

Financial Regulatory Alert

17 January 2017

Financial Conduct Authority Publishes New Consultation Paper on MiFID II

On 16 December 2016, the Financial Conduct Authority (FCA) published its final Consultation Paper on the implementation of the second Markets in Financial Instruments Directive (MiFID II) (CP16/43). This follows three previous Consultations Papers on the topic (CP15/43, CP16/19 and CP16/29).

CP16/43 seeks views on the proposed changes to the FCA Handbook in the areas below:

- **Specialist Regimes** – The FCA Conduct of Business sourcebook (COBS) 18 contains a number of tailored conduct regimes (covering MiFID and non-MiFID business) for specialist types of designated investment business. The FCA has proposed changes to ensure that all relevant cross references in the Handbook are identified and updated where necessary and to ensure appropriate decisions are made in relation to non-MiFID investment business that has some MiFID derived conduct rules applied to it.
- **Tied Agents** – The FCA has proposed rules reflecting the technical changes in MiFID II to the tied agents regime in the FCA rules dealing with appointed representatives (ARs).
- **SME Growth Markets** – The FCA has proposed rules to apply the MiFID II SME growth markets regime, including guidance on how to register as an SME growth market.
- **Market Data** – The FCA has proposed guidance on the scope of the Approved Reporting Mechanism (ARM) regime, the circumstances in which trading venues can make transaction reports using ARMs and that Data Reporting Service Providers (DRSPs) should be required to undertake an annual assurance review of their compliance with their obligations under the DRSP regime, verified by a member of the management body of the DRSP. The FCA has also proposed guidance of certain aspects of the use of ARMs.
- **Miscellaneous Changes to the Handbook** – The FCA has proposed changes to various Handbook modules (including the FCA's Perimeter Guidance), clarification of the territorial scope of rules on remuneration and training and competency, and amendments to the Banking: Conduct of Business sourcebook (BCOBS) to reflect the FCA's proposals in CP16/29 in relation to structured deposits.
- **Fees** – The FCA has proposed opening the authorisation gateway in January 2017 to assist firms and, consequently, proposed a transitional rule for fees to deal with the period between when the FCA starts accepting applications for authorisations related to the changes in MiFID II and the point at which legislation changes to enable the FCA to collect fees for the changes of scope.
- **Forms** – The FCA has provided feedback on the changes to Form A consulted on in CP16/29.

Of particular interest to UK investment managers, with regards to the use of Research Payment Accounts or “RPAs” (being the only way MiFID II allows UK investment managers to pay for investment research, other than out of their own pockets), the FCA has confirmed that firms can agree terms of the RPA with the fund itself (rather than with underlying investors). Additionally, the FCA has confirmed that UK investment managers adopting the use of an RPA in an authorised fund may, for a period of two years after the new rules take effect, consider this as a “significant change” (rather than as a “fundamental change”) which would require that investors be given prior notice (rather than requiring the firm to obtain prior investor consent, which would otherwise be necessary for a fundamental change). Furthermore, the FCA has expanded the RPA-related disclosure rules, requiring firms not only to provide information about research costs and RPA payments to clients (i.e., funds managed by the firm) but also to investors.

The FCA has requested comments on CP16/43 by 17 February 2017, except for comments on Chapter 7 on Fees which the FCA has asked to reach them by 16 January 2017.

In terms of next steps, the FCA still aims to meet the deadline set by MiFID II for EU Member States to bring their national laws and regulations into line with the MiFID II requirements by 3 July 2017. The FCA intends to publish two Policy Statements (the first in March 2017, the second in June 2017) containing final rules implementing MiFID II in the UK before 3 July 2017, thereby providing at least a six month lead-in period before these rules are required to come into effect on 3 January 2018.

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