June 2019

PRIVATE BANK BRIEFING

Issues Impacting the Private Bank Sector

Welcome to our quarterly round-up of legal and compliance issues impacting private banks and their clients.

In This Edition

FCA and PRA Priorities for 2019/20

The FCA and the PRA published their Business Plans for 2019/20 in April 2019.

FCA Priorities

As expected, with Brexit remaining a key focus, there are few new initiatives for this year. The FCA's Business Plan sets out both cross-sector priorities and sector-specific priorities. Many of the FCA's cross-sector priorities (see table) remain the same as in previous years, although the FCA is placing a greater emphasis on operational resilience. The FCA and PRA plan to publish a joint Consultation Paper on building operational resilience towards the end of 2019, following the 2018 joint Discussion Paper. There is also more of a focus on the FCA's vision for the future.

FCA Cross-Sector Priorities	
Current priorities	Brexit
Continuing priorities	Culture & governance Operational resilience Financial crime Fair treatment of existing customers
Strategic challenges	The future of regulation Innovation, data and data ethics Demographic change

This ties in with an FCA speech in which Andrew Bailey set out the FCA's plans for the future of regulation. In the speech, Mr. Bailey discussed the need for a public debate on what the future of regulation should look like. He emphasised the role that outcomes and principles have to play, noting that rules are only one way of achieving the desired outcomes and principles. As part of this plan for the future, the FCA intends to further examine the role of its Principles for Businesses.

Of relevance to private banks, the FCA's sector priorities include:

- Evaluating the FCA's review of the PRIIPs Regulation and considering what the FCA can do to resolve the issues identified.
- Reviewing firms' compliance with the MiFID II product governance regime.
- Finalising the FCA's proposed pricing remedies in the overdrafts market.
- Carrying out a second review on suitability of advice and disclosure, and starting to review the impact of the Financial Advice Market Review.
- Following up on its Strategic Review of Retail Banking Business Models.
- Ensuring that open banking services are introduced securely.
- Continuing to focus on market abuse risks, particularly in fixed income markets.
- Undertaking diagnostic work to understand access to and use of data in wholesale markets.

PRA Priorities

The PRA's Business Plan notes a shift from focusing on post-crisis reforms, to supervisory business as usual. The PRA will switch from helping to establish the ring-fencing regime to policing it, and in doing so will review firms' proprietary trading activities. As well as concentrating on operational resilience in conjunction with the FCA, the PRA also plans to evaluate the effectiveness of the SMCR and remuneration policies. Finally, the PRA notes increased expectations on firms to identify and manage financial risks arising from climate change.

Product Intervention: FCA Measures on Binary Options and CFDs

Following its consultation in December 2018, on 29 March 2019 the FCA set out its final rules in PS19/11 to permanently prohibit the sale, marketing, and distribution of binary options to retail consumers by firms that carry out activities in, or from, the UK. The prohibition has applied since 2 April 2019.

The FCA's rules are in substance the same as ESMA's existing ban on binary options, which has applied since July 2018 with some subsequent modifications, although the FCA is also applying its rules to securitised binary options. These are binary options that are listed on a formal trading venue, are subject to a prospectus, and have minimum contract periods from the point of entry to the expiry of the binary option.

The FCA has significant concerns about the sale of all types of binary options to UK retail consumers. These concerns are based on evidence of aggressive or misleading marketing of these products, their inherent complexity, a lack of transparency, and the level and speed of retail consumer losses experienced when trading binary options.

Private banks will need to observe the outcome of this consultation closely, as the broad definition of CFDs proposed could potentially capture various structured products.

Meanwhile, the FCA is still considering its final rules for CFDs and CFD-like options. On 26 April 2019, the FCA published a statement announcing that it is delaying publication of these rules and will publish a Policy Statement and any final Handbook rules in the summer of 2019. Private banks will need to observe the outcome of this consultation closely, as the broad definition of CFDs proposed could potentially capture various structured products. Whether industry feedback on this point will be taken into account by the FCA remains to be seen.

Complaints: FCA Complaints Data for Second Half of 2018 and FOS Annual Review

The FCA has published its complaints data for the second half of 2018, and the FOS has published its annual review for 2018/19. Points of note for private banks are set out below.

FCA Complaints Data

- 3.91 million complaints were reported by firms in the second half of 2018, a 5% decrease compared with the first half of 2018. This figure marks the first time the number of complaints has fallen since firms were required, in 2016, to change the way they report complaints.
- PPI remains the most complained-about product, followed by current accounts and then credit cards — in relation to which complaints are increasing (this trend corresponds to the increase in FOS complaints about credit products, shown below).
- The total redress paid to consumers in the second half of 2018 was £2.26 billion, a 12% (£216 million) decrease compared with £2.57 billion in the first half of 2018.

FOS Annual Review

- In 2018/19, the FOS received 388,392 new complaints, an increase of 14% on 2017/18.
- Complaints about consumer credit products and services grew by 89%, representing one in three of all new cases received (excluding complaints about PPI).
- Complaints arising from the move to online banking, including the impact of banks' IT failures, have increased.
- Complaints concerning vulnerability and harm, including the penalisation of customer loyalty in the insurance sector and banks' treatment of victims of fraud, have come under particular focus.
- **An online portal for use by complainants will be introduced in 2019. This tool will change the way in which complaints can be made, and firms may therefore need to update their customer documentation to reflect this change.**

Consumer Protection: Enforcement and Modernisation of EU Rules

As part of the European Commission's "New Deal for Consumers" package, designed to ensure that the rights of EU consumers are fully respected and that existing consumer protection measures are fit for purpose, on 17 April 2019 the European Parliament approved a proposal for a Directive that will amend existing consumer protection Directives in the following four areas: unfair commercial practices, consumer rights, unfair contract terms, and price indication.

The Directive is designed to protect consumer rights in the internet age by mandating that online marketplaces and comparison websites provide more information about how online rankings work, and when those rankings derive from paid placements. Such marketplaces and sites will also be required to make the use of online reviews and personalised pricing more transparent for consumers.

Additionally, the Directive will address the "dual quality of products" issue. This is when products marketed under the same brand in different EU countries differ in composition or characteristics. The Directive will clarify how national authorities should handle misleading marketing. If a marketing practice meets certain conditions (*e.g.*, it amounts to marketing products that have a significantly different character or composition as being identical), it may amount to a misleading practice and be prohibited.

The European Council is expected to formally adopt the Directive at first reading without further discussion at one of its next meetings.

Policy: Definition of a Private Bank in FCA Rules

As we reported in the previous edition of this briefing, the FCA had been proposing to use a definition of a private bank in its new rules on overdrafts that appeared to be unnecessarily restrictive, meaning that some private banks would not be able to benefit from the private bank exemption in those new rules. To qualify as a private bank pursuant to this definition, more than half of the bank's (or brand's) personal current account customers must meet the definition of "eligible individuals". However, the net worth threshold for eligible individuals was set by reference to assets held in cash and transferable securities only, therefore excluding assets held in most collective investment schemes.

This issue was raised with the FCA, and the FCA reported in its Policy Statement on overdrafts (PS19/16), published on 7 June 2019, that it has taken on board the feedback it received and is amending the private bank definition. The FCA will remove any reference to how assets are held, so that eligible individuals simply need net assets of £250,000 or above. The definition already appears in BCOBS 7 (requirement to publish information about current account services) and will appear in BCOBS 8 (requirements to provide overdraft alerts), both of which also intend to exclude private banks. The FCA is consulting separately, in CP18/19, on amending the definition of a private bank in the same way in these Handbook provisions.

The fact that most private banks will be able to take advantage of the exemption from the stringent new rules on overdrafts is a welcome development. Private banks should note, however, that the new guidance on refused payment fees will apply to all payment services providers within scope of the Payment Services Regulations 2017.

POAs: Guidance for Staff in Regulated Markets in Relation to Lasting Powers of Attorney, Enduring Powers of Attorney, and Deputy Court Orders

The Office of the Public Guardian has published a Guide for staff in regulated markets in relation to lasting powers of attorney (LPAs), enduring powers of attorney (EPAs), and deputy court orders, which has been written in partnership with the UK Regulators Network, including the FCA.

The Guide aims to help firms understand what the law requires of them when dealing with powers of attorney and deputy court orders, and contains guidance for staff in regulated firms on:

- The different types of LPAs and EPAs, when they can be used, and which are relevant to staff in regulated markets.
- What to ask for if someone informs the firm they have a power of attorney or deputy court order.
- How to check that an LPA, EPA, or deputy court order is genuine and valid, as well as the documents that should be retained in this respect.
- Common issues to look out for when dealing with attorneys and deputies.
- How to treat attorneys and deputies.
- How attorneys and deputies must act, and how to deal with any concerns or suspicions raised by an attorney or deputy.

The Guide provides a helpful point of reference for private banks in terms of assessing the adequacy of their policies and procedures, ongoing monitoring, and training. In particular, the Guide contains a number of worked scenarios that private banks may find useful to provide to their staff who deal with attorneys and/or deputies, or to incorporate into any training that they may provide in this respect.

Unfair Terms: FCA Finds Termination Clause to Be Unfair

On 9 May 2019, the FCA published a new undertaking in relation to an unfair termination clause in a customer contract for investment services.

The clause in question allowed the firm to terminate the contract for any reason, without providing consumers with any advance written notice. The FCA's concern was that if the firm was to terminate the contract at short notice, consumers may not have sufficient time to make arrangements with an alternative provider, causing them unnecessary inconvenience and expense.

The firm agreed to amend the contract to provide consumers with at least 20 business days' notice in the event that the firm terminates the contract. **This undertaking indicates that when drafting a termination clause firms must consider how long, in practice, a customer might take to find an alternative service. Private banks should take this factor into account when drafting and reviewing client documentation.**

Policy: FCA Feedback Statement on a New Duty of Care

On 23 April 2019, the FCA published a Feedback Statement (FS19/2) to its July 2018 Discussion Paper on a duty of care and potential alternative approaches.

While most respondents agreed that change was needed, they did not agree on the best option for change.

The FCA had previously sought views on whether to introduce a new duty of care and, if so, what form this duty should take. The FCA also sought views on alternative approaches to strengthening consumer protection without introducing a new duty of care.

While most respondents agreed that change was needed, they did not agree on the best option for change. Some respondents felt that there should be a new duty of care, either as a statutory duty, or a duty expressed within the FCA's Principles for Businesses. Other respondents considered that the SMCR is already initiating the necessary change, and the FCA should wait and see what impact that change has before assessing whether a new duty of care is required.

Regardless of their views as to whether or not a new duty of care is needed, most respondents felt that the FCA should consider changes to the way it uses the existing regulatory framework. This would include being more willing to take action in relation to breaches of the Principles, and being more transparent about expected standards for good customer treatment. Respondents consider this approach would incentivise firms to get things right in the first place, rather than relying on the regulator to tell them when their practices do not meet expectations.

The FCA concludes that there is not a sufficient basis for introducing a statutory duty of care at this stage, but plans to publish a further paper in autumn 2019 seeking detailed views on specific options for change.

The FCA's primary focus will be on:

- Reviewing how it applies the regulatory framework, particularly how it applies the Principles and how it communicates with firms about this.
- Strengthening or clarifying firm's duties to consumers with new or revised Principles, including consideration of the potential merits and unintended consequences of a potential private right of action for breaches of Principles.

Private banks should follow these developments closely and consider the impact any change could have on their approach to, and interactions with, their clients.

FCA Call for Input: Evaluation of Retail Distribution Review and Financial Advice Market Review

On 1 May 2019, the FCA published a Call for Input to assess how the Retail Distribution Review and the Financial Advice Market Review have impacted the market to date, focusing in particular on whether advice and guidance services meet current consumer needs as well as whether they will continue to do so in the future.

The FCA highlighted its concern that parts of the market may be experiencing problems with conflicts of interest, poor treatment of consumers, and misleading or confusing communications — meaning that consumers can struggle to assess the cost of advice and may overpay for services they do not need. The FCA will, however, use the feedback that it receives to the Call for Input (which has now closed) to inform the additional research that it will carry out during 2019.

The FCA intends to publish its findings in 2020, noting that if it identifies problems in the market, or ways to improve advice and guidance services, it will consider how best to intervene.

TCF: UK Finance Principles for Exiting a Customer

On 4 June 2019, UK Finance published a set of principles for exiting a customer. The principles set out the approach that a bank should adopt when communicating a decision to a customer that it cannot offer, or continue with, the provision of its service.

The principles emphasise that, in every such case, a bank must treat the customer fairly and communicate in plain language. If a bank is considering whether it should not offer, or continue with, the provision of a service to a customer, the bank should discuss the matter with the customer, so far as is feasible and permissible. The principles also set out the steps that a bank should take once it has concluded that it should not offer, or continue with, the provision of a service to a customer. For example, the bank should endeavour to provide an appropriate period of time for the customer to make alternative arrangements.

Private banks may wish to ensure that these principles are integrated into their internal policies and procedures for exiting customers.

Payments: New PSR Industry Code Entitles Victims of Fraud to Reimbursement

On 28 May 2019, the Payment Systems Regulator (PSR) published an industry code for the reimbursement of those who have suffered authorised push payment (APP) fraud. The code is voluntary, and so far 16 banks and payment service providers have signed up.

Over £350 million was stolen from accounts last year through APP fraud, in which a customer is tricked into making a payment to another account that is controlled by a fraudster. Historically, victims of this sort of fraud have struggled to retrieve their money, which the fraudster quickly dissipates after the bank transfers the money in accordance with the customer's mandate. However, the code provides that customers will be reimbursed in all circumstances in which they have done everything expected of them under the code. These expectations include:

- Taking appropriate action in response to any "effective warnings" given by the bank.
- Having a reasonable basis for believing that the transaction was legitimate.
- Having not been "grossly negligent".

The code makes a real difference to the position for banks and for customers. Developments in banking that have led to quick and easy payment methods, combined with increasingly sophisticated cyber scams, have created an environment in which fraudsters are flourishing.

The code sets out standards of conduct for both sending banks and receiving banks that cover detection and prevention of APP fraud and the banks' response to it. In particular, these standards provide that sending banks should take reasonable steps to detect APP scams and send "effective warnings" to potential victims about the risk and what they should do to protect themselves. However, even with these higher standards, some fraudsters will inevitably succeed, and the default position under the code is that the bank will be liable in these cases.

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Although the code is voluntary, it is widely anticipated that the PSR will review its voluntary nature in the longer term. The PSR has also indicated that it may introduce legislation to cover APP fraud if voluntary adoption does not progress satisfactorily. Given this indication, and the industry's continued focus on protecting customers from the threat of APP scams, private banks should consider the contents of the code carefully and be mindful of future developments, such as the planned introduction of "confirmation of payee" requirements (under which customers will be alerted if the intended recipient's name is different from that of the account holder).

MiFID II: ESMA Final Report on Integrating Sustainability Risks and Factors

On 3 May 2019, ESMA published its Final Report on technical advice to the European Commission on integrating sustainability risks and factors in MiFID II.

ESMA reports that most respondents agreed with the proposed principles-based approach to integrating sustainability risks and factors, given that a more prescriptive approach might risk stifling innovation or creating regulatory inconsistencies.

As reported in a previous edition of this Briefing, ESMA consulted on the draft technical advice in December 2018. The technical advice suggests how environmental, social, and governance (ESG) considerations can be woven into firms' organisational requirements and the product governance and suitability regimes under MiFID II. In the draft technical advice, ESMA sensibly suggested a fairly flexible and pragmatic approach to integrating ESG considerations. For example, in relation to the product governance requirements, ESMA suggested that the amendments would not mean that investment products need always have a reference, in their target market, to whether the products fulfils ESG preferences or not.

ESMA has finalised its technical advice in relation to changes to the MiFID II delegated acts (concerning organisational requirements and product governance), as it intends to complete amendments to the guidelines on suitability and product governance only after the amended legislation has been approved. ESMA reports that most respondents agreed with the proposed principles-based approach to integrating sustainability risks and factors, given that a more prescriptive approach might risk stifling innovation or creating regulatory inconsistencies. However, many respondents noted the need for a common and reliable taxonomy and standardised practices to be implemented before the changes come into effect.

The Commission must now develop the technical advice into formal delegated acts. Once these acts are adopted, there will be a 12-month period before the changes enter into force. Work on the common taxonomy remains ongoing and so it is hoped that this work will be finalised before these changes take effect. Clearly firms will face difficulties if they are expected to take ESG considerations into account when there is no clear definition of which products fit this label.

MiFID II: ESMA Launches Supervisory Work on Appropriateness

On 3 June 2019, ESMA announced the launch of a "common supervisory action" regarding the MiFID II appropriateness requirements.

Participating national regulators will carry out supervisory work in the second half of 2019, assessing how firms apply the appropriateness requirements through a sample of investment firms under their supervision. ESMA believes that this initiative, and the related sharing of practices across national regulators, will help ensure consistent implementation and application of the MiFID II rules.

This work will use ESMA's supervisory briefing on appropriateness (which was updated in April 2019) as a starting point. The briefing is aimed at national regulators, and provides an overview of the MiFID II rules on appropriateness, as well as indicative questions that supervisors could ask themselves, or a firm, when assessing a firm's approach to the application of the rules.

It is not yet clear which national regulators will participate in the common supervisory action, but private banks may wish to revisit their implementation of the appropriateness rules ahead of any potential supervisory focus on this area.

PRIIPs: European Commission Refuses Opportunity to Clarify Application to Bonds

On 28 May 2019, the European Commission published a letter it sent to the ESAs concerning the PRIIPs Regulation. The letter came in response to the ESAs' letter of last July, which flagged concerns about bonds with certain features falling within the PRIIPs regime, and asked the Commission to consider clarifying the scope of the regime.

Unfortunately, however, the Commission has not taken the opportunity to clarify the application of the PRIIPs Regulation to bonds. In the letter, the Commission emphasised that it is necessary to assess each type of bond on a case-by-case basis to determine whether or not the bond is a PRIIP, and that the reason or purpose for which investors acquire the bond is irrelevant for this determination.

Further, the Commission stated that, consequently, even categories of bonds that might appear to fall outside of the PRIIPs Regulation could still contain contractual terms and conditions that would in fact mean that they are PRIIPs. Therefore, the Commission insists that "it is neither feasible nor prudent to agree ex-ante and in abstract terms whether some categories of bonds fall under the PRIIPs Regulation or not".

The remaining uncertainty is unfortunate, as obtaining further clarity ahead of the formal review of the PRIIPs regime, due to take place this year, now seems unlikely.

> "It is neither feasible nor prudent to agree ex-ante and in abstract terms whether some categories of bonds fall under the PRIIPs Regulation or not."
>
> European Commission

Outsourcing: FCA and PRA Fine Bank for Serious Outsourcing Failings

On 29 May 2019, the FCA and the PRA announced that they had fined an independent UK bank for failing to manage its outsourcing arrangements properly. The bank received separate fines of £775,100 from the FCA and £1,112,152 from the PRA for breaches of the regulators' high-level principles for authorised firms, as well as their more detailed rules on outsourcing. Each fine includes a 30% early settlement discount.

The bank's failings meant that it did not have adequate processes to enable it to understand and assess the business continuity and disaster recovery arrangements of its outsourced service providers.

The bank relied heavily on a number of outsourced service providers, including reliance on third-party card processors for the authorisation and processing of card transactions. The bank's failings meant that it did not have adequate processes to enable it to understand and assess the business continuity and disaster recovery arrangements of its outsourced service providers. This lack of preparedness posed a risk to the bank's operational resilience, which crystallised when a technology incident at a card processor led to the unavailability of authorisation and processing services for over eight hours.

The FCA and the PRA found that the bank's specific failings resulted from "deeper flaws in its overall management and oversight of outsourcing risk, from Board level down", including:

- A lack of adequate consideration of outsourcing within its board and departmental risk appetites.
- An absence of processes for identifying critical outsourced services.
- Flaws in the bank's initial and ongoing due diligence of outsourced service providers.

This case emphasises the importance of conducting thorough due diligence on outsourced service providers, and ensuring that service providers' business continuity plans are considered in as much detail as a firm's own plans. With the regulators' ever-increasing focus on operational resilience, it is a crucial time for private banks to ensure that they have established proper outsourcing systems and controls.

Lessons From Enforcement: Are Your Competition Risk Arrangements Up to Scratch?

The FCA published the full decision in its first competition enforcement case on 22 May 2019. This case centred on information-sharing by three asset managers in the lead-up to two securities offerings.

Although the conduct took place in a capital markets context, the case includes some interesting learning points around the sharing of information that are relevant across the financial services sector more broadly.

Notably, the conduct in question was fairly isolated and did not form part of a broader collusive effort by the firms involved. Clearly the FCA was keen to make use of its competition powers as soon as it had the chance, as the securities offerings that the regulators investigated took place only months after the FCA gained its competition powers in April 2015.

Although the conduct took place in a capital markets context, the case includes some interesting learning points around the sharing of information that are relevant across the financial services sector more broadly.

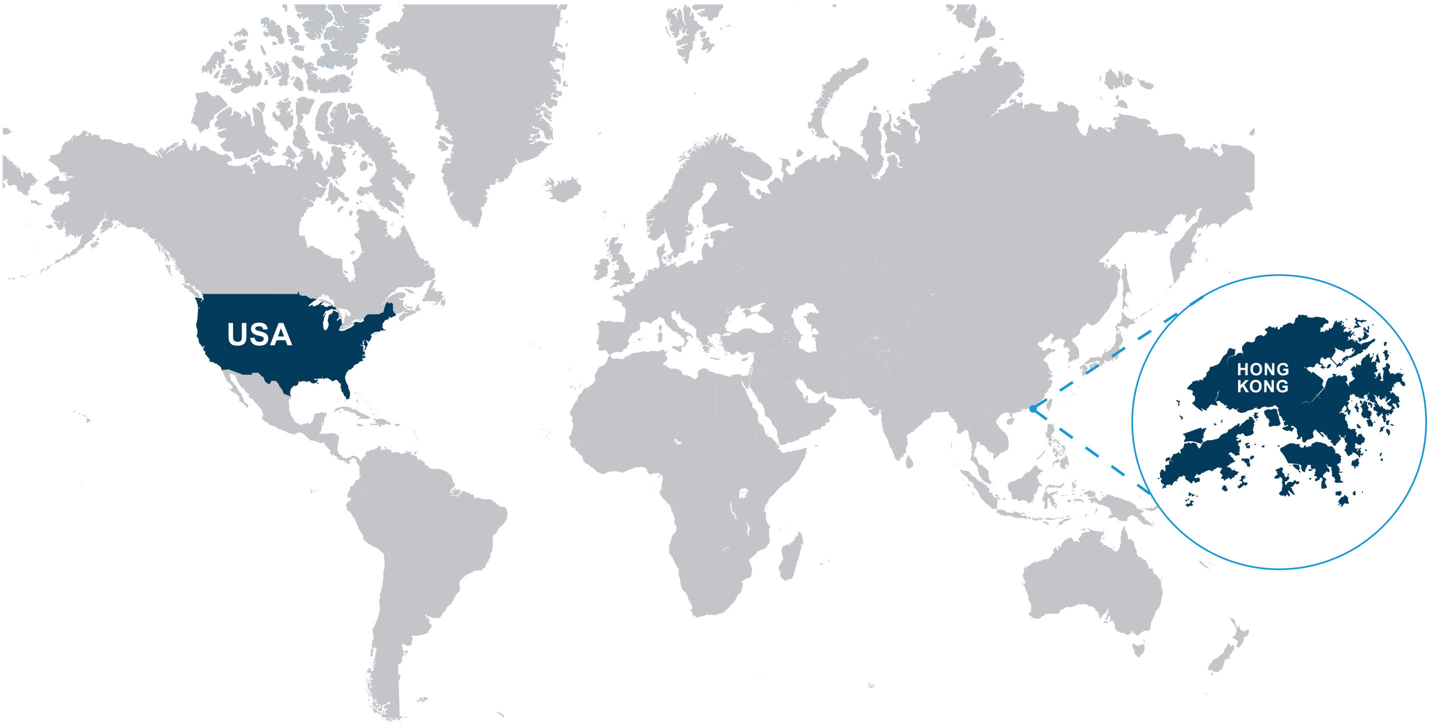
For individuals less familiar with competition law, some of these points may be quite surprising and so understanding the sorts of conduct that may be problematic from a competition law perspective is critical.

The FCA's decision included the following key points:

- Competitors are prohibited from sharing "strategic information", that is, information that reduces or eliminates uncertainty by allowing parties insight into how their competitors are likely to behave.
- The more granular the information, the more likely the information is to be strategic. However, even quite limited information, a one-off disclosure, or just one piece of information in a sea of other information can be strategic.
- A two-way flow of information is not necessary to establish a breach by the discloser or the recipient; one party disclosing strategic information to another party is sufficient.
- There must be some form of knowing cooperation between parties, but this cooperation can be established if the recipient of the information merely accepted the information. In this context "acceptance" can be implied if the recipient does not distance themselves from the disclosure (for example, by reporting the disclosure to internal compliance).
- A breach can be established if the parties remain "active in the market" after the sharing of strategic information, even if they do not alter their subsequent conduct or agree to any sort of joint strategy. Again, distancing oneself from the disclosure and rejecting the information can help avoid the presumption that they have acted in the knowledge of a competitor's intentions.

The FCA also took the opportunity to remind firms that their knowledge and appreciation of competition law could be much improved. Consequently, private banks should ensure that their employees understand the application of competition law to their activities, and appreciate the circumstances in which disclosing information to, or accepting information from, competitors could breach competition law.

Global Insights



US: SEC Adopts Regulation Best Interest Package

On 5 June 2019, the US Securities and Exchange Commission (SEC) adopted Regulation Best Interest, which requires broker-dealers registered with the SEC to act in the best interest of their retail customers when making a recommendation of any securities transaction or investment strategy involving securities. The purpose of the rule, according to the SEC, is to make clear that a broker-dealer may not put its own financial interests ahead of the interests of a retail customer when making recommendations. The final rule does not explicitly define what "best interest" means, but instead provides an extensive set of requirements that a broker-dealer must comply with to meet the overarching Regulation Best Interest obligation.

The core of the rule is the requirement that broker-dealers disclose, mitigate, and eliminate conflicts of interest with the client for each recommendation made.

Regulation Best Interest includes the following four components:

- **Disclosure:** Broker-dealers must disclose material facts about the relationship between the broker-dealer and the customer, any risks and fees associated with their recommendations, and any conflicts of interest related to the recommendations.
- **Care:** A broker-dealer must exercise reasonable diligence, care, and skill when making a recommendation to a retail customer.
- **Conflict of Interest:** Broker-dealers must establish, maintain, and enforce written policies and procedures reasonably designed to identify and at a minimum disclose or eliminate conflicts of interest.
- **Compliance:** Broker-dealers must establish, maintain and enforce policies and procedures reasonably designed to achieve compliance with Regulation Best Interest as a whole.

The SEC simultaneously adopted a final rule mandating the use of the Form CRS Relationship Summary. Registered broker-dealers (and investment advisers under the Investment Advisers Act of 1940) will be required to provide retail investors with simple, easy-to-understand information about the nature of their relationship with their financial professional, at the inception of the relationship.

While seemingly straightforward, the complexities that an SEC-registered broker-dealer faces in complying fully with Regulation Best Interest cannot be overstated. The requirements set forth in the rule apply to a broad range of transaction categories and business lines. Furthermore, a "retail customer" for the purposes of the rule includes any natural person who receives a recommendation from a broker-dealer with respect to any transaction or investment strategy involving securities, and who uses such recommendation primarily for personal, family or household purposes, irrespective of the person's net worth, financial literacy, sophistication, or experience in investment-related matters.

Notably, the rule applies to every single transaction a broker-dealer recommends to a client. When a broker-dealer advises a client on more than one transaction, each transaction is considered a distinct recommendation, and the broker-dealer must determine that each transaction serves the customer's best interest, and also that the cumulative result of the series of transactions is in the best interest of the customer.

The core of the rule is the requirement that broker-dealers disclose, mitigate, and eliminate conflicts of interest with the client for each recommendation made. The Form CRS Relationship Summary requirement reflects an initial layer of disclosure upon initiation of the relationship, while the rule's general disclosure obligation requires additional layers of ongoing disclosure, as required over the course of the relationship to mitigate possible conflicts of interest.

The SEC has established a compliance date of 30 June 2020. All broker-dealers (and their associated persons) that are registered with the SEC will be subject to the requirements of Regulation Best Interest.

Hong Kong: SFC Delays Implementation of Online Platform Guidelines and Offline Requirements for Complex Products

On 19 March 2019, the Hong Kong Securities and Futures Commission (SFC) announced that the implementation date of the Guidelines on Online Distribution and Advisory Platforms and the new paragraph 5.5(a) to the Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission is to be extended by three months, to 6 July 2019.

The Guidelines, which were issued in 2018, set out additional requirements applicable to SFC-licensed or registered persons that operate online distribution and advisory platforms.

The Guidelines, which were issued in 2018, set out additional requirements applicable to SFC-licensed or registered persons that operate online distribution and advisory platforms, including requirements in relation to robo-advisory activities on online platforms, the application of the suitability requirement and other conduct requirements to services provided through online platforms, and the sale of complex products on online platforms. The new paragraph 5.5(a) of the Code of Conduct provides that the additional measures in respect of the sale of complex products under the Guidelines will also apply to licensed intermediaries in an offline environment.

In light of the market's queries on the scope of paragraph 5.5(a) of the Code of Conduct, the SFC issued FAQs on 22 March 2019 and on 13 June 2019 to provide further guidance, notably the following:

- The requirement under paragraph 5.5(a) of the Code of Conduct is applicable only when a client purchases a complex product on an unsolicited basis.
- When an execution broker executes orders placed by an investment adviser or asset manager on behalf of a client (*i.e.*, an external asset manager model or shared relationship structure is being used), the execution broker does not need to comply with the requirements specified in paragraph 5.5(a) of the Code of Conduct and the Guidelines, provided that certain conditions are met.
- In general, product information disclosures should be made on a transaction-by-transaction basis. Intermediaries may adopt a risk-based approach, having regard to the client's circumstances (*e.g.*, the client's trading pattern, level of sophistication, and investor experience), when disclosing product information and warning statements for repeat transactions of complex products.

Separately, the SFC has added security tokens to its non-exhaustive list of examples of complex products, which includes products such as exchange traded derivatives and complex bonds. Intermediaries should check this list frequently, as the SFC may update it to include new investment products at any time.

TechTrends: IOSCO Report on the Treatment of Cryptoassets

On 28 May 2019, the International Organization of Securities Commissions (IOSCO) published a consultation report entitled "Issues, Risks and Regulatory Considerations Relating to Crypto-Asset Trading Platforms". The report aims to assist IOSCO members in assessing and evaluating the risks relating to cryptoasset trading platforms (CTPs). The comment period of the consultation will end on 29 July 2019.

Regulatory authorities globally are beginning to consider more closely the issues surrounding cryptoasset trading, specifically, whether these assets are securities or a different type of financial instrument, or whether they should be considered separately as having their own jurisdiction. As an example, the report highlights that, should a CTP trade a cryptoasset that would be considered a security, the basic principles or objectives of securities regulations should apply.

However, uncertainty remains surrounding the application of existing regulation in relation to cryptoassets once they have been classified as falling within scope of regulation. For example, there is a lack of clarity as to how existing consumer and investor protection, market integrity, tax evasion, and anti-money laundering and counter-terrorist financing requirements should apply to regulated cryptoassets and the intermediaries who deal with them (including CTPs). Hence, regulators are examining the application of such requirements in more detail. IOSCO intends the report to aid financial regulators when applying existing regulatory regimes to cryptoassets that fall within their jurisdiction, as well as create a degree of cross-border standardisation in relation to the regulation of cryptoassets.

Regulatory authorities globally are beginning to consider more closely the issues surrounding cryptoasset trading, specifically, whether these assets are securities or a different type of financial instrument, or whether they should be considered separately as having their own jurisdiction.

Acknowledging the evolving nature of CTPs, IOSCO created the report to address some of the unique issues that regulators are facing in the context of CTP regulation. Key considerations and toolkits in the report relate to access to CTPs, safeguarding participant assets, conflicts of interest, operations of CTPs, market integrity, price discovery, and technology. The report also sets out the relevant IOSCO Principles and Methodologies, looking primarily at those relating to cooperation, secondary and other markets, market intermediaries, and principles relating to clearing and settlement.

What to Look Out for in Q3 2019

- The ESAs are expected to hold a public consultation on the review of the PRIIPs KID RTS
- FCA to issue a Call for Input on data use and access to data in wholesale markets
- FCA to publish a Feedback Statement on its proposed guidance on cryptoassets

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