to conduct due diligence to ensure that reports are being submitted accurately ...”

The article reminds brokers that when they are completing a transaction report where the client is a portfolio management firm, the report should identify the portfolio management firm - using either its FSA Reference Number (“FRN”) or its BIC (see below) - and not the underlying funds.

Firms that do transaction report, including portfolio managers not able to take advantage of SUP 17.2.2G, are encouraged to regularly review the integrity of the data submitted. Firms can request a sample of transaction reports by completing an online form (further details are in Market Watch 35). Comment is made that some firms are failing to submit transaction reports about securitised derivatives (SUP 17.1.4R concerns which transactions need to be reported).

Elsewhere the FSA reminds us that all MiFID investment firms need to have a BIC (see Regulatory Roundup #11). It should be noted that whilst a BIC code consists of either eight or eleven alphanumeric characters, the FSA system can only validate eleven character BICs. As such ‘XXX’ should be added to eight character BICs.



## Transaction reporting update (cont.)



### Useful Links:

(cont.)

[TRUP](#)

The FSA has announced its intention to remove the option of identifying entities with an FRN at some time in the future; no date has yet been set.

Market Watch 35 should be read in conjunction with the Transaction Reporting User Pack published last September.



## Who, where and what ESAs



### Useful Links:

[Dan Waters Speech](#)

[Regulatory Roundup #15](#)

As you will be aware from Regulatory Roundup #15, the European Commission has proposed the establishment of a European System of Financial Supervisors (ESFS) which will be composed of national supervisors and three new European Supervisory Authorities (ESA). The latter will be created by the transformation of the three existing Committees that represent the regulators of securities (CESR), banking (CEBS) and insurance and occupational pensions (CEIOPS). Regulatory Roundup #15 provided further details on changes in European supervision.

Although the original intention was to base the three new ESAs in Frankfurt, it has been announced that the new banking authority – European Banking Authority (EBA) – will be based in London where the CEBS Secretariat is currently based.

Dan Waters suggested in his recent speech (10 June 2010) that national authorities will be expected to carry on their supervisory role with the ESAs generally performing a co-ordination function within the EU. A recent meeting of the European Council Committee (Ecofin) meeting confirmed that ESAs will not overrule national regulators.



## Financial Services Act 2010



### Useful Links:

[Regulatory Roundup #13](#)

[FSA CP 10/18:  
Implementing aspects of  
the Financial Services Act  
2010](#)

Regulatory Roundup #13 contained an article on a consultation paper on the implementation of certain parts of the Financial Services Act 2010 ('FSA2010') and which introduced FINMAR to the regulated community. Based on the feedback received the FSA has now published CP10/18 "Implementing aspects of the Financial Services Act 2010". Although comments are welcomed, the paper contains final rules and guidance, most of which come into effect on **6 August**.

**FINMAR** (the Financial Stability and Market Confidence Sourcebook) is the new sourcebook that will belong in the 'High Level Standards' block of the Handbook. In addition to giving the FSA 'financial stability information power', FINMAR includes short positions disclosure requirements (which has been removed from MAR 1.9). The disclosure requirements have been largely transposed unchanged save that the **rights issue disclosure requirement** (currently in MAR 1.9.2A) has been **narrowed in scope**. It will now effectively be restricted to UK companies which are admitted to trading on a UK prescribed market (non-UK companies are also captured if the UK prescribed market is the sole or main venue for trading the securities). Responsibility for disclosure remains with the holder of the net short position, although this function can be performed by a discretionary/non-discretionary investment manager – see FINMAR 2.4. One effect of the changes is that the FSA no longer has to link shorting rules with market abuse.

FINMAR 3 will replace 'Threshold Conditions' COND 3 in its entirety (COND 3 is only relevant to firms falling within the scope of the Banking Act 2009).

FINMAR can be found in Appendix 2 of CP10/18.

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## Financial Services Act 2010 (cont.)



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**DEPP** (Decision Procedure and Penalties Manual) has been enhanced to reflect the **additional powers** given to the FSA under FSA2010. These include the power to: impose penalties on persons that perform controlled functions without approval; impose suspensions or restrictions on authorised persons and approved persons; and impose financial penalties on persons that breach short selling requirements.

# 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](#)**

**For details of any other of Complyport's services, please contact [Philip Chapman](#)**

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