

Brexit and Financial Services — FCA Issues Further Guidance for Firms

The FCA outlines how it intends to use its temporary transitional powers in a no-deal scenario.

Key Points:

- The FCA has highlighted areas in which transitional relief will not be granted in a no-deal scenario.
- Firms need to prepare now to comply with relevant Brexit-related changes from exit day, although the FCA has indicated that it will take a proportionate approach to supervision and enforcement.
- The FCA has also outlined its plans to set up an FCA FIRDS to record financial instrument reference data for the UK.

Use of the FCA's Temporary Transitional Powers

Under the Brexit onshoring legislation, the UK financial services regulators will be given powers to grant transitional relief to firms, to help address the cliff-edge effects of a no-deal Brexit. These powers would give the regulators the flexibility to delay or phase in changes to regulatory requirements made under onshored EU legislation for a maximum of two years from exit. These powers are designed to be used in circumstances where the specific onshoring legislation does not make provision for transition.

Until now, the regulators have not set out specific details as to how they intend to make use of these powers. In the [new guidance](#), the FCA indicates the areas in which it does not intend to grant transitional relief. The FCA highlights that, in these areas, market participants should begin preparing to comply with the changed obligations now (on the assumption that there will be no implementation period). It is important that businesses build this into their Brexit preparations as a priority.

Helpfully, however, the FCA's expectations are realistic. It states that it expects affected parties to take "reasonable steps" to comply with the changes by exit day. The FCA is aware of the scale, complexity, and magnitude of some of these changes, and consequently intends to act proportionately. This means that the FCA will not take a strict liability approach, and does not intend to take enforcement action against those who do not meet all requirements straight away, where there is evidence that they have taken reasonable steps to prepare to meet the new obligations by exit day.

Consequently, market participants cannot be complacent, but neither must they be unduly concerned about enforcement action if they are making attempts on a best efforts basis to comply with the changes from exit day. However, the FCA is planning to take a slightly stricter line in relation to transaction reporting, as explained further below.

The FCA plans to publish further detailed information on the areas in which it will use its transitional powers prior to exit day. At a Treasury Select Committee hearing this week, Andrew Bailey suggested that the FCA was intending to publish this information at the end of February.

Who Will Not Benefit From Transitional Relief?

The FCA indicates that market participants will need to be prepared to comply with the onshoring changes from exit day in the following areas:

- **MiFID II transaction reporting:** the UK's transaction reporting regime under MiFID II will change from exit day (as explained in our previous [Client Alert](#) on onshoring MiFID II), including connected obligations such as the requirement to submit financial instrument reference data. The main impact will be for UK trading venues (which will need to prepare to transaction report for transactions on their venues by their EEA members) and EEA firms with a UK branch entering the temporary permissions regime (which will need to start transaction reporting to the FCA post-Brexit), as well as UK-approved reporting mechanisms that submit reports on behalf of firms.
- **EMIR reporting obligations:** from exit day, all firms and central counterparties who enter into derivatives transactions in scope of EMIR will be required to report into a UK-registered trade repository. The FCA plans to make a list of UK-registered trade repositories available on its website prior to exit day.
- **Issuer rules:** EEA issuers that have securities admitted to trading or traded on UK markets will be required to submit information to the FCA and disclose certain information to the market from exit.
- **Contractual recognition of bail-in:** UK firms within scope of the Bank Recovery and Resolution Directive will need to include contractual recognition of bail-in language in the terms of all new or materially-amended liabilities governed by the law of an EEA jurisdiction from exit day, with the exception of unsecured liabilities that are not debt instruments.
- **Short selling notifications:** any EEA firm wishing to use the exemption for market-making activities under the Short Selling Regulation in the UK will be required to join a UK trading venue and notify the FCA of their intention to use the exemption, 30 days ahead of their intended use of the exemption. Any notifications already made to the FCA will remain valid post-exit.
- **Use of credit ratings:** all ratings will need to be issued or endorsed by a credit ratings agency (CRA) established in the UK and registered with the FCA for them to be eligible for regulatory use in the UK after exit day. Users of credit ratings should therefore take steps to ensure they are operationally ready to use credit ratings issued or endorsed by FCA-registered CRAs after exit day. Ratings issued or endorsed in the EU before exit by a CRA with an affiliate registered or currently applying for registration with the FCA, may be used for regulatory purposes in the UK for up to one year after exit.

- Securitisation: UK originators or sponsors will need to direct notifications to the FCA from exit day for UK securitisations they wish to be considered simple, transparent, and standardised under the new Securitisation Regulation. UK originators, sponsors, or securitisation special purpose entities choosing to make use of a third-party verifier to assess compliance with the simple, transparent, and standardised criteria may only use a verifier established in the UK and authorised by the FCA.

FCA FIRDS and Transaction Reporting

The FCA has also provided [further specific guidance](#) for firms in relation to transaction reporting. This provides a high-level overview of what firms need to do now to comply with the onshored MiFID II regime in relation to transaction reporting, which will apply from exit day.

The FCA reports that it has built FCA FIRDS to replace ESMA FIRDS (the EU record of all financial instruments reported as being traded on a trading venue in the EEA) in the UK. The FCA states that it will begin feeding the system with live production data from early March 2019, to ensure that it has a full database of instruments by 29 March 2019. In a no-deal scenario, the FCA plans to switch off its feeds to ESMA FIRDS at 11pm on Friday 29 March 2019, and to have FCA FIRDS open from Monday 1 April 2019.

The FCA also confirms that it intends to publish an extract of ESMA data in FCA FIRDS, given that the scope of the UK transaction reporting regime will include instruments traded on EEA venues. Hopefully this will mean that firms and venues transaction reporting in the UK need only consult FCA FIRDS, rather than needing to piece together information from both the FCA and the ESMA systems.

The FCA aims to provide some consistency by making its system as similar as possible to ESMA FIRDS. The schema for the two systems will be identical on day one. However, the FCA flags that some fields within the system will not work in the same way as they do now, as a consequence of Brexit. For example, the Relevant Competent Authority (RCA) field will no longer be meaningful post-Brexit and so will default to “GB”.

The FCA explains that firms will be able to test FCA FIRDS from 21 February 2019, and provides [technical specifications](#) for the new system.

The FCA reiterates that it will not take a strict liability approach to compliance with the UK transaction reporting requirements following a no-deal Brexit, but firms should note that the FCA expects firms unable to comply immediately to back-report missing, incomplete or inaccurate transaction reports as soon as possible. While this may give firms some leeway, in practice they will need to ensure that they are compliant fairly promptly, or risk the task of back-reporting becoming increasingly unmanageable. Although the FCA intends to exercise some forbearance, transaction reporting is such a critical source of information for the FCA that it could well take a less generous approach if it finds that it is not getting the information it needs to supervise UK markets effectively.

If you have questions about this *Client Alert*, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

David Berman

david.berman@lw.com
+44.20.7710.3080
London

Kishore Bhindi

kishore.bhindi@lw.com
+44.20.7710.4785
London

Brett Carr

brett.carr@lw.com
+44.020.7710.4695
London

Charlotte Collins

charlotte.collins@lw.com
+44.20.7710.1804
London

Stuart Davis

stuart.davis@lw.com
+44.20.7710.1821
London

Carl Fernandes

carl.fernandes@lw.com
+44.20.7710.4777
London

Nicola Higgs

nicola.higgs@lw.com
+44.20.7710.1154
London

Gabriel Lakeman

gabriel.lakeman@lw.com
+44.020.7710.4645
London

Anne Mainwaring

anne.mainwaring@lw.com
+44.20.7710.1018
London

Sam Maxson

sam.maxson@lw.com
+44.20.7710.1823
London

Ella McGinn

ella.mcginn@lw.com
+44.20.7710.4649
London

Frida Montenius

frida.montenius@lw.com
+44.20.7710.1161
London

Rob Moulton

rob.moulton@lw.com
+44.20.7710.4523
London

Denisa Odendaal

denisa.odendaal@lw.com
+44.20.7710.1845
London

Jonathan Ritson-Candler

jonathan.ritson-candler@lw.com
+44.20.7710.1815
London

Emily Torrens

emily.torrens@lw.com
+44.20.7710.1883
London

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