January 2019

PRIVATE BANK BRIEFING

LATHAM & WATKINS

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

PRIIPs: Joint Committee of the ESAs Consults on Amendments to the PRIIPs KID RTS

On 8 November 2018, the Joint Committee of the European Supervisory Authorities (ESAs) published a Consultation Paper concerning amendments to the PRIIPs KID. This follows a letter sent by the ESAs to the European Commission on 1 October 2018 setting out their intention to make proposals to:

(a) Support legislative changes to avoid the possibility of duplicating information requirements for investment funds from 1 January 2020; and

(b) Tackle various key issues that have arisen in relation to the KID.

In relation to the first issue, the temporary exemption in the PRIIPs Regulation for UCITS and relevant non-UCITS funds will cease to apply on 31 December 2019, meaning that after this date UCITS and relevant non-UCITS funds will be required to draw up and publish both a PRIIPs KID and a UCITS KIID. The ESAs are therefore consulting on the changes needed to the PRIIPs Delegated Regulation in order to ensure that it works for UCITS and relevant non-UCITS funds, on the assumption that such funds will be required to provide retail investors with a PRIIPS KID from 1 January 2020. Subsequent to this, the European Commission made a statement on 19 November 2018 indicating this it is prepared to accept an extension to the exemption for UCITS, possibly until 31 December 2021. If the extension is granted then this issue should be resolved within the Level 1 text.

The ESAs are also consulting on proposed amendments to the PRIIPs Delegated Regulation to address various issues with the KID that have been identified since the implementation of the PRIIPS KID regime.

The main issue that has arisen is that the performance scenarios in the KID often give an overly positive outlook of potential returns, which risks providing retail investors with inappropriate expectations about the returns that they will receive. In order to address this it is proposed that additional information on past performance should be included in the KID and changes to the presentation of the information should be introduced in order to reduce the risk of the performance scenario section of the KID being misinterpreted. However, given the "challenging" timeframe in which the amendments need to be finalised, no changes to the current methodology are being proposed. Although this means that there will be no changes to the figures displayed, it is noted in the consultation that arguably these presentational amendments will reduce the risk that the meaning of these figures could be misinterpreted or that there could be undue reliance on them.

The ESAs also note that some PRIIP manufacturers have decided to supplement the information in the KID due to concerns that the performance scenarios may be misleading. However, the ESAs highlight that this raises its own supervisory concerns. Given that the proposed amendments would not take effect until 2020, the ESAs plan to communicate their views on these practices and will address this either in the final report or in a separate communication. In this context the FCA has previously issued a statement specifying that "where a PRIIP manufacturer is concerned that performance scenarios in their KID are too optimistic, such that they may mislead investors, we are comfortable with them providing explanatory materials to put the calculation in context and to set out their concerns for investors to consider".

In addition, certain further amendments are being consulted on to address other specific issues that have arisen since the implementation of the PRIIPS KID regime. These include adjusting the market risk measure calculation to provide for PRIIPs with regular investor payments, specific features for products with autocallable features, extending the character limit for narratives relating to the summary risk indicator, and amending the narrative text relating to performance fees. However, priority is being given to the amendments to the performance scenarios and therefore the ESAs may decide to make only very minor amendments to the PRIIPS Delegated Regulation in relation to these additional issues, supplemented with additional clarification through Level 3 measures such as a Q&A.

The consultation closed on 6 December 2018. The ESAs intend to submit the draft legislation to the Commission for endorsement in January 2019, and will also publish a Final Report at the same time. It is intended that the amendments will apply from 1 January 2020. The consultation also notes that any potential amendments would need to be submitted to the Commission as early as possible in 2019 for these to be finalised before the Parliamentary elections at the end of May 2019. Therefore, it is not intended that there will be a further public consultation on the draft RTS through which the legislative amendments will be implemented.

Overdrafts: FCA Proposes Significant Changes to How Banks Charge for Overdrafts

On 18 December 2018, the FCA published a consultation on reforming the overdraft market (CP18/42). While aimed primarily at retail banks serving vulnerable customers, the proposed changes are relevant across the banking sector. The proposals are described by Andrew Bailey as "the biggest intervention in the overdraft market for a generation".

The FCA is proposing substantial changes, including:

- Stopping firms from charging higher fees when customers use an unarranged overdraft
- Banning fixed fees for borrowing through an overdraft (other than fees for refusing a payment due to lack of funds)
- Simplifying overdraft pricing, by ensuring that the fee for each overdraft will be a simple, single interest rate, with no fixed daily or monthly charges
- Standardising how arranged overdraft prices are presented in advertising, including an Annual Percentage Rate to help consumers compare overdrafts against other products
- Requiring firms to do more to identify overdraft customers who are showing signs of financial strain or are in financial difficulty, and to help them reduce their overdraft use

The proposed changes are likely to require significant amendments to firms' arrangements in relation to overdrafts. Private banks offering overdrafts should consider how these measures might impact their business, and respond to the consultation accordingly. Responses are due by 18 March 2019, and the FCA plans to publish its final rules in June 2019. The changes would come into effect in early December 2019.

Whistleblowing: FCA Findings from Review of Banks' Whistleblowing Arrangements

On 14 November 2018, the FCA published its findings on how retail and wholesale banks have implemented the FCA's whistleblowing rules.

Although the FCA has found that the new rules are helping to improve practices, and is particularly pleased with the role that whistleblowers' champions are playing, it does note some important areas for improvement. Private banks should ensure that they consider the areas highlighted by the FCA, and take action to correct any deficiencies.

In particular, the FCA made the following observations:

- Policies and procedures: Firms need to improve how they document their whistleblowing investigation process, and the practical arrangements and processes for protecting whistleblowers against victimisation.
- Annual whistleblowing report: Some firms were only preparing an annual report for the first time since the rules were introduced, and some annual reports did not contain a sufficient level of information and analysis — particularly if firms had a lower volume of whistleblowing cases.
- Training: Most firms need to improve their training by including more detail, and distinguishing between training given to all employees and that given to managers — particularly those who deal with whistleblowing incidents.

As well as providing pointers for firms, the FCA also relays some key messages for senior managers. The FCA expects senior managers to both oversee and ensure that their firm has fully considered and implemented effective whistleblowing arrangements, and to continuously assess how the arrangements are working in practice. The FCA also emphasises the importance of senior management and the board clearly communicating and fostering a culture that welcomes discussion and challenge, so that wrongdoing is identified early and addressed promptly.

Culture and governance remain key regulatory priorities, and any failings in relation to whistleblowing will reflect directly onto the regulators' perception of a firm's culture.

Overall, the FCA emphasises how seriously both the FCA and the PRA take whistleblowing failings. Culture and governance remain key regulatory priorities, and any failings in relation to whistleblowing will reflect directly onto the regulators' perception of a firm's culture. Private banks should be aware that it is not only about having the right policies and procedures in place, but also ensuring that the firm's culture allows individuals to speak up, and that when an incident does arise, individuals know how to react appropriately.

Culture: FCA Letter Regarding Sexual Harassment in the Workplace

On 16 October 2018, the FCA published a letter (dated 28 September 2018) sent from Megan Butler to Maria Miller MP. This letter follows previous correspondence on this topic arising from the Women and Equalities Committee report on sexual harassment in the workplace, whereby Ms. Miller wrote to the FCA to ask how it addresses this issue.

In the letter, Ms. Butler makes clear that the FCA views sexual harassment as misconduct that falls within the scope of the FCA's regulatory framework. She highlights that the FCA increasingly is discussing with firms how they handle poor conduct, including allegations of sexual misconduct.

Ms. Butler explains how culture in financial services is widely accepted as a key root cause of major conduct failings in the industry, and that tolerance of sexual harassment would be a clear example of a driver of poor culture within a regulated firm.

She also highlights how firms and the FCA must consider whether an individual has faced any convictions or sanctions for harassment or sexual misconduct as part of the fit and proper assessment, and that any such misconduct would go to an individual's honesty and integrity. Ms. Butler emphasises that there have been instances in which the FCA or a firm has found that an individual is not fit and proper on the basis of their non-financial conduct.

In relation to whistleblowing, Ms. Butler outlines the FCA's expectations regarding internal whistleblowing and complaints processes, and clarifies that individuals can raise sexual misconduct issues directly with the regulator through its whistleblowing procedures. She also highlights that FCA rules make clear that so-called "gagging orders" do not affect an individual's ability to blow the whistle by making a disclosure to the FCA.

Private banks should take note of the regulator's continued focus on culture, and the importance of treating non-financial misconduct with sufficient gravity.

> "We provide feedback on and challenge the drivers of behaviour we observe through our supervisory engagement with firms, and make it clear that the benefits of diversity of thought cannot be achieved without a culture that is actually diverse and inclusive."
>
> Megan Butler, FCA Executive Director of Supervision — Investment, Wholesale and Specialists Division

MiFID II: ESMA Consults on Integrating Sustainability Preferences

As previously reported in this Briefing, as part of the EU's action plan on sustainable finance, consideration of sustainability preferences will be hardwired into certain MiFID II requirements. The European Securities and Markets Authority (ESMA) launched a consultation on 19 December 2018 on integrating sustainability risks and factors into the MiFID II framework.

In its consultation, ESMA considers how environmental, social, and governance (ESG) considerations can be woven into firms' organisational requirements, and the product governance and suitability regimes.

Organisational requirements

ESMA suggests amendments to the MiFID II Delegated Regulation to address ESG considerations. In particular, ESMA proposes that firms would be expected to incorporate ESG considerations within their processes, systems and controls in order to ensure the investment and advisory process correctly takes such factors into account. ESMA also suggests that firms should be required to take into account ESG factors as part of their risk management processes. Finally, ESMA recommends adding a new recital to the Delegated Regulation in relation to conflicts of interests, to help ensure that the inclusion of ESG considerations in the advisory process does not lead to mis-selling practices or misrepresentations, and does not work against the client's best interests.

Product governance

ESMA proposes to include references to ESG preferences in both the MiFID II Delegated Directive and the Guidelines on product governance requirements. ESMA considers that ESG preferences should be built in to the target market assessment, and that both manufacturers and distributors should be required to take ESG considerations into account when identifying target markets. Manufacturers and distributors will be required to specify with a meaningful level of granularity which ESG preferences an investment product fulfils.

Helpfully, ESMA notes that that these proposed amendments do not require that all investment products always need to have a reference, in their target market, as to whether the products fulfils ESG preferences or not. They do require, however, that manufacturers need to assess whether products possess identified ESG characteristics. This is more in the sense of identifying and highlighting positive ESG characteristics where these exist. ESMA envisages that this approach will result in two types of target market: target markets in which certain ESG characteristics are specified, and target markets without any reference to ESG characteristics.

Suitability

Although the Commission is consulting separately on amendments to the MiFID II Delegated Regulation in relation to suitability, ESMA considers how its Guidelines on suitability under MiFID II might be amended to include provisions on ESG preferences. ESMA proposes that the Guidelines should specify that firms are expected to take into account ESG preferences in the context of assessing a client's investment objectives, and are expected to consider ESG factors in the context of product classification. ESMA also suggests stating that firms should collect information from clients in relation to their ESG preferences; at present this is merely noted as good practice.

ESMA emphasises that ESG considerations should be treated as an additional aspect to the other suitability criteria, and it is important that sustainability considerations do not outweigh the relevance of other suitability criteria. Therefore, ESMA suggests a two-step process whereby firms would identify suitable products based upon the main suitability criteria, and then overlay ESG preferences. ESMA is also keen to stress that investments that do not meet ESG criteria should not automatically be considered unsuitable for clients who have expressed ESG preferences.

Given the concern that has been caused by the wider proposals, it is encouraging to see that ESMA is trying to take a fairly high-level and flexible approach to weaving ESG preferences into the MiFID II framework. This approach is sensible, given that there could be unintended consequences of mandating an overly prescriptive approach, as giving undue emphasis to ESG preferences could go against a client's best interests. However, much rests on common definitions in this field, which are still to be developed by the Commission. Until these definitions are established, firms are expected to clearly specify what they consider to be ESG preferences or ESG considerations, taking into account current market standards. This could lead to divergent approaches.

Comments on the consultation are requested by 19 February 2019, and ESMA expects to publish a Final Report by 30 April 2019. Private banks should consider the proposals and ensure that they respond to the consultation to flag any areas of concern.

SMCR: FCA to Consult Further on the Scope of the Client Dealing Function

Banks are by now accustomed to the regulators tinkering with aspects of the Senior Managers and Certification Regime (SMCR). The latest point of focus is the Client Dealing Function under the Certification Regime.

The description of this Function is very broad, and has led to concerns that it could capture employees of a firm who are carrying on purely administrative functions. This appears to be an anomaly, given the nature of other Certification Functions, and the fact that such functions are supposed to capture employees who could cause "significant harm" to the firm or its customers.

In the context of the FCA's work on extending the SMCR to all authorised firms, the FCA has become aware of these concerns and has decided to consult further on clarifying the scope of the Client Dealing Function. The FCA announced via a new webpage on 19 November 2018 that it would be launching a consultation, with the aim of finalising amended rules before the commencement of the SMCR for solo-regulated firms on 9 December 2019.

In the meantime, banks (which are already subject to the SMCR) may follow the FCA's interim arrangements. These permit firms to assume that the ambiguous and broadly worded parts of the activities that make up the Client Dealing Function do not include employees who perform solely administrative functions.

Private banks should consider whether this helpful concession permits them to conclude that any employees (or groups of employees) who they currently treat as falling within the Certification Regime may be taken out of scope.

Compensation: Changes to the FOS Award Limit and Access to the FOS

Private banks should take note of some upcoming changes in relation to the Financial Ombudsman Service (FOS).

First, access to the FOS will be widened to include more SMEs, larger charities and trusts, as well as personal guarantors of loans to a business in which the guarantor is involved. The FCA published its near-final rules in Policy Statement (PS18/21) on 16 October 2018. The FCA subsequently published final rules and confirmed a start date of 1 April 2019 for the changes.

When the changes come into effect, SMEs with annual turnover of less than £6.5 million and either: (i) a balance sheet total of less than £5 million; or (ii) fewer than 50 employees, will be eligible to access the FOS. This is a slight relaxation of the FCA's original proposals, which provided that an SME would need to be below all three thresholds in order to be eligible. Feedback to the consultation suggested that requiring SMEs to meet all three criteria could exclude certain SMEs that are not well placed to protect their own interests in disputes with firms.

The FCA also published a Consultation Paper (CP18/31) on the same date, setting out proposals to increase the award limit for the FOS's Compulsory Jurisdiction.

The FCA is proposing that the FOS's current £150,000 award limit should increase to:

- £350,000 for complaints about acts or omissions by firms on or after 1 April 2019; and
- £160,000 for complaints about acts or omissions by firms before 1 April 2019, and which are referred to the FOS after that date.

The FCA notes that it has not increased the award limit for over six years (when the limit increased from £100,000 to £150,000), and that many existing complainants are failing to receive adequate compensation. The FCA also highlights that the existing limit may be too low to meet the needs of some of the newly eligible complainants. However, the FCA has decided not to pursue an option of only having a substantially higher limit for larger SMEs, as evidence suggests that existing complainants also experience situations in which compensation due exceeds the current award limit.

Notably, as well as stating that the proposals aim to ensure that more complainants receive fair compensation, another stated aim is to strengthen firms' incentives to resolve complaints quickly and informally, or to avoid them altogether. The FCA estimates that increasing the award limit to £350,000 would result in additional financial compensation of £113 million being paid to complainants. Firms will therefore expect increased costs, in particular in relation to the cost of professional indemnity insurance.

The FCA intends to publish final rules in a Policy Statement in early March 2019.

Product Intervention: FCA to Introduce Permanent Measures in Relation to Binary Options and CFDs

The FCA launched two consultations on 7 December 2019, on:

- Banning the sale, marketing, and distribution of binary options to retail consumers (CP18/37)
- Restricting the sale, marketing, and distribution of contracts for difference (CFDs) and similar products to retail customers (CP18/38 and Annex)

These measures largely follow ESMA's temporary product intervention measures in relation to CFDs and binary options, but with some important changes.

The FCA proposes to go further than ESMA by extending its CFD restriction to capture closely substitutable products (such as "turbo certificates" and "knock out options")...The FCA may also cast the restriction on CFDs even more broadly in future.

CFD restrictions — inclusion of turbo certificates

The FCA proposes to go further than ESMA by extending its CFD restriction to capture closely substitutable products (such as "turbo certificates" and "knock out options"). This extension could mean that some private banks are caught by the restriction.

The FCA may also cast the restriction on CFDs even more broadly in future. CP18/38 includes a discussion as to whether other complex derivative products — such as exchange-traded futures or similar over-the-counter products — could benefit from similar rules.

Binary options ban

The FCA is proposing to impose a ban in line with the original scope of ESMA's measures, thereby removing the helpful exclusion for securitised binary options that ESMA introduced when it renewed the measures in August 2018. This could leave private banks in doubt as to whether or not certain structured products they sell to clients are in or out of scope.

Scope

The measures have been drafted to apply to UK, EEA and third-country firms in relation to the sale, marketing, or distribution of relevant investments in or from the UK. Therefore, private banks should note that the measures will affect not only UK entities but also UK branches of overseas firms, and any EEA firms passporting into the UK on a cross-border services basis (as least while passporting remains).

Next steps

Responses to the main proposals are requested by 7 February 2019. The FCA plans to publish final rules by March 2019, which would come into force shortly afterwards (but with a two-month delay for the CFD measures in relation to closely substitutable products). Feedback on the discussion relating to the inclusion of other complex derivative products in the CFD measures may be provided until 7 March 2019. If the FCA decides to go ahead with proposals to extend the measures in this way, the regulator will consult on this "later in 2019".

TechTrends: Focus on Cyber

First FCA Fine for Cyber Security Failings

Cyber security has been a key focus area for the UK regulators for some time now. Firms are expected to build up appropriate levels of cyber resilience, and ensure that proper time and resources are invested in preparing to defend against cyber-attacks. The regulators also expect cyber security to generate sufficient discussion at board level; it is not an issue to be left entirely to IT specialists.

In this context, the Tesco Personal Finance plc Final Notice — the FCA's first fine against a regulated firm for cyber security failings — serves as a reminder of how seriously the regulators consider any failure to meet the expected standards.

The FCA imposed a fine of £16.4 million on Tesco on 1 October 2018, for failings in relation to a cyber-attack on Tesco's customers in November 2016. Specifically, the FCA found that Tesco breached Principle 2 of the FCA's Principles for Businesses, by failing to exercise due skill, care, and diligence in relation to the cyber-attack.

The FCA found that there were deficiencies in Tesco's design of its debit card, its financial crime controls, and in the actions of its Financial Crime Operations Team, all of which cyber attackers had exploited in order to carry out the attack. Although the issues were resolved and customers were fully compensated, the FCA noted that the attack was a "largely avoidable incident".

Importantly, although the FCA found that Tesco had appropriate policies and procedures in place, these were not followed properly during the cyber-attack, and Tesco committed a series of errors that delayed its ability to stop the attack.

The FCA uses the Final Notice to remind firms that the board is ultimately responsible for ensuring that the firm's cyber-crime controls are designed to meet robust standards of resilience. In particular:

- The board must set an appropriate cyber-crime risk appetite and ensure that the firm's controls are designed to anticipate and reduce the risk of a successful attack.
- If an attack is successful, the board should ensure that response plans are clear, well-designed and well-rehearsed, and that the firm has the ability to recover quickly from the incident.
- Following an attack, the firm should commission a root cause analysis and address the vulnerabilities that made the firm susceptible to the attack.

An important lesson from this incident is that not only must firms have appropriate policies and procedures in place, but these must be tested and understood so that they can be deployed effectively when the need arises.

Private banks should consider how their cyber resilience arrangements measure up, and whether they are confident that they can defend themselves against cyber attackers. While the FCA understands that some attacks will succeed, it wants firms to ensure that this is despite everything being done to prevent an attack, not because defences were insufficient.

> "The standard is one of resilience, reducing the risk of a successful cyber attack occurring in the first place, not only reacting to an attack."
>
> Mark Steward, FCA Executive Director of Enforcement and Market Oversight

FCA Report on Cyber and Technology Resilience

The FCA published a report on 27 November 2018 setting out findings from a cross-sector survey it conducted into firms' cyber and technology resilience.

The FCA surveyed 296 firms during 2017 and 2018 to assess their cyber and technology capabilities. Firms self-assessed their capabilities, and the FCA then analysed the responses for each firm and across sectors.

A key message is that the FCA's evidence suggests that firms are under-reporting cyber- and technology-related incidents. The FCA also identified several areas in which firms assessed themselves as strong, yet FCA data suggests that there remain pervasive weaknesses. This suggests that firms may have a tendency to overestimate their capacity to manage and deal with cyber- and technology-related issues.

Key findings from the survey include:

- Governance: firms reported a lack of Board understanding of cyber risks, and the FCA found that management information is often not presented to the Board in a way that can be easily understood and challenged.
- Identification of key assets, services and third parties: The FCA found that, while firms have established processes to identify their information assets (i.e., the information they own), they do not consistently and regularly review and update their records as needed.
- High-risk staff and a security culture: The FCA was disappointed to learn that not all firms operate a cyber-awareness programme. Firms described difficulty in identifying and managing their high-risk staff, and many did not provide additional cyber training for those employees.
- Detecting attacks: Only the largest firms reported having automated systems to spot potential cyber-attacks and support their subsequent response.
- Change management: The FCA found that there is a disconnect between firms' self-assessed strength in change management (such as IT upgrades and systems changes) and the FCA's analysis of the cause of technology-related incidents reported to the regulator.
- Managing third parties: Half of the firms surveyed reported that they do not maintain a comprehensive list of all third parties with whom they do business and which access their systems and data.

Notably, the publication of these results came just days after the Treasury Committee announced that it had launched an inquiry into IT failures in the financial services sector.

Private banks should take note of the findings from the FCA's survey, and place particular attention on their change management capabilities and their management of outsourcing arrangements. Private banks should have regard in particular to the Discussion Paper on building operational resilience (DP18/4), which was published by the regulators over the summer. This paper examines how firms can plan for, try to prevent, and recover from disruptive events.

Lessons from Enforcement: PRA Fines Senior Managers for Failure to Disclose Information

On 7 November 2018, the PRA fined the former Chair of Mitsubishi UFJ Securities International plc (MUS (EMEA)), Mr. Kamiya, and one of its former non-executive directors, Mr. Onodera, for failing to disclose that Mr. Kamiya would potentially be restricted from conducting certain banking activities in the US following an investigation and enforcement action by the New York Department of Financial Services (DFS). This follows the 2017 fines the PRA levied against The Bank of Tokyo-Mitsubishi (BTMU) and MUS (EMEA) in respect of the same matters.

Chronology of events

20 June 2013 The DFS fined BTMU in respect of improper proceedings of US dollar clearing activity through its New York branch.

2 September 2014 The DFS notified BTMU of concerns about BTMU's conduct in respect of the June 2013 settlement.

18 November 2014 The DFS publicly announced that a second settlement had been reached with BTMU. BTMU agreed to prevent Mr. Kamiya from conducting any US banking-related business in the future (the Second DFS matter).

9 February 2017 PRA issued Final Notices and fines against BTMU (£17.85 million) and MUS (EMEA) (£8.925 million) for failing to be open and cooperative with the PRA prior to the DFS' public announcement. The fines imposed recognised a 30% discount for early settlement.

7 November 2018 PRA Final Notices and fines issued against Mr. Kamiya (£22,700) and Mr Onodera (£14,945). The fines imposed recognised a 30% discount for early settlement.

The crux of the PRA's frustration with the individuals involved was that they had not been transparent with the PRA about the Second DFS matter, even though it was reasonable to assume that the outcome could have serious consequences for Mr. Kamiya as Chair of MUS (EMEA). The PRA was concerned that it had not been informed about the matter until it became public, and so did not have appropriate time to consider the implications for Mr. Kamiya's fitness and propriety.

Mr. Onodera's fine sends a particularly clear message to senior managers throughout the banking industry that the PRA will be taking a tough stance as regards disclosing information to the regulator, even when individuals have taken what many might consider to be appropriate steps. Mr Onodera was not directly implicated in the DFS investigation in the same way that Mr. Kamiya was (although he did know about the potential outcome slightly earlier than Mr. Kamiya), and was only aware of the potential outcome and implications for Mr. Kamiya for a matter of days prior to the DFS' public announcement. However, the PRA took the position that Mr Onodera (as an approved person and CF2) had information relevant to assessing the fitness and propriety of Mr. Kamiya that he ought reasonably to have passed on to the PRA or, at the very least, to the individuals at BTMU responsible for notifying the PRA.

This was despite acknowledging that Mr. Onodera had concerns that a disclosure to the PRA would be in breach of the confidentiality restrictions imposed by the DFS, and that he genuinely believed (albeit on an incorrect interpretation of the legal advice received) that he was in a position of conflict. The PRA was equally unmoved by the fact that Mr. Onodera had himself sought out and received UK regulatory advice that the notification to the PRA should not be made until after the DFS' public announcement.

Although on the face of it the outcome of these cases seems unsurprising, closer examination of the sequence of events suggests that the PRA took a very strict line. These fines are clear evidence that the PRA will not accept being left behind regulators in other jurisdictions, nor will it permit firms to deal with one regulator, or one regulatory issue, at a time. The PRA reiterated that the Principles require senior managers to deal with the PRA in an open and cooperative way, and to balance any "competing or conflicting multijurisdictional legal or regulatory responsibilities", adding that individuals "must ensure that they promptly and properly consider their own responsibilities to UK regulators, including the PRA".

Global Insights — Switzerland

Just days after the European Commission indicated that it may not extend the equivalence decision in relation to Swiss stock exchanges under MiFID II beyond its expiry date at the end of 2018, the Swiss government announced that it had adopted special measures to address this situation (see this Lenz & Staehelin briefing for more information).

However, in a typical nail-biting finish, right at the last minute the European Commission announced its intention to extend the equivalence decision for a further six months. The decision was confirmed on 21 December 2018. It applies as of 1 January and will expire on 30 June 2019.

The Commission indicated that conclusion of the Institutional Framework Agreement between Switzerland and the EU, which has been agreed by Swiss and EU negotiators, would be a precondition to the EU extending its equivalence decision beyond June 2019. The Swiss Federal Council launched a consultation on the agreement that will last until spring 2019, so the issues around Swiss equivalence have been temporarily put aside, rather than resolved.

Withdrawal of equivalence would mean that EU investment firms would no longer be able to place orders on Swiss exchanges, and instead would need to redirect these order flows to EU trading venues. Given that most Swiss issuers have their securities traded on both Swiss and EU venues, this could have a significant impact on Swiss financial markets. In retaliation, the Swiss government was planning to introduce measures that effectively would have made it a criminal offence to trade Swiss listed equities on an EU trading venue.

The European Commission notes that the Institutional Framework Agreement is required as a precondition to equivalence because the trading of Swiss equities in the EU is so widespread, and the commercial ties between Switzerland and the EU are much closer than between the EU and other jurisdictions. Therefore, Switzerland must be treated differently from other non-EU jurisdictions seeking equivalence.

Although it would be an oversimplification to suggest that the EU's actions are driven purely by Brexit, one cannot help but assume that at least part of the EU agenda is to make clear that equivalence is a political gift, not a right. It is expected that the EU will make some of the same points in the context of Brexit, for example when deciding whether to grant equivalence to UK trading venues.

What to Look Out for in Q1 2019

- HM Treasury to consult on whether and how cryptocurrencies, and firms providing services in relation to cryptocurrencies, could be regulated
- FCA to publish feedback statement on its call for input in relation to the PRIIPs Regulation
- HM Treasury, the PRA, and the FCA to finalise their measures to onshore EU financial services legislation in the context of Brexit, subject to political outcome

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