# 2019 Regulatory Bulletin Issue 3

***"Alone we can do so little; together we can do so much."***

***Helen Keller***

We might be leaving the EU but the FCA has ensured that their long-standing partnership with the United States (US) Securities and Exchange Commission (SEC) remains the same. Andrew Bailey, FCA CEO met with Jay Clayton, SEC Chairman and signed two updated Memoranda of Understanding (MOUs) to ensure the continued ability to cooperate and consult with each other regarding the effective and efficient oversight of regulated entities across national borders.

## Brexit: the FCA confirms final rules for firms

The FCA has now published its final instruments and guidance that will apply in the event the UK leaves the EU without a deal or an implementation period.

The final instruments are largely unchanged from the near-final versions, which were published in February. The most significant change is that the instruments now commence on 'exit day', rather than 11pm on 29 March. This change reflects the decision made at the European Council on 21 March, as well as the changes made by the European Union (Withdrawal) Act 2018 (Exit Day) (Amendment) Regulations 2019.

The FCA has also published the majority of its final transitional directions and guidance for using the transitional power. The FCA has identified three additional areas where it has made amendments to the near-final directions published in February.

These changes relate to:

- UK managers of EEA UCITS funds
- the application of the Client Assets sourcebook (CASS) to activities carried on from an EEA branch, and
- the distance marketing provisions.

The FCA has also confirmed it has extended the notification window for firms who wish to enter the TPR until the end of **11 April 2019**.

## FCA Statement on the reporting of derivatives under the UK EMIR regime in a no-deal scenario

**What changes for Trade Repositories ("TRs")?**

The FCA will become the UK authority responsible for the registration and ongoing supervision of TRs operating in the UK.

TRs who want to offer services from the UK immediately following Exit are required to have a UK legal entity registered by the FCA. The TR statutory instrument provides both a conversion regime and a temporary registration regime to ensure TRs can be registered and operational from Exit day.

Further details on the options available for TRs can be found on the FCA TR webpage. UK counterparties are encouraged to engage with their TRs to understand the choices their TR has made and how this will affect them.

A list of the TRs who intend to offer services in the UK will shortly be made available on the FCA's website.

**What changes for UK counterparties?**

After Brexit, all UK firms that enter into a derivative contract (both over-the-counter (OTC) and exchange-traded derivatives) are in scope of the UK EMIR regime and required to report details of those transactions to an FCA-registered, or recognised, TR according to the UK EMIR regime.

UK branches of third-country firms (including branches of firms from EU27 countries after Brexit) are not in scope of the UK EMIR reporting regime and so do not have to report under the onshored UK regime.

Third-country (after Brexit, including EU27) branches of UK established firms are in scope of the UK EMIR reporting regime and must report details of their derivative transactions to an FCA-registered, or recognised, TR.

Non-UK Alternative Investment Funds (AIFs) are generally classified as third-country entities and so are not in scope of the UK EMIR reporting regime. However, where a non-UK AIF is managed by an Alternative Investment Fund Manager (AIFM) that is registered under the onshored UK Alternative Investment Fund Managers Directive (UK AIFMD), it will be reclassified as a Financial Counterparty
for the purposes of the UK EMIR regime and in scope of the reporting requirements.

## Statements of Policy on the operation of the MiFID transparency regime

The FCA has published Statements of Policy outlining how it will operate the MiFID transparency regime, if the UK leaves the EU without an implementation period.

The MiFID transparency regime was calibrated using trading data from the EU including the UK. It currently operates by ESMA validating data on trading across the EU and performing various calculations to set assorted thresholds and make various determinations.

If the UK leaves the EU without an implementation period agreed between UK and the EU, the FCA will be solely responsible for operating the regime within the UK.

The onshored UK regime provides the FCA with new decision-making powers as well as new obligations to operate the transparency regime. This includes a degree of flexibility during a 4-year transitional period to allow the FCA to build the systems necessary to operate the system as ESMA currently operates it, and to change the regime if need be given the possible move from an EU-wide trading data set to a UK-only data set.

The FCA's Statements of Policy outline how the FCA may expect to use these new powers. The statements should give further clarity to market participants about the FCA's approach in advance of Brexit.

## Brexit: the data protection implications

The EU (Withdrawal) Act 2018 (the Withdrawal Act) sets out which existing EU law should be kept as UK domestic law after the UK leaves the EU. If the UK leaves the EU under a No-Deal Brexit, then, in accordance with section 3 of the Withdrawal Act, the EU's General Data Protection Regulation (the EU GDPR) will become "retained EU law" and form part of UK domestic law on 29 March 2019 (the UK GDPR).

As a result, the EU GDPR (or rather a revised version of it) will continue to apply in the UK.

The EU GDPR will need to be modified in order to make sense in the UK post-Brexit and the draft "Data Protection, Privacy and Electronic Communications (Amendments etc.) (EU Exit) Regulations 2019" provide the statutory instrument through which these modifications would be made which seek to:

- maintain the EU GDPR standards in UK domestic law
- maintain the extraterritorial scope of the UK data protection framework
- require all non-UK organisations who are subject to the UK GDPR to appoint data protection representatives in the UK (if they are processing the personal data of individuals in the UK on a large scale)
- enable flows of personal data from the UK to the EEA by initially recognising all EEA / EU countries (and Gibraltar) as "adequate", whilst also recognising all existing adequacy decisions made by the EU (subject to ongoing review), and
- recognise:
    - EU Standard Contractual Clauses in UK law and give the ICO the power to issue new clauses, and
    - Binding Corporate Rules (BCRs) authorised prior to the UK's exit from the EU and give the ICO the power to approve new BCRs.

## FCA acts to improve competition in the investment platforms market

The FCA has set out a package of measures to help consumers who invest through investment platforms more easily find and switch to the right one for them. The package - set out in the final report of its Investment Platforms Market study - includes proposed FCA rules and actions industry is taking forward.

The FCA found that while competition is generally working well, some consumers and financial advisers can find it difficult to shop around and switch to a platform that better meets their needs. Consumers can find it difficult to switch due to the time, complexity and cost involved - driven in part by the exit charges they incur and difficulties switching between unit classes.

To address the issues uncovered, the FCA is consulting on rules to allow consumers to switch platforms and remain in the same fund without having to sell their investments, and is proposing to ban or cap exit fees.

The proposed restriction on exit fees would apply to platforms, and also firms offering a comparable service to retail clients. The FCA is seeking views from the wider market about how a restriction could work, before consulting on any final rules.

## Senior Management & Certification regime sets a minimum standard for culture

…according to a speech by Jonathan Davidson, Executive Director of Supervision – Retail and Authorisations, at the Credit Summit.

Johnathan stated that: "Culture is the key to a healthy business." He went on to explain that the FCA do not believe there should be a 'one size fits all' culture and do not prescribe what any firm's culture should be.

However the Senior Managers and Certification Regime (SMCR) is the minimum standard that they require of a firm's culture, behaviours and mindsets.

In outlining the SMCR attention was drawn to three key areas that Investment firms should be developing:

1. the Conduct Rules, for the behaviour of almost all financial services staff. The hope is that these rules will reinforce the idea that everyone will take accountability for their own actions.
2. the Senior Managers Regime. The rules talk about being clear about each individuals area of responsibility and taking reasonable steps to ensure that there is no. In fact he expected Senior Managers to be a role model, a leader and drive the culture in the areas under their control.
3. the Certification Regime. It will be a firm's responsibility to certify that individuals are fit and proper at least annually.

**If you have not yet started on SMCR, then please feel free to contact FMConsult for assistance.**

## FCA to introduce UK Benchmarks Register

As we know the FCA continue to plan for a range of outcomes in relation to Brexit, including the UK leaving the EU without an implementation period. To prepare for this

scenario, the FCA has developed a new UK Benchmarks Register. The new Register will replace the ESMA Register for UK supervised users, and UK and third-country based benchmark administrators that want their benchmarks to be used in the UK.

### Benchmarks Administrators

The Benchmarks Administrators Register is a public record of all benchmark administrators that are:

- authorised, registered or recognised by the FCA
- outside the UK and have notified the FCA that they benefit from an equivalence decision that has been adopted by the UK
- copied from the ESMA register as set out in the Benchmarks (Amendment and Transitional Provision) (EU Exit) Regulations 2019 (link is external).

### Third-country Benchmarks

The Third-country Benchmarks Register is a public record of all benchmarks that are:

- provided by third country benchmarks administrators recognised by the FCA
- endorsed by a UK authorised or registered benchmarks administrator, or other supervised entity, for use in the UK
- provided by benchmarks administrators from outside the UK, that have notified the FCA that they benefit from an equivalence decision that has been adopted by the UK
- copied from the ESMA register as set out in the Benchmarks (Amendment and Transitional Provision) (EU Exit) Regulations 2019.

On Exit day, the FCA will temporarily copy information from the ESMA register onto the UK Benchmarks Register. This information will stay on the UK Benchmarks Register for a period of 2 years unless it is subsequently removed pursuant to and in accordance with the UK Benchmarks Regulation.

## FCA reveals findings from first cryptoassets consumer research

The FCA has published two pieces of research looking at UK consumer attitudes to cryptoassets, such as Bitcoin or Ether. The research includes qualitative interviews with UK consumers and a national survey.

The qualitative research indicated some potential harm, including that many consumers may not fully understand what they are purchasing. For example, several of those interviewed talked of wanting to buy a 'whole' coin, suggesting they did not realise they could buy part of a cryptoasset.

Both the survey and qualitative research found that some cryptoasset owners made their purchases without completing any research beforehand. However, despite the general poor understanding of cryptoassets amongst UK consumers, findings from the survey suggest that currently the overall scale of harm may not be as high as previously thought.

73% of UK consumers surveyed don't know what a 'cryptocurrency' is or are unable to define it – those most aware of them are likely to be men aged between 20 and 44. The FCA estimate only 3% of consumers surveyed had ever bought cryptoassets.

Of the small sub-sample of consumers who had bought cryptoassets, around half spent under £200 – a large majority of these said they had financed the purchases through their disposable income.

## Enforcement cases

### FCA takes action for contempt of court

On Friday 1 March, The High Court of Justice sentenced former Director to 6 months imprisonment for contempt of court. He had diverted funds and failed to disclose information about his assets in breach of freezing injunctions obtained by the FCA.

He was the main Director and sole shareholder of a collective investment scheme. The scheme was unlawfully promoted and operated without authorisation from the FCA. The Court found that the former Director made misleading statements to investors and was knowingly concerned in misleading statements made by others.

When the FCA took action in 2013, it obtained a freezing order against him. Upon Judgment in March 2018, the Court made a further freezing order requiring him to disclose all his assets and preventing him from disposing of them.

In breach of the freezing orders, the former Director appointed his wife to manage his portfolio of buy-to-let properties at a commission rate significantly higher than he had paid to his previous letting agents. He then diverted the rental income from these properties to his wife. He did not disclose these arrangements.

As a result, the FCA brought an application to Court with the primary aim of discovering what had happened to the money so it could recover it for investors. In response, he admitted his breaches of the freezing orders and finally provided an account of where the money went. The FCA will ensure that as much of it as possible is recovered for investors.

On 1 March 2019 the Court sentenced the former Director to prison for being in contempt of court by breaching the freezing injunctions obtained by the FCA.

### FCA fines investment banking company £27.6 million for transaction reporting failures

The investment banking company has been fined £27,599,400 by the FCA for failings relating to 135.8 million transaction reports between November 2007 and May 2017.

Effective market oversight relies on the complete, accurate and timely reporting of transactions. This information helps the FCA to effectively supervise firms and markets. In particular, transaction reports help the FCA identify potential instances of market abuse and combat financial crime.

The investment company failed to ensure it provided complete and accurate information in relation to approximately 86.67m reportable transactions. It also erroneously reported 49.1m transactions to the FCA, which were not, in fact, reportable. Altogether, over a

period of 9 and a half years, the company made 135.8m errors in its transaction reporting, breaching FCA rules.

The FCA also found that the company failed to take reasonable care to organise and control its affairs responsibly and effectively in respect of its transaction reporting. These failings related to aspects of UBS's change management processes, its maintenance of the reference data used in its reporting and how it tested whether all the transactions it reported to the FCA were accurate and complete.

The investment banking company agreed to resolve the case and so qualified for a 30% discount in the overall penalty. Without this discount, the FCA would have imposed a financial penalty of £39,427,79.

### FCA fines international investment bank £34 million for transaction reporting failures

The investment bank has been fined £34,344,700 by the FCA for failing to provide accurate and timely reporting relating to 220.2 million transaction reports between November 2007 and March 2017.

The bank failed to ensure it provided complete, accurate and timely information in relation to approximately 213.6m reportable transactions. It also erroneously reported 6.6m transactions to the FCA, which were not, in fact, reportable. Altogether, over a period of 9 and a half years, it made 220.2m errors in its transaction reporting, breaching FCA rules.

Mark Steward, FCA Executive Director of Enforcement and Market Oversight said:

'The failings in this case demonstrate a failure over an extended period to manage and test controls that are vitally important to the integrity of our markets. These were serious and prolonged failures. We expect all firms will take this opportunity to ensure they can fully detail their activity andare regularly checking their systems so any problems are detected and remedied promptly, unlike in this case.'

# 2019 Regulatory Bulletin Issue 3

## FMConsult Services

### All offices

- Compliance monitoring services
- Company authorisation services
- Fund authorisation services
- Outsourced MLRO services
- Outsourced compliance solutions
- Regulatory project assistance (e.g. Investment Restrictions, Money Laundering, Client Money, ICAAPs)
- Compliance 'Health' checks
- Policy and procedures
- Systems and Controls
- GDPR assistance
- SMCR assistance
- Related training
- Financial Crime

### UK and Ireland

- Consumer Credit Authorisation, whether you have an interim authorisation or not
- Investment & Operational Risk management services
- Fund restructuring services
- ICAAP review and development
- ACD / Management Company structuring and governance review
- Fund and firm re-domiciliation advice
- AIFM Authorisation
- AIFM monitoring (including risk services)
- Dublin also provides Fund UCITS IV Reporting, MLRO and Company Secretarial Services.
- Related Training

## FMConsult Contacts


**Dallas J. McGillivray**
Group Managing Director & Authorisation Services
Tel: 020 7220 9073
dmcgillivray@fmconsult.co.uk

**Andrew (Andy) Hicks**
Director, Head of Monitoring Services
Tel: 020 7220 9074
ahicks@fmconsult.co.uk

**Ross Revell**
Director
Tel: 020 7220 9078
rrevell@fmconsult.co.uk

**Colette Panebianco**
Director, FMConsult USA
cpanebianco@fmconsult.us

**John Clare**
General Manager, FMConsult Ireland
Tel: +353 87 2599510
jclare@fmconsult.ie


**Join Our LinkedIn Group**

Ask to join our LinkedIn Group for News and Updates on regulatory compliance and risk, or follow us on twitter **@FMConsultNews**

**FMConsult website**

For more information on the services we provide and detailed profiles of our team, please visit our website

**Newsletter Opt Out**

Please let us know if you do not wish to receive further newsletters