

FCA CP18/36 — The Second Brexit Onshoring Consultation

The FCA has published a second consultation on the Brexit onshoring project. Like the first, and many other Brexit onshoring documents, it is both long and very technical. However, a number of important policy points are made, which are highlighted in this briefing.

Senior Managers Regime

Under the Temporary Permissions Regime (TPR), the FCA intends to apply the Senior Managers and Certification Regime (SMCR) and the Approved Persons Regime to UK branches of EEA firms in the same way as the regimes currently apply (this contrasts with the PRA's announcement that it plans to apply the SMCR for third-country branches to both inbound branch and services firms doing business in the UK under the TPR).

Consequently, firms utilising the TPR need only have a handful (probably two) Senior Managers or Approved Persons. However, when such firms get authorised properly as a third-country branch, and the TPR ceases to apply, those firms will then be subject to a longer list — perhaps half a dozen potential Senior Management Functions (to take the SMCR as an example). Therefore, firms will need to be aware of the consequences of changes to their status under the regime.

Retail Product Definitions

The FCA's rules currently contain definitions relating to non-readily realisable securities (NRRS) and non-mainstream pooled investments (NMPIs). The FCA proposes to depart from its baseline onshoring approach of treating the EU as a third country, and plans to retain the existing scope of the COBS restrictions that apply to these products. Therefore, a product which does not currently count as an NRRS or NMPI because, for instance, it is listed on an EEA exchange, will continue not to be an NRRS or NMPI. Maintaining the current scope of the definition is the FCA's chosen policy in order to avoid disruption for firms and investors following exit day.

Appropriateness Definition

The FCA is taking a similar approach to the rules that apply when an appropriateness assessment must be carried out. Such assessment is only required when an instrument is complex. At the moment, the list of non-complex instruments includes those admitted to trading on certain EEA markets, and UCITS. The FCA proposes to keep the current scope, and therefore instruments traded on EEA regulated markets and EEA UCITS will continue to be treated as non-complex.

Primary Markets — Listing and Transparency Rules

HM Treasury has already stated that the UK's primary markets regime will apply to issuers with securities listed on regulated markets in the UK, or where public offers are made in the UK. This means that a UK-approved prospectus will be required. The ability of issuers to passport a prospectus from another jurisdiction will expire when the UK exits the EU. As a transitional measure, the FCA notes the government's proposal to treat prospectuses that are valid in the UK before exit date as retaining that validity for a period of 12 months from the date of their approval.

With regard to the free float requirement, the FCA proposes to remove the reference to EEA holders in the rules, so that holders from any jurisdiction can count towards the free float requirement.

In respect of the DTRs, the transparency rules will apply only to issuers with securities admitted to trading on a UK regulated market. The FCA notes that HM Treasury intends to issue an equivalence decision, in time for exit day, to permit EU-adopted IFRS to continue to be useable in the preparation of financial statements required under the Transparency Directive and Prospectus Directive.

PRIIPs

The FCA intends to amend the UK's PRIIPs regime to enable EEA entities to be treated as equivalent to UK entities in respect of provisions relating to risk indicators. Therefore, the existing regime will continue so that the EEA is not a third country for this purpose.

The FCA also intends to maintain the exemption post-exit for both UK and EEA UCITS from the requirement to produce a PRIIPs KID.

Non-Handbook Guidance

The FCA has confirmed that it does not intend to rewrite existing non-Handbook guidance (such as that set out in speeches or guidance notes). The FCA's request is that firms "sensibly and purposively interpret non-Handbook guidance" in order to produce sensible results without the FCA having to undertake a review of the existing guidance materials. It is possible that, in due course, some guidance might not be able to be interpreted either sensibly or purposively, and that the FCA may be asked to give additional guidance where this proves to be the case.

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