



Regulatory Roundup

18 March 2014

Issue 53



In Brief:

AIFMD: Remuneration: The FCA's CP14/4 proposes to introduce guidance on SYSC 19C

UCITS V: Both the European Parliament and the European Council appear to have reached wording agreement re UCITS V

AIFMD: Other Matters: CP14/4 contains other proposals of interest to AIFMs

Best Execution: The FCA is undertaking a review of best execution in different markets.

FATCA: HMRC has updated its Guidance Notes

Suspicious Activity Reports: Guidelines introduced on submission of SARs

CRD IV: Remuneration and Risk Takers: RTS adopted on the identification of 'material risk takers'

EMIR: Risk Mitigation: FCA statement on risk mitigation techniques relating to OTC derivative trades not cleared by a CCP

Fixed Overheads: RTS concerning calculation of CRD IV own funds

In the Complyport Regulatory Roundup:

<i>AIFMD: Remuneration</i>	<u>2</u>
<i>UCITS V</i>	<u>2</u>
<i>AIFMD: Other Matters</i>	<u>3</u>
<i>Best Execution</i>	<u>4</u>
<i>FATCA</i>	<u>5</u>
<i>Suspicious Activity Reports</i>	<u>6</u>
<i>CRD IV: Remuneration and Risk Takers</i>	<u>6</u>
<i>EMIR: Risk Mitigation</i>	<u>7</u>
<i>Fixed Overheads</i>	<u>8</u>
<i>Regulatory Roundup Archive</i>	<u>9</u>

Follow us on Twitter



Join us on LinkedIn



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

AIFMD: Remuneration

UCITS V



Useful links:

[CP14/4](#)

[FCA Guidance re SYSC 19B](#)

The FCA's Quarterly Consultation CP14/4 proposes to introduce guidance on SYSC 19C (BIPRU Remuneration Code) to the effect that an AIFM that is also a BIPRU firm that complies in full with SYSC 19B (AIFMD Remuneration Code) will **not** have to demonstrate compliance with SYSC 19C.

The above may look familiar and it may have been assumed that this Guidance already existed. It certainly used to, pre-CRD IV, when SYSC 19 only comprised two chapters: SYSC 19A for BIPRU firms and SYSC 19B for AIFMD firms. However when SYSC 19 was revised into three chapters as a result of CRD IV, the above Guidance disappeared so its re-introduction is to be welcomed. The precise wording can be found in Appendix 2, Annex B of the consultation paper. It is noted that CP14/4 does not propose adding any similarly worded Guidance for those AIFMs that fall under IFPRU.

Useful links:

[EC press release](#)

[Regulatory Roundup 42](#)

UCITS V is making steady, if slow, progress. A press release by the European Commission informs us that both the European Parliament and the European Council have **reached agreement** on the wordage of UCITS V (although this does **not** mean that it has been **formally adopted** by both parties – that will be the next stage).

The agreement relates to a proposal issued in **July 2012** to amend the current UCITS IV (2009/65/EC); Regulatory Roundup 42 contains an article on UCITS V with a link to the EC proposal.

The press release advises that **key elements** of the agreement reached include:

- Tightening the rules on which entity can act as a **depository**
- Enhanced protection of UCITS assets in the event of **insolvency** of the depository
- Strengthening the **depository's liability** for the loss of UCITS assets with investors always having the right of redress against the depository
- **Remuneration policies** to apply for all risk takers – the policies will be in line with those in the AIFMD
- Strengthening the existing regime to ensure effective and harmonised **administrative sanctions**.





Useful links:

[CP14/4](#)

[FuM Modification by Consent](#)

The Quarterly Consultation (see previous page, AIFMD: Remuneration) also contained other proposals which will be of interest to AIFMs.

IPRU(INV) 11 contains the **prudential rules** for both Collective Portfolio Management Firms and for Collective Portfolio Management Investment firms (albeit that the latter also have to refer back to IPRU or GENPRU/BIPRU as applicable). Common to both types of firms is the need to calculate a component of regulatory capital based upon funds under management of the AIFs. Currently the definition of ‘funds under management’ as it relates to IPRU(INV) 11 requires **derivative instruments** to be converted into their **equivalent positions in the underlying assets**. The FCA has now rethought this stance (the AIFMD is silent on the exact method by which the portfolios of AIFs should be calculated). The definition will be **amended** so that derivative instruments will be valued at their **market value**. Until such time as the definition is changed firms can apply to the FCA for a **modification by consent**. The process is fairly painless and simply involves completing a ‘Direction’ form and emailing it to the Central Waivers team. Details of the process, and access to the form, can be accessed by way of the link provided.

Article 36 Custodians (sometimes referred to as ‘**depository-light**’) are those entities that carry out limited depository-like activities e.g. safe-keeping (and specifically as set out in AIFMD Article 21(7), (8) & (9)) when a non-EU AIF managed by an EU AIFM is marketed in the Union. Unless such an entity also undertakes MiFID activities it will be categorised as an ‘investment management firm’ and will fall under the prudential requirements as set out in IPRU(INV)5. IPRU(INV) 5.2.3(3)(a)(ia) imposes a minimum own funds requirement of **€125,000** on such firms. However if such an entity was a MiFID firm because of additional activities (i.e. an ‘investment firm’) then those additional activities could mean a minimum prudential requirement of only **€50,000**. The FCA proposes to amend FUND 3.11.33 so that €125,000 is applicable all such firms.

The Quarterly Consultation also contains a suite of notification forms for use by AIFMs when notifying the FCA of e.g. delegation (the form includes a useful flow-chart clarifying when prior approval or prior notification is required) or of a new fund etc. – see Appendix 2 of CP14/4 for details.



Useful links:

[Market Watch 45](#)

Market Watch 45 confirms that the FCA is currently undertaking a **thematic review of best execution** in different markets. Although the findings will not be published until later this year, as the article also takes the opportunity to update industry ‘on some areas where firms may have mis-understood the requirements’ it may well be that the review found significant shortcomings – and indeed there are some bulleted issues on page 2. These include a reminder that best execution also applies to OTC trades and that specific instructions from a client does not override the basic concept of ‘best execution’.

Those operating in **CFDs, spread-betting** and **rolling spot forex contracts** for difference get a particular mention. Investment firms are reminded of the need to take into account the **execution factors** (see COBS 11.2.1) as well as the **characteristics** of their clients (this being one element of the ‘best execution criteria’ (COBS 11.2.6)) that a firm must consider when determining the relative importance of said execution factors. The need for firms to have in place an appropriate policy in respect of either execution of orders or, for most portfolio managers, the transmission of orders to a suitable executing broker is also mentioned.

The article concludes by reminding all that the FCA will seek to take further regulatory action if a firm is in breach of the rules.

As the best execution article is less than three pages in length we would recommend that firms set aside time to review it and to consider the merit of **undertaking a review** of their own processes and procedures relating to order execution.





Useful links:

[FATCA: HMRC Guidance February 2014](#)

[UK Regulations SI 2013/1962](#)

[IRS Portal](#)

HMRC has updated its Guidance Notes in respect of FATCA ('Foreign Account Tax Compliance Act').

Strictly speaking, as far as UK firms are concerned, the Guidance Notes relate to the UK Regulations SI 2013/1962 which in turn give effect to the UK/US Agreement under which relevant UK Financial Institutions will report to HMRC and not to the US Internal Revenue Service. Having said that, reporting firms will still need to obtain a GIIN ('Global Intermediary Identification Number') which is issued when a firm completes its registration on the IRS Portal.

As a reminder, the reporting of relevant Specified US Persons (and Specified US Controlling Persons) for 2014 needs to be completed by **31 May 2015**. The reportable data will gradually increase over the following two years and firms may find the reporting timetable in section 9.3 of the Guidance Notes useful.

The next update of the Guidance Notes will be published in August 2014.



Suspicious Activity Reports

CRD IV: Remuneration and Risk Takers



Useful links:

[SAR Best Practice](#)

[SAR Reporting](#)

[Obtaining Consent](#)

The National Crime Agency, whose remit now includes those areas which were previously the responsibility of SOCA, has recently produced guidelines on the submission of a suspicious activity report (SAR), including by way of the SAR Online system. Use of the latter medium will require pre-registration so MLROs that have not already done so should consider registering now to avoid any undue delay should the time come when there is a need to submit a SAR. The system also allows reporting firms to request consent to continue with a specified transaction where money laundering is suspected.

Useful links:

[Regulatory Technical Standards: Remuneration](#)

The European Commission has adopted Regulatory Technical Standards on the identification of 'material risk takers', being those staff whose professional activities have a material impact on a firm's risk profile – see '**Remuneration code staff**' in SYSC 19A.3.4 and which is effectively a copy-out of Article 92(2) of the CRD.

The RTS document is only a few pages long and is restricted to six Articles. Meeting any one of the 15 '**qualitative criteria**' in Article 3, or any one of the 3 '**quantitative criteria**' in Article 4(1) will mean that the individual will be captured. Examples include having the authority to veto the introduction of new products; heading up legal affairs or being awarded total remuneration of **€500,000 or more** in the preceding financial year (for the purposes of the RTS remuneration which has been awarded but not yet paid is valued as at the **date of the award** - but see Article 5 for full details). There is an **exclusion** available for those falling within the quantitative criteria (only) but who are deemed not to have such a material impact. However to ensure a consistent application of this exclusion there is the requirement to **notify the Regulator** where the exclusion is applied to those awarded total remuneration of €500,000 or more. **Prior approval** is required for staff awarded total remuneration of **€750,000** or more and the **EBA must be informed**, via the Regulator, **before approving** the exclusion of a staff member awarded total remuneration of **€1,000,000** or more.



EMIR: Risk Mitigation



Useful Links

[EMIR](#)

[EMIR: Delegated regulation 149/2013](#)

[FCA EMIR Portal](#)

[Portal User Guide](#)

[ISDA Protocol](#)

As we know, certain risk mitigation techniques relating to OTC derivative trades not cleared by a CCP came into force on 15 September 2013, namely:

Dispute resolution: a firm must tell the FCA about any disputes between counterparties relating to an OTC, its valuation or the exchange of collateral for an amount or a higher value than €15m and outstanding for at least 15 business days – see link for access to the FCA’s EMIR Portal (which requires pre-registration). Further details can be found in Article 15 of Commission Delegated Regulation (EU) No 149/2013.

Portfolio reconciliations: uncleared OTC trades are subject to reconciliation procedures. The frequency will range from daily (500+ outstanding) to quarterly (50 or less). Details can be found in Article 13 of Commission Delegated Regulation (EU) No 149/2013.

Portfolio compression: all counterparties with 500+ uncleared OTC derivatives with one counterparty are required to have procedures in place to regularly review, at least twice a year, and to consider the possibility of portfolio compression. Details can be found in Article 14 of Commission Delegated Regulation (EU) No 149/2013.

For counterparties that have ISDA agreements in place, ISDA provides a solution to the reconciliation procedures and disputes procedures requirements as it offers a ‘protocol’ (at a cost of \$500) which has the effect of amending the standard/master ISDA agreement used by counterparties to be compliant with these two EMIR obligations.

With the above implementation date in mind the FCA has recently published the following statement which will be of importance to those firms that are not already in compliance with the above requirements:

“In line with our supervisory approach, the FCA expected firms which were unable to comply with risk mitigation requirements for non-cleared trades relating to portfolio reconciliation, dispute resolution and compression to have a detailed and realistic plan to achieve compliance within the shortest time-frame possible. **The FCA expects that such plans will be**

Cont...

7



COMPLYPORT
COMPLIANCE LEADERSHIP

Complyport Limited

4 Millbank, Westminster, London SW1P 3JA

t: +44 (0) 20 7399 4980

e: info@complyport.co.uk

f: +44 (0) 20 7629 8002

w: www.complyport.com

EMIR: Risk Mitigation (Cont)

Fixed Overheads



completed and implemented by 30 April 2014 and that firms will be able to demonstrate compliance after that date. Please refer to our statement of FCA supervisory priorities in relation to EMIR, which is available at <http://www.fca.org.uk/firms/markets/international-markets/emir/fca-supervisory-priorities>".

The FCA has a dedicated helpline for any EMIR related queries: emir@fca.org.uk.

Useful links:

[CRD IV: Fixed Overheads \(draft\)](#)

[Regulatory Roundup 51](#)

Those firms that remain categorised as **BIPRU firms**, as opposed to those subject to IFPRU, (see e.g. Regulatory Roundup 51) will be aware that calculation of the fixed overheads requirement (**FOR**) is a component in the calculation of the variable capital requirement (GENPRU 2.1.45). The FOR is based upon one-quarter of the firm's total expenditure in its most recent audited annual report and accounts, as adjusted in line with GENPRU 2.1.54.

However matters are not so straightforward for IFPRU investment firms or for firms authorised under the **AIFMD** (full-scope) and **UCITS firms**. The reason for the latter two types of firms sharing the same issue with IFPRU investment firms is that the AIFMD (Article 9(5)) and UCITS IV (Article 7(1)(a)(iii)) require such firms to maintain minimum own funds as set out in Article 21 of **CRD III** (being equivalent to one quarter of their preceding year's fixed overheads). The introduction of CRD IV means that the minimum own funds **must now be based upon Article 97 of CRD IV**. Whilst the concept of 'one-quarter of fixed overheads' remains ("own funds based on fixed overheads"), CRD IV, and therefore IPRU(INV) 11, doesn't tell a firm how to calculate its 'fixed overheads' – the calculation of fixed overheads in GENPRU 2.1.54 mentioned above relates to CRD III and not CRD IV. Full-scope AIFMs will have noticed that the required adjustments to total expenditure to ascertain the fixed overheads requirement that was in IPRU(INV) 11.3.4 were deleted from the Handbook with effect from 1st January 2014.

The EBA has recently published draft **Regulatory Technical Standards (RTS)** in respect the calculation of the own funds required under Article 97. The adjustments to total expenses do not precisely mirror the CRD III approach e.g. the RTS propose the deduction of fees to tied agents and then adding back 35% of all fees relating to tied agents. As such it may be in some cases that the 'fixed overheads' calculated under CRD IV will produce a different figure when calculated under CRD III.





Useful links:

[Past issues](#)

[Searchable archive](#)

Past issues of Complyport's Regulatory Roundup are available to view using the link provided.

You can access a searchable version of our Regulatory Roundup archive by clicking on the link.

The Regulatory Roundup archive allows search in three modes: by topic; by issue number; or by text search.

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.





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 us at info@complyport.co.uk

Complyport is always interested to receive feedback and general comments on either the Regulatory Roundup or the Complyport website. Comments can be sent to info@complyport.co.uk

The Complyport Regulatory Roundup is provided for information purposes only and represents a summary of the above subjects. It is not intended to offer a legal opinion, advice or recommendation as to future action and it is provided solely as a discussion document. ©Complyport Ltd

Complyport Limited ("Complyport"), Company Number: 04333584 is a Limited Company registered in England with Registered Office at Devonshire House, 1 Devonshire Street London. W1W 5DR.

This Regulatory Roundup is for the named person's use only. It serves purely for information purposes, and is not an offer or financial promotion. It may contain confidential, proprietary or legally privileged information. No confidentiality or privilege is waived or lost by any transmission errors. If you receive this Regulatory Roundup in error, please immediately delete it and all copies of it from your system, destroy any hard copies of it and notify the sender. You must not, directly or indirectly, use, disclose, distribute, print, or copy any part of this message if you are not the intended recipient. Transmission is not guaranteed to be secure. Any information contained herein is subject to Complyport's Standard Terms and Conditions of Business which are available upon request. Complyport and its affiliates do not assume any liability whatsoever for the content of this document, or make any representation or warranties, as to the accuracy or completeness of any information contained in this document.

