



# Regulatory Roundup

28 April 2015

Issue 64



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**FCA Business Plan & Outlook:** FCA publishes combined Risk Outlook and Business Plan

**FCA Restructure & Supervisory Model:** FCA structure changes introduced to help embed new strategy

**HM Treasury: AML & CTF Report 2013-14:** HM Treasury publishes Anti-Money Laundering and Counter Terrorist Finance Supervision report

**Fourth Money Laundering Directive:** European Council issues press release on the progress of the 4MLD

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## Useful links:

[Regulatory Roundup 54](#)

[Regulatory Roundup 61](#)

[FCA Business Plan 2015/16](#)

Around this time of the year the FCA publishes its **Risk Outlook** (identifying the most important areas of focus) and its **Business Plan** (setting out the Regulator's priorities for the year ahead).

In a break with tradition the FCA has decided to **combine** the two in the publication of its Business Plan 2015/16.

The Risk Outlook for 2014 identified seven 'forward-looking areas of focus' (summaries of both the previous Risk Outlook and Business Plan can be found in Regulatory Roundup 54); the seven areas of focus this time around are largely unchanged save that the importance of **firms' systems and controls in preventing financial crime** replaces concerns relating to house price growth. 'Financial crime' should be read in the broadest sense; not just **anti-money laundering** (and terrorist financing and sanctions) but will also encompass **anti-bribery and corruption** and **fraud**.

It may be recalled that in December the FCA announced a **strategy review** (see Regulatory Roundup 61) in which the Regulator proposed the need to provide a 'sharper focus' in its approach – particularly given the FCA now regulates around **73,000 firms** (consumer credit business added circa 50,000 in April 2014) – which will place more emphasis on sector and market-wide analysis.

The Business Plan sets out the FCA's priorities which include but are not limited to:

- **asset management** – full scope to be developed but will include charges paid by investors and the drivers behind those charges
- **asset management** – will look at whether segregated mandates and authorised funds are operated in line with expectations and mandates
- **investment and corporate banking** – will look at competition in this sector
- **appointed representatives** – a review of their role in the distribution of general insurance products
- **MiFID 2 & MAR** – a commitment to 'educate and prepare' firms for the implementation of the new rules
- **individual accountability** – focus on enforcement action against individuals to continue





Annexes to the publication which may of interest include:

- Annex 1: current and planned market studies and thematic work
- Annex 2: current EU initiatives
- Annex 3: FCA organisation chart

With **'financial crime'** moving in to the 'top seven areas of focus', and the FCA's recent update of its **'Financial Crime: a guide for firms'** firms should ensure that a review of their systems and controls in preventing financial crime is high up on the 'to do' list.



# FCA Restructure & Supervisory Model



## Useful links:

[Regulation Round-up:  
April 2015](#)

[FCA Business Plan  
2015/16](#)

The FCA's Business Plan for 2015/16 – see previous article in this Regulatory Roundup – advises us that to help embed its new strategy the FCA has made some **changes to its structure**. Aside from an organisation chart (see **Annex 3** of the Business Plan) there is not much detail save that 'Supervision – Retail and Authorisations' Division will be headed by Linda Woodall as acting Director and that 'Supervision – Investment, Wholesale & Specialists' Division will be led by Tracey McDermott.

The FCA's April edition of its '**Regulation round-up**' sheds a little more light on the changes.

We are informed that the 'Supervision – Retail and Authorisations' Division will cover retail banking; retail lending; general insurance and protection.

On the other hand the Division headed by Tracey McDermott will cover investment, wholesale banking and markets. There will be a **new Investment Management department**, which will bring together Asset Management and Wealth Management, with a number of cross-divisional teams that will support both Divisions.

We are promised that the restructuring is only part of the changes being made and that the FCA will be evolving its **supervisory model** over the next few months. Areas being looked at include how the FCA classifies firms and how it can make more use of cross-firm work to improve communication of examples of good and bad practice. **Smaller firms** will be pleased to read that a key aim is to ensure that the FCA increases its focus on engagement and education in relation to them.





## Useful links:

[HM Treasury Report](#)

[Money laundering Regulations 2007](#)

With **'financial crime'** having joined the FCA's top seven risks - see the article on the FCA Business Plan in this Regulatory Roundup - the publication by HM Treasury of its 'Anti-money laundering and counter terrorist finance supervision report 2013-14' is timely.

The report acts as a useful reminder that whilst the regulated industry may think in terms of the FCA being the AML/CTF supervisory authority, the **UK Money Laundering Regulations 2007** also captures the likes of casinos, legal professionals, tax advisers etc. as per Regulation 3. As a result there are **27** AML/CTF 'supervisors' (HM Treasury is responsible for their appointment) ranging from the FCA to the Faculty Office of the Archbishop of Canterbury ('AoC'). The Report is based upon responses received from the supervisors, although three of them – including the AoC – did not submit their returns.

Interestingly, of the **combined** total of 11,489 desk based reviews and compliance visits ('inspections') undertaken by supervisors in 2013-2014, for various reasons (including seven supervisors that either do not currently record the outcome of their visits or do not record the specific outcome of AML/CFT compliance where the visit covers broader regulatory activity) there were no results of assessment available in 31% of those cases. On the positive side, only 4% of firms were found to be 'non-compliant'.

The report's conclusions include (a) that firms are 'broadly compliant' with their AML/CFT obligations and (b) that whilst supervisors have a high level of awareness of the need to take a risk-based approach, the majority of them had difficulty articulating how their assessment of risk translated into their monitoring approach.

The report advises that in keeping with FATF expectations, HM Treasury and the Home Office undertook the first UK AML/CFT national risk assessment ('NRA'); a summary of the NRA findings will be published in due course.

# Fourth Money Laundering Directive



## Useful links:

[Regulatory Roundup 61](#)

[EC Press Release: 4MLD](#)

[4MLR: Agreed Text](#)

[4MLD: Agreed Text](#)

As an update to the article in Regulatory Roundup 61 on the progress of the (fourth) Money Laundering Directive ('4MLD'), the European Council ('EC') has recently issued a **press release**.

We are advised that the EC has approved the current text of 4MLD. For this purpose, 4MLD refers to both the Directive on money laundering and the Regulation which will apply to the transfer of funds sent or received by a payment service provider.

According to the release, the EC decision will allow the European Parliament to adopt the package at a second reading (no date provided save for 'forthcoming').

As a reminder, when the Directive finally comes into force, Member States will have **two years** to transpose the requirements into national law.





## Useful links:

[Regulatory Roundup 60](#)

[Feedback Summary](#)

[FC: Parts 1 & 2](#)

[FC Amendments](#)

It may be recalled that last November the FCA issued Guidance Consultation GC14/7 (see Regulatory Roundup 60) proposing amendments to Parts 1 & 2 of the Financial Crime Guide (FC).

The FCA published a summary of feedback received, which gave rise to **several minor changes** to the guidance.

**Part 1** has been enhanced to provide examples of financial crime MI and defines 'source of wealth' and 'source of funds' – distinguishing the latter (meaning the activity that generated the funds used in a business relationship) from the 'source of funds' that appears in the JMLSG Guidance (meaning satisfying **standard** customer due diligence requirements in the situation where payment is drawn on an account in the customer's name with a regulated credit institution).

Part 2 includes incorporation of new chapters 16 (relating to the management by small banks of money laundering risk and sanctions risk) and 17 (relating to managing bribery and corruption risk in commercial insurance broking).

The FCA is in the process of amending its regulatory guidance (FC) – which takes effect on **27 April 2015** – although the amendments can be found at the link provided.



# Fixed Overheads Calculation



## Useful links:

[Regulatory Roundup 59](#)

[Regulatory Roundup 53](#)

[Regulation 2015/488](#)

Under **CRD 4** certain firms are required to calculate their **Own Funds** requirements by reference to fixed overheads in line with Capital Requirements Regulation, Article 97. In addition, **full-scope AIFMs** and **UCITS firms** are also required to ensure minimum Own Funds based upon Article 97 – see Regulatory Roundup 53 for a summary of the prudential regimes. Having said that, Article 97 does not define ‘Fixed Overheads’.

As mentioned in Regulatory Roundup 59 (October 2014), draft Regulation was published by the EC on the methodology of calculating ‘fixed overheads’ and which was based upon EBA recommendations.

The final adopted Regulation (**2015/488**) appeared in the Official Journal dated 24 March and so entered into force on **13 April 2015** (in line with Article 2 of said Regulation).

For the avoidance of doubt, the prudential requirements of **BIPRU** firms involve a ‘Fixed Overheads Requirement’ based upon CRD 3 (see GENPRU 2.1.54) and so the above will not be relevant to them.



# European Long Term Investment Funds



## Useful links:

[Regulatory Roundup 61](#)

[ELTIF Regulation](#)

[EC Press Release: ELTIFs](#)

The European Council has formally adopted the Regulation on **European Long Term Investments Funds** ('ELTIFs').

In brief ELTIFs are designed to tackle barriers to long-term investment e.g. infrastructure projects which in turn should stimulate employment and economic growth. Only Alternative Investment Funds ('AIFs') that are managed by Alternative Investment Fund Managers, will be eligible to market themselves as ELTIFs; however unlike pure AIFs an ELTIF will target both **professional and retail** investors - see Regulatory Roundup 61 for further details.

The ELTIF Regulation will enter into force on the twentieth day following its publication in the Official Journal.



# FATCA: Nil Returns



## Useful links:

[Regulatory Roundup 63](#)

[HMRC FATCA Nil Returns](#)

[HMRC FATCA Guidance](#)

[HMRC Changes to FATCA Guidance](#)

As we know - e.g. see Regulatory Roundup 63 – those firms that are subject to FATCA must ensure that their first return (in respect of 2014) is submitted to HMRC by 31 May 2015.

The current (August 2014) HMRC Guidance – e.g. see page 72 - advises that Reporting Financial Institutions with no Reportable Accounts are required to submit **nil returns** to HMRC. However, earlier this month HMRC clarified that those UK financial institutions that do not have any US reportable accounts will **not have to submit nil returns**. Having said that, where the nil return position is as a result of application of the **de minimis** \$50,000 threshold **election** (see section 5.1 of the Guidance – the de minimis is \$250,00 for Cash Value Insurance Contracts or Annuity Contracts) then a return **will** still have to be submitted in order to make the election.

Elsewhere we are informed that **holding companies** and relevant treasury companies are no longer defined as financial institutions.

Revised HMRC Guidance is expected later this year.



# Transaction Reporting Failure



## Useful links:

[Final Notice: MLI](#)

[FCA: Transaction Reporting Fines](#)

**Merill Lynch International (MLI)** became the twelfth firm to be fined by the Regulator for transaction reporting failures – the previous one being Deutsche Bank last August.

The Final Notice concerns failings between November 2007 and November 2014, although it does also reference that the firm had been subject to a previous Enforcement action and a Private Warning for similar failings.

In the Notice eleven breaches are listed which in total relate to 35,156,197 inaccurate or absent transaction reports. The breaches include: reporting inaccurate **trade times**; incorrect identification of **counterparties**; incorrect use of the **buy/sell indicator**; incorrect **BIC codes**; and the **failure to report** 121,387 listed derivative trades.

After the usual 30% discount for early stage settlement, MLI were subjected to a financial penalty of **£13,285,900** – the highest (to date) imposed for transaction reporting failures. It is noted that the FCA has **increased** the metric for transaction reporting breaches to **£1.50 per breach** (the Deutsche Bank penalty in August last year included a ‘fine’ of £1 for each reporting breach) because it believes that past fines have not been high enough to achieve ‘credible deterrence’.

Although perhaps most firms that are subject to transaction reporting obligations are far removed from the size of MLI, the failings that gave rise to the Enforcement action e.g. inaccurate trade times, incorrect use of buy/sell indicator etc. were fairly basic. As such, relevant firms may wish to review the Final Notice in detail and consider whether their own systems and processes are sufficient to provide comfort that they will not be added to the current list of the one dozen transgressors.

# Bank of New York: Custody Enforcement Action



## Useful links:

[Final Notice: BNY](#)

[Regulatory Roundup 8](#)

The FCA has taken enforcement action against two entities within The Bank of New York Mellon Group - The Bank of New York Mellon London Branch (BNYMLB) and The Bank of New York Mellon International Ltd (BNYMIL) (together 'the Firms') for **custody failings** over a period from 1 November 2007 to 12 August 2013.

It is often the case that a Final Notice reveals that it was the firm subject to the Notice, rather than the Regulator, that discovered and reported the breaches that gave rise to action by the Regulator. However in this case we are informed that all of the failings, bar one, were drawn to the Firms' attention by the Regulator and external advisers, including Skilled Persons, rather than through the Firms' own compliance monitoring.

In 2010 the then FSA issued a fairly scathing report on the handling of client money and assets by firms – see Regulatory Roundup 8 – which, it was hoped, would have prompted the Firms to review their custody asset compliance. The Regulator visited the Firms in the second quarter of 2012 to review their application of the banking exemption under the Client Money rules, but during the visit identified issues relating to compliance with the Custody Rules. Later that year, an on-site risk assessment visit by the Regulator identified further CASS failings. The sorry history, including the use of external regulatory advisers and a s166 Skilled Person's report, is included in the Final Notice.

The failings include (but are not limited to): inadequate reconciliations; commingling of firm and clients' custody assets; use of clients' assets without express prior consent; inadequate CASS resolution packs; and failure to provide CASS-specific training to relevant employees.

Given that the BNY Mellon Group is the world's largest global custody bank; that the custody asset balances held by BNYMLB and BNYML peaked at approximately £1.3 trillion and £239 billion respectively; and that the Firms provide custody services jointly to 6,089 UK-based clients, it is not surprising that the FCA considered the breaches 'serious' with the result that a financial penalty of £126m was imposed – which would have been £180m without an early stage discount.





## Useful links:

[Regulatory Roundup 61](#)

[CP15/14](#)

[Fee Calculator](#)

It may be recalled that CP14/26 (see Regulatory Roundup 61) “Regulatory fees and levies: policy proposals for 2015/16” proposed certain policy changes to the fee and levy **regimes**. However its function was not to consult on fee **rates**; we have had to wait for the publication of CP15/14 “FCA Regulated fees and levies: Rates proposals 2015/16” for those details (and which also includes feedback to responses on CP14/26). As a reminder, FCA periodic fees relate to the FCA’s financial year, which is 1 April to 31 March.

The annual funding requirement (‘AFR’) for 2015/16 – which will need to be allocated across fee-blocks - has been set at **£481.6m**, a £35.2m (+7.9%) increase on last year’s AFR of £446.4m. Although the FCA is required to pay all financial penalties it has imposed on firms to the Treasury, it is permitted to retain sufficient to cover the costs incurred in generating these penalties. This ‘rebate’ is **estimated** to be £40.3m (£39.1m in 2014/15) so the **net** increase in fees is £33.9m year on year (although para 5.9 advises that the FCA has found another £3.5m to include in the overall rebate).

Draft fee rates are set out in Appendix 4 - fortunately the FCA provides a fees calculator which firms can use to have a better idea of the impact that the **consultative** fee rates will have on them – we will not know the **final** rates until the end of **June**. The calculator also covers FOS and FSCS levies etc.

Comments are invited by 18 May 2015.



## Useful Links:

[ESMA CP](#)

[MiFID 2](#)

Generally the FCA's Training and Competence ('TC') rules only apply to FCA authorised firms where certain activities (as listed in TC App 1.1) are carried on for retail persons. The activities range from what one would recognise as 'regulated activities' and which would be associated with a CF30 function to those which seem more operational e.g. oversight on a day-to-day basis of the operation of a CIS or of administrative functions in relation to managing investments. The majority of activities falling within TC App1.1 require an appropriate qualification and all of them are subject to the relevant individuals being 'appropriately supervised' by the firm they work for and on-going maintenance of competence.

Firms without any retail involvement escape the TC regime and instead are subject to the higher level non-prescriptive requirements in SYSC 5.1.1 (although strictly speaking this is a rule that applies to most firms regardless of client base).

MiFID 2 firms will be subject to a more stringent regime (Article 25(1) of MiFID 2 provides for relevant persons needing to possess the "**necessary knowledge and competence**") when investment advice is given or information is given about financial instruments/services/ancillary services.

In keeping with Article 25(9) ESMA has produced a Consultation Paper which considers that staff knowledge and competence translates into requiring an "**appropriate qualification**" and "**appropriate experience**". By way of exception, ESMA considers that existing relevant staff with not less than five consecutive years of "appropriate experience" could be considered to possess the necessary knowledge and competence. It will be left to individual Member States to set and determine both the "appropriate qualifications" and "appropriate experience".

Annex IV of the Consultation Paper contains the draft guidelines. It will be noted from paragraph 18 that the compliance function will be responsible for assessing and reviewing compliance with the guidelines, with the review being included in reports to the management body. Annex V provides illustrative examples of the application of certain aspects of the guidelines.

# Training and Competence for MiFID Firms (continued)



Although MiFID 2 is the driver, note that the proposal will extend to **UCITS firms** and to **AIFMs** when they are carrying out permitted additional activities (see definition of 'firms' on page 12 of the CP).

The guidelines have to be in place by **3 January 2016** albeit that MiFID 2 will not be transposed until 3 January 2017. ESMA will consider all comments received by 10 July 2015.





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[Searchable archive](#)

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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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