

A blue-toned background image featuring a financial line chart with multiple data series and a grid. The chart shows various trends, including a sharp decline followed by a recovery and another peak.

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13 March 2024

Financial Regulation Monthly Breakfast Seminar

Overview

- 
- FCA's proposals on its approach to enforcement
 - FCA Consumer duty – an update
 - Financial promotions – an update
 - EU ESG Ratings Regulation – the market impact
 - HMT's consultation on the intermittent trading venue (PISCES)

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The FCA's consultation on publicising
enforcement investigations and changes to its
enforcement approach

Andrea Monks

What is being proposed?

- FCA is consulting on plans to publicly announce when it opens an enforcement investigation
- FCA will publish the identity of the subject of the investigation, and updates during the life of the investigation
- Firms only – FCA will not generally announce an investigation into a named individual
- FCA will state clearly that announcing an investigation does not automatically mean it has decided that there has been misconduct or breaches
- FCA will be transparent when cases closed with no outcome

Why?

- Reassures the public the FCA is taking appropriate action
- Ensures faster dissemination of best practices and concerns
- Increases deterrence and drives positive behavioural change
- Encourages witnesses and whistleblowers to inform

But really, why....?

- Settlement (more quickly)
- Insulates the FCA from press criticism

How?

- Public interest framework applied on a case-by-case basis
- Announcement (or update) will be in the public interest if it will:
 - Enable the interests of consumers or investors to be protected
 - Help the investigation e.g. witnesses or whistleblowers come forward
 - Address public concern or speculation, including by correcting information already in the public domain
 - Provide reassurance that the FCA is taking appropriate action
 - Deter future breaches
- Announcement may not be in the public interest if it will adversely impact:
 - The conduct of FCA's/another regulator's investigation
 - The interests of consumers
 - The stability of the UK financial system

The small print

- Content of the announcement
- Retrospective
- Firms typically given 24 hours notice of decision to announce
- Changes to the EG
- Answers to the CP by 16 April 2024

What does the industry have to say?

- Impact on the firm not a factor for the public interest test
- Potential for irreparable – and unjustified – harm to the firm
- Trial by media / Treasury Select Committee / social media
- Potential for the FCA to become entrenched once views set out in public
- Unnecessary to achieve the FCA's objectives
- 24 hours to prepare for an announcement or an update unfairly short



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The latest from the FCA on Consumer Duty implementation, including feedback on areas for improvement

Ella McGinn

Consumer Duty: latest FCA feedback

- FCA published further feedback on good practice and areas for improvement on 20 February 2024
- Sheldon Mills, Executive Director, Consumers and Competition at the FCA delivered a speech on 20 February 2024 to support and highlight the FCA's latest publications
- FCA also published findings from an Autumn 2023 survey on how firms have been managing the implementation of the Duty

Consumer Duty implementation: good practice and areas for improvement (1)

- FCA highlighted six key areas which mirror the four outcomes and other Consumer Duty rules:
 - Culture, governance and monitoring
 - The Duty should be considered at all levels of the firm across the business, not just by the Board or risk and compliance
 - Firms need better data and monitoring strategies – not simply repackaging existing information
 - Proactive approach to issues rather than reacting to regulatory intervention
 - Staff bonus and incentive structures
 - Consumers in vulnerable circumstances
 - How are vulnerable customers considered in product and service design
 - Addressing weaknesses in processes to track vulnerability or data used for this purpose
 - FCA has concerns where firms believe they do not have any vulnerable customers and around treatment of vulnerable customers who have been asked to self-identify

Consumer Duty implementation: good practice and areas for improvement (2)

- FCA highlighted six key areas which mirror the four outcomes and other Consumer Duty rules:
 - Products and services
 - Defining target market, ensuring products are sold appropriately and tracking customers in the negative target market who have been sold a product or service
 - Sharing of information across distribution chains
 - Price and value
 - FCA sees this as the most challenging area for firms
 - Solid data and credible evidence required to justify products' value to customers
 - Over-reliance on market benchmarking
 - All aspects of fair value and impacts on different consumers must be considered
 - Unjustified fees, or charging customers for services they are not benefitting from

Consumer Duty implementation: good practice and areas for improvement (3)

- FCA highlighted six key areas which mirror the four outcomes and other Consumer Duty rules:
 - Consumer understanding
 - What charges apply and when
 - Improve communications across different channels, develop customer understanding frameworks and redesign customer journeys
 - How to test customer understanding
 - Consumer support
 - Staff training
 - Supporting existing and new customers
 - Positive friction in customer journeys
 - How to monitor customer support, such as customer feedback

Consumer Duty: closed products and services

- Evidencing good outcomes and addressing data gaps
- Fair value of closed products
- Less engaged customers
- Vested rights



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A financial promotions update, including the reversal of recent changes to certain exemptions and ESMA's warning for people posting investment recommendations on social media

Jonathan Ritson-Candler

Reversal of changes to high net worth and self-certified sophisticated investor exemptions

- Relate to promotions regarding unlisted companies
- Criteria for falling within these exemptions were updated, with effect from 31 January 2024
- Reversal back to pre-31 January position was announced as part of the Spring Budget
- Further work to review the scope of the exemptions is anticipated
- New (old) rules take effect from 27 March 2024
- Result of lobbying from tech, angel investing and theatre sectors

Reversal of changes to high net worth and self-certified sophisticated investor exemptions (cont.)

- High net worth individuals: criteria revert back to income of at least £100,000 in the last financial year (lowered from £170,000) and/or net assets of £250,000 or more (lowered from £430,000)
- Self-certified sophisticated investors: revert back to a qualifying criterion being having made two or more investments in an unlisted company over the past 2 years (previously entirely removed) or having been a director of a company with an annual turnover of at least £1m (lowered from £1.6m)
- Investor statements signed between 31 January and 27 March that are compliant with 31 Jan rules will remain valid until 30 Jan 2025. After which time, new investor statements compliant with 27 March rules must be signed

FCA publishes financial promotion Q4 2023 data

- 1,004 promotions amended or withdrawn by firms because of FCA action
- Authorised firms: 407 promotions actively reviewed by FCA (31% from FCA's proactive monitoring, 31% flagged by consumers, 12% from other UK regulators, 17% from elsewhere in the FCA and 9% from firms)
- Unauthorised firms: FCA received 6,143 reports of potentially unauthorised business. FCA in turn issued 793 alerts to unauthorised firms and individuals – many of these involved breaches of the financial promotions restriction

ESMA warning for people posting investment recommendations on social media

- Concern regarding increased access to investment recommendations by retail clients via social media
- ESMA reminds influencers that communications could amount to investment recommendations under MAR
- Any social media post that recommends or suggests, directly or indirectly, an investment strategy in relation to issuers or financial instruments could be an investment recommendation
- Gives guidance in an easily digestible format for social media users to avoid making investment recommendations
- Penalties for breach of IR regime up to €500,000 for natural persons and €1m for legal persons

ESMA warning for people posting investment recommendations on social media (cont.)

- Also warns against social media being used to commit market abuse (e.g., dissemination of misleading statements including selective disclosure)
- Reminds social media users that the IR rules apply to anyone (with an enhanced set of disclosure requirements for “experts”)
- Experts defined broadly to capture those who repeatedly propose investment decisions in relation to financial instruments and who: (i) present themselves as having financial experience or expertise; or (ii) put forward their recommendation in such a way that other persons would reasonably believe that they have financial expertise

ESMA warning for people posting investment recommendations on social media (cont.)

- Recognises that social media influencers not disclosing conflicts of interest could be considered market manipulation by way of giving false or misleading signals
- Taking advantage of the impact of the foregoing would also be market manipulation
- Paper gives some helpful worked examples



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The provisional agreed text of the EU ESG
Ratings Regulation and the potential market
impact

Nicola Higgs

EU ESG Ratings – Scope

The trigger for falling within scope of the Regulation is the provision of an ESG rating by an ESG rating provider operating in the EU. The key terms relating to scope are defined as follows:

Definition	Description
1. ESG rating	An opinion, a score, or a combination of both, regarding a rated item’s profile or characteristics with regard to environmental, social and human rights, or governance factors, or exposure to risks, or the impact on environmental, social and human rights, or governance factors, that are based on both: <ul style="list-style-type: none">• An established methodology; and• A defined ranking system of rating categories, irrespective of whether such ESG rating is explicitly labelled as “ESG rating”, “ESG opinion,” or “ESG score”
2. ESG opinion	ESG ratings issued by regulated financial undertakings that are used exclusively for internal purposes or for providing in-house or intra group financial services or products
3. ESG score	An ESG measure derived from data, using a rule-based methodology, and based only on a pre-established statistical or algorithmic system or model, without any additional substantial analytical input from an analyst
3. Rated item	A legal person, a financial instrument, a financial product, or a public authority or a body governed by public law which is explicitly or implicitly rated in the ESG rating, irrespective of whether such rating has been requested for and irrespective of whether the legal person has provided information for that ESG rating
3. ESG rating provider	A legal person whose occupation includes the issuance and publication or distribution of ESG ratings on a professional basis

EU ESG Ratings – Territoriality

“Operating in the Union” covers:	Relevant to ESG ratings providers established in the EU?	Relevant to third-country ESG ratings providers?
1. Issuing and publishing ratings on the provider’s website or through other means	✓	✗
2. Issuing and distributing ratings through subscription or other contractual relationships to: <ul style="list-style-type: none"> a. Regulated financial services firms in the EU b. Entities within scope of the EU Accounting Directive or EU Transparency Directive; or c. Certain EU bodies, or public authorities in an EU Member State 	✓	✓

EU ESG Ratings – Exemptions

1. Private ESG ratings
2. ESG ratings for internal purposes
3. ***ESG ratings issued by regulated financial undertakings in the EU**
4. EU SFDR disclosures
5. EU Taxonomy disclosures
6. ESG data
7. Credit ratings
8. **Products and services which incorporate *an element of an ESG* rating, including investment research**
9. ESG ratings produced by EU or Member States' public authorities; or European System of Central Banks
10. Ratings developed exclusively for accreditation or certification processes
11. ESG labels
12. Non-profit organisations that issue ESG ratings for non-commercial purposes
13. **Unsolicited EU distribution by a third-country ESG ratings provider**

* Consider need for additional disclosure
Annex in product / service marketing



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HM Treasury's consultation on the proposed
Private Intermittent Securities and Capital
Exchange System (PISCES)

Rob Moulton

What is PISCES?

- A secondary market trading platform (MTF)
- No new capital raising
- Can only be used by non-listed companies
- No retail investors permitted (at least at the outset)
- Intermittent trading occurs, which enables private companies to go (semi)-public for a short period, before going private again
 - MAR will apply only during the public window

Legal framework

- This will be the second use of the FSMA 2023 powers to temporarily modify or disapply other areas of law
 - Market abuse
 - MiFID
 - But what about the EU regime?
- First use of the sandbox expected H2 2024, with the intention that the platform goes live by year end
- Will rely upon existing definitions of retail, and FPO exemptions
 - May permit investment by existing employees, probably an important category

Transparency

- No requirement for pre- or post-trade information to be made public
- Only those with access to PISCES will see pre- and post-trade transparency information
- Companies required to disclose, shortly prior to the opening of the trading window
 - Any inside information
 - Share capitalisation table
 - Transactions by PDMRs
 - Information on any price parameters or trading restrictions

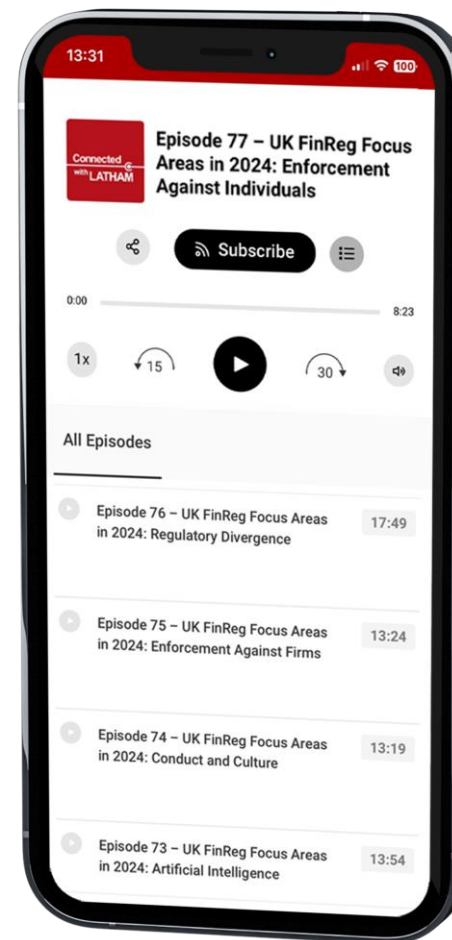
Market abuse implications

- MAR would apply only from (1) the date of disclosure by the company to (2) the closing of the trading window (a few days). Scope limited to shares admitted to trading, and not related financial instruments, and only to trading on the venue
- Regime on disseminating false and misleading information outside trading venue will apply if there could be an impact during the trading window
- Unlawful disclosure, market manipulation, and insider dealing offences will apply during the window
- Again, EU MAR implications?

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We have published a 10-part podcast series complementing our **“10 Key Focus Areas for UK-Regulated Financial Services Firms in 2024”** report. Topics include The Edinburgh Reforms, AI, Regulatory Divergence, ESG, Enforcement, and more.

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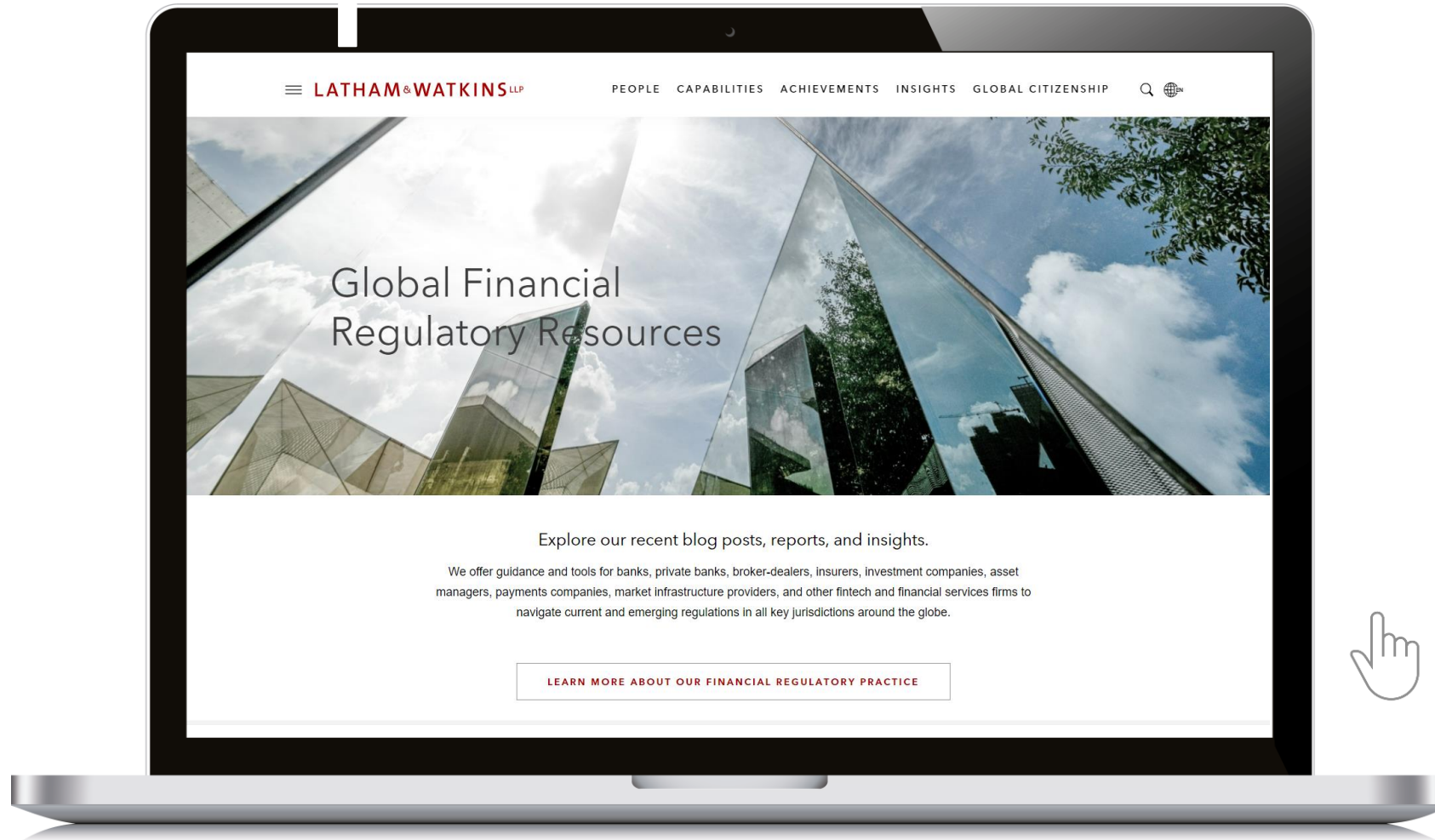
Each month the UK and European Financial Regulatory lawyers at Latham & Watkins host a presentation and discussion covering recent changes to financial services regulation.

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- [FCA Sets Out Latest Areas of Focus Under the Consumer Duty](#)
- [EU Reaches Provisional Agreement on ESG Ratings Regulation](#)
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- [FCA Publishes Findings From Its Wholesale Data Market Study](#)
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