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# PRIVATE BANK BRIEFING

## Issues Impacting the Private Bank Sector

Welcome to our quarterly round-up of legal and compliance issues impacting private banks and their clients.

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# Consumer Protection: FCA Discussion on Introducing a Duty of Care

The FCA published a Discussion Paper on a duty of care and potential alternative approaches (DP18/5) on 17 July 2018.

The FCA is exploring whether there should be a duty of care in the financial services sector. It is doing so via a Discussion Paper at this stage, as the regulator is conscious that the debate around this issue is complex, and there are strongly held views on both sides. Some stakeholders argue that the current framework does not provide adequate protection for consumers, and that introducing a duty of care might not only provide an additional avenue for redress, but might also serve to prevent poor consumer outcomes in the first place. For example, there are concerns that the Principles for Businesses do not remove conflicts and do not positively incentivise good conduct. Other stakeholders, however, argue that a duty of care would add an unnecessary layer of complexity and uncertainty to the regulatory regime, could lead to unintended consequences, and would be very difficult to formulate appropriately.

Consequently, the FCA is trying to understand whether there is a gap in the legal and regulatory framework, or in the way the framework is applied in practice, which could be addressed by introducing a duty of care. To help inform the debate, the paper summarises the current framework, how the FCA applies its rules in practice, and the range of potential outcomes for consumers — including redress. The FCA is particularly interested in understanding whether change is desirable, and if so, what form it could take, how it would sit alongside the current framework, and what consequences it might have.

In addressing the discussion, the FCA recognises that "duty of care" is not a precise term, and explains that suggestions for change have ranged from introducing a positive duty of care, to introducing something more akin to a fiduciary duty (based around the prohibition of certain actions that go against a client's interests). The FCA is keen to explore the potential merits of different types of duties, and other approaches that might fill any identified gap in the framework.

The regulator does not have a particular formulation in mind at this stage, and presents various options for discussion. These include introducing a duty via regulatory rules or statute, and alternative options such as extending the client's best interests rule, or introducing additional rules or guidance on the Principles for Businesses. Currently, the FCA seems to envisage that any change would be directed only at firms, not individuals. The paper does not suggest that individuals within financial services firms would owe clients a personal duty of care.

The FCA requests responses to the Discussion Paper by 2 November 2018, but has not yet set out a timetable for next steps. Although the FCA has brought forward this discussion (which was due to take place as part of the regulator's post-Brexit Handbook review), the FCA is not expected to move quickly on taking any policy action.

# SMCR: Further Optimisations and the Directory

Although most of the recent publications on the Senior Managers and Certification Regime (SMCR) relate to non-banks, the regulators have used the consultation process for the extended regime to make some "optimisations" to the regime for banks. Banks should also be aware that the FCA is using the opportunity to relocate and streamline some pre-existing Handbook material, and so from 10 December 2018 certain Handbook provisions relating to the SMCR will move.

In terms of optimisations, the near-final rules published on 4 July 2018 confirm that the FCA is introducing a new Prescribed Responsibility relating to the Conduct Rules. The new Prescribed Responsibility will apply to banks from 1 November 2018.

Banks should allocate this Prescribed Responsibility to the Senior Manager who is the most senior person responsible for the training and notification requirements relating to the Conduct Rules. This may be the person accountable for ensuring that activities undertaken across different parts of the firm enable the firm to comply with its obligations under the Conduct Rules, but need not be someone who is personally involved in these activities day-to-day. The FCA expects to make the relevant forms available for submission during September, and firms will need to submit the forms by 1 November 2018.

The FCA also confirms that it is making a change to the "12-week rule", to allow firms to reallocate any responsibility that an absent Senior Manager holds pursuant to the Overall Responsibility requirement to someone who is not approved, during the 12-week grace period. This could be reallocated to the person covering their Senior Management Function, or to another person. This change will come into effect on 10 December 2018.

Further, the FCA is consulting on creating a new register of individuals working at authorised financial services firms. The "Directory" would include details of all Certified Staff and directors who are not Senior Managers, as well as details of approved Senior Managers. The Directory would offer enhanced search capabilities and additional information on individuals, including workplace location, qualifications, and regulatory sanctions and prohibitions.

*The "Directory" would include details of all Certified Staff and directors who are not Senior Managers, as well as details of approved Senior Managers.*

Importantly, firms would need to submit certain information to the FCA via Connect to keep the Directory up to date. The FCA is proposing that firms would need to provide information about individuals commencing and leaving roles within one business day of them starting or finishing (bar in exceptional circumstances). Firms would need to provide other information, such as changes in circumstances, within three business days.

The FCA is also proposing to amend the Prescribed Responsibility relating to the Certification Regime, to provide that this encompasses responsibility for the reporting requirements in relation to the Directory.

The FCA proposes that banks would need to have all of their data uploaded to the Directory by 10 December 2019, covering the period from 10 December 2018. Banks would not need to backdate their reporting to cover the period prior to 10 December 2018.

# Asset Management: FCA Investment Platforms Market Study

The FCA published an interim report on its investment platforms market study on 17 July 2018. The FCA launched this market study last year following the asset management market study, to explore how well competition is working in this fast-growing market. The FCA was particularly interested to see whether investors and financial advisers are able to make informed choices, and whether investment platforms help investors to get a better deal.

Generally, the FCA found that competition is working well. However, current findings reveal some concerns about how platforms serve five particular types of customer. The FCA is proposing measures to address these specific concerns, and requests feedback from stakeholders on these issues.

| Customer type / concern | FCA proposals |
|---|---|
| Customers who would benefit from switching between platforms, but find it difficult or costly to do so. | The FCA is aware that industry-led initiatives are helping, and welcomes views on how it might reinforce these. The FCA may take further action if not satisfied with progress on these initiatives by the time of the final report.<br>The FCA is also considering further remedies, such as banning exit fees, improving switching between share classes, and providing more guidance around appropriate adviser charges associated with switching. |
| Price-sensitive customers using direct-to-consumer platforms, as platform fees are often hard to understand and compare, making shopping around for a lower cost platform difficult. | The FCA will conduct a supervisory review to see whether firms are complying with the MiFID II costs and charges requirements, and disclosure requirements under the PRIIPs Regulation.<br>The FCA will wait and see how the MiFID II costs and charges requirements are bedding in before it publishes the final report, and will decide then whether further measures are required. In particular, the regulator wants to see more innovation in the way platforms present costs and charges data.<br>The FCA welcomes feedback on whether enhancing the role of intermediaries, such as price comparison websites, would help customers who are finding choosing a direct-to-consumer platform based on price difficult. |
| Customers using model portfolios, as the FCA found that the information that platforms provide can make comparison difficult, and the risks and expected returns of model portfolios with similar risk labels are unclear. | The FCA will undertake further analysis to understand the impact of risk labels and main drivers of different charges.<br>The FCA will also explore whether these issues might apply more broadly to all types of model portfolios and equivalent products. |
| Customers with large cash balances using direct-to-consumer platforms, who may not be aware of platform fees, or that they are missing out on investment returns or on the interest they forego by holding cash this way. | The FCA wants to understand better why customers are building large cash balances and whether existing rules on disclosure ensure customers are making informed decisions. |
| Customers who were previously advised but no longer have any relationship with a financial adviser. These customers face higher charges and poorer service as a result. | The FCA is considering a number of potential measures, such as tackling price discrimination between “orphan” and existing clients. |

The interim report also highlights concerns around fund managers offering discounts to certain platforms, and welcomes feedback on whether such discounts might inhibit competition. The FCA is interested in the impact of how platforms present fund charges, and plans to examine further the extent to which disclosures are creating a clearer picture of the costs and charges of funds available on a platform. The FCA believes that platforms can play a key role in helping investors understand charges, and driving competition between asset managers.

The FCA is asking for feedback on the interim report by 21 September 2018, and plans to publish its final rules in early 2019. Private banks should take note of the FCA’s findings and proposals. In particular, the FCA’s comments regarding costs and charges disclosures, which have broader application beyond the investment platforms market.

# PRIIPs Update

**Publishing a KID on the Public Part of a Website**

On 20 July 2018, the Joint Committee of the European Supervisory Authorities (ESAs) published an updated version of its Q&A document on the PRIIPs Regulation. The ESAs have added a new Q&A, stating that a PRIIP manufacturer must publish a KID on the public section of its website.

*Unfortunately, by trying to resolve one area of uncertainty, the ESAs have inadvertently created a new problem for manufacturers.*

Unfortunately, by trying to resolve one area of uncertainty, the ESAs have inadvertently created a new problem for manufacturers. First, this approach raises the issue that publishing a KID on the public section of a website might imply that there is an offer to the public, and therefore trigger the requirement to publish a prospectus. This is a particular concern in relation to PRIIPs for which an approved prospectus would not ordinarily be produced, such as privately placed structured notes. Second, and of particular relevance to private banks, there are concerns that this requirement would force firms to publish on their websites the details of products that are often treated as highly confidential, such as the terms of bespoke bilateral derivatives contracts.

This new guidance puts manufacturers such as private banks in a difficult position. They must weigh up the risks of not following the ESAs' guidance against the potentially undesirable and unintended consequences of publishing client sensitive information on their websites.

**FCA Call for Input**

Market participants continue to experience issues with the interpretation and application of the PRIIPs Regulation. In this context, the FCA launched a call for input on 26 July 2018, asking for information about market participants' initial experiences of the requirements under the Regulation.

The FCA is interested to hear from manufacturers and distributors of PRIIPs about uncertainties regarding the scope of the Regulation (acknowledging the specific issues concerning corporate bonds and the impact this is having on distribution to retail investors), and practical issues with some of the disclosure requirements in the KID. The FCA also welcomes input on any other aspects of the Regulation that are raising concerns. The FCA asks for responses by 28 September 2018, and aims to publish a feedback statement in early 2019. Presumably, as the FCA cannot make any changes to the regime itself, the FCA will use the feedback obtained to provide input into the EU-level review of the PRIIPs Regulation, due to take place by the end of the year. Therefore, while the review signifies a helpful public acknowledgement of the difficulties caused by the Regulation, it seems unlikely to offer a quick fix.

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**PRIIPs: Bonds**

Private banks hoping for clarity sooner rather than later will be pleased to see that the ESAs have written to the European Commission, entreating the Commission to provide detailed guidance as a matter of urgency as to which types of products, and in particular which types of bonds, fall within the scope of the Regulation. To support this, the ESAs have prepared an analysis of the application of the Regulation to some of the main types and features of bonds. The ESAs do not believe that this uncertainty can be resolved simply through further Level 3 guidance — they consider that it requires intervention by the Commission.

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In the letter, the ESAs highlight some of the negative consequences of the uncertainty regarding the scope of the PRIIPs Regulation, particularly the impact on retail investors, and how this has the potential to undermine the aims of the Capital Markets Union initiative. Whether the letter results in any swift or decisive action by the Commission remains to be seen, but private banks will undoubtedly be hopeful that the letter will impress upon the Commission the urgent need to make some changes.

"During discussions with NCAs and stakeholders, the ESAs have been made aware of analysis in some Member States indicating that there has been more than a 60% reduction in the number and overall volume of low denomination issuances by non-financial corporates in the first quarter of 2018 compared to the first quarter of 2017. It has also led to difficulties for retail investors to trade their bonds where these were issued before the introduction of PRIIPs regime on 1 January this year, with evidence of up to a 25% reduction in some secondary markets."

Letter from the ESAs to the European Commission, 19 July 2018

# Product Intervention: ESMA Confirms Structured Products Not in Scope of Binary Options Ban

There had been concerns in the industry that ESMA's broadly worded temporary ban on distributing binary options to retail clients, which came into effect on 2 July 2018, could capture other types of financial products more commonly sold by private banks, such as structured products.

On 30 July 2018, ESMA updated its Q&A document on the measures, adding a new Q&A that clearly states structured finance products are not within scope of the binary options ban. Whilst helpful in some respects, ESMA does not provide any explanation for this conclusion, leaving some doubt as to whether (or in what circumstances) a structured product could in fact be categorised as a binary option for the purposes of the ban.

ESMA has also announced that it will extend the initial ban (which will expire on 2 October 2018) for a further three months. At the same time as extending the ban, ESMA is proposing to restrict the scope, by excluding the following:

- Binary options for which the lower of the two predetermined fixed amounts is at least equal to the total payment made by the client for the binary option, including any commissions, transaction fees, and other related costs.
- Binary options that meet all of the following three conditions:
  - The term from issuance to maturity is at least 90 calendar days.
  - A prospectus drawn up and approved in accordance with the Prospectus Directive is available to the public.
  - The binary option does not expose the provider to market risk throughout the term of the binary option, and the provider or any of its group entities do not make a profit or loss from the binary option, other than previously disclosed commissions, transaction fees, or other related charges.

The above exclusions may also help private banks to conclude that certain structured products are not within the scope of the ban.

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# Suitability Assessments: UK Government Views on Sustainability Preferences

The UK government published a memorandum produced by HM Treasury on 5 July 2018, setting out the Treasury's views regarding the proposed EU Regulation on disclosures relating to sustainable investments and sustainability risks. The Regulation was adopted by the European Commission on 24 May 2018 as part of its Action Plan on Sustainable Finance.

This proposal is still likely to be of relevance to UK firms — the memorandum notes that, if agreed, the proposed Regulation would likely come into force during the Brexit transitional period (assuming there is such a period). Although, there is a significant risk that the complete framework may not be agreed until after any implementation period comes to an end.

*HM Treasury notes that firms are already subject to significant disclosure requirements.*

The proposed Regulation would introduce mandatory disclosures relating to environmental, social, and governance considerations for financial market participants. This would require participants to publish information on how sustainability risks are incorporated into their investment decision-making or advisory process in their pre-contractual disclosures and on their websites. The Regulation would also require that, if a financial product has sustainability targets, financial market participants set out how those targets are reached in their disclosures and on their websites.

The memorandum explains that the UK government is supportive of the aim to enhance the transparency of environmental, social, and governance considerations for the benefit of investors. However, HM Treasury notes that firms are already subject to significant disclosure requirements. While the Treasury is not opposed to the introduction of specific disclosures to support sustainability considerations if this helps investors to make informed decisions, it is concerned that there would be significant associated costs for firms, and that these should not be underestimated.

HM Treasury is not yet convinced that a new Regulation is necessary to achieve the Commission's stated aim, particularly as thinking on climate change is developing very rapidly and any legislation would need to be fluid enough to keep pace with this change. The Treasury suggests that, if there was a consensus about what information should be disclosed in relation to sustainability risks in investment decision and advisory processes, the same objective could be achieved through guidance from the European Supervisory Authorities. The latter would be more flexible and easier to update as thinking develops.

*HM Treasury is not yet convinced that a new Regulation is necessary to achieve the Commission's stated aim.*

# TechTrends: Big Data in Wealth Management

Financial services firms are starting to embrace the potential of technological opportunities, including those associated with the use of so-called “big data”.

Big data is essentially a term used to describe large digital data sets that can be analysed electronically to help reveal patterns and trends, often using artificial intelligence. Whereas, historically, data analysis often involved resource-intensive methods such as digitalising sub-sets of data for review, big data signifies the potential for vast quantities of digital data to be processed automatically, bringing various information advantages for those using the analysis.

Effective use of big data by those in the wealth management sector offers the potential for such firms to gain superior insights across a range of functions, including:

- Investment research, modelling, and trading strategies
- Investor distribution, retention, and conversion
- Performance analysis and benchmarking
- Compliance, including in relation to anti-money laundering and market abuse controls
- Risk analytics and management

*Big data is essentially a term used to describe large digital data sets that can be analysed electronically to help reveal patterns and trends, often using artificial intelligence.*

This presents both significant opportunities and potential risks. As Charles Randall, FCA Chair, explained in a recent FCA speech, the industry needs to innovate ethically and to harness big data to help customers, not simply to maximise firms’ revenue by exploiting known customer bias. For example, firms could use big data to help encourage customers to move to better products for their profile, rather than using the data to keep customers the firm knows are not proactive investing in products with high fees.

One dilemma that big data presents is whether with great knowledge comes great responsibility. Can firms legitimately exploit big data to improve business, but not apply newfound knowledge to improve the fair treatment of customers? For example, if a firm uncovers trends indicating that customers could be getting a better deal, is it obliged to act? As with many areas of innovation, exactly how the regulatory framework applies to firms’ use of big data, or the responsibilities this brings, is unclear. Therefore, firms need to innovate with this in mind.

*Big data signifies the potential for vast quantities of digital data to be processed automatically, bringing various information advantages for those using the analysis.*

Another issue that Randall highlights is that there must be accountability within a firm for innovation, through appropriate risk management, governance, and control. Although ostensibly a “tech” matter, given the potential sensitivities and regulatory risks, firms should not be tempted to leave exploration of the benefits of big data to the technology team without appropriate oversight. They should allocate responsibility for any algorithms, data analytics or other technology employed to a Senior Manager, who should have at least a high-level understanding of the technology and how it works.

Firms using big data must be transparent with customers as to how and why they are using their data. Firms also need to ensure they comply in full with their legal obligations relating to data protection and privacy.

Therefore, to make the most of the opportunities at hand, private banks considering how they might reap the benefits of big data should take time to consider how they can create a framework in which they can innovate whilst respecting regulatory boundaries and mitigating risks appropriately.

# Global Insights — Hong Kong

On 28 March 2018, the Hong Kong Securities and Futures Commission (SFC) published its consultation conclusions on the Proposed Guidelines on Online Distribution and Advisory Platforms (the Guidelines). The Guidelines provide recommendations to the industry on the design and operation of online distribution and advisory platforms, including specific guidance on the provision of automated or robo-advice.

Of particular note, platform operators will need to ensure the suitability of “complex products” sold, even if the products sold are not recommended or solicited by the platform operator. This development, in effect, extends the scope of the existing suitability requirement. The Guidelines also set out a number of factors to help platform operators determine whether an investment product is complex or not. In making such determination, the platform operator should consider these factors, and the non-exhaustive list of examples of non-complex and complex products set out on the SFC’s website.

The final Guidelines will become effective on 6 April 2019.

The SFC also conducted a further consultation on whether the requirement to ensure the suitability of complex products (even if the sale of such products is not recommended or solicited) should also apply to offline sales. The SFC’s current proposal is to align the regulatory requirements for both online and offline sales. These consultation conclusions have not been published yet.

# Lessons from Enforcement: Watch Out for Possible Changes to the UK Suspicious Activity Reporting Regime

In a characteristically thorough and thoughtful consultation paper published on 20 July 2018, the Law Commission (at the request of the Home Office) has reviewed the UK's suspicious activity reporting (SARs) regime. The results make somewhat dispiriting reading for anyone in the UK regulated sector for money laundering reporting purposes, but especially banks, who make the most reports and pay the lion's share of the costs. Unfortunately, the Law Commission's proposals for reform do not, in our view, really address the problems — and might even make the situation worse.

*This volume of reports might not matter if they were effective at stopping money laundering. But they are not.*

The paper's key points are as follows:

- The current regime is not working. The UK's decision to gold-plate EU requirements and the internationally accepted standards for reporting known or suspected money laundering means the UK regulated sector generates 26 times as many reports as the regulated sector in Germany (which has a larger economy than the UK), and nearly 10 times more reports than the regulated sector in France (which has a marginally smaller economy).
- This volume of reports might not matter if they were effective at stopping money laundering. But they are not. Only a miniscule proportion of reports result in action by law enforcement — and the vast majority of reports are of no intelligence value whatsoever.
- Since the Proceeds of Crime Act 2002 was passed, UK law enforcement agencies have seized about £1.6 billion of criminal proceeds. In the same period, the UK regulated sector (extrapolating from the £5 billion a year spent by banks alone) has spent (conservatively) at least £50 billion on complying with the requirements of the UK regime. That is not a sensible return on investment — and risks harming the competitiveness of the regulated sector in the UK.
- To address these issues, the Law Commission is consulting on various options, including the following:
  - **Replacing the requirement to report "all crimes" with "serious crimes"**. This might work, but it is fiendishly difficult to work out where the boundary should lie. We would give this a cautious "maybe — if any proposal is sufficiently clear".
  - **Removing the requirement to report based on "mere suspicion" — but retaining the need to report based on knowledge or reasonable grounds to suspect.** Although this change is superficially attractive, the distinction is one that only really appeals to lawyers and is unlikely to make a difference in the "real" world. Further, it opens the door to customers complaining that the bank set the bar too low, reported when it should not have, and caused all sorts of harm as a result. This is a "no" in our view.
  - **Allowing banks to ring-fence only the "criminal" part of commingled property and deal with the rest.** We also view this as a "no" because of the risk of claims that the bank got it wrong — and because it requires the regulated sector to substitute its judgment for that of law enforcement.
  - **Introducing a new offence of "failing to prevent" employees' failure to report money laundering.** So, a bank would be criminally liable for its employees failing to report money laundering unless it could show that it had taken reasonable measures to ensure reports were made. A definite "no" for us. Not just because failure to prevent offences (which have become the legislator's darling since the Bribery Act 2010) are lazy law-making in our view (failing to prevent someone else's failure to do something is a particularly tautologous and peculiar concept), but because there are already a raft of sanctions available to the authorities if a bank does not take adequate steps to detect and prevent money laundering, including prosecution and regulatory sanctions. There is no evidence that these need topping up.

Responses to the consultation paper are due by 5 October 2018. Given the risks identified above, we strongly encourage private banks to consider responding — individually, or collectively through relevant trade bodies.

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# What to Look Out for in Q4 2018

- HM Treasury will continue to lay secondary legislation as part of the onshoring of EU financial services legislation
- The FCA and the PRA plan to consult on changes to their rules required for onshoring EU financial services legislation
- UK government and EU27 aim to conclude a Brexit deal
- European Parliament and Council of the EU to consider a number of legislative proposals, including in relation to sustainable finance measures, reform of the European System of Financial Supervision, amendments to the CRD IV framework, and amendments to the Bank Recovery and Resolution Directive


**Latham & Watkins**
99 Bishopsgate
London EC2M 3XF

## CONTACTS

**Nicola Higgs**
+44.20.7710.1154
nicola.higgs@lw.com

**Anne Mainwaring**
+44.20.7710.1018
anne.mainwaring@lw.com

**Charlotte Collins**
+44.20.7710.1804
charlotte.collins@lw.com

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