FitchLearning

Knowledge | Skills | Conduct

Chartered Institute for Securities and Investment

UK Financial Regulation

Study Companion – ED32 (01/04/2025)

FitchLearning

Knowledge | Skills | Conduct

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1. Agent as client

This conduct of business rule covers business brought to a firm on behalf of a client by an agent of that client; for example, a broker approaching a firm on behalf of his client. In these situations, the firm treats the agent as client.

However, the firm will treat the underlying client as the client if:

- The firm agrees with the agent in writing to treat the underlying client as its client; or
- The agent is not an authorised firm

1.1 Agents representing more than one client with the same firm

If an agent is acting on behalf of a number of underlying clients and there is a written agreement (as above) to treat the underlying clients as the clients of the firm, this can create a lot of administration regarding documentation. For this reason, if the information being communicated is of a general nature (for example information about the firm) the firm may send to, or receive from, the agent a single communication.

However, a separate communication is required for each underlying client in respect of:

- Risk warnings
- Confirmations (contract notes)
- Periodic statements (portfolio valuations)

2. Aggregation and allocation of orders

Aggregation is a process where a firm combines it own orders with those of its clients. A firm is not permitted to aggregate a client order with an own account transaction or another client order unless the following conditions are met:

- It must be unlikely that the aggregation will work overall to the disadvantage of any client whose order is to be aggregated
- It must disclose to each client that the effect of aggregation may work to their disadvantage in a particular order
- The firm must have in place an order allocation policy, providing in precise terms for the allocation of aggregated orders

If a firm aggregates a client order with an own account transaction and the aggregated order is partially executed, it must allocate the related trades to the client in priority to the firm. However, if the firm is able to demonstrate reasonable grounds that, without the combination it would not have been able to carry out the order on such advantageous terms, or at all, it may allocate the own account transaction proportionally, in accordance with its order allocation policy.

3. Appointed representatives

An appointed representative is defined as:

- A party to a contract with an authorised person (his principal) which permits or requires him to carry on business
- Someone for whose activities the authorised person has accepted responsibility in writing

Large financial firms selling their products and services directly to the public often engage the services of self-employed representatives. These individuals are known as appointed representatives (or tied agents). They do not need individual authorisation from the regulator. Firms, as well as individuals, may also act as appointed representatives of a product provider, such as a life assurance company.

An appointed representative will only provide advice on the products and services of a single product provider. This contrasts with an independent financial adviser (IFA) who is permitted to advise on the marketplace as a whole. Consequently, IFAs must obtain authorisation.

3.1 Appointed representatives and authorisation

An appointed representative is an exempt person. This means they do not require authorisation from the regulator. This exemption, however, only applies to:

- Arranging deals
- Advising
- Safeguarding and administering
- Placing

The exemption does not apply to:

- Dealing as agent or principal
- Managing investments

As the appointed representative is not an authorised person, the employing firm is responsible for ensuring that appointed representatives meet the ‘fit and proper’ criteria. The appointing firm must also take complete responsibility for the appointed representative’s actions and omissions.

3.2 Appointed representatives and the conduct of business rules (COBS)

The COBS rules apply directly to an authorised firm. As an appointed representative is not an authorised firm, the conduct of business rules apply only indirectly to these firms.

Although the COBS do not apply directly to a firm’s appointed representatives, a firm will always be directly responsible for the acts and omissions of its appointed representatives in carrying on business for which the firm has accepted responsibility.

See also: ‘Exempt Persons’

4. Appropriateness as rule

This conduct of business rule applies to a firm which:

- Provides investment services in the course of MiFID business other than making a personal recommendation and managing investments
- Arranges or deals in relation to a derivative or a warrant with or for a retail client and the firm is, or reasonably should be, aware that the order is in response to a direct offer financial promotion
- Assesses appropriateness on behalf of another MiFID investment firm

When providing one of the services set out above:

- A firm must ask the client to provide information about his relevant knowledge and experience to enable the firm to assess whether the service or product envisaged is appropriate for the client
- A firm must determine whether the client has the necessary experience and knowledge to understand the risks involved in relation to the product or service

A firm may assume that a professional client has the necessary experience and knowledge to understand the risks involved in relation to the products or services for which he is classified as professional. As with the rule on suitability, a firm is entitled to rely on the information provided by the client.

Note: This rule does not apply to eligible counterparty business.

See also: 'Appropriateness – risk warnings'.

5. Appropriateness - exempt instruments

Financial instruments that are exempt from the appropriateness rule are:

- Shares traded on a regulated (or equivalent) market
- Money market instruments, bonds or other forms of securitised debt (excluding those embedding a derivative)
- Units in a UCITS scheme
- Other non-complex financial instruments

Non-complex financial instruments must satisfy the following criteria:

- They are not derivatives (or similar products)
- There are frequent opportunities to trade them at independently determined, publicly available prices
- They do not involve a potential liability that exceeds their cost
- There is publicly available information on their characteristics that an average retail client is likely to understand when making an investment decision

6. Appropriateness - exempt services

A firm is not required to ask its client to provide information or to assess appropriateness if all three conditions are met:

- The service:
  - Only consists of execution and/or reception and transmission of orders
  - It relates to particular financial instruments
  - It is provided at the initiative of the client
- The client has been clearly informed that the firm is not required to assess suitability and that the client therefore does not benefit from the protection of the rules on suitability (this warning can be in a standardised format)
- The firm complies with its obligations in relation to conflicts of interest

7. Appropriateness - risk warnings

A firm is required to give a warning to the client in two circumstances (these warnings may be standardised):

- Where the firm considers that the product or service is not appropriate for the client, it must warn the client of that
- Where the client does not provide sufficient information to enable the firm to assess appropriateness, the firm must warn the client that it is unable to determine appropriateness

If a client asks the firm to go ahead with a transaction despite the warning given by the firm, it is up to the firm to decide whether to do so in the circumstances.

8. Approved persons

The term 'approved persons' applies to the senior managers within a firm. If a firm appoints an individual to perform what the regulators call a 'controlled function', the firm must apply to the regulators to grant approved person status for that individual.

S59 of FSMA2000 states that an authorised firm must take reasonable care to ensure that no person performs a senior manager function unless approved by the FCA or PRA.

Firms who use non-approved persons to carry out controlled functions are liable to be sued under S71 FSMA 2000.

See also: 'Certification Regime'

See also: 'Conduct Rules' See also: 'Prohibition order'

See also: 'Senior Managers Regime'

See also: 'Suing for damages from employment of prohibited or non-approved persons'

9. Approved persons - process

Where a person performs a controlled function, it is the responsibility of the firm, not the candidate, to submit the application to the regulator. A firm seeking approval for a candidate must complete a document referred to as Form A.

The regulator will only grant approved person status if the individual is fit and proper to undertake controlled functions.

In assessing fitness and propriety, the regulators consider:

- Honesty, integrity and reputation
- Competence and capability
- Financial soundness

The regulators are very rigorous in their assessment. When considering whether an individual is fit and proper, the regulators will take into account:

- The activities of the firm and the markets in which it operates
- Information about an applicant regardless of the jurisdiction or industry in which the activity occurred

The regulators will either grant or withhold approved person status. There is no such thing as conditional approval.

Where approved person status is refused, the matter is passed on to the Regulatory Decisions Committee (RDC) who communicates the decision. Applicants wishing to appeal against the RDC decision may do so to the Upper Tribunal.

10. Approved persons - timings

The FCA/PRA will come to a decision **within three months** of receiving a properly completed application form.

Until the regulator has determined the outcome of the application, the firm must inform the regulators of any significant changes to the information given immediately it becomes aware of them.

Where an approved person ceases to perform a senior manager function, the firm must notify the regulators within **seven business days** using Form C: Notice to withdraw approval.

After resigning as an approved person, an individual is still liable to disciplinary action from the regulators for a period of **three years.**

11. Approved persons - withdrawal of approval

Where the regulators believe that an individual is no longer fit and proper, they may withdraw approval.

When withdrawing approval, the regulators assess the factors that they consider when a person is applying for approval.

Some of the factors that the regulators typically consider include failure to:

- Obtain necessary qualifications
- Complete/continue training
- Achieve/maintain necessary levels of competence

Where the regulators seek to withdraw approved person status, they will pass the matter on to the Regulatory Decisions Committee (RDC). The RDC will inform the individual by issuing a warning notice followed by a decision notice. Applicants wishing to appeal against the RDC decision may do so to the Upper Tribunal.

Once the regulators have issued a final notice relating to a withdrawal of approval, they will generally publicise the decision (unless this would prejudice the interests of consumers).

12. Authorisation

The Financial Services and Markets Act 2000 (FSMA 2000) requires any person undertaking regulated activities in the UK to be:

- An authorised person
- An exempt person

As a general rule, firms rather than individuals apply to become authorised under FSMA 2000. To this effect, an authorised (or exempt) person refers to a firm. It is both a criminal and civil offence to conduct unauthorised investment activity as it is a breach of the general prohibition (S19 FSMA 2000).

The FCA provides guidance about the circumstances in which authorisation is required in the Perimeter Guidance Manual (PERG). There are two principal types of authorisation in the UK: Part 4a permission and passporting.

13. Authorisation - Part 4A permission

Applications to the appropriate regulator under Part 4A of FSMA 2000 may be made by:

- An individual
- A body corporate
- A partnership
- An unincorporated association, such as a trust

The regulators have to satisfy themselves that the applicant has sufficient financial resources and management skills to undertake the relevant functions (i.e. is ‘fit and proper’). Although the firms apply for authorisation, the regulators will also consider the fitness and propriety of all individuals in a position of responsibility.

Authorisation is specific not general. Applicants must apply in respect of each business activity they wish to pursue. The regulators have **six months** to decide on an authorisation from the date it receives the application.

14. Authorisation - Part 4A permission statements

If the applicant is successful, the regulators will issue a Part 4A permission statement. This states:

- A description of the activities the firm may carry on
- The specified investments involved
- Any requirements or limitations imposed by the regulators

The FCA will give written notice to the successful applicant and update the regulators' register of authorised firms.

Note that it is not necessarily a criminal offence for a firm to go beyond its specified permission, but it may give rise to:

- Civil claims from consumers
- The FCA using its full range of disciplinary powers

15. Authorisation - Unsuccessful Part 4A application

An applicant for Part 4A authorisation may be unsuccessful in one of two ways: Either the application requires some modification before permission is granted or it has been rejected outright.

Where the regulators are satisfied that the applicant is a 'fit and proper' person but the permission applied for needs modification, Part 4a permission will be granted subject to limitations, such as a narrower description of the permitted regulated activity.

If the applicant does not satisfy the regulators' requirements or in the situation above, the Regulatory Decision Committee will issue the statutory notice and refuse the application for Part 4a permission.

The applicant may approach the Regulatory Decision Committee (RDC) to make representations for review. The process might result in a final reference to the Upper Tribunal.

In either case, the RDC will notify the applicant and advise them on any further steps they may take, including the ability to appeal to the Upper Tribunal.

16. Authorisation - Withdrawal or variation of authorisation

Once the regulators have granted Part 4A permission, they may vary authorisation where:

- The firm is failing (or might fail) to meet the threshold conditions for one or more regulated activity
- The firm has not carried out a regulated activity for at least 12 months
- It is necessary to protect consumers

The regulators will consider cancelling authorisation where:

- It has very serious concerns about a firm
- Where a firm's regulated activities have come to an end

B

1. Basel III

See 'CRD 4'

2. Best execution

This conduct of business rule applies when an authorised firm executes a trade on behalf of a client.

When executing an order for a client, a firm must take all sufficient steps to obtain the best possible result for its client taking into account the execution factors.

The execution factors are elements such as the price, costs, speed, likelihood of execution and settlement, size, nature or any other consideration relevant to the execution of an order.

2.1 Role of price for retail clients

In the case of a retail client, the best possible result must be determined in terms of the total consideration, representing the price of the financial instrument and the costs related to execution.

The costs related to execution must include all expenses directly related to the execution of the order incurred by the client. These include execution venue fees, clearing and settlement fees and any other fees paid to third parties involved in the execution of the order.

2.2 Competing execution venues for retail clients

In the case of a retail client, where the firm assesses and compares the results it could achieve on competing execution venues, it must take its own commissions and costs for executing the order into account.

The firm must not structure or charge its commissions in such a way as to discriminate unfairly between execution venues.

Where there are competing execution venues, the firm must list these in its order execution policy.

Note: This rule does not apply to eligible counterparty business

See also: 'Order Execution Policy'

3. Brexit

From 1 January 2021, UK firms are no longer able to 'passport' financial services in the EU, as UK firms are now classified as third country firms. UK and EU firms are therefore limited in their ability to provide financial services to EU and UK clients, respectively.

Many UK firms have responded to this by setting up subsidiaries in EEA countries and seeking local authorisation, so as to ensure they can continue to enjoy passporting rights across the EEA.

As part of this onshoring process, the UK is in the process of redrafting EU legislation and regulations into the FCA's handbook (e.g. 'UK MiFID', 'UK MiFIR' and 'UK MAR').

The general application for the Conduct of Business Rules (COBS) is modified depending on the firm's location and activities. For example:

- The rules in COBS that derive from MiFID apply to UK MiFID firms carrying on MiFID business from a UK establishment.
- Due to Brexit, the COBS handbook no longer applies to MiFID business of a UK MiFID firm carried on from an establishment in another EEA state.
- The rules in COBS that derive from MiFID apply to a non-UK MiFID investment firm (i.e., a third country firm) operating a branch in the UK carrying out MiFID business within the UK.
- Note: EEA firms are now considered third country firms in the UK

4. Bribery Act 2010

The Bribery Act 2010 came into force in July 2010 and replaced the old laws on bribery with a more stringent set of anti-bribery rules.

4.1 Offences

Under the Act it is an offence to:

- Pay bribes – It is illegal to give/offer a financial, or other, advantage with the intention of inducing a person to perform 'a relevant function or activity' improperly
- Receive bribes – It is illegal to receive a financial, or other, advantage in order to encourage the performance of 'a relevant function or activity' improperly
- To bribe foreign officials
- Fail as an organisation to prevent bribery

4.2 Definitions under the Bribery Act

Bribery is the offering, giving, receiving, or soliciting something of value for the purpose of influencing the action of a person in the discharge of his or her public or legal duties.

Relevant function or activity is any function of a public nature, such as consenting to planning applications or import licenses, and any activity connected with a business, such as responsibility for awarding contracts to suppliers.

Hospitality and promotional expenditure is the offer or provision of facilities, such as meals or seats at sporting events, to clients, or potential clients. The Bribery Act does not prohibit this as long as it is reasonable and proportionate.

Facilitation payments is the offering, giving, receiving, or soliciting small bribes to secure (or speed up) a routine government action. The Bribery Act prohibits this.

4.3 Penalties

- Individual – maximum jail sentence is ten years
- Company – unlimited fine

There are also a range of Confiscation Orders and Civil Recovery Orders that can be used in conjunction with the Bribery Act.

C

1. Cancellation rights

This conduct of business rule applies to:

- Most providers of retail financial products that are based on deposits or designated investments
- Firms that enter into distance contracts with consumers that relate to accepting deposits or designated investment business.

A consumer has a right to cancel any of the following contracts with a firm:

- Life policy
- Pension policy
- Cash deposit ISA
- Collective investment scheme (CIS)
- Junior ISA
- Accepting deposits or conducting designated investments at a distance

1.1 The cancellation period

There are two cancellation periods to be aware of:

- Life policy, pension contracts – 30 calendar days
- Cash deposit ISAs, units in CISs, junior ISAs (JISAs), accepting deposits or conducting designated investments at a distance – 14 calendar days

1.2 Start of cancellation period

The cancellation period begins on the later of:

- The day of the conclusion of the contract, except in respect of contracts relating to life policies where the time limit will begin from the time when the consumer is informed that the contract has been concluded
- From the day on which the consumer receives the contractual terms and conditions and any other pre-contractual information

1.3 Right to cancel

The firm must disclose in a durable medium to the consumer in good time before or, if that is not possible, immediately after the consumer is bound by a contract that attracts a right to cancel.

If a consumer exercises his right to cancel he must, before the expiry of the relevant deadline, notify the firm following the practical instructions given. The deadline is deemed to have been observed if the notification is dispatched before the deadline expires. In the event of any dispute, unless there is clear written evidence to the contrary, the firm should treat the date cited by the consumer as the date when the notification was dispatched.

A consumer need not give any reason for exercising the right to cancel.

2. Capital requirements directives (CRD)

Financial regulations provide investor protection by ensuring that a firm always has enough capital to operate. The rules ensure that what a firm has (its financial resources) exceeds what it needs (the financial resources requirement imposed by its regulator).

As a result of these financial regulations, should a firm become insolvent and go into liquidation, there should be enough money to close down the business and transfer positions in an orderly manner.

In 2007, the Capital Requirements Directive (CRD) came into force. It is a major piece of legislation that introduced a modern prudential framework relating capital levels more closely to risks.

It follows the 'three pillar approach' of Basel II:

- Pillar 1 deals with the minimum capital requirements for credit, market and operational risks.
- Pillar 2 requires firms to assess the need for additional capital not covered under Pillar 1 by implementing an Individual Capital Adequacy Assessment Process (ICAAP).
- Pillar 3 deals with disclosure requirements

The legal framework around the CRD needs to be regularly updated and refined to respond to the needs of the financial system as a whole.

See also: 'Liquidity Framework'

3. Certification Regime

The Certification Regime is a key part of the new Accountability Regime, and came into effect from 7 March 2016.

The Certification Regime applies to material risk-takers of regulated firms. These are staff subject to the Remuneration Code, and other staff that pose a risk of significant harm to the firm or any of its customers. Unlike customer function staff in the Approved Persons Regime, the regulator will not pre-approve certification regime staff – instead, the firm is responsible for assessing the fitness and propriety of its own certification regime staff and attesting to the regulator that this has been carried out.

Firms must identify all certified individuals and assess them as fit and proper, and have procedures in place to re-assess the fitness and propriety of certified staff on an annual basis.

The list of Certification Functions include:

- CASS oversight
- Proprietary trader
- Significant management
- Functions requiring qualifications
- Managers of certification employees
- Material risk takers
- Client-dealing
- Algorithmic trading

See also: "Accountability Regime"

See also: "Conduct Rules"

4. Chinese walls

A Chinese wall is an arrangement that requires information held by a person in the course carrying on one part of its business to be withheld from, or not to be used for, persons with or for whom it acts in the course of carrying on another part of its business.

The Financial Conduct Authority deems Chinese walls to be part of the control of information rules (required under S147 FSMA 2000). The effect of this is that, where a firm acts in conformity with this rule:

- It provides a defence against proceedings brought under S89-91 Financial Services Act 2012 (misleading statements and misleading impressions)
- It does not amount to market abuse
- It provides a defence against FCA enforcement action (or an action for damages under S150 Financial Services and Markets Act 2000) based on breach of a requirement to disclose this information.

A firm will not be taken to have knowledge of information held within the firm when, in any particular transaction, the individuals involved on behalf of the firm do not have knowledge of the information because it is held elsewhere in the firm behind a Chinese Wall.

5. CISI (Chartered Institute for Securities and Investments) code of conduct

Professionals within the securities and investment industry owe important duties to their clients, the market, the industry and society at large. Where these duties are set out in law, or in regulation, the professional must always comply with the requirements in an open and transparent manner.

Membership of the Chartered Institute for Securities and Investment (CISI) requires members to meet the standards set out within the Institute's Principles. These Principles impose on members an obligation to act in a way beyond mere compliance and to support the underlying values of the Institute.

A material breach of the Principles would be incompatible with continuing membership of the Chartered Institute for Securities and Investment.

Members who find themselves in a position which might require them to act in a manner contrary to the Principles are encouraged to:

- Discuss their concerns with their line manager
- Seek advice from their internal compliance department
- Approach their firm's non-executive directors or audit committee
- If unable to resolve their concerns and, having exhausted all internal avenues, contact the CISI for advice

6. CISI Code of Conduct - Principles

	Principle	Stakeholders
1.	Personal accountability – uphold highest levels of personal and professional standards at all times, acting with integrity, honesty, due skill, care and diligence to avoid damaging reputation of your firm or profession	Self, clients, regulators, colleagues, market participants, firms, society
2.	**Client focus** – put the interests of clients and customers first by treating them fairly, being a good steward of their interests, respect confidentiality	Clients

3.	**Conflict of interest** – being alert to, and actively manage fairly and effectively, any personal or other conflict of interest; obey the law and regulations	Clients, market participants, regulators
4.	**Respect for market partners** – treat all counterparties and business partners with respect, observe proper standards of market integrity and conduct	Clients, market participants
5.	**Professional development** – strive continually for professional excellence, commit to CPD, promote and support the development of others	Profession, clients, colleagues
6.	**Aware of capabilities** – decline to act on any matter of which you are not competent or qualified, unless you have access to advice or assistance	Clients, profession, market participants
7.	**Respect others and the environment** – treat everyone fairly and with respect, support opportunity for all, embrace diversity and inclusion, ensure the environmental impact of your work is considered	Society, colleagues, clients, regulators, market participants, profession, professional body
8.	**Speak up and Listen up** – Be active in speaking up, and encourage others to do so by listening up, promote safe environment for all	Society, colleagues

7. Client agreement

The conduct of business rules describe a client agreement as a written basic agreement between the firm and the client, which sets out the essential rights and obligations of the firm and the client. A client agreement is required when a firm carries on designated investment business for a retail client and (in relation to MiFID business) for a professional client. A client agreement is not required where the only business is advising on investments or the firm is effecting contracts of insurance in relation to a life policy.

A firm must provide a client with:

- The terms of the agreement; and
- Information about the firm and its services relating to the agreement.

At the same time, the firm must provide the client with information about itself and its services required by COBS 6, including information on communications, conflicts of interest and authorised status. The firm must provide the client with a client agreement before the earlier of:

- The client agreement becoming binding; or
- The provision of any services

This rule on timing is relaxed in the case of an agreement concluded by distance communication.

The firm must make a record if its client agreements and retain this record for a period which is the longest of:

- Five years;
- The duration of the relationship with the client; or
- In the case of a record relating to a pension transfer or opt-out or FSAVC, indefinitely.

Note: This rule does not apply to eligible counterparty business

See also: 'Initial Disclosure Document'

8. Client asset (custody) rules (CASS 6)

The purpose of the custody rules is to:

- Restrict co-mingling of clients' and firms' assets; and
- Minimise the risk of client assets being used without the consent or against the wishes of the clients.

The custody rules apply to a firm when it is safeguarding and administering investments, either:

- Safeguarding and administration of assets by the firm; and
- Arranging the safeguarding and administration of assets by a third party.

8.1 Definitions

- Safe custody investments -designated investments (such as shares, bonds, insurance contracts) that a firm receives or holds on behalf of a client.
- Custody assets - any other assets the firm holds in the same portfolio as a designated investment on behalf of the client.

8.2 Exemptions from custody rules

The custody rules do not apply to:

- A firm acting as the operator of a regulated collective investment scheme; and
- Where the client transfers full ownership to the firm.

The custody rules do not apply to delivery versus payment (DVP) transactions provided that delivery of the asset or payment for the asset by the firm occurs within three business days of the client making delivery or payment.

8.3 Reconciliations of client assets

Any discrepancies thrown up by the reconciliation process must be corrected promptly and any shortfalls made up for by the firm.

A firm must ensure that they make proper records of custody assets and retain these for a period of five years after they were made.

A firm that uses a safe custody investment in stock lending activity must ensure that its records identify which safe custody investments are available to be lent, and which have been lent.

9. Client categorisation

Client categorisation is a vital process for firms contained in the conduct of business rules. Only by categorising a client can a firm know which rules to apply.

The formal definition of a client includes more than just existing customers of a firm. The regulators define the following persons as a client of a firm:

- A person to whom the firm provides a service;
- A potential client;
- In relation to the financial promotion rules, a person to whom a financial promotion is communicated by or on behalf of the firm; and
- A client of an appointed representative of the firm.

10. Client categorisation – client categories

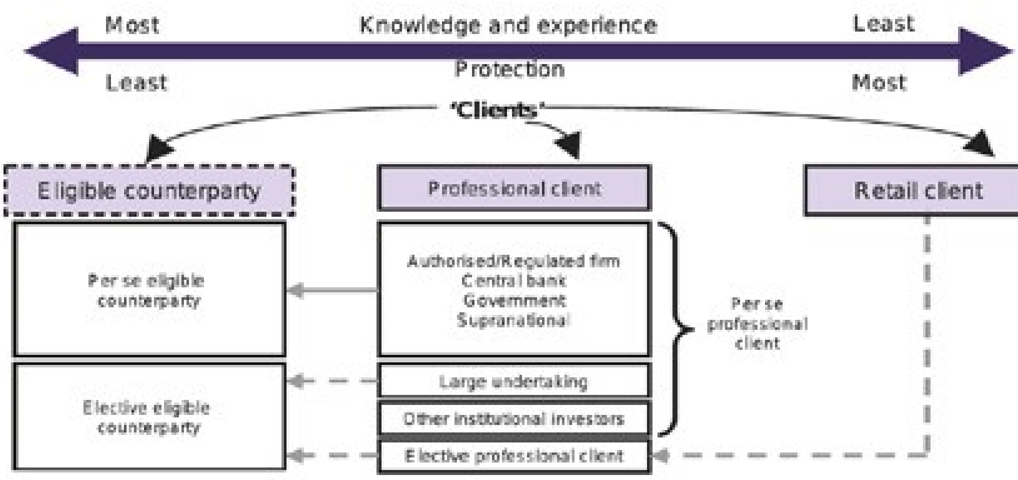
There are three basic terms used for categorisation:

- Retail clients (least knowledge and experience);
- Professional clients (more knowledge and experience); and
- Eligible counterparties (most knowledge and experience).

These three forms can be simplified as customers (retail and professional clients) and counterparties.

A firm must notify a client of its categorisation (as a retail client, professional client or eligible counterparty) and, before providing any services, inform the client in a durable medium about any right the client has to request a different categorisation and about any limitations to the level of client protection.

Of the three categories, an eligible counterparty is not a customer. Eligible counterparties are the most knowledgeable and experienced parties in the markets, and when these parties conduct certain business with each other it become difficult to identify who is the firm and who is the customer. For this reason, the FCA creates the eligible counterparty category to show that we are not looking at a firm doing business for a customer, but equals doing business with each other.



11. Client categorisation – 'Opting Down'

Although the regulator presents a clear framework of client categorisation, it is possible to offer clients more protection than that suggested by the regulatory framework (known as 'opting down'). A per se eligible counterparty may be treated as a professional client or a retail client; and a per se professional client may be treated as a retail client.

Recategorising a client as a retail client under these provisions does not necessarily mean that it will become an eligible complainant.

12. Client categorisation – 'Opting Up'

See 'Elective Professional Clients'

13. Client's best interests rule

This is a general obligation under the conduct of business rules. It states that a firm must act honestly, fairly and professionally in accordance with the best interest of its client in relation to designated investment business carried out for all clients.

13.1 Duty of portfolio managers to act in clients' best interests

The obligation to act in the best interest of its clients is extended to a portfolio manager when it places an order with another entity for execution on behalf of its client.

A portfolio manager is defined as a firm which manages portfolios in accordance with mandates given by clients on a discretionary client-by-client basis (i.e. a discretionary investment manager providing a personalised service).

The same obligation applies to any firm, which receives and transmits orders to another entity for execution on behalf of a client.

14. Client limit orders

Where a client places a limit order in respect of shares traded in a regulated market and the order is not immediately executed under prevailing market conditions, then, unless the client expressly instructs otherwise, the firm must make the order public with a view to having it executed as soon as possible. The firm can do this by transmitting the order to a regulated market or MTF that operates an order book trading system. This is part of the pre-trade transparency rules.

This obligation to make public a limit order will not apply to a limit order that is large in scale compared with normal market size.

15. Client money and asset return (CMAR)

For medium and large CASS firms (i.e. those holding more than £1m of client money and/or £10m of client assets during the last calendar year), the CASS operational and oversight function must submit a CMAR within 15 days of the end of each month to the FCA.

16. Client money (CASS 7) rules

When a firm holds money which belongs to someone else then it is client money. The rules apply where the firm is holding client money in relation to **designated investment business.** Records must be retained for five years if in relation to investment business after being produced.

17. Client money – client money reconciliations

17.1 Internal client money reconciliations

Every business day, firms are required to ensure that they have enough funds in client accounts to cover the client money requirement, i.e. physical cash held must equal the total of balances on client money accounts.

Normal approach – a firm will check its client money resource (an aggregate of the bank's client money accounts) at the close of business on the previous day. This must be at least equal to the client money requirements at the close of business on the day of the check.

Alternative approach – a firm will check its client money resource at the close of business on the day of checking. This must be at least equal to the client money requirements at the close of business on the previous day. **Note:** There should be no excess or shortfall when using this method.

Other points:

- Firms should use accounting records (e.g. a cash book) not bank statements
- If a discrepancy is identified, the firm should identify the reason, and pay back any shortfall or withdraw any surplus by the close of business on the day of the reconciliation

17.2 External client money reconciliations

A firm must reconcile its records of client balances to bank statements from approved banks as often as is necessary. The firm must complete the reconciliation of client money within ten business days of the date to which the reconciliation relates.

If a discrepancy exists, firms must identify the reason and correct the discrepancy **as soon as possible.** Unresolved shortfalls in client funds need to be met out of the firm's resources until the discrepancy is resolved.

If a firm cannot comply with the reconciliation rules it must notify the FCA as soon as possible.

17.3 Exemptions from client money rules

The client money rules do not apply to:

- Deposits made with a credit institution;
- Coins held for the value of their metal;
- Investment business passported into the UK; and
- Client money held on behalf of an affiliated company.

18. Client money - not client money: Discharge of fiduciary duty

Money is not client money when the firm has discharged its responsibilities to segregate client money and holds it separately. Examples include when money is paid to:

- The client or their representative
- A third party on behalf of the client (e.g. payment to a clearing house to cover a margin call)
- A bank account of the client
- The firm where it is an excess in the client bank account (e.g. records show there is more in the account than is attributable to the client)

When a firm draws a cheque or other payable order to discharge its fiduciary duty, it must continue to treat the sum concerned as client money until the cheque or order is presented and paid by the bank.

19. Client money - not client money: Due and payable to the firm

Money is not client money when it becomes properly due and payable to the firm for its own account. Typically this would refer to fees and commissions payable by customers. Other circumstances where the money becomes due and payable are when the firm sells securities as principal to the client or buys them as agent on behalf of the client. When the firm subsequently receives the money it is entitled to keep it for its own account.

20. Client money – segregation of client money

Client money should be **segregated** from funds of the firm by the use of client money bank accounts. The FCA generally requires a firm to place client money in a client bank account with an 'approved bank'.

Firms must create trusts over client money bank accounts by an exchange of trust letters with the bank(s) holding client money. This prevents liquidators setting off client assets against the debts of the firm in an insolvency situation.

If a firm leaves some of its own money in a client money account, this will be referred to as a 'pollution of trust'. A liquidator will be able to seize **all** the money held in the client account for the general creditors of a bank.

21. Client order handling

A firm must implement procedures which provide for the prompt, fair and expeditious execution of client orders.

Orders executed on behalf of clients must:

- Be promptly recorded and allocated; and
- Otherwise comparable orders must be carried out sequentially and promptly.

The rule applies unless:

- The characteristics of the order or prevailing market conditions make this impracticable; or
- The interest of the client require otherwise; or
- If there is any material difficulty in properly carrying out an order promptly.

Where a condition prevents the rule being followed, retail client must be immediately notified of the case.

21.1 Record keeping of client orders and decisions to deal

In relation to every order received from a client, a firm must immediately make a record of the following details:

- Name of client (or of a person acting on his behalf)
- Buy/sell; instrument; unit price; quantity
- Nature of order (if other than buy/sell)
- Type of order
- Other relevant details, conditions, instruction
- Date and exact time of receipt of order
- Equivalent details must be recorded when a firm makes a decision to deal as a portfolio manager

Note: This rule does not apply to eligible counterparty business

See also: 'Aggregation and allocation of orders'

See also: 'Client limit orders'

22. Code of Market Conduct

The Market Abuse Regulation requires regulators to set out guidance, relevant to their domestic market, as to what constitutes market abuse, and what constitutes legitimate behaviour. The FCA has done this with the Code of Market Conduct.

See also: 'Safe harbour'

23. Cold calls

See 'unsolicited non-written financial promotions'

24. Common Platform Firm

A common platform firm is a term used in the Senior Management Arrangements, Systems and Controls (SYSC) sourcebook. It refers to any firm subject to either the Capital Requirements Directive (CRD) or the Markets in Financial Instruments Directive (MiFID).

For common platform firms, the provisions under SYSC have the status of rules and are legally binding on these firms.

For firms that are not subject to the CRD and MiFID some of the requirements have the status of being a rule (for example, the provisions relating to financial crime), and other aspects apply as guidance.

See also "Senior Management Arrangements, Systems and Controls (SYSC)"

See also "Capital Requirements Directive"

See also "Markets in Financial Instruments Directive (MiFID)"

25. Communication media

25.1 Examples

A firm can use any type of media for financial promotions. Examples of means of communication include:

- Printed advertising
- Radio and television broadcasts
- Personal visit
- Telephone call
- Email
- Internet
- Electronic media such as digital and interactive television

25.2 The meaning of 'made', 'directed at' and 'recipient'

A communication being **made** to another person is a reference to a communication being addressed, whether verbally or in writing, to a **particular** person or persons, (e.g. where it is contained in a telephone call or letter).

A communication being **directed** at persons is a reference to a communication being addressed to persons **generally,** (e.g. where it is contained in a television broadcast or website).

A **recipient** of a communication is the person to whom the communication is made or (in the case of a non real-time financial promotion which is directed at persons generally) any person who reads or hears the communication.

26. Complaints

Investors who suffer losses as a result of another person's actions are always entitled to seek redress through the courts.

However, many investors (particularly small investors) may not be in a position to instigate court action. As a result, the Financial Services and Markets Act 2000 requires the Financial Conduct Authority (FCA) to ensure that complaints are handled appropriately and that an independent body exists to consider claims.

Note that a loss that is a 'financial loss' can include consequential or prospective loss, in addition to actual loss. For example, financial loss that has not yet crystallised because of the type of product involved (e.g. pensions, endowments, etc).

26.1 Definition of a complaint

A complaint, as defined by the FCA, is any expression of dissatisfaction, oral or written, about financial services activities.

If the complaint is based on the firm's non-compliance with rules, this is referred to as a breach. The rules could be FCA rules, the firm's own rules or any other rules from other organisations, such as Her Majesty's Revenue and Customs (HMRC). Firms must record all breaches, whether they were committed through action or inaction.

Regulated firms must also establish procedures for handling complaints.

27. Complaints procedures

All firms are required to operate an appropriate and effective complaints procedure. Internal complaints procedures must be in writing and cover:

- Receiving complaints;
- Responding to complaints;
- Referring complaints to other firms;
- The appropriate investigation of complaints; and
- Notifying complainants of their right to go to the Financial Ombudsman Service (FOS) where relevant.

The management of the firm has a responsibility to ensure appropriate controls are in place to ensure that the firm complies with the rules in relation to complaints and uses complaints to identify recurring and systematic problems.

Complaint procedures must make provision for:

- Complaints to be investigated promptly and fully by an employee of sufficient competence who was not involved in the matter which is the subject of the complaint;
- The person charged with responding to complaints to have the authority to settle complaints, or to have access to someone who has the necessary authority; and
- Responses to complaints to address the subject matter of the complaint and, where appropriate, offer appropriate redress.

Where redress is appropriate, a firm must provide compensation for any acts or omissions for which it was responsible, and comply with any offer of redress that the complainant accepts.

All employees (and appointed representatives) that deal with clients should be made aware of the complaints procedures.

The procedures must be publicised as follows:

- Drawn to the attention of customers (together with the clients' rights of access to the FOS) at the first point of contact or when documentation is first provided; and
- Sent to customers on request and to complainants automatically when a complaint is received (unless the complaint is resolved in three days). The procedures given to customers must contain the specific

name of the person dealing with the complaints.

In order to comply with the publicity requirement, a firm may include reference to its complaint handling procedures in contractual documentation, e.g. terms of business letter, key features document or client agreement.

All official stationery and marketing literature should publicise the fact that a firm is a member of the FOS. All branches should display a notice indicating that they are covered by the FOS.

28. Complaints - returns to the regulator

An authorised firm must provide the regulator with reports every **six months**. The complaints return must include information on:

- The total number of complaints;
- Complaints closed within four weeks of receipt;
- Complaints closed within eight weeks of receipt;
- Complaints closed more than eight weeks after receipt; and
- Complaints outstanding at the end of the reporting period.

The firm must send a report even if no complaints were received (i.e. a nil return).

28.1 A closed complaint

A complaint is ‘closed’ where:

- The firm has sent a final response;
- The complainant has accepted in writing the firm’s earlier response; or
- The complainant has not responded to the firm within eight weeks of the firm’s written response to the complainant.

29. Complaints – timings and recordkeeping

A firm must send a written acknowledgement and a copy of the complaints procedure **promptly** from receipt of the complaint, providing the name or job title of the individual handling the complaint for the firm.

A firm has a maximum of **eight weeks** from receipt of a complaint to try to resolve it. By the end of eight weeks, the firm must either send a final response, **or** a response which:

- Explains that the firm is not in a position to make a final response, gives reasons for the further delay and indicates when it expects to be able to provide a final response; and
- Informs the complainant that he may refer the complaint to the FOS if dissatisfied with the delay, and encloses a copy of the Financial Ombudsman Service’s explanatory leaflet.

When a firm sends a complainant its final response, it must:

- Inform the complainant that he may refer the complaint to the FOS if dissatisfied with the final response, and that he must do so within six months; and
- Enclose a copy of the Financial Ombudsman Service’s explanatory leaflet.

A firm must retain records of complaints for at least **three years** from the date of receipt of the complaint unless it is a MiFID business where records must be kept for **five years**. Records must include:

- The name of the complainant;
- The substance of the complaint; and

- Correspondence and redress offered by the firm.

30. Conduct (FCA Handbook)

Conduct is a provision in the FCA Handbook that is a safe harbour for market abuse purposes, i.e. behaviour that does not amount to market abuse.

31. Conduct risk

The risk of the culture of the firm leading poor conduct, rather than the more obvious breach of rules.

Regulators have emphasised that conduct in the financial services needs to go beyond simple compliance with the letter of regulation. Firms should be concerned with the spirit of these regulations.

The drive by the FCA can be seen as an extension of the principle-based, then outcomes-focused, regulation of the previous regulator. It is exemplified in the Fair Treatment of Customers (FTOC) regime.

32. Conduct Rules

Conduct Rules are new requirements of managers and staff covered by the Accountability Regime.

32.1 First Tier

Individual Conduct Rules (these apply to ALL staff except ancillary staff)

Rule 1: You must act with integrity.

Rule 2: You must act with due skill, care and intelligence.

Rule 3: You must be open and co-operative with the FCA and PRA and other regulators.

Rule 4: You must pay due regard to the interests of customers and treat them fairly.

Rule 5: You must observe proper standards of market conduct.

Rule 6: You must act to deliver good outcomes for retail customers.

32.2 Second Tier

Senior Manager Conduct Rules (these apply to Senior Manager Functions only)

SM1: You must take reasonable steps to ensure that the business of the firm for which you are responsible is controlled effectively.

SM2: You must take reasonable steps to ensure that the business of the firm for which you are responsible complies with the relevant requirements and standards of the regulatory system.

SM3: You must take reasonable steps to ensure that any delegation of your responsibilities is to an appropriate person and that you oversee the discharge of the delegated responsibility effectively.

SM4: You must disclose appropriately any information of which the FCA or PRA would reasonably expect notice.

See also: 'Accountability Regime'

33. Conflicts of interest

A firm must take all reasonable steps to identify conflicts of interest between:

- Itself (including its managers, employees and appointed representatives) and a client of a firm; or
- One client of the firm and another client.

The types of conflicts of interest that may arise include situations where the firm (or one of its managers, etc):

- May make a financial gain (or avoid a financial loss) at the expense of the client;
- Has an interest distinct from the client's in a service provided, or a transaction undertaken, for the client;
- Has a financial or other incentive to favour one client's interest over another client's interest; or
- Receives an inducement from a person other than the client in relation to a service provided for the client (other than the standard commission or fee for the service).

A firm must have effective arrangements to manage conflicts of interest to prevent them giving rise to a material risk of damage to a client's interests. Where these arrangements might not be sufficient to prevent this risk, the firm, before undertaking business for that client, must disclose relevant details of the conflict of interest in a durable manner.

34. Conflicts of interest policy

A firm must have in place a written conflicts of interest policy which:

- Identifies the circumstances that may give rise to a conflict of interest; and
- Specifies the procedures the firm will adopt in order to manage such conflicts.

Special attention should be paid to the activities of investment research and advice, proprietary trading, portfolio management and corporate finance business, including underwriting or selling in an offering of securities and advising on mergers and acquisitions.

35. Consumer Duty

The aim of Consumer Duty is to ensure retail customers receive good outcomes when they purchase products or services. Any firm that provides products or services to retail clients, whether intentionally or not, e.g., distribution under arrangement by third parties, falls within scope of Consumer Duty.

Consumer Duty has three cross-cutting rules that apply to firms:

- act in good faith toward retail clients
- avoid causing foreseeable harm to retail clients
- enable and support retail clients to pursue financial objectives.

Furthermore, the financial understanding of the target market must always be considered when applying these rules.

The FCA will assess a firm's success against four outcomes: product and services; price and value; consumer services; and customer understanding.

36. Consumer Rights

The FCA is a qualifying body under the Unfair Terms in Consumer Contracts Regulations 1999. As such the FCA has the statutory power to challenge unfair terms in financial services consumer contracts and has the power to seek an undertaking from a firm that it will amend or remove an unfair contract term from future consumer contracts. The FCA can also apply to the court for an injunction to prevent a firm from using or enforcing the term against existing customers.

These powers are set out in the Consumer Rights Act 2015.

37. Controlled functions

Controlled functions are listed in Section 10 of the Supervision Sourcebook (SUP 10). All individuals carrying out a controlled function must be assessed as fit and proper by the appropriate regulator under the accountability regime.

If a person wishes to change functions, this will usually require a new approval. The firm has a duty to inform the regulators in writing within seven days if an approved person ceases to perform a controlled function.

The approval process of controlled functions depends on whether the firm is regulated by the Financial Conduct Authority (FCA) or regulated by both the Financial Conduct Authority (FCA) and the Prudential Regulatory Authority (PRA) (i.e. dual-regulated firms).

38. Counter Terrorism Act 2008

The Counter Terrorism Act 2008 (CTA 08) was implemented to compliment the existing legislation and regulation on managing funds for terrorist activities. Schedule 7 is the key change, giving extra powers to Her Majesty's Treasury (HMT) to impose direction on firms that it suspects are handling funds to be used for Terrorist activities.

Under CTA 08, HMT may give a direction when one or more of the following conditions is met:

- The Financial Action Task Force (FATF) has advised that action should be taken due to a risk of terrorist financing or money laundering
- HMT reasonably believes that action should be taken due to a risk of terrorist financing or money laundering
- HMT reasonably believes that a country's development or production of weapons, such as nuclear or chemical weapons, or a country's facilitation of such developments pose a significant risk to the national interests of the United Kingdom.

The directions can be given to firms dealing with individuals or institutions who are doing business or are resident outside the EEA. The directions that HMT can impose relate to customer due diligence, ongoing monitoring, systematic reporting and limiting or ceasing business.

- Customer due diligence: HMT can issue a direction that requires a firm to undertake enhanced customer due diligence measures before entering into or during a business relationship. This obligation on the firm could be required generally to cover all client relationships, or focused on specific clients of the firm.
- Ongoing monitoring: The customer due diligence requirement could be enhanced even further by HMT requiring the firm to keep the due diligence documentation about the client up-to-date and scrutinising transactions undertaken during the course of the relationship. Again this could be a general obligation on the firm, or one focused on specific clients.
- Systematic reporting: HMT has also been given powers to demand information and documents from firms relating to transactions and business relationships with clients. HMT can specify to whom the information needs to be provided and set the time frame for the provision of that information.
- Limiting or ceasing business: A direction issued by HMT can also require a firm not to enter into or continue to conduct business that they deem relevant. This could be a specific transaction or business relationship, a specific type of service or business relationship, or any transaction or business relationship.

See also: 'Terrorism'

See also: 'Terrorism Act 2000'

39. Custody

The main objective of the rules relating to custody (client assets and client money) ensure that custody assets are protected either from the misuse by a firm or its employees or if an authorised firm becoming insolvent.

Note: Under the EEA passporting regime, a passported firm applies its home state's rules on client assets. Therefore, a UK firm passported to Germany would still be required to follow the FCA rules on custody.

The rules on custody are contained in the Client Assets Sourcebook (CASS).

See also: 'Client asset (custody) rules'

See also: 'Client money rules'

D

1. Data Protection Act 2018 (DPA 2018)

The Data Protection Act (DPA) 2018 governs the way in which personal data must be dealt with in order to protect the rights of the persons concerned. Personal data relates to living individuals who can be identified by that data either directly or indirectly.

DPA 2018 implements many of the measures set in the EU General Data Protection Regulation (GDPR). These include:

- **Accountability** – data controllers must demonstrate compliance.
- **Data Protection Officers (DPOs)** – certain organisations, such as public authorities, must designate a data protection officer (DPO).
- **Processing conditions** – the data controller must be able to demonstrate that the consent is freely given, specific and informed through clear affirmative action. The right to revoke consent must also be given.
- **Erasure** – individuals have the right to request that businesses delete their personal data which builds on the 'right to be forgotten' principle.
- **Portability** – data subjects have the right to request from a controller all information held on them in a portable form.
- **Right to object** – the right to object to some data processing, e.g. marketing cookies.
- **Data security** – implement appropriate technical and organisational measures to ensure a level of security of personal data proportionate to the risk.

The DPA 2018 Principles are:

1. Processing must be lawful and fair
2. Purposes of processing must be specified, explicit and legitimate
3. Personal data must be adequate, relevant and not excessive
4. Personal data must be accurate and kept up to date
5. Personal data must be kept for no longer than is necessary, and
6. Personal data must be processed in a secure manner.

Scope

The DPA 2018 has a wider remit than the GDPR as noted below:

- GDPR protections are amended for those that would not work in the UK national context.
- It sets out the requirements for the processing of personal data for criminal 'law enforcement purposes'.
- Provisions are based on the Council of Europe Data Protection Convention 108 that apply to intelligence services.
- There are also separate parts to cover the Information Commissioner's Office (ICO) and their duties, functions and powers plus the enforcement provisions.

The Information Commissioner's Office (ICO)

The ICO's mission is 'to uphold information rights in the public interest, promoting openness by public bodies and data privacy for individuals'. All entities classified as data controllers that process personal data have to register with the ICO.

Enforcement action:

- ICO penalties: Maximum fine £17.5 million or 4% of global revenue, whichever is higher

- Criminal penalties: Maximum unlimited fine

Penalties for breaches can lead to:

- Reputation damage
- A blow to consumer loyalty
- Customer disengagement.

Note: Under the GDPR, organisations can be fined up to 4% of their annual worldwide turnover (or, if greater, €20,000,000) for breaches of certain provisions, and up to 2% (or, if greater €10,000,000) for other specified breaches.

2. Decision notice

Decision notices are issued when the RDC has reviewed representations relating to a warning notice or supervisory notice, and has made a decision subject to the RDC going through its formal procedures.

This is then stated, setting out the terms of the decision. This is then stated, setting out the terms of the decision. The firm has 28 days from the issue of a decision notice to approach the Tax and Chancery Chamber of the Upper Tribunal.

3. Designated Investment Exchanges (DIEs)

The FCA **designates** non-recognised overseas exchanges, which would have met the recognition criteria if they had been situated in the UK but are, in fact, based overseas. Examples of DIEs include the New York Stock Exchange, the Tokyo Stock Exchange and the Minneapolis Grain Exchange.

Note that DIEs are **not** exempt persons, as they do not fall under the FCA's jurisdiction in the first place – they are not electronically-accessible from the UK (unlike ROIEs for example).

4. Designated Professional Bodies

A person who is a member of a Designated Professional Body (DPB), e.g. an accountant or solicitor, and is carrying on incidental regulated activities, does not require authorisation. This recognises the fact that certain professions are regulated by their own industry bodies in such a way that their customers can have confidence in their methods of conducting investment business.

Member firms of DPBs are not automatically granted exemption from authorisation but must apply to their professional body for their licence. Furthermore, two other conditions must be met; these are:

- The firm only provides incidental investment services, and
- It does not receive remuneration in respect of the investment services it provides other than from its clients

Authorisation would need to be obtained where the investment activity is a distinct and separate business from the usual core activities of the firm.

Members of DPBs are:

- Chartered accountants
- Lawyers
- Chartered actuaries
- Chartered surveyors
- Chartered conveyancers

See also: 'Exempt Persons'

5. D - Direction (FCA Handbook)

Directions indicate that the corresponding paragraph is a requirement. They are binding on the persons or categories of persons to whom they are addressed.

6. Direct offer financial promotions

Direct offer financial promotions are financial promotions that enable a person to enter into an agreement with a firm by responding in a specified manner (such as completing a tear-off coupon in a newspaper or magazine).

If it is likely to be received by a retail client, a direct offer financial promotion must contain:

- Such of the information set out in the disclosure of information rules (in COBS 6) as is relevant to the product or service being promoted (this covers information about the firm, its services, the safeguarding of investments, cost and charges)
- If it does not relate to MiFID business, additional appropriate information enabling the client to understand the nature and risks of the investment and to take investment decisions on an informed basis

7. Disclosure and transparency rules (DTR)

The disclosure and transparency rules in the FCA Handbook attempt to limit the incidence of inside information being disseminated unequally or illegally, and in order to comply with the Market Abuse Directive and Transparency Directive.

The DTR rules highlight:

- What type of information should be disclosed
- How and when the information should be disclosed
- Procedures for delaying disclosure

DTR also emphasise that a firm must have effective arrangements in place to deny access to inside information to any person who should not have access to the information.

The key objectives of the directive are:

- Prompt and fair disclosure of relevant information to the market
- Sets out specific circumstances when information can be delayed
- Requirements to ensure the control of information to protect investors and prevent insider dealing

The disclosure rules only apply to public limited companies (plcs).

8. Distance marketing directive (DMD)

The DMD aims to ensure that for consumers there is a consistent cross-border approach to providing both information about a product and cancellation rights when business is conducted either in writing, electronically or over the telephone (distance contracts).

Specifically it requires that clients:

- Are given minimum specified information about a financial product or service before contracting for it; and
- Have the right to cancel a range (but not all types) of contracts once entered into (see 'Cancellation')

The DMD only applies to:

- Financial services for consumers (defined as 'any natural person who…is acting for purposes which are outside his trade, business and profession'). So the DMD requirements apply to retail clients as well as those professional clients who are natural persons.

- Where the contract is offered, negotiated or concluded exclusively by one or more means of distance communication under an organised distance sales or service provision scheme. In simple terms this means where there is no face-to-face contact between the customer and the firm or its representative

If the distance marketing is conducted solely over the telephone, any information must be transmitted to the client in a durable medium before the client is bound by any contract. However, if - at the client's request - the contract has been concluded before receiving the information, the firm must transmit this information immediately after conclusion.

9. Durable medium

The FCA often states that a firm must provide information in durable form. It has a distinct definition of a 'durable form' or 'durable medium'.

A durable medium is any of the following:

- Paper, or
- Any instrument which enables the recipient to store information in an accessible way for future reference which allows the unchanged reproduction of information stored (e.g. CD/DVD ROM discs, hard drive of recipient's computer, etc.)
- But **not** internet websites unless they fulfil the criteria in this definition

The firm should use an appropriate durable medium for the business carried on. The durable medium should also be chosen by the recipient.

E

1. Elective eligible counterparty

The status of being an elective eligible counterparty is only available to an undertaking. Large undertakings can elect for eligible counterparty status.

2. Elective professional client

Elective professional clients are those that are not automatically professional clients. These clients can choose to be treated as such. Normally a client would choose to do this because they would be charged lower fees by the firm.

A firm may treat a client as an elective professional client if it complies with:

- The 'qualitative test', and
- The procedures, and
- The 'quantitative test'

2.1 Qualitative test

The firm must check that the client is able to be a professional client.

In particular the 'qualitative test' requires the firm to undertake an adequate assessment of the expertise, experience and knowledge of the client. This must give reasonable assurance, in light of the nature of the transactions or services envisaged, that the client is capable of making its own investment decisions and understanding the risks involved.

2.2 The procedures

The procedures require that:

- The client must state in writing that it wishes to be treated as a professional client (either generally or in respect of a particular service or transaction or type of transaction or product)
- The firm must give the client a clear written warning of the protections and investor compensation rights the client may lose, and
- The client must state in writing, in a separate document from the contract, that it is aware of the consequences of losing such protections, such as losing access to the Financial Ombudsman Service.

In summary, this is a **three-way** process. The client states it wants this treatment, the firm provides details of the consequences and the client confirms it understands this.

2.3 Quantitative test

The 'quantitative test' only applies to MiFID business.

This requires that at least **two** of the following criteria are satisfied:

- The client has carried out transactions, of significant size, on the relevant market at an average frequency of ten per quarter over the previous four quarters.
- The size of the client's financial instrument portfolio (defined as including cash deposits and financial instruments) exceeds €500,000.

- The client has relevant work experience. In particular, the client works, or has worked, in the financial sector for at least one year in a professional position. This position must require knowledge of the transactions or services to be undertaken.

The following further points about elective professional clients should be noted:

- If the client is an entity, the qualitative test should be performed in relation to the person authorised to carry out transactions on its behalf
- An elective professional client should not be pressured to possess market knowledge and experience comparable to a per se professional client

If the firm becomes aware that an elective professional client no longer fulfils the relevant initial conditions for elective status, the firm may need to recategorise the client as a retail client. If the client is recategorised, it must be notified of this.

3. Electronic media

Where a rule requires a notice to be delivered 'in writing' a firm can use electronic media such as email. If a firm is going to use electronic communication, it must:

- Have in place appropriate arrangements, including:
  - Contingency plans, such as disaster recovery
  - Ensuring the secure transmission and receipt of the communication
  - Being able to verify the authenticity and integrity of the communication, i.e. know that the instruction comes from the client
  - Making the arrangements proportionate and taking into account the different levels of risk in a firm's business
- Be able to demonstrate that the customer wishes to communicate using this form of media

It must also check that:

- The client has internet access
- The client has consented
- The firm's website has been made known to the client

The client must be told if the electronic agreement creates a legal contract.

4. Eligible claimants

Most clients of an insolvent firm are eligible claimants under the Financial Services Compensation Scheme. A notable exception is authorised firms. Refer to the CISI manual for a more detailed list.

5. Eligible complainants

The complaints procedures of an FCA regulated firm must only be followed in respect of 'eligible complainants'. They are:

- A consumer
- Micro-enterprise - an enterprise which:
  - Employs fewer than ten persons; and
  - Has a turnover or annual balance sheet that does not exceed €2 million
- A charity with annual income of less than £6.5 million

- The trustee of a trust with net assets of less than £5 million
- Certain SMEs with:
  - An annual turnover of less than £6.5 million; and
  - A balance sheet of less than £5 million or less than 50 employees

A person can be an eligible complainant as an **existing** or **past** client of a firm, or if the complaint arises out of a failure to act for the complainant in their capacity as a **potential** customer.

6. Eligible counterparty

An eligible counterparty is either a per se eligible counterparty or an elective eligible counterparty.

In relation to MiFID business, a client can only be an eligible counterparty in relation to eligible counterparty business. For any other business these organisations are professional clients.

6.1 Rules applying to eligible counterparties

Only the following COBS rules apply to eligible counterparties:

- Client categorisation
- Chinese Walls and other conflict of interest duties
- Personal account dealing
- Client money

7. Eligible counterparty business

Eligible counterparty business comprises services and activities carried on with or for an eligible counterparty in the areas of dealing on the accounts, execution of orders on behalf of clients or reception and transmission of orders (or any ancillary services directly related to these).

Essentially, eligible counterparty business can be summarised as two knowledgeable and experienced organisations dealing or arranging deals with each other. In this situation they are considered equals or counterparties.

8. Enforcement Decision-Making Committee (EDMC)

The PRA delegates decision-making powers to the Enforcement Decision-Making Committee (EDMC) for the PRA enforcement regime. Like the RDC, the EDMC process is administrative, not judicial. It is not an appeal body.

See also: RDC

9. The European Economic Area

The EEA comprises the European Union (EU) countries, plus Norway, Iceland and Liechtenstein.

Under the scope of MiFID and UCITS, investment businesses can set up branches in other countries in the EEA without having to seek local authorisation. The arrangement is often known as 'passporting'.

10. European Markets Infrastructure Regulation (EMIR)

European Regulation on OTC derivatives, central counterparties and trade repositories. There are three key elements to EMIR:

- Improve the transparency of the OTC derivative market by reporting all trades to an approved trade repository
- Improve the safety of the OTC derivatives markets through the adoption of formalised risk management procedures including regular reconciliation of agreements, positions and collateral
- Mandatory clearing of some contracts through an approved central counterparty

11. Event-driven work

One of the three pillars of supervision by the FCA.

The FCA's commitment to deal quickly and decisively to problems that are emerging or have already happened.

12. Evidential provision (FCA Handbook)

Evidential provisions are rules that are not binding in their own right, but derive their authority from a linked rule. Compliance with an evidential provision tends to establish compliance with the linked rule.

13. Excluded activities (general prohibition)

The following activities are not regulated and do not require authorisation under FSMA 2000:

- Investment advice in newspapers: Advice that takes the form of regularly updated news or information provided that the provision of investment advice is not the primary purpose of the newspaper or publication. Note that tip sheets (issued by financial institutions) are not excluded.
- Television broadcasts and similar activities
- Providing information: Organisations such as Reuters and Bloomberg do not need to be authorised
- Trustees, nominees and personal representatives: the trustee or representative must not receive remuneration. It therefore follows that a trustee of an authorised unit trust would need to be authorised as they are paid for their services.
- Operating an employee share scheme.
- Trading on one's own account: Transactions are not regulated if the principal investor is also the end user and no service is offered to others, i.e. a person buying shares for him/herself does not need to be authorised provided that he/she is not holding him/herself out to be a dealer in the investments.
- Dealing in contracts for foreign exchange
- Overseas persons - defined as firms which do not carry out regulated activities from a permanent place of business within the UK. This exception covers two categories. The activity will be excluded provided that the overseas firm conducts its activities in the UK through an authorised or exempt firm or where the activity is the result of an unsolicited approach by a UK individual; e.g. if a UK individual asks a US broker to buy US shares, the firm does not need to be authorised under FSMA 2000.

14. Excluded investments (general prohibition)

Excluded investments are those items that are not defined as specified investments by the Regulated Activities Order 2001. Consequently, firms whose only activity is in relation to these 'investments' do not require authorisation under FSMA 2000.

The following are excluded investments:

- Physical property (e.g. land, antiques and commodities)
- Unsecured cash loans (e.g. a personal loan) - note: a mortgage is a specified investment
- Currencies and transactions in currencies (e.g. spot and forward contracts for foreign exchange)
- Premium bonds
- National Savings Certificates (in fact, all National Savings Bank products)

15. Exempt persons

Certain categories of persons carrying on regulated activities do not require any authorisation under Part 20 of FSMA 2000.

Such a person is called an **exempt person**, as defined by the Exemption Order.

The following are exempt persons (or are treated as exempt):

- Appointed representatives
- Recognised investment exchanges (RIEs) and recognised clearing houses (RCHs)
- Lloyd's syndicate members
- Members of designated professional bodies (DPBs)
- Other exempted persons

F

1. Fair, clear and not misleading rule

A firm must ensure that a communication by the firm or a business or a financial promotion communicated or approved by the firm is fair, clear and not misleading.

The rule applies to a firm that communicates to a client in relation to designated investment business.

This rule does not apply to financial promotions communicated by the firm that:

- Are excluded communications, or
- Non-retail communications for business other than designated investment business, e.g. deposit taking

An excluded communication is:

- A financial promotion that is exempt under the Financial Promotions Order
- A financial promotion that is subject to the Takeover Code
- A personal quotation or illustration form, or
- A one-off financial promotion that is not a cold call (i.e. a promotion communicated only to one recipient, or only to one group of recipients, in relation to a product or service that has been tailored to the particular circumstances)

A non-retail communication is one made only to eligible counterparties or professional clients.

2. Fair Treatment of Customers (FTOC)

The FCA's Fair Treatment of Customers (FTOC) initiative is intended to reinforce Principle 6 (Customers' interests). It is a core part of the move to a more principles-based approach to regulation. The FTOC initiative aims to introduce a step-change in the behaviour of the financial services sector and to deliver six improved outcomes for consumers.

These outcomes are summarised below:

- Outcome 1: Consumers can be confident that they are dealing with firms where the fair treatment of customers is central to the corporate culture
- Outcome 2: Products and services marketed and sold in the retail market are designed to meet the needs of identified consumer groups and are targeted accordingly
- Outcome 3: Consumers are provided with clear information and are kept appropriately informed before, during and after the point of sale
- Outcome 4: Where consumers receive advice, the advice is suitable and takes account of their circumstances
- Outcome 5: Consumers are provided with products that perform as firms have led them to expect, and the associated service is both of an acceptable standard and as they have been led to expect
- Outcome 6: Consumers do not face unreasonable post-sale barriers imposed by firms to change product, switch provider, submit a claim or make a complaint

One aspect of the move to a more principles-based approach to regulation is the removal (or reduction) of any unnecessary detailed rules. Accordingly, the FCA does not envisage introducing new rules as part of the FTOC initiative. Instead, the FCA wants the senior management of firms to focus on the principles and the outcomes for consumers that it is looking to achieve.

In publicising its FTOC initiative, the FCA has made it clear that FTOC is a ‘culture’ issue (i.e. firms should be seeking to make FTOC an integral part of their business culture). FTOC is also a continuous process: it is not something that firms can implement and then forget about.

See also: ‘Outcome focused regulation’, ‘Conduct risk’

3. Final notice

Final notices set out the terms of final action that the RDC has decided to take once formal procedures have taken place. They state the **date** from which this action takes effect.

4. Financial Action Task Force (FATF)

The Financial Action Task Force (FATF) is an inter-governmental money laundering and terrorist financing watchdog. They set and monitor standards (recommendations) and hold their members to account for non-compliance with these standards.

5. Financial Conduct Authority (FCA)

The FCA is a company limited by guarantee. The guarantor is the Treasury. The Treasury is also responsible for appointing the FCA’s board and the Chancellor of the Exchequer appoints the chairperson of the FCA directly. The FCA’s board consists of a chair, a chief executive officer, three managing directors, and ten non-executive directors (including a lead non-executive director, the deputy chair).

The FCA is accountable to Treasury Ministers and, through them, to Parliament. The FCA must report to the Treasury annually. Treasury Ministers must then present the report to Parliament. The FCA is also regularly called to give evidence to the Treasury Select Committee. On an ongoing basis, the FCA is funded by annual levies charged on regulated firms.

6. Financial penalties (discipline)

The main reason for financial penalties is to encourage high standards of regulatory conduct. The aim is to:

- Deter firms and approved persons (individuals) who have breached regulations from doing this again
- Generally demonstrate the benefits of compliant behaviour

The FCA can impose financial penalties for the same reasons that warrant the issue of a public censure or public statement of misconduct. It can also impose a financial penalty on a person who has committed market abuse or where an applicant for listing has breached the listing rules.

In determining the size of the penalty, the FCA considers:

- Removing profits made through misconduct, often referred to as ‘disgorgement’
- The seriousness of the misconduct
- The extent to which the misconduct was deliberate or reckless
- Achieving the appropriate deterrent
- Applying any discount due to cooperation of those involved

The maximum financial penalty the FCA can impose is **unlimited**.

See also: ‘Relevant circumstances’

7. Financial Ombudsman Service (FOS)

The FCA oversees a system for the consideration of complaints against its firms by customers who feel aggrieved and entitled to seek redress. The system involves consideration of the complaint by the firm itself and, if the customer is not satisfied, independent investigation of the complaint by the FOS.

The FOS can make awards for a range of reasons including financial loss, pain and suffering, damage to reputation and distress or inconvenience.

Complaints against authorised firms relating to a regulated activity fall under the 'Compulsory Jurisdiction' of the FOS. Unauthorised firms can also submit to the 'Voluntary Jurisdiction' of the FOS by entering into a contract with the FOS as a voluntary participant. This might cover activities outside the definition of designated investment business, such as general insurance, deposit taking and credit/debit card transactions.

A complaint can be dismissed by the FOS if it considers that:

- The complainant has not suffered financial loss, material inconvenience or material distress
- The complaint is frivolous or vexatious
- The firm has already offered reasonable compensation

See also: 'Eligible complainant'

8. Financial Ombudsman Service (FOS) – compensation for complaints

The FOS can make financial awards to complainants. The **maximum award** is £415,000 and reasonable costs (although awards of costs are not common). If the FOS feels that an amount in excess of the maximum is appropriate it can invite the firm to pay the balance.

9. Financial Ombudsman Service (FOS) – investigation of complaints

When the FOS investigates a complaint the firm involved must cooperate with the FOS. When there is a reasonable possibility of resolution by mediation, the FOS will endeavour to achieve settlement by this route. If mediation is not an option, the FOS will investigate the complaint.

During an investigation, both parties can make representations. After a provisional assessment is made, if one of the parties objects to the provisional assessment, the FOS will present a written statement of determination.

Only if the complainant accepts the determination is it binding on the firm. If the complainant rejects the FOS's decision, they can pursue the matter further through the courts.

10. Financial Ombudsman Service (FOS) - timing of complaints

If a complaint has not been settled to the satisfaction of the customer within **eight weeks** of receipt by the firm, the complainant must be informed that he/she has the right to complain to the FOS.

The firm must also provide the complainant with an explanatory leaflet about the FOS and advise him/her that any referral should take place within **six months**.

11. Financial Promotion

A financial promotion is an invitation or inducement to engage in investment.

S21 FSMA 2000 imposes a restriction on the communication of financial promotions by unauthorised persons. A person **must not** communicate a financial promotion unless:

- He/she is an authorised person, or
- The content of the financial promotion is approved by an authorised person
- Breach of S21 carries a maximum penalty of two years in jail and an unlimited fine.

12. Financial promotion on speculative illiquid securities

The FCA has brought in new rules to prevent harm to retail clients from investing in higher-risk products that they do not understand and that are unsuitable for them.

The categories of investment covered by the rules are:

- Readily Realisable Securities (permitted)
- Restricted Mass Market Investments (restricted), e.g., P2P agreements
- Non-Mass Market Investments (prohibited), e.g., unregulated CIS, traded life policy and illiquid securities, such as mini-bonds and preference shares.

13. Financial Promotions Order

The Financial Promotions Order specifies certain exemptions from S21 FSMA 2000 (the law restricting financial promotions). The effect of an exemption is that a promotion would not need to be issued or approved by an authorised firm. The main exemptions are as follows:

- Communications directed at investment professionals, e.g. communications to authorised firms or exempt persons
- Communications directed at certified high net worth individuals.
- Communications directed at associations of high net worth individuals.
- A financial promotion which is subject to the Takeover Code.
- Communications directed at sophisticated investors.

See also: 'Financial promotion'

14. Financial promotion approval

Before a firm approves a financial promotion for communication by an unauthorised person, it must confirm that the financial promotion complies with the financial promotion rules and it must withdraw its approval if at any time it becomes aware that this is no longer the case, and notify any person known to be relying on its approval.

A firm must not approve a financial promotion to be made in the course of a personal visit, telephone conversation or other interactive dialogue.

15. Financial promotion approval by another firm

A firm may communicate a financial promotion which has been:

- Produced by another person, and
- Approved (as regards confirmation of compliance with the financial promotion rules) by another firm

…so long as it takes reasonable care to establish that the confirmation of compliance was validly given and has not been withdrawn.

16. Financial promotion on behalf of an overseas person

Where a firm communicates or approves a financial promotion on behalf of an overseas person, the financial promotion must make clear which firm has communicated or approved it and (where relevant) must explain:

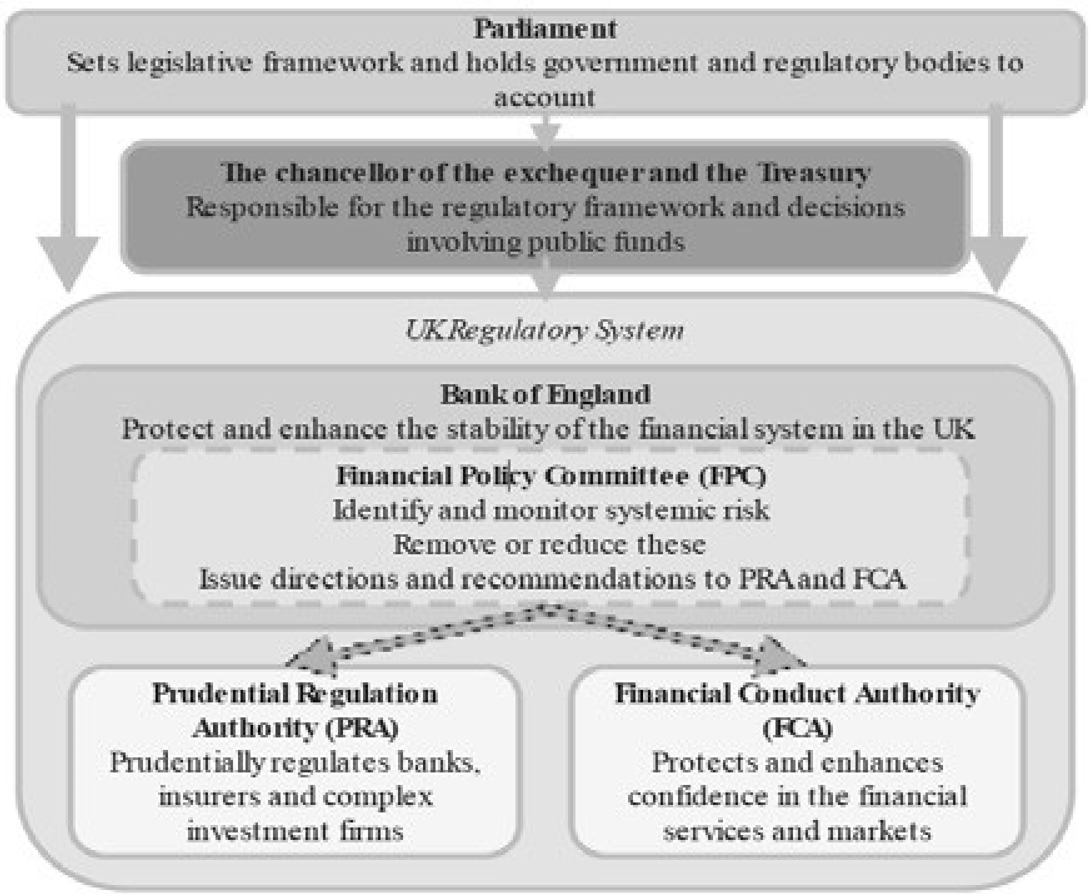
- That the conduct of business rules for the protection of retail clients do not apply
- The extent to which the compensation scheme will be available (or, if not, a statement of that fact), and (optionally) any other system of protection or compensation that may apply
- The firm communicating or approving the financial promotion must have no reason to doubt that the overseas person will deal with retail clients in the UK in an honest and reliable way.

17. Financial Services Act 2012

FSMA 2000 - drafted by the Treasury - created the framework for regulation in the UK financial services industry. Although still in force, it has been substantially amended by the Financial Services Act 2012.

FSA2012 created two regulators for the financial services industry. The Financial Conduct Authority (FCA) is the conduct of business regulator, and the Prudential Regulation Authority (PRA) is the new prudential regulator. Because these regulators were created by law, they are often referred to as 'statutory bodies'. This means that the regulators' powers and responsibilities have been granted directly to them by an Act of Parliament (or statute).

The diagram below outlines the relationship between the Treasury, FCA and the PRA.



In order to assist the regulators in the implementation of their systems, member firms are obliged to fund two other organisations that offer specific protection to consumers:

- The Financial Ombudsman Service (FOS)
- The Financial Services Compensation Scheme (FSCS)

18. Financial Services Compensation Scheme (FSCS)

The Financial Services Compensation Scheme (FSCS) was established to provide compensation where authorised persons and appointed representatives are unable to satisfy claims against them. To succeed, an eligible claimant must have a protected claim against a relevant person and make that claim within the relevant time limits.

Note that a claim can only be made once a firm is in liquidation. If the firm still exists the customer must explore all other avenues of redress. Claims must be made within six years from when the claim arose.

The FSCS is funded by authorised firms. For the scheme as a whole, the total payout for compensation in any one year is unlimited.

See also: 'Eligible claimant'

19. Financial Services Compensation Scheme (FSCS) protected claims

Protected claims are claims made in respect of:

- Designated investment business
- Deposits
- Insurance

The activity subject to a claim must be carried on in the UK or in an EEA state by a firm passporting its services there.

20. Financial Services Compensation Scheme (FSCS) relevant persons

The following are relevant persons:

- An authorised firm
- An appointed representative of an authorised firm

An EEA firm passported into the UK is not a relevant person. Customers losing money from the activities of such a firm would have to seek compensation through the firm's home state regulator.

21. Financial Services Compensation Scheme (FSCS) scheme limits

- **Deposits** –100% of any claim up to a maximum of £85,000
- **Investments** –100% of any claim up to a maximum of £85,000
- **Long-term insurance** – 100% of the value attributable to the rest of the policy with no upper limit
- **Compulsory general insurance** –100% of valid claims and unexpired premiums
- **Non-compulsory general insurance** – 90% of the value attributed to the policy with no upper limit

22. Firm systematic framework (FSF)

FSF will use a common framework across all sectors, which is targeted to the type of firm. The common features involve:

- Business Model and Strategy analysis – to give a view on how sustainable the business would be in respect of conduct, and where the future risk might lie (linking with the Business Model Threshold condition check carried out at authorisation)
- Assessment of how the firm embeds fair treatment of customers and ensures market integrity. The assessment has four modules:
  - Governance and culture – assess the effectiveness of a firm's process for identifying, managing and reducing conduct risks;
  - Product design – determine the processes a firm has in relation to determining whether products meet customer's needs;
  - Sales or transaction processes – assess firm's systems and controls;
  - Post-sales/services and transaction handling – how effective are firm's processes to ensure customers are treated fairly after the point of dale service or transaction, and including complaints handling.
- Deciding what actions are required by the firm – addressing issues highlighted by the FCA.
- Communication to the firm – setting out the assessment and actions required.

Firms are categorised as either:

- Fixed portfolio – are subject to a programme of firm or group-specific supervision
- Flexible portfolio – subject to event-driven reactive supervision and thematic review or product supervision only.

23. Fit and proper test

The FCA/PRA will only grant approved person status if the individual is fit and proper to undertake senior manager functions.

When considering whether an individual is fit and proper, the regulator will take into account the activities of the firm and the markets in which it operates.

The regulator has the right to discuss any application with the firm submitting the application on behalf of an employee and the right to retain notes on any discussions held.

23.1 Assessing fitness and propriety

In assessing fitness and propriety the regulator considers:

Honesty, integrity and reputation

- Criminal convictions, including old (spent) convictions as defined by the Rehabilitation of Offenders Act 1974
- Civil findings relating to financial activities
- Discipline by the FCA/PRA or other regulators
- Complaints which have been upheld
- Involvement in a company that has gone into liquidation
- Honesty and openness in dealing with the regulator
- Breaches of FCA/PRA rules

The regulator is also entitled to look back into the last six years of a person's employment history in order to evaluate their suitability.

Competence and capability

- Exam success in appropriate qualifications
- Experience and training

Financial soundness

- Breach of a court order requiring the payment of debts
- Bankruptcy

23.2 Fitness and propriety for Certification Functions

Certification Functions must be assessed as fit and proper to perform their role. However, it is the employing firm that needs to conduct this assessment. Firms are required to follow the fit and proper test of the regulator and perform the test at least annually.

24. Fundamental Rules (PRA firms)

The PRA Fundamental Rules replace the Principles for Businesses for PRA authorised firms. They are high-level rules that set out the PRA's expectations of firms. They are more closely linked to the PRA's general objective of ensuring that firms are safe and sound.

The Rules apply proportionately to all PRA firms, taking into account the difference between sectors and between sizes of firms. They apply with respect to a firm's activities wherever they are carried on. The Fundamental Rules are:

1. Integrity
2. Skill, care and diligence
3. 3Prudence
4. Adequate financial resources
5. Effective risk management
6. Organisation and control
7. Relationship with regulators
8. Resolution procedures

See also "Principles for Businesses"

25. Further decision notice

Further decision notices give the recipient details of different action from that stipulated in a previous decision notice. They can only be issued with the recipient's consent.

See also: 'Decision notice'

26. Future performance figures

Where financial promotion information contains an indication of future performance (e.g. of an investment or a financial index), this must:

- Not be based on, or refer to, simulated past performance
- Be based on reasonable assumptions supported by objective data

- Disclose the effect of commissions, fees or charges (if based on gross performance), and
- Contain a prominent warning that such forecasts are not a reliable indicator of future performance

G

1. General prohibition (S19 FSMA 2000)

The General prohibition states that ‘No person may carry on a regulated activity in the UK unless he is an authorised person or an exempt person’. The consequence of the General prohibition is to control entry into the financial services industry with the aim of protecting investors.

FSMA 2000 defines ‘regulated activities’ as carrying out specified activities in relation to specified investments.

S23 FSMA 2000 makes it a criminal offence to carry on a regulated activity without authorisation or exemption. The Act also restricts engaging in financial promotions unless the promotion is issued or approved by an authorised person, or an exemption applies.

The FCA has the power to prosecute these offences. The maximum penalty for breaching S19 is six months’ imprisonment and/or a £5,000 fine from the magistrates court, or two years’ imprisonment and/ or an unlimited fine from the Crown court.

The FCA may also seek civil intervention and can ask a court for:

- Injunctions against likely or continuing breaches, orders to remedy such breaches and freezing orders against likely disposals of assets
- Restitution orders for profits obtained, or losses suffered by others
- Compulsory administration, bankruptcy or winding-up orders for inability to pay debts or, in the last case, because it would be just and equitable

Contracts entered into where there has been a breach of the general prohibition are voidable at the option of the investor.

The investor has the following choices:

- Enforce the contract: Rely on the agreement and sue for damages if any loss is suffered
- Avoid the contract: The investor has the right to his/her money back

2. General Data Protection Regulators (GDPR)

See ‘Data Protection Act 2018’

3. Guidance (FCA Handbook)

Guidance highlights and expands upon any issues surrounding the rules. It is not binding on the firm and need not be followed to achieve compliance with the associated rule.

H

1. Handbook

S138 FSMA 2000 grants the FCA the power to make general rules governing regulated firms and individuals. The FCA rules have been collated into a central source known as the Handbook. The Handbook has been divided into seven main blocks, each block dealing with different aspects of regulation. Each block contains a variety of sourcebooks (or manuals) that provide more detail on particular aspects of compliance.

I

1. Implicit recognition

Implicit recognition can be given to industry guidance. This involves no formal recognition by the FCA at all. It is not mentioned in the FCA handbook, in law or through any formal statement. It has no legal effect on the FCA or on others. However, it does reflect an industry solution to a problem by presenting methods of best practice. An example would be the Banking Code.

See also: 'Industry guidance'

2. Inducements

Inducements are payments of money, or other benefit, made by a firm to a firm representing a client, in the hope of winning that firm's business. Such inducements can cause a conflict of interest if not carefully managed. MiFID II has strengthened the rules on inducements.

In relation to designated investment business or, in the case of MiFID business, another ancillary service, a firm must not pay to, or accept from, a person other than the client any fee or commission (or provide or receive any non-monetary benefit) unless the following conditions are satisfied:

- The fee, commission or benefit does not impair compliance with the firm's duty to act in the best interests of the client
- The fee, commission or benefit is designed to enhance the quality of service to the client
- The firm clearly discloses to the client the existence, nature and amount of the fee, commission or benefit before providing the service

Proper fees which are necessary for the provision of the business or ancillary services (such as custody costs, settlement and exchange fees, legal fees, etc.) are permissible since, by their nature, they cannot give rise to conflicts with the firm's duties to act honestly, fairly and professionally in accordance with the best interest of its clients. Additionally, this prohibition does not apply to 'minor non-monetary benefits'.

Where a firm gives a fee, commission or benefit to another firm it must make a record and keep it for at least five years from the date on which the fee, etc was given.

3. Industry guidance

The regulators seek to encourage greater use of industry guidance in its drive towards a more principles-based approach to regulation. Industry guidance includes codes of practice and similar statements generated by trade associations and professional bodies to help their members understand and follow good practice in meeting regulatory requirements.

The FCA sees guidance as a supplement to rules rather than a replacement and sets out a standardised process for recognition. The FCA will not take action against a firm which has complied with recognised guidance covering the issue concerned.

The FCA recognises industry guidance in three conceptual ways. These different forms of recognition have different legal effects and the requirement to follow them varies. The methods are:

- Safe harbour
- Sturdy breakwater
- Implicit recognition

4. Information disclosure before providing services

This rule applies in relation to MiFID business. A firm must provide appropriate information in a comprehensive form to a client about:

- The firm and its services
- Designated investments and proposed investment strategies (including appropriate guidance and warnings about the risks associated with these investments and strategies)
- Execution venues
- Costs and associated charges

…so that the client is reasonably able to understand the nature and risks of the service and of the specific risks of the service and of the specific type of investment being offered.

5. Initial disclosure document (IDD)

Most of the information required to be disclosed to a client before providing services about the firm, its services, the investments, fees and charges will be provided in an initial disclosure document (IDD) to retail clients before engaging in business.

A firm must provide all clients with prescribed information. This includes:

- Information about the firm and its services:
  - Name and address of the firm and appropriate contact details
  - Method and language of communication
  - Statement that the firm is authorised (and the name of its competent authority - i.e. regulator)
  - Whether the firm is acting through an appointed representative (or a tied agent)
  - Details of occasional and periodical reporting
  - Conflicts of interest policy
- Information about safeguarding of designated investments and client money
- Information about costs and associated charges

This information must be provided in a durable medium, whether before any service is provided or (if this is impossible, such as where an agreement is concluded by distance communication) immediately after starting to provide the service.

A firm carrying on MiFID business must also make available information to enable a client to identify any relevant investor compensation scheme.

6. Initial disclosure document (IDD) - Information by a firm that manages investments

If a firm proposes to manage investments for any client, the following information must be provided so as to enable the client to assess the firm's performance:

- The method and frequency of valuation of the client portfolio
- Details of any third party who may provide the discretionary management
- Information of any benchmark against which the performance of the client portfolio will be compared
- The types of designated investments that may be included in the client portfolio and the types of transactions that may be carried out in those designated investments
- The management objectives, the level of risk and any specific constraints on the management of the portfolio

7. Initial disclosure document (IDD) - Information regarding costs and associated charges

A firm must provide a retail client with information on costs and associated charges including, if applicable:

- The total price to be paid by the client in connection with the designated investment or the designated investment business or ancillary service
- If paid in a foreign currency, the applicable currency conversion rates and costs
- Notice of the possibility that other costs, including taxes, may arise for the client
- Arrangements for payment

8. Initial disclosure document (IDD) - Safeguarding of client's designated investments and money

A firm that holds designated investments or client money for any client must provide that client with the following information:

- If held by a third party
- The responsibility of the firm for any acts or omissions by the third party
- The consequences for the client of the insolvency of the third party
- If the designated investments belonging are not segregated from those of the third party or of the firm, notify the retail client and warn of the resulting risks
- If the accounts of the client will be subject to the law of jurisdiction other than that of an EEA state and an indication that the rights of the client may differ accordingly
- If applicable, about the existence and terms of any security interest or lien which the firm has or may have over the client's designated investments or client money
- A summary description of the steps which the firm takes to ensure the protection of the designated investments belonging to the client or client money it holds

Before entering into stock lending of a retail client's assets, a firm has to provide the clients, in a durable medium, with clear, full and accurate information on the obligations and responsibilities of the firm with respect to the use of those designated investments.

See also: Client assets

See also: Client money

9. Insider dealing - Defences

The following constitute a valid defence to the charge of insider dealing (known as **general defences**):

- Information was being passed on in the proper course of employment
- The person who passed on the information did not expect the recipient to deal
- The person believed that the information was already publicly available: This is a very wide-ranging defence since, under the legislation, information disclosed to a 'section' of the public is deemed to be publicly available
- The person would have behaved in the same way even if he/she was not in possession of the inside information

There are three further defences relevant to market professionals (known as **special defences**):

- Stabilisation - a procedure used to maintain the price of new issues, carried out under strict rules.
- Market makers acting in the ordinary course of business - they are duty bound to buy and sell securities. An individual is therefore not guilty of insider dealing if he/she can demonstrate that he/she was acting in good faith in the course of market making.
- Recipients of market information - this is designed to protect market participants where they have knowledge of transactions that have taken place, or are to take place, or that a transaction will not take place. Market information refers to information that market professionals may hear about and it would be unreasonable to prevent them from using. The criteria the court will apply is that 'it was reasonable for an individual in their position to have acted as they did despite having that information as an insider'. For example where a market professional knows of the client's intention to enter into a large transaction, then the firm can continue to act on behalf of other clients or deal with them provided that it is reasonable to do so. This defence allows a company planning a takeover of another to buy shares in the target company before announcing its full intentions. Although it has price-sensitive information of its own intentions at the time, it will not be found guilty of insider dealing. This defence is called '**bid facilitation**'.

10. Insider dealing - Enforcement

The market operations division of the London Stock Exchange (LSE) monitors transactions on the LSE in order to identify possible abuses. Suspicions are passed on to the FCA for investigation and prosecution. The FCA has operating arrangements in place with the recognised investment exchanges (RIEs) which set out the responsibilities of the FCA and the market operators for monitoring, investigation and prosecution.

The FCA also has responsibility for prosecutions.

11. Insider dealing - Inside information

Many types of information are covered under the law regarding insider dealing (i.e. the Criminal Justice Act 1993) including financial results, takeover plans and news of the departure of key employees. Under the legislation, the information must have **all** of the following characteristics:

- It relates to a particular issuer (or issuers) of securities, or to a particular issue of securities
- It is specific or precise
- It has not been made public
- It must be likely to have a significant effect on the price once made public

Information that satisfies this definition is called unpublished price-sensitive information.

The following categories of information are deemed to be published information:

- Information published via a regulated marketplace, e.g. recognised investment exchange
- Information available through public records
- Information that is generally available to market users or can be derived by market users from public information, e.g. financial press
- Information that can only be acquired by expertise or by payment of a fee
- Information that is published outside the UK
- Information that is published to the public, regardless of whether it was published to a section of the public or the general public as a whole
- Information that can be acquired by observation, e.g. news broadcasts

12. Insider dealing - Insiders (primary and secondary)

A person is defined as an insider if they have information that they **know** is inside information and he/she **knows** that it is from an inside source.

Insiders could include directors, employees, shareholders, and anyone obtaining information because of their employment or profession. Such insiders are known as **primary** insiders as they have acquired their information due to their connection with the company. A **secondary** insider (sometimes known as a 'tippee') is anyone who came across inside information, directly or indirectly, from a primary insider. Both types of insider can be guilty of insider dealing.

13. Insider dealing - legislation

Company directors and their professional advisors often have access to price sensitive information about a company's results or prospects. It is a criminal offence under the Criminal Justice Act 1993 for anyone to benefit from such information prior to its release to the market as a whole.

The Criminal Justice Act defines three types of offence as 'insider dealing'. These are:

- **Dealing** on the strength of inside information either on a regulated market or through a professional intermediary
- **Encouraging** another person to deal on the strength of inside information with a reasonable belief that dealing would take place on a regulated market or through a professional intermediary
- **Disclosing** inside information to another person other than in the proper performance of one's duties

Note that disclosing information is only an offence when the person disclosing the information believes that the recipient is **likely** to deal on the strength of that information.

An offence is committed when one of the actions described above is taken and the person has information as an insider. This means that the person **knows** that it is inside information and **knows** that the information is from an inside source.

14. Insider dealing - Penalties

In a Crown Court the maximum penalty is an unlimited fine and ten years in jail.

15. Insider dealing - Securities affected

Insider dealing offences relate specifically to abuses of information in respect of financial securities. Any MiFID instrument is covered, so long as it trades on any UK, EEA or Gibraltar regulated market, MTF or OTF, NYSE, NASDAQ or SIX.

Only transactions on an exchange or via a professional intermediary (such as a stockbroker) are covered. Thus, a private sale from one investor directly to another is not subject to the legislation.

16. International Capital Market Association (ICMA)

ICMA is the regulatory body of the international bond market. ICMA is an exempt person to the extent that it arranges deals in investments through the operation of TRAX (the reporting system for transactions in international bonds).

17. Investigations by the FCA

Direct supervision by the FCA is carried out via supervision visits by FCA enforcement officers. The FCA is granted the power to appoint such persons under S167/8 FSMA 2000.

The FCA normally expects to give reasonable notice of a visit. However, a firm must permit representatives of the FCA to have access **with** or **without** notice during normal business hours.

FSMA 2000 has granted the FCA certain statutory powers to assist it in its ability to investigate and gather information. FCA surveillance officers can:

- Demand the production of documents, tapes, files, computer data or any other information required by the FCA
- Demand that **any** employees make themselves available for interview

The FCA can demand that meetings take place at the FCA or the firm's premises.

Furthermore, the FCA Handbook states that firms must have appropriate systems in place to be able to produce adequate records within 48 hours of a request from the FCA.

Surveillance officers **cannot** remove original documentation, but they may demand that the firm copy documents or other materials at the firm's expense.

17.1 Cooperation by firms with regulatory investigations

The FCA expects senior management to take steps to remedy any shortfall by the firm (or individuals working for it) in relation to the regulatory requirements. Where consumers suffer loss as a result, the FCA seeks to ensure redress is provided.

Where possible, the FCA will use 'persuasion and dialogue'. However, it has the ability to use enforcement powers, and has the **legal power** (S165 FSMA 2000) to require an authorised firm, RIE or RCH to produce information and/or documentation.

S177 FSMA 2000 makes it a criminal offence not to cooperate with the FCA during an investigation or to provide false or misleading information. The penalty for breaching S177 is two years in jail and/or an unlimited fine in a Crown Court (trial by jury).

It is possible for the FCA to appoint third parties to conduct the investigation if appropriate (FSMA 2000 S167/8).

18. Investment research

When a firm produces investment research for dissemination to its clients or to the public, the financial analysts involved in the production of investment research (and other relevant persons) may have interests which conflict with the interests of the persons to whom the investment research is disseminated. Accordingly, the firm must ensure the implementation of all the measures for managing conflicts of interest in SYSC 10 (conflicts of interest).

In particular, a firm must ensure that:

- If a financial analyst or other relevant person has advance knowledge of investment research which is not yet available to the firm's clients or the public, he/she must not undertake personal transactions or trade on behalf of another person (including the firm) until the recipients of the investment research have had a reasonable opportunity to act on it. (There are exceptions for dealing as a market maker in good faith and in the ordinary course of business and for dealing to execute an unsolicited client order)

- A financial analyst or other relevant person must not undertake personal transactions in financial instruments to which the investment research relates contrary to current recommendations (except in exceptional circumstances and with prior approval from the firm's legal or compliance function)
- The firm, a financial analyst or other relevant person must not accept inducements from those with a material interest in the subject matter
- The firm, a financial analyst or other relevant person must not promise issuers favourable research coverage
- Issuers, relevant persons (other than financial analysts) and any other persons must not, before the dissemination of the investor research, be permitted to review a draft of it for the purpose of verifying the accuracy of factual statements made in it, or for any other purpose other than verifying compliance with the firm's legal obligations, if the draft includes a recommendation such as a target price

A firm is not obliged to comply with all these requirements where it is simply disseminating investment research produced by another person, where the producer is itself subject to these requirements and is independent of the firm.

19. Issues and Products Supervision

One of the three pillars of FCA supervision.

The FCA's commitment to fast, intensive campaigns on market sectors or specific products. Historic examples that would fit into this type of work is the Retail Distribution Review, which looked at retail financial advice, and the Mortgage Market Review.

If the FCA decides consumers are suffering from poor outcomes, they have the flexibility to deploy supervisors to run sector risk assessment (SRA) work to identify problems and offer solutions.

J

1. Joint Money Laundering Steering Group (JMLSG)

The JMLSG produces guidance notes for financial institutions on fulfilling their duties in relation to money laundering and money laundering for terrorist activities. The JMLSG is made up of the leading trade associations in the financial services sector (such as the British Bankers Association), and its existence pre-dates that of the FCA.

In particular, the JMLSG set out the standards expected in relation to senior management's responsibility to control risks that could lead to the firm furthering financial crime. To do this the firm should adopt a risk-based approach.

1.1 Risk-based approach

- Senior management roles should include an MLRO and a senior manager responsible for the direction and oversight of anti-money laundering and combating the financing of terrorism (AML/CFT).
- Adequate documentation should be produced, including the policy and procedures of the firm to implement AML/CFT. This documentation must include a named employee responsible for its implementation and an assessment of the firm's risks. These documents must be specific to the firm's business and customer risks - a generic document is not adequate.
- As part of the risk-based approach, the JMLSG also identifies low risk clients. These are clients with a regular income, clients who have had a long-term active relationship with the firm and clients who have court approval, for example the executors of a will.

1.2 The terrorism financial sanction regime

In addition, the JMLSG comments on how a firm should guard against contravening any sanctions set out by governments in relation to terrorism.

The terrorism financial sanctions regime also prohibits the provision of financial services to sanctions targets. It is generally a criminal offence under the UK implementing legislation directly or indirectly to make funds or economic resources available to or for the benefit of targets ('sanctions targets') on the list unless a licence is obtained from HM Treasury. It is also generally a criminal offence to deal with the funds or economic resources of such targets unless licensed. The prohibitions apply whether dealing directly with targets, or dealing with targets through intermediaries such as lawyers or accountants.

In the UK, the main legislation covering this area is the Terrorist Asset-Freezing etc. Act 2010, which states the maximum penalty for a person committing these offences is seven years.

For this reason the JMLSG guidance strongly recommends that firms have robust monitoring systems in place to ensure that they do not fall in breach of any sanctions put in place on these targets.

In respect of each prohibition, it is a defence for the provider of the funds, economic resources, or where applicable financial services, not to have known or have had reasonable cause to suspect that the prohibition was being breached.

Application of the guidance notes is not mandatory, and failing to comply with them does not mean that a breach of the Regulations or the FCA rules has occurred. However, they do provide a good indication of the behaviour expected of financial sector firms and are a safe harbour in respect of the Regulations.

POCA 2002 and the Terrorism Act 2000 also require the courts to take account of guidance that has been approved by HM Treasury when considering whether a person within the financial sector has committed an offence of not reporting. The JMLSG guidance notes have received Treasury approval.

See also: 'Money laundering'

See also: 'Proceeds of Crime Act 2002'

See also: 'Terrorism Act 2000'

K

1. Key features document (KFD)

Under Principle 7 (communications with clients) firms must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading.

A firm must prepare a key features document for each non-PRIIP packaged product in good time before that document has to be provided.

1.1 General requirement

Whenever a non-PRIIP packaged product or an individual savings account (ISA), junior ISA (JISA) or child trust fund (CTF) is offered to a retail client, the client must be provided with a key features document (KFD) outlining the basic elements of the investment and the services provided by the firm in the investment.

Key features must be provided in a 'durable medium' and must also:

- Be produced and presented to at least the same quality and standard as the sales or marketing material used to promote the relevant product
- Display the firm's brand at least as prominently as any other
- Include the 'keyfacts' logo in a prominent position at the top of the document
- Include the following statement in a prominent position:
  - 'The Financial Services Authority is the independent financial services regulator. It requires us, [provider name], to give you this important information to help you to decide whether our [product name] is right for you. You should read this document carefully so that you understand what you are buying, and then keep it safe for future reference.'

1.2 Contents of a KFD

A KFD must:

- Include enough information about the nature and complexity of the product
- Explain:
  - The arrangements for handling complaints about the product
  - That compensation might be available from the FSCS
  - Details covering the right to cancel or withdraw exists
  - (for a CTF) That stakeholder CTFs, cash-deposit CTFs and share CTFs are available and which type the firm is offering
  - (for a personal pension scheme) Clearly and prominently, that stakeholder pension schemes are generally available and might meet the client's needs as well as the scheme on offer

2. Key Information Document (KID)

A product disclosure document, similar in nature to the Key Features Document (KFD).

Firms advising or selling packaged retail and insurance-based investment products (PRIIPs) to retail clients must provide a KID in good time before any transaction is concluded. It should have prescribed information about the nature and complexity of the investment, including:

- What is this product?
- What are the risks and what could I get in return?
- What happens if [firm] is unable to pay out?
- What are the costs?
- How long should I hold it, and can I take the money out early?
- How can I complain?
- Other relevant information

3. Key Investor Information Document (KIID)

A product disclosure document, similar in nature to the Key Features Document (KFD).

Firms must provide a KIID for every UCITS fund that they market. It will give the investors sufficient information (not more than two sides of A4) about the product to allow investors to make an informed decision about whether the product is suitable for them. It must:

- Identify the scheme
- Describe the objectives and investment policy
- Provide past performance
- Show costs and associated charges
- Provide a risk/reward profile

L

1. Liquidity framework

To amplify Principle for Businesses 4, under which a firm must maintain adequate resources, the FCA state in the GENPRU that adequate financial resources and adequate systems and controls are necessary for the effective management of prudential risks. It is concerned with the adequacy of the financial resources that a firm needs to hold in order to be able to meet its liabilities as they fall due. These resources include both capital and liquidity resources. However, the FCA's rules and guidance in relation to the adequacy of the liquidity resources of a bank are set out in the BIPRU.

The liquidity framework applies to BIPRU firms. These are banks, building societies and investment firms. It applies to UK firms, any incoming EEA BIPRU firm who has a branch in the UK and any other BIPRU firm with a branch in the UK.

1.1 The overall liquidity adequacy rule

A firm must at all times maintain liquidity resources which are adequate, both as to amount and quality, to ensure that there is no significant risk that its liabilities cannot be met as they fall due.

These resources must be of the firm itself and cannot be made up of the resources from other members of the same group of companies.

However, this provision can be modified or waived if the FCA is satisfied that conditions contained in Section 148 of the Act have been fulfilled.

Those resources held by an incoming EEA firm or any other firm must satisfy the following conditions:

- They are under day-to-day control of the UK branch's senior managers
- They are held in an account in the sole name of the UK branch
- They are not committed elsewhere (unencumbered) and
- They are attributed to the balance sheet of the UK branch.

Firms are not permitted to include any resources that may be made available through any emergency liquidity assistance from a central bank.

1.2 Systems and controls requirements

A firm must have in place robust strategies, policies, processes and systems that enable it to identify, measure, manage and monitor liquidity risk.

The strategies, policies, processes and systems required under this rule must be comprehensive and proportionate to the nature, scale and complexity of a firm's activities.

They should consider:

- The nature and level of the liquidity risk to which it is or might be exposed
- The risk that the firm cannot meet its liabilities as they fall due and
- The risk that its liquidity resources might in the future fall below the level, or differ from the quality and funding profile, of those resources advised as appropriate by the PRA or FCA.

See also: 'Capital Requirements Directive'

2. Lloyd's syndicate members

Whilst the Society of Lloyd's itself requires authorisation under FSMA 2000, a **member** of a Lloyd's syndicate is an exempt person. Note, however, that advising on syndicate participation, or managing a syndicate, would require authorisation.

M

1. Market Abuse

Market abuse is a **civil offence** under the EU Market Abuse Regulation (MAR). The offence applies in addition to the criminal offences of insider dealing and misleading statements and impressions and is easier to prove as the burden of proof in civil law is based on the balance of probabilities.

The offences are

- A person shall not:
  - Engage or attempt to engage in insider dealing
    - Includes amending and cancelling orders
  - Recommend or induce another person to engage in insider dealing
  - Unlawfully disclose inside information
- A person shall not engage in or attempt to engage in market manipulation

The FCA publishes 'Market Conduct' which forms part of the FCA Handbook. The Code provides guidance on what does and does not constitute market abuse. These types of behaviour are in relation to qualifying investments trading or to be traded on a prescribed market which are deemed to be market abuse.

The statutory definition of market abuse does not require the person engaging in the behaviour to have intended to abuse the market. It is the **effect**, rather than the intention of the person, that is important in determining whether market abuse has occurred or not.

There is a reporting requirement for firms that arrange or execute trades in a qualifying investment on a prescribed market. If a firm suspects that a transaction might constitute market abuse, it must report to the FCA using a suspicious transaction and order report (STOR) without delay.

Penalties for market abuse are severe, with wrongdoers being subject to an unlimited fine. Other penalties open to the FCA include withdrawal of regulated status, financial penalties, seeking a restitution order, obtaining an injunction and issuing public statements of misconduct.

2. Market abuse - Dissemination

This behaviour consists of the dissemination of information by any means which gives, or is likely to give, a false or misleading impression as to a qualifying investment by a person who knew, or could reasonably be expected to have known, that the information was false or misleading.

The following behaviours are, in the opinion of the FCA, market abuse (dissemination):

- Knowingly or recklessly spreading false or misleading information about a qualifying investment through the media, including in particular through a regulatory information service (RIS) or similar information channel

3. Market abuse - Improper disclosure

This is where an insider discloses inside information to another person other than in the proper course of the exercise of his/her employment, profession or duties.

Disclosure of inside information by the director of an issuer to another in a social context or selective briefing is an example of behaviour which is, in the opinion of the FCA, market abuse (improper dis-closure)

4. Market abuse - Insider dealing

This is where an insider deals, or attempts to deal in a qualifying investment or related investment on the basis of inside information.

- An insider is someone who has inside information as a result of:
- Membership of administration, management or supervisory body of an issuer
- Holding capital in an issuer
- Their employment, profession or duties
- Criminal activities
- Obtaining information by other means and which he/she knows, or could reasonably be expect to know, is inside information

The following behaviours are, in the opinion of the FCA, market abuse (insider dealing):

- Dealing on the basis of inside information which is not trading information
- Front running/pre-positioning – where a firm deals ahead of an order it is to carry out for a client. The idea behind this kind of market abuse is that a firm anticipates the client order affecting the market price, so wishes to take advantage of the situation
- In the context of a takeover, an offeror or potential offeror entering into a purely speculative transaction to benefit from the impact of the offer (for example, a spread bet on the target company's share price

5. Market abuse - Manipulating devices

Behaviour that consists of effecting transactions or orders to trade which employ fictitious devices or any other form of deception or contrivance.

The following behaviours are, in the opinion of the FCA, market abuse (manipulating devices):

- Taking advantage of access to the media by voicing an opinion about a investment (or about its issuer) while having previously taken positions on that investment and profiting from the impact of the opinions voiced
- A transaction designed to conceal the ownership of a investment, by the holding of the investment in the name of a colluding party. This does not include nominee holdings
- Pump and dump - taking a long position in a qualifying investment and then disseminating misleading positive information about the qualifying investment with a view to increasing its price
- Trash and cash - taking a short position in a qualifying investment and then disseminating misleading negative information about the qualifying investment, with a view to driving down its price

6. Market abuse - Manipulating transactions

This is behaviour which consists of effecting transactions or orders to trade that are not for legitimate reasons or in conformity with accepted market practices and which:

- Give or are likely to give, a false or misleading impression as to the supply of, or demand for, or as to the price of, the qualifying investment, or
- Secure the price of such investments at an abnormal or artificial level

The following behaviours are, in the opinion of the FCA, market abuse (manipulating transactions) of a type involving false or misleading impressions:

- Buying or selling investments at the close of the market with the effect of misleading investors who act on the basis of closing prices, other than for legitimate reasons
- Wash trades - a sale or purchase of a investment where there is no change in beneficial interest or

market risk, or where the transfer of beneficial interest or market risk is only between parties acting in concert or collusion, other than for legitimate reasons

- Painting the tape - entering into a series of transactions that are shown on a public display for the purpose of giving the impression of activity or price movement in an investment

The following behaviours are, in the opinion of the FCA, market abuse (manipulating transactions) involving securing the price of a investment:

- Transactions or orders to trade by persons acting in collusion that secure a dominant position over the supply of or demand for an investment and which have the effect of fixing prices
- Transactions where both buy and sell orders are entered at, or nearly at, the same time, with the same price and quantity by the same, or colluding, parties. This does not include legitimate trades, such as crossing trades
- Entering small orders into an electronic trading system, at prices which are higher than the previous bid or lower than the previous offer, in order to move the price of the investment

An abusive squeeze is a situation in which a person:

- Has a significant influence over the supply of, or demand for, or delivery mechanisms for an investment or the underlying product of a derivative contract
- Has a position (directly or indirectly) in an investment under which quantities of the investment or product in question are deliverable and
- Engages in behaviour with the purpose of positioning at a distorted level the price at which others have to deliver, take delivery or defer delivery to satisfy their obligations

7. Market abuse - Benchmark manipulation

The behaviour is similar to manipulating transactions, manipulating devices or dissemination, but involves the use of published benchmarks (such as LIBOR or EURIBOR, for example).

8. Markets in Financial Instruments Directive (MiFID)

MiFID allows investment services firms to be passported into the UK and throughout the EEA. MiFID applies to any firm whose head office and registered office are situated in the same EEA state and which conducts investment services and activities, as defined by MiFID.

These activities are often referred to as ‘core’ activities and include:

- Reception and transmission of orders in relation to one or more financial instruments
- Execution of orders on behalf of clients
- Dealing on own account
- Portfolio management
- Investment advice
- Underwriting and placing of financial instruments
- Operation of multi-lateral trading facilities (MTFs)

Or organised trading facilities (OTFs)

MiFID instruments include:

- Transferable securities, e.g. shares, bonds and CFDs
- Money market instruments
- Units in collective investment schemes
- Derivatives relating to securities, currencies, interest rates or yields

- Commodity derivatives
- Credit derivatives
- Financial contrasts for differences
- Other derivatives (relating, e.g. to climate variables or other statistics)

8.1 Scope of MiFID

In summary, a firm conducting any activities in investments within the scope of the MiFID directive is considered to be doing MiFID business.

For example, a UK firm offering dealing services in bonds would need Part IV permission, and would also be allowed to passport its services throughout the EEA as the firm is conducting MiFID business. However, a UK firm offering advice on pensions would also need Part IV permission, but would NOT be able to passport its services throughout the EEA.

From this example you can see that MiFID business does not cover the full range of business listed under the Regulated Activities Order (RAO). The most notable omissions are that retail products: mortgage business, insurance business and pension business are not considered MiFID business. Nevertheless, MiFID business can be seen as a subsection of the business covered in the RAO.

On a final note, a firm that conducts MiFID business will be referred to as a MiFID firm. The title MiFID firm is determined by the business that the firm conducts and not by whether or not the firm has chosen to passport that business.

8.2 Ancillary services

Under MiFID, a firm which carries out ancillary services only will not be a MiFID firm and will therefore not be able to benefit from passporting its services into other member states. However, if a firm carries on both core activities and ancillary services, it will be subject to MiFID and will be able to provide these services in other member states.

Ancillary services include:

- Safekeeping and administration of financial instruments, including custody and related services
- Granting loans to an investor (to carry out a transaction in which the firm is involved)
- Advice to undertakings on capital structure and on mergers and acquisitions
- Foreign exchange services
- Investment research and financial analysis
- Services related to underwriting

9. Mass detriment references

References made to the FCA by the Financial Ombudsman Service or authorised firms relating to:

- Regular regulatory failure of firms leading to consumer loss or damage
- Where behaviour by a firm, although not prompting a complaint, would lead to the complaint being upheld by the FOS if a complaint were made

10. Misleading statements and impressions

Misleading statements and impressions consists of three separate crimes:

- Making misleading statements,

- Making misleading impressions (i.e. market manipulation), and
- Making misleading statements in relation to benchmarks.

Making misleading statements covers not just lies but misleading, false or deceptive statements, promises or forecasts. It can also cover dishonestly concealing material facts.

Examples include:

- Persuading someone to (or not to) deal, underwrite or take up rights/vote at a company meeting
- Making or omitting statements in takeover defence documents
- Making false or misleading statements or creating false or misleading impressions in relation to a specified benchmark

Misleading impressions covers any deliberate act which creates a false impression as to the liquidity, price or value of a security, for example, share price support. No dishonest motivation needs to be proved.

In proceedings brought under S89-91 of the Financial Services Act (FSA) 2012, it is a defence to show that:

- The accused reasonably believed that his/her act or conduct would not create an impression that was false or misleading
- The accused acted in conformity with the price stabilising rules or control of information rules

In a Crown Court the maximum penalty is an unlimited fine and seven years in jail.

11. Money laundering

Money laundering is a very serious crime. It is the process by which criminals disguise the source of their criminal proceeds. The legislation on money laundering is the Proceeds of Crime Act (POCA) 2002, as amended by the Serious Organised Crime and Police Act (SOCPA) 2005. It relates to cash generated from any illegal activity – be it drugs, fraud, forgery or tax evasion.

The legislation refers to 'criminal property', which is property that has arisen from 'criminal activity'. Criminal activity is any conduct which:

- Is an offence in the UK; or
- Would constitute an offence if it had taken place in the UK. However, there is now a defence introduced by SOCPA where the relevant criminal conduct occurred outside the UK in a country where it was not at the time unlawful.

The scope of 'relevant criminal conduct' in relation to money laundering is ultimately determined by the Secretary of State. Firms must maintain a sufficient audit trail of records and documents so that it can be used by the authorities should a suspicious chain of events come to light.

Money laundering is usually described in three stages: Placement, layering and integration. Each stage is explained below:

11.1 Stage one: Placement

Placement involves the physical disposal of the illegal cash proceeds as a result of a criminal activity. For instance, an investor with illicit proceeds deposits £100,000 into a bank account.

11.2 Stage two: Layering

Layering is the activity that separates the cash proceeds from their illegal source. For example, the criminal now draws a cheque to buy a range of investments (possibly through an authorised firm).

11.3 Stage three: Integration

The third and final stage is integration. This stage is an attempt to lose the audit trail even further by re-investing cash proceeds from a seemingly legitimate source back into the financial system. For example, the investments purchased in the layering stage are now sold and the proceeds are reinvested into a business and/or property and real estate.

See also: 'Proceeds of Crime Act 2002'

See also: 'Money Laundering Regulations 2017'

12. Money laundering reporting officer

Each firm, no matter how small, must appoint a Money Laundering Reporting Officer (MLRO) to whom suspicions should be reported. The MLRO will then, if appropriate, speak to the relevant authority, which is the National Crime Agency (NCA).

The MLRO is a required controlled function and therefore must be a senior member of the firm with approved person status. Other conditions for an MLRO are:

- Expected to be based in the UK
- Be sufficiently independent
- Have sufficient resources at his/her disposal

See also: 'Money Laundering Regulations 2017'

13. Money Laundering Directive

The European Union Money Laundering Directive requires that all financial institutions located in the EU should adopt various internal procedures and controls as a deterrent to money laundering. The aim of this directive is:

- To prevent financial and credit institutions being used for money laundering purposes, i.e. **deterrence**
- To ensure financial and credit institutions cooperate with relevant law enforcement agencies i.e. **co-operation**
- To ensure financial and credit institutions establish appropriate customer and identification procedures in order to assist in the detection, tracing and prosecution of money launderers, i.e. **detection**

The requirement to adopt internal procedures was implemented in the UK by the passing of the Money Laundering Regulations. The EU Directive also made money laundering a criminal offence. This was implemented in the UK by the passing of POCA 2002 (which replaced the Criminal Justice Act 1993).

See also: 'Proceeds of Crime Act 2002'

See also: 'Money Laundering Regulations 2017'

14. Money Laundering Regulations 2017

The Money Laundering Regulations, issued by the Treasury and approved by Parliament, set down detailed procedures on what a firm should do to protect itself against money laundering. A breach of the Regulations can be committed **whether or not** any money laundering actually takes place. The maximum penalty is a two-year jail sentence and an unlimited fine.

The Regulations apply to:

- Banks, building societies and other credit institutions
- Individuals and firms engaging in investment business within the meaning of the FSMA 2000
- Insurance companies covered by the EU Life Directives, including the life business of Lloyd's of London
- Bureaux de change, cheque encashment centres and money transmission services
- Other relevant businesses including lawyers, casinos, estate agents and dealers in high value goods

15. Money Laundering Regulations 2017 - Due Diligence procedures

The Money Laundering Regulations (2017) has increased the emphasis on obligations regarding due diligence, for example:

- Explicit requirements for firms to undertake ongoing monitoring of business relationships
- Firms being required to identify not just the client, but the beneficial owner underlying the client

It requires firms to take enhanced customer due diligence measures in higher risk situations, while allowing firms to take reduced identification measures for specific situations with a lower risk of money laundering. It also allows firms to rely on certain other firms for undertaking customer identification.

15.1 Simplified due diligence

Eligibility for simplified due diligence (SDD) is assessed on a case-by-case basis.

15.2 Enhanced due diligence

Note that a firm should carry out identification checks, even on those persons where it is not usually required to do so, if it is suspicious of the motives of that person.

For example, new emphasis has been placed on firms with regard to politically exposed persons (PEPs). These are clients who hold or have held public office or have gained a high political profile which could make them vulnerable to corruption. The enhanced due diligence applies to PEPs, their families and associates.

16. Money Laundering Regulations 2017 - Identification procedures

Firms are obliged to verify the identity of new clients as part of customer due diligence. Unless satisfactory evidence of identity is obtained as soon as reasonably practicable, the business must not proceed (unless a report has been made to SOCA).

Firms are required to carry out identification procedures on new customers in the following circumstances:

- Where a new business relationship is to be established
- Where there are suspicions

16.1 Suitable evidence

Individuals

For individuals, examples of proof of identity include a passport or driving licence.

Evidence of address is also required, e.g. a utility bill or entry on the electoral roll. A passport is not evidence of address.

Where a person is acting on behalf of a third party or the client of the firm is different from the beneficial owner of the investment, the firm has a duty to identify and know both parties.

Companies

For companies, it may be necessary to carry out checks on the company and individuals representing the company.

Examples of evidence include:

- Registered name
- Address
- Directors
- Shareholders

Where possible, evidence should be obtained from independent sources, e.g. Companies House, company accountants and lawyers, rather than the company itself.

Trusts

With a trust client it is necessary to verify the identity of:

- Those taking control of trust assets (i.e. trustees)
- Those providing trust funds (i.e. settlors), and
- Any other person with the power to remove the trustee

17. Money Laundering Regulations 2017 - Internal controls

Under the Money Laundering Regulations, firms must ensure that they set up appropriate internal controls and institute a programme of staff training. A Money Laundering Reporting Officer (MLRO) must be appointed to act as an internal and external point of contact for matters arising in relation to money laundering.

An MLRO is also required under the FCA's rules and, as a 'required controlled function', needs FCA approval.

Once a member of staff has reported their suspicions to the firm's MLRO they have discharged their statutory duty and cannot face any criminal liability in respect of the reported transaction.

Staff must be trained to recognise suspicious transactions. Suspicious transactions would include those which are unusual in size or in timing for the investor, the security or the market. To facilitate this, firms should set out detailed training schedules on anti-money laundering (AML) awareness for employees.

18. Money Laundering Regulations 2017 - Record keeping

The following records must be made and maintained:

- Evidence of identity: Maintained for five years from the end of the firm's relationship with the client

- Transaction records: Maintained for five years from the date when the transaction was completed

Records of the following should also be kept for five years:

- The dates when anti-money laundering training was given, the nature of the training and the names of the staff who received training
- Reports made by the MLRO to SOCA, consideration of those reports and any action taken as a consequence

19. Money Laundering Regulations 2017 - Reporting suspicions

Under the Regulations, employees are required to report suspicious transactions as soon as possible to the MLRO, who will in turn refer the matter to the SOCA. Once an employee has reported his/her suspicion he/she has no further reporting obligation.

Examples when a firm may be suspicious of the motives of a new/existing client include:

- A reluctance of a new client to provide identification documents
- The unnecessary use of a third party to act as an intermediary
- Continual patterns of unusual trading
- A request for non-market price transactions
- The constant use and transfer of bearer securities
- An introduction from a suspicious party or jurisdiction
- Where the client has no obvious reason to use the firm's services
- Unusual and/or frequent payment to third parties

POCA 2002 also has implications for reporting suspicions.

See also: 'Proceeds of Crime Act 2002'

N

1. National Crime Agency (NCA)

The National Crime Agency leads the UK's fight to cut serious and organised crime, and protecting the public by targeting and pursuing those criminals who pose the greatest risk to the UK. They are the main body in the enforcement of the laws such as the Proceeds of Crime Act 2002 and Terrorism Act 2000.

2. Non-independent research

Investment research is research which is presented as being objective and independent. Non-independent research is a research recommendation which does not constitute investment research (and which cannot, therefore, be presented as being objective and independent).

Non-independent research must:

- Be clearly identified as a marketing communication, and
- Contain a clear and prominent statement that:
  - It has not been prepared in accordance with rules designed to promote the independence of investment research, and
  - It is not subject to any prohibition on dealing ahead of the dissemination of investment research

The financial promotion rules apply to non-independent research as though it were a marketing communication.

3. Non-written financial promotions

A **non-written** financial promotion is a financial promotion made during the course of:

- A personal visit
- A telephone conversation
- Other interactive dialogue

Contact can be initiated by the client, in which case it is described as 'solicited', or by the firm, in which case it is 'unsolicited' (an unsolicited real-time communication is, of course, simply an elaborate regulatory description of a cold call).

When a firm initiates a non-written financial promotion communicated to a particular person outside the firm's premises, the person communicating must:

- Only do so at an appropriate time of day
- Identify him/herself and the firm they represents at the outset and make clear the purpose of the communication
- Clarify that the client can continue with or terminate the communication at any time
- Give a contact point to any client with whom they arrange an appointment

See also: 'Unsolicited non-written financial promotions'

4. Notice of discontinuance (discipline)

A notice of discontinuance is issued where proceedings set out in a warning notice or decision notice are being discontinued.

5. Notices (discipline)

FSMA 2000 grants the FCA/RDC the power to issue notices to firms and individuals. There are different types of notice including warning notices, supervisory notices, decision notices, further decision notices and final notices. The statutory notices are warning, supervisory, decision and further decision notices. Final notices and notices of discontinuance are not statutory notices.

O

1. Occasional reporting (confirmations)

When a firm has carried out an order on behalf of a client, it must promptly provide the client in a durable medium with the essential information concerning the execution of the order.

In the case of a retail client, the firm's notice must include the relevant trade confirmation information. This must be sent as soon as possible and no later than the next business day after execution (or, where the confirmation is received by the firm from a third party, no later than the next business day after receipt).

The trade confirmation information comprises:

- Reporting firm
- Name of client
- Trading day
- Trading time
- Type of order (e.g. limit order or market order)
- Venue
- Instrument
- Buy/sell (or nature of order if not buy/sell)
- Quantity
- Unit price
- Total consideration
- Total of commissions and charges
- Rate of exchange (for currency conversion)
- Settlement details
- (if applicable) firm acted as counterparty

In the case of non-MiFID business, a firm need not dispatch a confirmation if:

- The firm has agreed with the client (in the case of a retail client, in writing and with his/her informed consent), that information need not be supplied, either generally or in specified circumstances, or
- The investment is a life policy or a personal pension scheme (other than a SIPP)

A firm must retain a copy of any confirmation dispatched to a client for the following periods from the date of dispatch:

- Five years – MiFID business
- Three years – non-MiFID business

2. Order execution policy

In order to satisfy its obligation to obtain the best possible result for its clients, a firm is required to establish and operate an order execution policy. This policy must include, for each class of financial instrument, information about the different execution venues that the firm will use to execute client orders and the factors affecting the choice of execution venue.

2.1 Information about the order execution policy

A firm must provide appropriate information to its clients about its order execution policy. In the case of a retail client, the firm must provide the following details about its execution policy before executing any transaction:

- An account of the relative importance the firm assigns to the execution factors
- A list of the main execution venues used by the firm
- A clear and prominent warning that any specific instructions from the client may prevent the firm from taking the steps that it would otherwise have taken under its order execution policy to obtain the best possible result for the client

Where the order execution policy provides for the possibility that client orders may be executed outside a regulated market or an MTF, the firm must receive consent from its clients about this possibility. This could be general consent or with regard to individual transactions.

2.2 Other requirements

- A firm must obtain the prior consent of its clients to its order execution policy
- A firm must obtain the prior express consent of its clients before executing their orders outside a regulated market or an MTF. This may be by means of a general agreement or transaction-by-transaction
- A firm must regularly monitor the effectiveness of its order execution arrangements and execution policy, and it must review them annually
- A firm must be able to demonstrate to its clients, at their request, that it has executed their orders in accordance with its order execution policy

See also: 'Best Execution'

3. Outcomes-focused regulation

Outcomes-focused regulation means placing greater reliance on principles and high level rules as a means to achieve the regulatory aims, and less reliance on prescriptive rules. Outcomes-focused regulation also means a different approach to how the FCA deals with regulated entities, whether in the context of day-to-day supervisory contact, the information it requests or, when necessary, the way it uses its enforcement powers. The FCA's aim is to focus more clearly on the outcomes that regulators and firms want to achieve, leaving more of the judgement calls on how to achieve those outcomes to the senior management of the firms.

This does not mean the FCA will be a purely principles-based regulator. In certain areas it will continue to rely on detailed rules and prescriptive processes to ensure adequate consumer protection or sufficient consistency and comparability between regulated entities, for example so that consumers can compare information provided by firms. Also, when implementing EU legislation, it might need to include more detailed rules in its Handbook. In reality, therefore, there will always be a mixture of detailed rules and principles.

Past experience in regulation suggests that prescriptive standards have been unable to prevent misconduct. The ever-expanding rule books, designed to prevent misdemeanour, have not stopped further mis-selling, market misconduct or other detriment.

A principles-based approach is seen as better as it will:

- Allow for regulation that focuses on outcomes rather than prescription, which is more likely to support development and innovation
- Allow for accessibility, particularly for smaller firms, that do not generally have access to deep compliance or legal expertise, where the amount of detailed rules can be bewildering
- Finally, a large volume of detailed, prescriptive and highly complex rules can divert attention towards adhering to the letter rather than the purpose of regulatory standards

For these reasons, the FCA believes that further enhancing its risk-based and evidence-based approach to regulation with an increased emphasis on principles and outcomes is the way to progress its regulatory regime.

See also: 'Fair treatment of customers'

P

1. Packaged Product

Specific products targeted to retail clients:

- A life policy
- A unit in a regulated collective investment scheme
- An interest in an investment trust savings scheme
- A stakeholder pension
- A personal pension

See also: 'Packaged retail and insurance-based investment products'

See also: 'Retail investment products'

2. Packaged retail and insurance-based investment products (PRIIPs)

A broader range of products than Packaged Products. Include:

- Most investment funds, e.g.
  - Regulated and unregulated collective investment schemes
- Insurance-based investment products, e.g.
  - Unit-linked life insurance policies
- Retail structured securities, e.g.
  - Equity-linked note
- Structured term deposits e.g.
  - A deposit account where the interest paid is dependent on the performance of another asset, such as the equity markets

See also: 'Retail investment products'

See also: 'Packaged products'

3. Panel on Takeovers and Mergers (POTAM)

See 'Takeover Panel'

4. Past performance figures

Where information communicated by a firm contains an indication of past performance (e.g. of an investment or a financial index), the following rules apply:

- That indication must not be the most prominent feature of the communication
- Performance information must cover at least the last five years (or the whole available period, if less),

and must be based on complete 12-month periods

- The reference period and source information must be stated
- There must be a prominent warning that the figures refer to the past and that past performance is not a reliable indicator of future results
- The currency must be clearly stated (if different from that of the EEA state where the retail client is resident), together with a warning about the effect of currency fluctuations
- If the indication is based on gross performance, the effect of commissions, fees or charges must be disclosed

5. Pension Ombudsman Service

The Pension Ombudsman deals with complaints relating to personal or occupational pension schemes, regarding how pensions schemes are run. Examples include situations such as a pension scheme:

- Taking too long to do something without good reason
- Failing to do something they should have
- Not following their own rules or the law
- Breaking a promise
- Giving incorrect or misleading information
- Not making a decision in the right way

A complaint to the Ombudsman needs to be made within three years of when an event occurred or, if later, within three years of when the complainant first knew about it.

The Ombudsman has the legal power to make decisions that are final, binding and enforceable in court.

6. Pension Protection Fund

The Pension Protection Fund's main function is to provide compensation to members of eligible defined benefit pension schemes, when there is a qualifying insolvency event in relation to the employer, and where there are insufficient assets in the pension scheme to cover the Pension Protection Fund level of compensation.

The Pension Protection Fund is a statutory fund run by the Board of the Pension Protection Fund, a statutory corporation established under the provisions of the Pensions Act 2004. To help fund the Pension Protection Fund, compulsory annual levies are charged on all eligible schemes.

7. Pension Regulator

The Pensions Regulator was established by the Pensions Act 2004.

The objectives of the Pensions Regulator are to:

- Protect the benefits of members of work based schemes
- Reduce risk of situations requiring compensation from the Pension Protection Fund
- Promote good administration and improve understanding of the schemes it regulates
- Maximise employer compliance with employer duties

The Pensions Regulator's principal aim is to prevent problems from developing. Where possible, they will provide support and advice to trustees, administrators, employers and others where potential problems are identified.

The Pensions Act 2004 provides the Regulator with a range of powers to enable it to meet its objectives. The powers fall into three broad categories:

- Investigating schemes: gather information to help identify and monitor risks
- Putting things right where problems have been identified
- Acting against avoidance: ensure that employers do not sidestep their pension obligations

8. Periodic reporting to clients

If a firm is managing investments on behalf of a client, it must provide the client with a periodic statement in a durable medium (unless such a statement is provided by another person). In the case of a retail client, the periodic statement must include the relevant periodic information:

- Name of firm
- Name of retail client's account
- Statement of the contents and the valuation of the portfolio, including:
  - Market value (or fair value) of each investment
  - Cash balance at the beginning and end of the reporting period
  - Performance of the portfolio during the reporting period
- Total fees and charges
- Comparison of performance with benchmark (if any)
- Total of dividends and interest received
- Information about corporate actions (e.g. bonus issues)
- Relevant trade confirmation information (if not provided on a transaction-by-transaction basis)

In the case of non-MiFID business, a firm need not provide a periodic statement to a client habitually resident outside the UK if the client has so requested or the firm has taken reasonable steps to establish that he/she does not wish to receive it.

The periodic statement must be provided once every three months. If the client elects to receive information about executed transactions on a transaction-by-transaction basis (and there are no transactions in derivatives during the period):

- The periodic statement must be provided once every 12 months
- The firm must comply with the occasional reporting rules (confirmations) for each transaction executed

If a firm manages investments for retail clients or the portfolio includes contingent liability investments, the firm must report within one business day any losses beyond a predetermined limit. However, due to publication in December 2022 of amended regulations by HM Treasury, firms will no longer be required to provide this notification to clients from 7 June 2023.
A firm must retain a copy of any periodic statement for the following periods from the date of dispatch:

- Five years – MiFID business
- Three years – non-MiFID business

9. Per se eligible counterparties

The following are per se eligible counterparties (this includes entities from inside and outside the EEA):

- An investment firm
- A credit institution
- An insurance company

- A UCITS scheme (or its management company)
- A pension fund (or its management company)
- Another authorised or regulated EEA financial institution
- Certain own account dealers in commodities or commodity derivatives
- A national government (including a body dealing with public debt)
- A central bank
- A supranational organisation, such as the IMF or World Bank

10. Personal account dealing

A firm must have in place arrangements to prevent inappropriate dealing by any relevant person (this includes directors, partners, managers, employees and appointed representatives). Personal account dealing rules follow the home state regulations for firms, i.e. it is not dependent on where the client is based.

This covers personal account transactions which:

- Are prohibited under the Market Abuse Directive
- Involve the misuse or improper disclosure of confidential information relating to clients or their transactions
- Conflict or are likely to conflict with the firm's obligations to a customer under the regulatory system

This prohibition extends also to a relevant person:

- Advisory or procuring another person to enter into such a transaction, or
- Disclosing it in such a way that it could be used to the same effect

This rule also covers:

- Financial analysts who have advance knowledge of the content of investment research
- Relevant persons who misuse information relating to pending client orders of which they have advance knowledge

The firm's arrangements on personal account dealing must ensure that:

- Each relevant person is aware of the restrictions on personal transactions (and of the firm's arrangements in this area)
- The firm is informed promptly of all personal transactions
- A record is kept of all personal transactions notified to the firm (including any authorisation or prohibition in connection with such a transaction)

The rule on personal account dealing does not apply to personal transactions in:

- A discretionary account managed independently of the relevant person
- Writs or shares in a UCITS scheme
- Life policies

11. Pillars of supervison

The FCA's supervisory model is based on three pillars:

1. Proactive supervision – a forward looking approach to identify harm through review and assessment of firms and portfolios. This includes business model analysis and reviewing the drivers of culture.

2. Reactive supervision – any issues that are emerging or have happened are dealt with to prevent harm growing.
3. Thematic supervision –diagnostic work where actual or potential harm across a number of firms is assessed.

See also: ‘Firm systematic framework’

12. PRIIPs

See ‘Packaged retail and insurance-based investment products’

13. Principles for Businesses

The 11 Principles for Businesses are as follows (the actual text of the Principle is set out in bold):

1. Integrity

A firm must conduct its business with integrity.

Those working in the financial services industry have responsibilities to clients, and any profit must be made fairly.

2. Skill care and diligence

A firm must conduct its business with due skill, care and diligence.

Work must be of a high standard.

3. Management and control

A firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems.

This places emphasis on the way a firm is organised and managed.

4. Financial prudence

A firm must maintain adequate financial resources.

This builds in flexibility when a firm suffers losses or the economy takes a down turn.

5. Market conduct

A firm must observe proper standards of market conduct.

6. Customers’ interests

A firm must pay due regard to the interests of its customers and treat them fairly.

7. Communications with clients

A firm must pay due regard to the information needs of its clients and communicate information to them in a way which is clear, fair and not misleading.

This allows clients to make reasoned decisions concerning their investments.

8. Conflicts of interest

A firm must manage conflicts of interest fairly, both between itself and its customers and between a customer and another client.

One means of avoiding conflict is through the use of barriers to information flow within a firm, called **Chinese Walls**. In this way a sales team could be prevented from knowing any positions taken by a firm in order to avoid a potential conflict of interests. Note that the use of Chinese Walls is not compulsory, as this would be unrealistic for very small firms with a minimal number of employees. Where Chinese Walls are not implemented, the firm must manage conflicts of interests in other ways, e.g. disclosure or declining to act for certain clients.

9. Customers: Relationships of trust

A firm must take reasonable care to ensure the suitability of its advice and discretionary decisions for any customer who is entitled to rely upon its judgement.

10. Clients' assets

A firm must arrange adequate protection for client's assets when it is responsible for them.

11. Relations with regulators

A firm must deal with its regulators in an open and cooperative way and must disclose to the FCA/PRA appropriately anything relating to the firm of which the FCA/PRA would reasonably expect notice.

12. Consumer Duty

A firm needs to consider the characteristics and objectives of their customer. As well as acting to deliver good customer outcomes, firms will need to understand and provide evidence whether those outcomes are being met.

This Principle aims to ensure that the FCA and its member firms enjoy a relationship where the FCA can be less obtrusive in its day-to-day monitoring.

See also: 'Outcomes-focused regulation'

14. Principles of good regulation

The FCA's statutory objectives are supported in FSMA 2000 by a set of general principles of good regulation. The FCA takes account of these principles whilst working towards its statutory objectives. The principles require the FCA to take account of the following:

- The use of its resources in the most economic and efficient way
- That individuals involved in the management of authorised firms must take appropriate responsibility
- Balancing the burdens and restrictions on firms with the benefits of regulation for consumers and the industry
- Facilitating innovation
- The international nature of financial services and markets and the UK's competitive position
- Valuing competition between financial firms
- Enhancing the understanding and knowledge of the public in financial matters

By adopting these principles of good regulation, the FCA seeks to operate in an open and transparent way towards the firms and individuals it regulates.

15. Principles of supervision

The following supervisory principles guide the FCA's work:

- Forward-looking – the FCA seeks to pre-empt or address poor conduct.
- Focus on strategy and business models – the FCA assesses firms' business models to identify emerging risks and develop a strong understanding of a firm's business model.
- Culture and governance – the FCA seeks to look at what drives behaviour within a firm.
- Focus on individual as well as firm accountability.
- Proportionate and risk-based.

- Two-way communication – the FCA seeks to engage directly with consumers and the industry.
- Co-ordinated – the FCA will ensure its supervision teams work closely with others in the FCA, share intelligence with other regulatory bodies, and work with overseas regulators.
- Put right systemic harm that has occurred and stop it happening again.

See also: 'Firm systematic framework'

16. Private warnings

A private warning is issued when, despite having concerns regarding the behaviour of a firm or approved person, the FCA may decide that it is not appropriate, having regard to all the circumstances of the case, to bring formal disciplinary action.

Examples of circumstances where the FCA will tend to give a private warning rather than take formal disciplinary action include where the matter giving cause for concern is minor in nature or degree, or where the firm or approved person has taken full and immediate remedial action.

A private warning will state that:

- The FCA has cause for concern arising from the conduct of a firm or approved person
- The FCA does not at present intend to take formal disciplinary action
- The private warning will form part of the firm's or approved person's compliance history

The FCA requires acknowledgement of the receipt of the warning letter and invites the person to comment on the private warning if they wish to do so. A private warning is different to a warning notice.

17. Proceeds of Crime Act 2002

The Proceeds of Crime Act (POCA) 2002, as amended by the Serious Organised Crime and Police Act (SOCPA) 2005, defines money laundering offences and defences.

17.1 Offences

Concealing, acquiring, possessing and assisting

The Act makes it an offence for any person to acquire or possess criminal property, or to assist another person engaging in or benefiting from criminal conduct.

There is a **defence** when knowledge or suspicion of the offence is reported to the National Crime Agency (NCA) before the prohibited act is carried out or as soon afterwards as reasonably practicable. There is also now (as a result of SOCPA) sometimes a defence if the conduct occurred in an overseas country where it was not unlawful.

Failure to report

It is a criminal offence for any person within the regulated financial sector (i.e. anyone who falls within the scope of the Money Laundering Regulations) not to report his/her knowledge or suspicion that money laundering is taking place.

The Act introduces a new requirement to report **as soon as reasonably practicable** where there are 'reasonable grounds' to know or suspect that money laundering is taking place. If a report of a suspicion is not reported as soon as reasonably practicable, a criminal offence is committed.

Failure to report can be in relation to not just what the person suspected, but also in relation to what they ought reasonably to have suspected. In the latter situations, the courts will apply the 'objective test' to assess whether the person should have had a suspicion.

An additional offence of **not reporting** has also been introduced for MLROs. The offence applies where an MLRO who has received an internal report does not make a report to SOCA as soon as is practicable after the internal report was received.

Members of staff within the regulated financial sector are provided with a **defence** if their employer has not provided them with the training required under the Regulations to recognise and report suspicions or if they have a reasonable excuse for not reporting their suspicion.

Whether an excuse not to report a suspicion is reasonable will depend on the circumstances of the particular case. However, the burden of proof is that the person must demonstrate that he/she did have a reasonable excuse for not reporting their suspicion.

Note that, if an individual reports his/her suspicions regarding money laundering, he/she will **not** be in breach of any duty of confidentiality owed to a client.

Prejudicing an Investigation

A person in the regulated sector commits an offence if he/she makes a disclosure which is likely to prejudice any investigation which might be conducted. This includes disclosure to any third party no matter how small the crime may be, this specific offence carries a two year maximum penalty.

Tipping off

A person commits an offence if he/she makes a disclosure which is likely to prejudice any investigation which might be conducted. This includes disclosure to any third party no matter how small the crime may be.

It is a defence against this charge that a person can prove that they neither knew nor suspected that the disclosure would prejudice an investigation. Note that the burden of proof lies with the individual charged with the offence of tipping-off.

The offence of tipping off carries with it a maximum penalty of two years in prison.

Failure to comply with the Money Laundering Regulations

Failure to comply with the Money Laundering Regulations is a criminal offence punishable by a jail term. POCA 2002 defines the following maximum prison terms, all of which can be accompanied by an unlimited fine:

- Concealing, acquiring, possessing and assisting: 14 years
- Failure to report: Five years
- Failure to comply with the Money Laundering Regulations: Two years

FSMA 2000 grants the FCA the power to reprimand, fine and prosecute for money laundering offences under POCA 2002.

18. Product intervention rules

See 'Temporary product intervention rules'

19. Prohibition order

The FCA/PRA can make a prohibition order if it becomes apparent that an individual is not fit and proper (S56 FSMA 2000).

To issue a prohibition order, the FCA/PRA/RDC will first issue a warning notice followed by a decision notice. The individual has a right to refer the matter to the Upper Tribunal.

A prohibition order is much wider than withdrawal of approval. The regulator will only consider a prohibition order if the degree of risk to consumers or confidence in the financial system cannot be addressed by simply withdrawing approval from the relevant controlled function.

Once a final notice relating to a prohibition order has been issued, the regulator will generally publicise the decision.

An individual in breach of a prohibition order is subject to a maximum fine of £5,000.

See also: 'Approved person'

20. Prosecution (discipline)

As well as imposing financial penalties via the Regulatory Decisions Committee (RDC), the FCA also has the power to prosecute a number of offences through the criminal courts. These include:

- Carrying on regulated activity without authorisation or exemption (contravention of the general prohibition)
- Making false claims to be authorised or exempt
- Breaching the restrictions on financial promotion
- Failing to cooperate with or giving false information to an FCA appointed investigator
- Misleading the FCA
- Insider dealing (Part V of the Criminal Justice Act)
- Breaches of the money laundering regulations

21. Prospectus

A prospectus is a document produced by a company and its advisors when they wish to issue shares for the first time. If the company also wishes to list itself on the London Stock Exchange (LSE) the production of a prospectus becomes a requirement under FSMA 2000 S84-87.

22. Prospectus Rules

When advertising a new issue, the communication does not need to apply to the COBS rules on communications. Instead the Prospectus Rules, written by the UK Listing Authority (UKLA) need to be adhered to.

22.1 Key provisions

Communication relating to new issues or admissions to trading must comply with the following:

- It must state that a prospectus is, or will be, available, and where an investor may obtain it
- It must be clearly recognisable as an advertisement
- The information must be accurate and not misleading;
- The information provided is consistent with that in the prospectus

The UKLA also insist that these communications make it clear that the advertisement is not the prospectus itself.

23. Provisions of the FCA Handbook

Within the Handbook are various types of provisions. The precise legal status of any particular provision depends upon the terms of the Act and the particular power exercised by the FCA to create that provision.

The different types of Handbook provisions are explained below. Note the abbreviations used by the Handbook to denote the different provisions, for instance, R = Rule.

- R – Rule: Rules are made under S138 FSMA 2000. They place a binding duty on the firm and most give private persons a right of action under S150 FSMA. This means that a private person may sue the firm if it breaches a rule and the investor suffers financial loss as a result.
- E -Evidential provision: Evidential provisions are rules that are not binding in their own right, but derive their authority from a linked rule. Compliance with an evidential provision tends to establish compliance with the linked rule.
- G – Guidance: Guidance highlights and expands upon any issues surrounding the rules. It is not binding on the firm and need not be followed to achieve compliance with the associated rule.
- D – Direction: Directions indicate that the corresponding paragraph is a requirement. They are binding on the persons or categories of persons to whom they are addressed.
- P - Statement of principle: Statements of principle are binding on approved persons
- C - Conduct: Behaviour that does not amount to market abuse
- UK - Text from UK law

24. Prudential Regulatory Authority (PRA)

Operating as part of the Bank of England, the PRA will be a focused prudential regulator, with responsibility for the prudential supervision of deposit-takers, insurers and major investment firms (so-called ‘systemically-important firms’). The PRA has an overall objective of promoting the safety and soundness of regulated firms, and meets this objective primarily by seeking to minimise any adverse effects of firm failure on the UK financial system and by ensuring that firms carry on their business in a way that avoids adverse effects on the system.

25. Public censure (discipline)

A public censure can be issued on a FIRM where the firm had contravened a requirement of S205 FSMA 2000 (public censure). Note: Compare to ‘statement of misconduct’.

See also: ‘Relevant circumstances’

26. Public Interest Disclosure Act 1998 (PIDA)

See 'Whistleblowing'

27. Pure protection product

A pure protection product is an insurance product that has no investment element, such as critical illness cover or a general insurance contract. Pure protection products are regulated investments, but are not designated investment business and so pure protection products are not covered by the conduct of business rules.

R

1. Recognised Clearing Houses (RCHs)

Agreements to buy and sell securities take place on exchanges but the delivery of the security in return for cash will happen through a clearing house. The Bank of England recognises four clearing houses in the UK.

RCHs are exempt from the need to be authorised under S19 FSMA 2000 (the General Prohibition).

2. Recognised Overseas Clearing Houses (ROCHs)

The Bank of England has recognised and supervises a number of Recognised Overseas Clearing Houses (ROCHs).

ROCHs are exempt from the need to be authorised under S19 FSMA 2000 (the General Prohibition).

3. Recognised Investment Exchanges (RIEs)

Certain investment exchanges are **recognised** by the FCA and, as such, are exempt from the requirement to be authorised under S19 FSMA 2000 (the General Prohibition).

In order to qualify for this status, exchanges must satisfy the following conditions:

- Must be a fit and proper person
- Must settle transactions in a timely manner
- Must have appropriate systems and controls
- Must cooperate with UK and overseas regulators

4. Recognised Overseas Investment Exchanges (ROIEs)

Certain overseas exchanges which can be accessed electronically from the UK are known as **Recognised Overseas Investment Exchanges** (ROIEs).

Recognition is given by the FCA. ROIEs are exempt from the need to be authorised under S19 FSMA 2000 (the General Prohibition).

5. Recording telephone communications and electronic communications

In an attempt to gather good quality information in order to detect and deter improper behaviour, it is possible for a firm to use recorded telephone communications and other electronic media, such as facsimile, email and instant messaging devices in order to provide information to the FCA during its investigations.

This rule did not, originally, cover communications made by mobile phone. This rule, however, was amended on 14th November 2011 to a requirement for a firm to take reasonable steps to prevent relevant communications from being made on privately owned equipment which the firm is unable to record or copy.

The rules apply to a firm that carries out any of the following activities:

- Receiving client orders
- Executing client orders
- Arranging for client orders to be executed
- Carrying out transactions on behalf of the firm, or another person in the firm's group, as part of their trading activities
- Executing orders that result from decisions by the firm to deal on behalf of its client
- Placing orders with other entities for execution that result from decisions by the firm to deal on behalf of its client

The activities must relate to:

- Qualifying investments admitted to trading on a prescribed market, or where a request for admission has been made and is under consideration; or
- Investments which are related investments whose price or value is determined by the price and value of qualifying investments.

This section does not apply to the carrying on of the following activities:

- Activities carried on between operators and depositories of the same collective investment scheme
- Corporate finance business
- Corporate treasury functions
- A discretionary investment manager. This last exception only applies in respect of telephone conversations or electronic communications with a firm which the manager reasonably believes is subject to the recording obligation

The COBS state that a firm must take reasonable steps to record relevant telephone conversations, and keep a copy of relevant electronic communications. A relevant conversation or communication is generally considered to be one that concludes or is intended to conclude an agreement between the firm and its client (or the firm and another person if the firm is acting as agent).

The rule would not normally; however, cover conversations or communications made by investment analysts, retail financial advisers, and persons carrying on back office functions, as such persons will not normally make relevant conversations or communications when acting in those capacities.

A firm must take reasonable steps to retain all records:

- For a period of at least five years from the date the record was created
- In a medium that allows the storage of the information in a way readily accessible for future reference by the FCA

The FCA do place conditions on the storage of this information. Namely, the storage must be secure and safe from alterations; although where any corrections or amendments are made these must be accurately traceable back to the original content.

6. Regulatory Decisions Committee (RDC)

Where investigations are launched by the FCA/PRA, the ongoing process is administered by the RDC.

Where a firm or individual is under investigation by the PRA/FCA/RDC they will be informed by a personal notice before the formal process of the investigation begins. However, the PRA/FCA/RDC does have the power to launch an investigation without notice. During the course of an investigation there is no automatic requirement that the firm (or individual) stops trading.

Although the PRA/FCA does have executive powers to make decisions regarding the disciplinary process, it will usually refer more significant matters to the RDC. As such, the RDC will usually take the final decisions on the following actions:

- To refuse, restrict or modify a Part IV permission application
- To refuse an application for approved person status
- To make a prohibition order in relation to any person
- To exercise the PRA/FCA's powers to impose financial penalties or public censure
- To seek a court restitution order against any person

Although it is generally the case that the RDC will come to decisions on matters of enforcement, the PRA/ FCA can also take on this role. These situations are known as 'executive procedures' and generally are to do with applications or variations to Part IV permission.

See also: 'Enforcement Decision-Making Committee (EDMC)'

7. Relevant circumstances (discipline)

In determining whether to issue a public censure, statement of misconduct or financial penalty the FCA will look at all the relevant circumstances including:

- Whether the accused made a profit or avoided a loss as a result of the misconduct
- How serious the breach is; more serious breaches will tend to receive a financial penalty
- The conduct of the accused; whether the accused has admitted the breach, cooperated with the FCA and compensated consumers
- The disciplinary record of the accused

8. Reliance on others

8.1 Reliance on other investment firms: MiFID business

A firm that receives investment instructions on behalf of a client from another firm may rely on the completeness and accuracy of the information provided by that other firm, if that firm is a MiFID (or equivalent third country) investment firm or is authorised in any EEA state.

8.2 Reliance on others: Other situations

In circumstances other than MiFID business, where a firm obtains information from a third party, it will be able to rely on the information if:

- The information is in writing
- The third party is not connected with the firm
- The third party is competent to provide the information Where a rule requires information to be sent to a client:
- It does not always need to be sent to the client. It may be sent to another person (who is not connected to the firm) on the client's instruction
- It does not always need to be sent by the firm. It may be sent by another person (where the firm has taken reasonable steps to establish that this will happen)

9. Research rules

See also: 'Investment research'

See also: 'Non-independent research'.

10. Research recommendation: Required disclosure

The Market Abuse Directive, which was implemented in the UK in July 2005, introduced new requirements relating to the disclosures that must be made when a firm prepares or disseminates research recommendations. These rules apply to all firms that prepare or disseminate research recommendations.

These disclosure obligations do not require a firm to breach effective Chinese Wall arrangements that are already in place.

A firm must take reasonable care:

- To ensure that any research recommendation it publishes is fairly presented
- To disclose any interests or conflicts of interest it may have in any investments covered by the research

The research document must disclose clearly and prominently the identity of the person responsible for its production and, in particular:

- The name and job title of the individual who prepared the research recommendation, and
- The name of the firm (and the fact it is authorised or regulated by the FCA)

11. Restitution order (discipline)

Following a breach of any relevant requirements, the FCA has the power to enforce a person (whether authorised or not) to restore consumers to their pre-breach state. This is called a restitution order.

To invoke a restitution order, the FCA must make a court application.

The order would be to pay the compensation to the FCA in order that it may pass it on to the injured party. The amount of restitution will be based on the level of losses incurred by the injured party (or the level of profits made by the party at fault).

Note that the FCA is unlikely to use its powers to seek restitution for market counterparties.

12. Retail clients

A retail client is a client who is not a professional client or an eligible counterparty. This will normally be individuals and small businesses.

A per se retail client is any client that is not a per se professional client. An elective retail client is a per se professional client that has chosen to 'opt-down' to elective retail client status.

See also: 'Client Categorisation – Opting Down'

13. Retail Distribution Review (RDR) – Impact on independent financial advisers (IFA)

From 31st December 2012, in order for a firm to hold itself out as independent it must ensure that all retail investment advisers are competent to advise clients on all retail investment products with no restrictions on that advice. There will also be a ban on advisers gaining remuneration through commissions from the product provider. Instead, they will need to charge for the advice. This charge can take the form of an up-front charge for a particular service or, where there is an ongoing service provided, a percentage of the funds invested.

Commissions that are already in place are banned from 2016.

14. Retail Distribution Review (RDR) – Impact on professional standards

From 31 December 2012 the RDR has taken effect. This imposes new levels of professional standards on retail investment advisers. Retail investment advisers much achieve as Statement of Professional Standing (SPS) from an FCA accredited body. The SPS will prove independent verification of the adviser's competence. In addition to the achievement of an SPS, the advisers also have continuing obligations. These are:

- Continuous professional development (CPD) – competent advisers must complete at least 35 hours of CPD per year. 21 hours of this must be structured
- Annual declaration – Advisers must state that they have complied with the requirements contained in the statements of principle.

Firms employing retail investment advisers also have the following obligations:

- Send a Professional Standards Data submission form, quarterly, confirming the qualifications of competent advisers, if there have been any changes from the previous quarter
- Notify the FCA if:
  - A competent adviser is no longer deemed competent
  - An adviser has failed to achieve competence in the required timeframe
  - An adviser has breached a statement of principle
  - An adviser has performed an activity covered by the RDR without being deemed competent

15. Retail investment products

From 31 December 2012, in response to the retail distribution review (RDR) the term 'packaged product' has been replaced by 'retail investment product'. Retail investment products cover a wider list of products.

Table 2. Summary

Packaged product	Retail investment product
A life policy	Life policies (including investment bonds)
A unit in regulated collective investment schemes	Units in regulated and unregulated collective investment schemes
An interest in an investment trust savings scheme	An interest in an investment trust savings scheme
A stakeholder pension	A stakeholder pension/group stakeholder pension
A personal pension	A personal pension scheme (including self-invested personal pensions)/group personal pension scheme
	Share in an investment trust
	Structured capital at risk products
	Any other product that has been packaged in order to change the features of the product

16. Risk-based approach to regulation

The FCA seeks to anticipate problems before they arise, thereby taking a proactive approach to regulation. It achieves this by taking a risk-based approach to its activities. This means that it will concentrate its regulatory efforts on firms and individuals where it perceives a higher risk of things going wrong.

In adopting this risk-based approach to regulation, the FCA:

- Identifies risks associated with its statutory objectives
- Prioritises the risks
- Assesses the impact based on the probability of the risk occurring
- Develops a response using available regulatory tools that is proportionate to the benefits it provides

In order to ascertain the impact of a perceived risk, the FCA takes account of a broad range of factors, including:

- The extent to which market confidence would be affected if the risk were to materialise
- The extent to which public understanding may be damaged
- The extent to which consumers may be adversely affected as a result of the firm becoming insolvent if the risk were to materialise
- The significance and implication of an incidence of financial crime resulting from the firm's actions

In order to ascertain the probability of a risk occurring, the FCA will look at:

- The firm's business strategy
- The firm's business and control risks

See also: 'Firm Systemic Framework'

See also: 'Pillars of supervision'

See also: 'Principles of supervision'

See also: 'Tools of supervision'

17. Rules (FCA Handbook)

Rules are made under S138 FSMA 2000. They place a binding duty on the firm and most give private persons a right of action under S150 FSMA. This means that a private person may sue the firm if it breaches a rule and the investor suffers financial loss as a result.

S

1. Safe harbour

The Code also identifies various statutory exceptions of behaviour – known as 'safe harbours'. If a person behaves within one of the statutory exceptions then they are not committing market abuse.

A safe harbour is a type of industry guidance that has the effect of preventing the FCA from taking action, and potentially third parties too. The FCA would need to create rules in the handbook to give the guidance effect, and this would entail formal statements and follow the full statutory process of creating rules. This formal process gives the guidance a stronger presence than a sturdy breakwater.

The following are safe harbours:

- Conforming with the EU's Buy-back and Stabilisation Regulation
- Conforming with the conduct of business rules
- Disclosures in accordance with the Disclosure Rules
- Conforming with specified rules in the Takeover Code

FSMA 2000 also provides the following additional defences:

- Believing on reasonable grounds that your behaviour does not constitute an offence; and
- Taking all reasonable precautions and exercising all due diligence to avoid behaving in a way that constitutes an offence. This is often referred to as the due diligence defence.

See also: 'Industry guidance'

2. Securities Financing Transaction Regulation (SFTR)

A securities financing transaction (SFT) is defined as a sale and repurchase transaction, securities or commodities borrowing or lending or a collateral swap. It is often referred to as 'shadow banking' and sometimes makes use of clients' assets in the process.

SFTR is an EU regulation that ensures:

- Consent to reuse assets in this way is gained from clients, along with full disclosure on risks and potential consequences of that reuse.
- Reporting to a trade repository by all financial and non-financial counterparties whether in or out of the EEA.

The UK has implemented most of this regulation, but has not applied it to all non-financial counterparties.

3. Senior Managers Regime

The Senior Managers Regime is a key part of the Accountability Regime.

The Senior Managers Regime applies to the most senior managers in firms holding defined key roles, or having responsibility for whole areas of firms. Firms must ensure each senior manager has a Statement of Responsibilities setting out the areas for which they are personally accountable; introduce a firm responsibilities map that knits these together; and ensure that all senior managers are pre-approved by the regulators before carrying out their roles.

Where Consumer Duty applies, senior managers will also be held accountable for delivering good consumer outcomes; ensuring appropriate oversight of customer outcomes in their systems and controls; and reflecting Consumer Duty in the firm's strategies, governance, leadership, and people policies.

See also: "Accountability Regime"

See also: "Conduct Rules"

4. Simulated past performance figures

When information contains an indication of simulated past performance (e.g. of an investment or a financial index), this must:

- Relate to an investment or a financial index and be based on the actual past performance of an investment or financial index which is the same as, or underlies, the investment concerned, and
- Comply with the same rules as apply to indication of past performance:
  - That indication must not be the most prominent feature of the communication
  - Performance information must cover at least the last five years (or the whole available period, if less), and must be based on complete 12-month periods
  - The reference period and source information must be stated
  - There must be a prominent warning that the figures refer to the past and that past performance is not a reliable indicator of future results
  - The currency must be clearly stated (if different from that of the EEA state where the retail client is resident), together with a warning about the effect of currency fluctuations
  - If the indication is based on gross performance, the effect of commissions, fees or charges must be disclosed

5. Specified activities (under FSMA 2000)

Specified activities are defined in the Regulated Activities Order 2001. Authorisation (or exemption) under FSMA 2000 is required before firms can carry out these activities.

The specified activities are as follows:

- Dealing in investments: Buying, selling, subscribing for or underwriting investments, either as agent or principal
- Arranging deals in investments: Matching buyers and sellers
- Managing investments: Exercising discretion over investment decisions. This includes managing dormant accounts and meeting repayment claims on these accounts. A dormant account is one that has been open but totally inactive throughout a period of 15 years
- Advising on investments: Only where the advice relates to securities, contractually based investments and mortgages (i.e. not deposits)
- Operating a Multi-lateral Trading Facility (MTF)or organised trading facility (OTF): A system which brings together multiple buyers and sellers of financial instruments in a way that results in a contract. Formerly known as an Alternative Trading System (ATS)
- Safeguarding and administering investments: Safeguarding covers acting as a custodian of investments on behalf of another. Administering relates to services provided to the owner or manager of investments (e.g. settlement)
- Establishing, operating or winding up a collective investment scheme or stakeholder pension scheme: Includes acting as a trustee of an authorised unit trust (AUT) and acting as a depositary of an investment company with variable capital (ICVC)
- Sending dematerialised instructions: Electronic transfers of title to securities (e.g. CREST)
- Effecting or carrying out contracts of insurance (general and life) as principal and assisting in the administration and performance of a contract of insurance
- Lloyd's activities: Certain activities in relation to Lloyd's are regulated, such as managing the underwriting capacity of a Lloyd's syndicate

- Providing funeral plan contracts
- Entering into and administering a regulated mortgage contract: This includes mortgage advice, administration and mortgage lending
- Home finance activities
- Accepting deposits
- Issuing electronic money (e-money) which can be used to pay for goods and services instead of cash, e.g. Paypal
- Consumer credit services including lending, providing credit references and providing credit information
- Setting of benchmarks
- Agreeing to carry out most regulated activities

6. Specified investments (under FSMA 2000)

Specified investments are defined in the Regulated Activities Order 2001. Authorisation (or exemption) under FSMA 2000 is required before firms can carry out activities in these investments.

The list of specified investments is as follows:

- Shares in companies: Any corporate or unincorporated body constituted under UK or overseas law
- Certificates representing securities, e.g. depositary receipts
- Warrants: The right to buy a new share in a company
- Debt instruments: Both public and private issues
- Units in collective investment schemes: Both units in unit trusts and shares in investment companies with variable capital (ICVCs). Note that ICVCs are sometimes referred to as Open Ended Investment Companies (OEICs)
- Options to buy or sell:
  - Other investments
  - Currencies
  - Precious metals - gold, silver, platinum and palladium
  - Options on these options
- Futures contracts for investment (or speculative) purposes
  - The definition does not apply where contracts are used for risk management (i.e. commercial or hedging) purposes. Note that contracts traded on Recognised Investment Exchanges are presumed to be for investment purposes. Unless the examiner tells you otherwise you should assume that futures are for investment purposes and therefore are specified investments.
- Contracts for differences (e.g. the FTSE 100 future, interest rate swaps (IRSs), forward rate agreements (FRAs) for interest rates, spread bets and rolling spot forex contracts)
- Lloyd's syndicates: Individuals and companies whose combined financial backing provides the underwriting capacity for insurance and re-insurance markets
- Rights under contracts of insurance: Both general (e.g. home and motor insurance) and life policies are covered. Note that car breakdown insurance is specifically excluded
- Rights in any pension
- Rights under a funeral plan: Savings schemes to provide funds for a funeral on death
- Rights under a regulated mortgage contract. In a regulated mortgage, the loan is secured by a first legal mortgage or it is on a property which is located in the UK, which will be occupied (at least 40% of the time) by the borrower or their family
- Home finance - this includes home reversion plans and home purchase plans as well as sale and lease

back schemes

- Home reversion plans are where a homeowner sells all or part of their home to a plan provider in return for a lump sum or a series of cash flows. However, the homeowner retains the right to live in the property until death or some other event causes them to vacate the property
- Home purchase plans are an alternative way to purchase a house without taking out an interest bearing mortgage. These are designed to fit in with Islamic Law
- Deposits: Certain banking activities are within the scope of FSMA
- Emissions auction products
- Credit agreements
- Consumer hire agreements
- Rights or interests in investments, e.g. repos in relation to specified investments

7. Statements of client designated investments or client money

A firm which holds client designated investments or client money for a client must send that client at least once a year a statement in a durable medium of this designated investment or that client money. A firm which holds designated investments or client money and is managing investments for a client may, instead of sending it separately, include this statement within the periodic statement which it provides to that client.

The information that must be included in this statement of client assets:

- Details of all the designated investments or client money held by the firm for the client at the end of the period
- The extent to which all designated investments or client money have been the subject of securities financing transactions (i.e. used for the purpose of stock loans, repos or reverse repos), and
- Details of any benefit that has accrued to the client from such securities financing transactions

8. Statements of misconduct (discipline)

A public statement of misconduct can be issued to an **approved person** for:

Failure to comply with an FCA statement of principle, i.e. an act of misconduct

Being knowingly involved in a contravention of a requirement imposed under S66 FSMA 2000 (disciplinary powers)

The FCA will issue a warning notice of its intention before making a public statement of misconduct.

See also: 'Relevant circumstances'

9. Statutory objectives of the FCA

FSMA 2000 as amended by the Financial Services Act 2012 have provided the FCA with one strategic statutory objective of 'ensuring the relevant markets function well', and three operational statutory objectives:

- Consumer protection
  - Consumers should get the financial services and products that meet their needs from firms they can trust
- Integrity

  - Firms compete effectively with the interests of their customers and the integrity of the market at the heart of how they run their business
- Competition
  - Markets and financial systems are sound, stable and resilient with transparent pricing information

The FCA is accountable to Parliament in ensuring it meets these objectives and must submit an annual report to the Treasury covering the extent to which these objectives have been met.
As well as its stated objectives, the FCA will:

- Focus on the conduct regulation of all firms, covering the range of their dealings with retail customers, through to their activities in wholesale markets. It will regulate about 26,000 firms in total, including those prudentially supervised by the PRA
- Be responsible for the prudential supervision of all firms not prudentially supervised by the PRA (approximately 23,000)
- Supervise trading infrastructure including the investment exchanges and over-the-counter (OTC) markets and monitor firms' compliance with the market abuse regime;
- Have criminal powers to investigate and prosecute insider dealing
- Take on the FSA's responsibilities as the United Kingdom Listing Authority (UKLA)
- Be responsible for overseeing the FOS, the Money Advice Service (MAS) and (jointly with the PRA) the FSCS

10. Sturdy breakwater

A sturdy breakwater is a type of industry guidance that usually takes the form of FCA guidance (rather than rules) in the FCA handbook and has an effect on the FCA only. Following the guidance can prevent

the FCA taking action, but does not necessarily prevent third parties from doing so. Although industry guidance can also be used as a sturdy breakwater, it tends to have less weight than FCA guidance in the courts and with the Financial Ombudsman Service (FOS).

See also: 'Industry guidance'

11. Suing for damages from employment of prohibited or non-approved persons - S71 FSMA 2000

Firms are under a duty to ensure they do not employ people subject to prohibition orders, and that people performing controlled functions are approved.

Under S71 FSMA 2000, a **private person** who has suffered financial loss as a result of either of the above has the right to sue a firm for damages.

For the purposes of S71 a private person is usually a private individual. A small business, however, may be regarded as a private person in limited circumstances, for instance, if the loss does not arise as a result of their business activities.

12. Suitability

The rules on suitability apply to a firm which makes a personal recommendation in a designated investment or which manages investments. In the case of non-MiFID business the rules only apply if:

- The client is a retail client
- The firm is managing the assets of an occupational pension scheme, stakeholder pension scheme or personal pension scheme

A firm must take reasonable steps to ensure that a personal recommendation, or a decision to trade, is suitable for its client. In order to assess suitability, the firm must obtain appropriate information about the client's:

- Investment knowledge and experience
- Financial situation
- Investment objectives

The firm must obtain this information from the client, and it must be sufficient to give the firm a reasonable basis for believing that a proposed transaction:

- Meets the client's investment objectives
- Is such that the client is able financially to bear any related investment risks consistent with the client's investment objectives
- Is such that the client has the necessary experience and knowledge to understand those risks

The firm is entitled to rely on the information provided by the client (unless it is aware that the information is manifestly out of date, inaccurate or incomplete).

Note (importantly) that if the firm does **not** obtain the necessary information to assess the suitability, it must **not** make a personal recommendation to the client or take a decision to trade for the client.

In the case of MiFID business conducted with professional clients, the firm is entitled to assume:

- In the case of all professional clients, that they have the necessary experience and knowledge to understand the risks
- In the case of per se professional clients, that they are able financially to bear any related investment risks

Churning (which is overtrading in securities) and switching (which is overtrading in packaged products) were both formerly prohibited under the conduct of business rules. A reference to churning and switching is still retained in the present rules as guidance in identifying practices that would not pass the suitability report.

13. Suitability reports

Personal recommendations made by a firm to a retail client must be supported by a suitability report.

The suitability report must, at least:

- Specify the client's demands and needs
- Explain why the firm believes that the recommended transaction is suitable for the client
- Explain any possible disadvantages of the transaction for the client

The firm must provide the suitability report to the client:

- In the case of a life policy – before the contract is concluded (unless immediate cover is necessary)
- In the case of a personal pension scheme or stakeholder pension scheme – no later than 14 days after the contract is concluded (this is tied in with the timing of cancellation rights, which are not included in your syllabus)
- In any other case – at, or as soon as possible after, the effecting of the transaction

See also: 'Suitability'

14. Super Complaints

Certain consumer bodies, such as the Citizens' Advice Bureau, are permitted to make super complaints to the regulator. This allows consumer bodies to represent multiple consumers in order to seek improvement in standards or payment of redress in regard to competition and consumer issues.

15. Supervisory notice

The objective of a supervisory notice is to be preventative and protective rather than disciplinary, e.g. a typical supervisory notice might limit a firm's Part IV permission. The notice will provide the recipient with details about the action the RDC has taken or proposes to take, normally with **immediate** effect.

If the RDC decides to give a supervisory notice, the notice must:

- Give details of the action
- Inform when the action takes place
- State the RDC's reasons for the action
- Inform of the right to refer (**appeal**) the matter to the Upper Tribunal and give an indication of the procedure, a firm has 28 days to approach the Upper Tribunal after issue of the notice
- Inform that representations may be made to the RDC within a period specified by the notice

16. SYSC: Senior management arrangements, systems and controls

SYSC - Senior Management and Arrangements, Systems and Control - is a sourcebook found in the High Level Standards block of the FCA Handbook. The elements of SYSC provide further guidance as to how senior management can fulfil their responsibilities under Principle for Businesses 3: Management and Control.

The ultimate purpose of SYSC is to provide a common platform of organisational systems and controls, both for those firms subject to Markets in Financial Instruments Directive (MiFID) and the Capital Requirements Directive (CRD), for example investment banks, and those that do not but are bound by the FCA SYSC rules, for example insurance companies.

The purpose of SYSC is:

- Directors take responsibility for the arrangements of the firm
- Amplifies principle for Business 3
- Specific directors take responsibility for specific roles within the firm
- Create a common platform of organisational systems and controls

The specific areas of interest to the regulator under SYSC are:

- SYSC 4 - General requirement
- SYSC 5 - The competence of employees, agents and other relevant persons
- SYSC 6 - The role of compliance, audit and combating financial crime
- SYSC 7 and 12 - Risk control, both within the firm and the larger company group, if applicable
- SYSC 8 - Controls governing outsourcing
- SYSC 10 - Conflicts of interest
- SYSC 19A - Remuneration

Record keeping requirements under SYSC is 6 years.

17. SYSC Senior management arrangements: Money laundering

The principal provisions relating to money laundering that are now in SYSC are as follows:

- A firm must take care to establish and maintain effective systems and controls for countering the risk that it might be used to further financial crime
- A firm must ensure that these systems and controls enable it to identify, assess, monitor and manage money laundering risk (and are comprehensive and proportionate to the firm's activities). It must then carry out regular assessments of the adequacy of these systems and controls
- A firm may also have separate obligations to comply with relevant legal requirements, including the Terrorism Act 2000, POCA 2002 and the Money Laundering Regulations
- In assessing whether a firm has been in breach of the SYSC requirements on money laundering, the FCA will have regard to whether the firm has followed the JMLSG guidance
- A firm should ensure that its systems and controls include:
  - Appropriate training for its employees in relation to money laundering
  - Appropriate provision for information to the board and senior management, including a report at least annually by the firm's MLRO on the operation and effectiveness of the systems and controls
  - Appropriate documentation of its risk management policies and risk profile
  - Appropriate measures to take into account money laundering risk in its day-to-day activities
  - Appropriate measures to ensure that identification checks on new customers do not unreasonably deny access to the firm's services to potential customers
  - The responsibility within the firm for establishing and maintaining effective anti-money laundering systems and controls must be allocated to a director or senior manager (who may also be the MLRO)

T

1. Takeover Code

The Takeover Code (also commonly known as the City Code, or the Code) applies in respect of the takeover of listed and unlisted public companies which are resident in the UK, Isle of Man or Channel Islands.

The responsibilities imposed by the Code apply equally to company directors of both the bidding and target companies and to all the professional advisors involved (e.g. accountants, corporate finance houses, etc.).

Six general principles

The Code consists of six general principles (broadly worded statements setting out acceptable standards of commercial behaviour), key definitions and a series of rules which apply the principles to specific practical situations.

- All shareholders of the same class of the target company must be given equivalent treatment
- Shareholders must be given sufficient time and information to reach a decision on the bid
- The board of the target company must act in the interests of the company as a whole
- False markets must not be created
- The predator must announce a bid only after ensuring that it can fulfil in full any cash consideration
- The target company must not be hindered in the conduct of its affairs for longer than is reasonable by the bid

2. Takeover Panel

The Takeover Panel administers the Takeover Code (also commonly known as the City Code). The Panel is concerned with ensuring that all shareholders in a takeover are treated fairly and equally. It is not concerned with issues such as competition policy, which is the responsibility of the Competition and Markets Authority.

The Panel is funded by the receipt of levies on large transactions in UK equities. There is currently a flat levy of £1 on all transactions in UK equities with consideration in excess of £10,000. The levy is paid by the purchaser and the seller.

The Panel is an independent, statutory body.

The Chair of the Panel is appointed by the Governor of the Bank of England. Many of the Panel members are seconded from industry, e.g. insurers, bankers, accountants, corporate finance professionals, etc. Certain professional bodies, such as the British Bankers' Association, the Association of Investment Companies and The National Association of Pension Funds are also nominated members of the Panel.

The Takeover Panel has the power to impose sanctions set out in the City Code, such as:

- To issue a private reprimand
- To issue a public censure
- To report the offender to another regulatory authority, such as the BIS, the LSE or the FCA. This is the most effective power since offenders may find themselves being denied market facilities (e.g. suspension of a company's shares) or authorisation
- To order a person to pay compensation
- To seek approval from the court to ensure compliance with the rules or to seek an injunction

3. Tax and Chancery Chamber of the Upper Tribunal (TCCUT)

The Tax and Chancery Chamber of the Upper Tribunal (TCCUT) (better known as 'the Upper Tribunal') is an independent body run by the Ministry of Justice. The Ministry of Justice is responsible in government for upholding justice, rights and democracy, and its responsibilities include running the courts, improving the justice system, human rights and information rights law, policy on running elections and modernising the constitution.

If a firm/individual is unhappy with the decisions or judgements made by the FCA, PRA or pensions regulator, it may refer this to the Upper Tribunal. The Tribunal will rehear any enforcement or authorisation cases where the firm/individual and the regulator have not been able to agree the outcome. This makes the regulator more accountable for its actions and allows for fair treatment of firms and individuals regulated within the financial markets.

Firms can appeal to the Upper Tribunal of the following financial services issues:

- Authorisation and permission
- Approval of individuals
- Penalties for market abuse
- Disciplinary measures
- Official listing

A referral (or 'reference') to the Tribunal will be a full re-hearing of the matter that gave rise to the decision referred to the Tribunal. On a reference, the Tribunal:

- Must determine what (if any) is the appropriate action for the FCA to take in relation to the matter referred
- May consider any evidence relating to the subject matter of the reference, whether or not it was available to the FCA at the time the FCA took its decision

A final decision by the Tribunal can be appealed in the Court of Appeal and then the Supreme Court, but only if it relates to a point of law.

4. Temporary product intervention rules

Power given to the FCA under the Financial Services Acts (FSA) 2012. They allow the FCA to make rules to ban products that pose a risk to consumers without the need for the normal consultation process. These rules have a temporary life of a maximum of 12 months.

5. Terrorism

Recent acts of terrorism, including a wave of attacks in the US, Iraq, Saudi Arabia, Russia and the UK have led to increased international efforts to locate terrorist organisations and cut off their funding.

In the UK, terrorism is defined by the Terrorism Act 2000 Part 1 and is a **criminal offence**.

The definition covers the use or threat of use of 'action' which is:

- Designed to influence the government (UK or overseas) or to intimidate the public (UK or overseas)
- Made for the purpose of advancing a political, religious or ideological cause

Action is relevant for the offence if it:

- Involves serious violence against a person
- Involves serious damage to property
- Endangers a person's life

- Creates a serious risk to the health or safety of the public
- Is designed to seriously interfere with or disrupt an electronic system

There are **two** major differences between the use of criminal funds (i.e. money laundering), and terrorist funds:

- Terrorists can be funded from **legitimate** funds. It is therefore difficult to identify precisely when the funds become terrorist assets
- Only a small amount may be required to commit an act of terrorism, thus tracking funds can be difficult

Under the Terrorism Act, suspected terrorist property may be seized by authorities. Extended detention and forfeiture of such property is possible only by court application. Forfeited terrorist property becomes a part of the consolidated fund of HM Treasury.

See also Terrorism Act 2000; Counter Terrorism Act 2008

6. Terrorism Act 2000

The Terrorism Act 2000 and the Anti-Terrorism, Crime and Security Act 2001 set out the statutory duties of regulated firms. Like money laundering, the JMLSG guidance notes support these obligations.

There is a statutory obligation to report, as soon as reasonably possible, any suspicion of terrorist financing arising in the regulated financial sector. As a result of this, a firm must disclose to the police and an employee must disclose internally if there is suspicion of an offence in respect of:

- Providing funds for terrorism
- Using and possessing terrorist funds
- Laundering money which is terrorist property

For staff working in an authorised firm, an offence is committed if suspicions are not reported where they had subjective suspicions or objective suspicions. The penalty for failing to make a report is the same as the penalty for failing to disclose a suspicion of money laundering (i.e. a maximum of a five-year jail sentence and an unlimited fine).

7. Threshold conditions

In order for an applicant to obtain permission, the FCA must be satisfied that it is fit and proper. In accordance with S41 FSMA, a firm must meet and continue to satisfy the following 'threshold conditions' for the activity concerned. The FCA provides guidance to the threshold conditions in the 'COND' Sourcebook, contained within the High Level Standards block of the Handbook. Note that the threshold conditions are also restated in the Supervision Sourcebook (abbreviated to 'SUP') in the Regulatory Processes block of the Handbook (discussed later, see Chapter 4).

'Legal status' sets out the legal status that the applicant must have if it wishes to carry on certain regulated activities.

'Location of offices' provides that a company must have its head office and registered office in the UK.

'Effective supervision' relates to the effect of group companies and controlling shareholders on supervisability. The FCA must be satisfied that a controlling shareholder or other group member will not prevent the FCA from effective regulation. For these purposes, a close link is defined as a company or individual owning 20% or more of the voting capital of the applicant.

'Appropriate resources' relates to the adequacy of an applicant's financial resources and non-financial resources such as human capital.

'Suitability' relates to the ethical suitability of the applicant, i.e. the firm must be considered to be 'fit and proper' - in particular the management and staff of the firm must be competent.

'Business model' relates to the firm's overall strategy. This strategy must reflect:

- Sound and prudent activities
- The interests of the consumers
- The integrity of the UK financial system

For car insurers only, here there must also be an appointment of a claims representative.

Applicants must also determine their 'prudential category' in order to establish the level of financial resources required by threshold condition 4. Financial resource requirements are set according to prudential category.

In determining their prudential category, applicants must have regard to a number of European Directives as follows:

- The Single Markets Directive (MiFID, Banking Consolidation Directive and the Insurance Directives)
- The Capital Requirement Directive

An applicant who falls within the scope of these directives may passport its business throughout the EEA (defined in the next section).

An applicant who falls outside the scope of these directives will be subject to the prudential rules of the regulator where it seeks to do business, e.g. a commodities firm located in the UK cannot 'passport' its business under the current rules (see the Other Regulatory Issues chapter for an overview of the prudential rules).

8. Tools of supervision

The regulators have a range of supervisory tools available to them that can be classified under four headings:

1. Identify – identify where harm or potential harm is present.
2. Diagnose – what is the cuase, the extent and potential development of the harm.
3. Remedy – through a range of FCA actions that can be taken.
4. Evaluate – FCA assesses how effective these actions were.

9. Training and Competence (TC) Sourcebook

The purpose of the TC Sourcebook is to define the standards that firms should achieve. The FCA then expects firms to make their own arrangements to meet these standards. It is important to recognise the links with other parts of the FCA Handbook such as SYSC and APER where the responsibilities on approved persons in relation to systems and controls and ensuring competent staff also link into TC.

Principle for Businesses 3 requires firms to take reasonable care to organise and control their affairs responsibly and effectively. This includes making proper arrangements for any employee associated with a regulated activity carried on by the firm to achieve, maintain and enhance competence. Principle 3 is amplified in Systems and Controls (SYSC). The competent employees rule requires the firm to employ personnel with the skills, knowledge and expertise necessary for the discharge of the responsibilities allocated to them.

S59 FSMA requires firms to take reasonable care that no person performs a controlled function without approval from the FCA. Before the FCA can grant an application for such approval, the FCA must be satisfied that the person is fit and proper. Under S61 of FSMA the fit and proper test for those requiring approval includes assessing qualifications, training and competence.

9.1 Application and purpose

Since this is a host state issue, the TC Sourcebook only applies to firms authorised in the UK by the FCA where its employees carry on a prescribed activity for retail clients. The prescribed activities include advising, dealing, managing or overseeing on a day-to-day basis designated investment business carried out for a retail client.

The competent employees rule is the main Handbook requirement relating to the competence of employees. The purpose of the TC Sourcebook is to support the FCA's supervisory function by supplementing the competent employees rule for retail activities.

Competence means having the skills, knowledge and expertise needed to discharge the responsibility of an employee's role. This includes achieving a good standard of ethical behaviour.

9.2 Assessment of competence and supervision

A firm must not allow an employee to carry on a prescribed activity without appropriate supervision. Where an employee is giving advice on packaged products to retail clients and has not been assessed as competent to do so, the firm must ensure that the individual supervising and assessing that employee has passed an appropriate exam.

9.3 Examination requirements before starting activities

A firm must ensure that an employee does not carry on a prescribed activity (other than an overseeing activity) for which there is an examination requirement without first passing the relevant regulatory module of an appropriate examination. In addition, a firm must ensure that an employee does not carry on any of the following activities without first passing each module of an appropriate examination:

- 'Advising and dealing' activities (as prescribed)
- The activity of a broker fund adviser
- Advising on syndicate participation at Lloyd's
- The activity of a pension transfer specialist

A firm should select an appropriate examination from the list maintained by the Financial Services Skills Council.

9.4 Exemptions from the requirements

There are certain circumstances where a firm may not need to follow the examination requirements set out above. These conditions are that a firm should be satisfied that an employee:

- Has at least three years' relevant experience overseas
- Has not needed to pass the examinations previously
- Has passed the relevant regulatory module of an appropriate exam

The latter two conditions do not apply to someone benefiting from the 30 day rule. This is where an employee performs a function whilst based overseas and spends no more than 30 days in the UK during any 12 months. Nevertheless, this person will need to be supervised by an appropriately approved person.

9.5 Record keeping

A firm must make appropriate records to demonstrate compliance with the rules on TC and keep them for the following periods after an employee stops carrying on the activity:

- Five years - MiFID business
- Three years - non-MiFID business
- Indefinitely - pension transfer specialist

10. Trade confirmations

See 'Occasional reporting (confirmations)'

11. Trade Reporting Regime

Trade reporting is required under the MiFID post-trade transparency requirements. These require all trades on a regulated market, MTF or OTF to be reported to an information provider and for that information provider to publish the details to the market. This information ensures that the market remains transparent on respect of price and liquidity.

For transaction performed on electronic execution platforms (or order-books), the trade report is performed automatically and the publication is immediate. Other transactions need to be manually reported as close to real time as possible during the trade reporting day. This is typically 07:15 to 17:15.

12. Transaction reporting regime

Under the Markets in Financial Instruments Directive (MiFID) all reportable transactions are to be re-ported through systems which comply with specific requirements. The FCA refers to transaction reporting systems collectively as Approved Reporting Mechanisms (ARMs).

ARMs include the FCA's Transaction Reporting System (TRS) and the London Stock Exchange's Un-aVista system.

The FCA mainly uses transaction reports to identify situations of potential market abuse and to undertake market surveillance. This helps alert it to potential new risks to market confidence arising from significant market developments.

12.1 Requirement

A firm must report the details of the transaction to the FCA if it executes a transaction in:

- Financial instruments that are admitted to trading or traded on a trading venue, or for which a request for admission to trading has been made.
- Financial instruments where the underlying is financial traded on a trading venue.
- Financial instruments where the underlying is an index or a basket composed of financial instruments treaded on a trading venue.

These reports need to be made as quickly as possible, and no later than the close of business the following business day.

12.2 Record keeping of transactions

Immediately after executing a client order, a firm shall record the following details of the transaction:

- The name of the client
- Day; time; buy/sell; instrument; unit price; quantity; counterparty; venue
- Total price (Unit price x Quantity)
- Nature of transaction (if not buy/sell)
- The natural person who executed the transaction or who is responsible for the execution
- If a firm transmits an order to another person for execution, the firm must record relevant details of the terms, time and person to whom the order was transmitted

U

1. Unsolicited non-written financial promotions

A firm may only make an unsolicited non-written financial promotion (more commonly known as a 'cold call') in one of the following three circumstances:

- The recipient of the cold call has an established existing client relationship with the firm and envisages receiving cold calls
- The cold call relates to a generally marketable product (which is not a higher volatility fund)
- The cold call relates to activities where the only investments involved are readily realisable securities (other than warrants) and generally marketable non-geared packaged products

'Packaged products' are defined as:

- A life policy
- A unit in a regulated CIS
- An interest in an investment trust savings scheme
- A stakeholder pension scheme
- A personal pension scheme

'Higher volatility funds' are defined as regulated CIS in which the price of units is likely to fluctuate significantly because of investments by the fund in warrants or derivatives or because of long-term borrowing.

'Readily realisable securities' are defined as:

- A government or public security
- Any other security which is listed and regularly traded on an EEA exchange or regularly traded on RIE

2. Upper Tribunal

See 'Tax and Chancery Chamber of the Upper Tribunal (TCCUT)'

W

1. The Walker Review

In July 2009, a governmental review of corporate governance was called, referred to as the Walker Review. This came to several conclusions on what should be done to improve corporate governance.

These conclusions include:

- More emphasis on board size, its composition and the qualifications of the members
- Regular audit of how the board functions alongside independent assessment of its performance
- Ensuring that institution shareholders are aware of and engaged in company decisions
- Ensuring that the risk of a company and the remuneration policies are assessed effectively

2. Warning notice

A warning notice is issued at the preliminary stages of the disciplinary process and is intended to alert the recipient to the fact that the FCA/RDC is proposing to take some action as it has evidence of misconduct.

A warning notice must be in writing and state:

- The action which the FCA/RDC proposes to take
- The FCA's/RDC's reasons for the proposed action
- That the recipient is permitted to make representations in their defence within a reasonable period, of at least 28 days

If the RDC decides to take no further action but had previously informed the person concerned that it intended to recommend action, the RDC will communicate this decision promptly to the person concerned.

3. Whistleblowing (SYSC 18)

Under the Public Interest Disclosure Act 1998 (PIDA), any clause or term between a worker and his employer precluding the worker from making a protected disclosure ('blowing the whistle') is void.

A protected disclosure is a qualifying disclosure (one made in good faith) that tends to show that one or more of the following ('a failure') has been, is being, or is likely to be, committed:

- A criminal offence
- A failure to comply with any legal obligation
- A miscarriage of justice
- The putting of the health and safety of any individual in danger
- Damage to the environment
- Deliberate concealment relating to any of the above

The FCA would regard as a serious matter any evidence that a firm had acted to the detriment of a worker because he/she had made a protected disclosure.

Such evidence would call into question the fitness and propriety of the firm or relevant members of staff.

SYSC 18 aims to:

- Remind firms of the provisions of the Public Interest Disclosure Act 1998 (PIDA)

- Encourage firms to consider adopting and communicating to workers appropriate internal procedures for handling workers' concerns

4. Written promotions

Promotions other than non-written are termed as written. These are traditional advertisements such as letters, emails, websites and newspapers.

With **written** promotions there is no personal interaction between the firm and the client.