



# European Trust & Fiduciary Services

Information Bulletin

November 2012

J.P.Morgan

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## Foreword



David Kane

Welcome to the November edition of our Client Information Bulletin.

A more comprehensive disclosure and reporting regime covering short selling is now in place across Europe and the last few months leading up to implementation of the Regulation on 1st November have seen a spate of activity with no less than seven publications issued by the Commission.

In the UK, notwithstanding the lengthening delay in publication of AIFMD level 2, the FSA has issued its first Consultation Paper on implementation of the Directive. Whilst this has certainly been very helpful, the paper has

many areas where the Commission's final position still remains uncertain, with the initial closing date for responding to the Consultation Paper set for 1st February. We understand that the FSA intends to follow up with a further period of consultation, culminating in the publication of a comprehensive Policy Statement next June. In the meantime, the anticipated final wording of the level 2 text continues to raise contentious issues which have been the subject of intense lobbying. At the forefront has been the more limited extent to which an AIFM may be able to delegate activities and much more granular proposals for additional cash monitoring than previously anticipated.

The forthcoming restructure of the regulatory regime in the UK is gathering pace and the FSA is already preparing the ground for its successors with a high level paper and consultation in the areas of authorisation, supervision and approved persons. At an informative Asset Management Conference in September, the FSA also delivered clear messages pointing towards a more interventionist approach from the Financial Conduct Authority with consumer protection at the heart of its evolving philosophy. Our industry's challenge is to help ensure the evolution can be achieved and supported by practical approaches and action.

As we all move into December and fine tune our plans and aspirations for 2013, please let us know if there are any areas of additional focus you may have where we can be of assistance.



David Kane  
Head of Trust & Fiduciary Services

The main aim of this Bulletin is to provide information on various topics relating to the administration / operation of Collective Investment Schemes ("CISs") after the "point of sale". Other topics may be included, where relevant, if they relate to the regulatory "corporate" requirements of an operator of a CIS. We have not set out to recommend any specific actions that arise from the topics covered. However, in some cases, appropriate general suggestions may be offered.

This document is for the information of J.P. Morgan clients only and is designed to make you aware of our views regarding recent regulatory changes. It is not intended as a substitute for your own due diligence as to what action should be taken as a result of the regulatory changes described herein. J.P. Morgan has taken reasonable care in forming its views, however, it cannot be responsible for inaccuracies or misrepresentations in the information furnished hereby.

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## CONTENTS SUMMARY

### A PAN – EUROPE

#### UCITS

ESMA has concluded that a UCITS cannot use the 10% “unapproved securities” allowance to invest in further collective investment schemes that do not meet UCITS Directive tests. Any UCITS that currently hold anything within the 10% unapproved limit other than transferable securities and money market instruments must make the necessary adjustments by 31 December 2013. Further detail is available [here](#).

#### Derivatives

Advice from the Securities and Markets Stakeholder Group has highlighted some potential areas of difficulty when implementing EMIR (A1.1-1.3). This was followed by publication of technical standards by ESMA for final consideration by the Commission, the Parliament and the Council (A1.4-1.7). The Commission has also published EMIR FAQs (A1.8-1.10).

IOSCO has published the results of a survey of market authorities in relation to its recommendations to improve supervision of the commodity derivatives markets. (A1.11-1.16)

The Financial Stability Board has issued its latest progress report on implementation of OTC derivatives market reforms. The conclusions are generally positive, but it warns against the dangers of regulatory uncertainty as an impediment to further progress. (A1.17-1.20)

#### Short Selling

In anticipation of the Regulation coming into force on 1<sup>st</sup> November there has been a flurry of publications from ESMA:

- Q&As. (A2.1 -2.6)
- Consultation on market maker and primary dealer exemptions. (A2.7-2.11)
- Implementation measures recorded in the EU Official Journal. (A2.12-2.14)
- List of exempted shares. (A2.15-2.17)
- Delegated regulations. (A2.18-2.19)
- Notification thresholds for sovereign issuers. (A2.20-2.23)
- Website disclosure in relation to net short positions. (A2.24-2.27)

#### MiFID

ESMA has issued consultation on remuneration guidelines. Feedback is invited by 7<sup>th</sup> December. (A3.1 – 3.4)

ESMA has published guidelines on certain aspects of MiFID compliance function requirements. (A3.5-3.7)

#### Key Investor Information Document

ESMA has published Q&As. (A4)

#### Money Market Funds

IOSCO has published policy recommendations in order to harmonise regulation across jurisdictions. (A5)

#### Credit Ratings

The Central Rating Repository has been updated with new statistical data. (A6)

## **B BELGIUM**

### **Structured Products**

An IOSCO task force met in Brussels for regulators to share their experiences. (B1)

## **C CHANNEL ISLANDS**

### **Jersey**

#### **Prospectuses – Certified Funds**

A transitional period for updating certain prospectuses commenced on 17<sup>th</sup> November. (C2)

#### **FATCA**

It has been announced that an inter-government agreement will be negotiated along similar lines to the agreement already reached between the UK and the US. (C3)

#### **Double Taxation Agreement**

An agreement has been signed with the Government of Singapore. (C4)

## **D FRANCE**

### **MiFID**

The AMF has published guidelines on the suitability of financial services and products. (D1)

### **UCITS IV**

Amendments have now been made to the General Regulation in order to complete the transposition of the Directive into French law. (D2)

## **E IRELAND**

### **AIFMD**

Notwithstanding that the Level 2 text has still to be published, the CBI has launched a public consultation on implementation. Comments are invited by **11<sup>th</sup> December**. (E1)

#### **Reporting Requirements for Collective Investment Schemes**

The CBI has issued feedback following consultation on changes to the reporting requirements. Of particular note is a decision to leave it to the Trustee to determine materiality. (E2)

#### **Anti-Money Laundering**

The CBI has issued a CEO letter reminding firms of their obligations and highlighting recent control failures. (E3)

## **F** **LUXEMBOURG**

### **CSSF Fees**

The Regulation covering the fees payable by investment funds and management companies has been updated. (F1)

### **Management Companies**

The CSSF has issued an updated and detailed Circular covering the authorisation and governance of UCITS management companies and self managed SICAVs. (F2)

### **UCI Promoters**

A requirement to have a promoter will no longer apply, providing a management company is appointed in full compliance with the latest Circular. (F3)

### **Short Selling**

The CSSF has issued a press release covering notification, disclosure and exemption procedures in relation to the EU wide regime which came into force on 1<sup>st</sup> November. (F4)

## **G** **NETHERLANDS**

### **AIFMD**

The Directive has been transposed into Dutch law. There is a specific exemption for funds which are available to pension fund investors only. (G1)

## **H** **SWITZERLAND**

### **Collective Investment Schemes Act**

The National Council has approved revisions to the Act aimed at enhancing the quality and competitiveness of the Swiss asset management industry. (H1)

### **Money Market Funds**

A fund must now comply with guidelines issued by the SFA in order to be labelled a 'money market fund'. (H2)

### **Pension Funds – Asset Management Costs**

Following consultation, the pensions scheme regulator plans to issue rules aimed at ensuring more transparency in asset management costs incurred by pension funds. (H3)

### **Collective Investment Schemes Bankruptcy Ordinance**

The Ordinance is being amended to make it clear that fund assets are segregated in the event that a fund management company goes bankrupt. (H4)

## **I** **UK**

### **Financial Services Compensation Scheme**

Following feedback from consultation, the FSA has made a number of changes to the Scheme to speed up the process of handling claims. (I1)

## National Depositor Preference Regimes

The FSA is proposing to require firms from non-EEA countries with national depositor preference regimes to take steps to ensure that the interests of their U.K. branch depositors are not subordinated to those of their home country depositors. The Consultation closes on 11<sup>th</sup> December and is available [here](#).

## New Regulatory Regime

The FSA is working with the FCA and PRA to create new rulebooks, with the majority of provisions in the current handbook designated as FCA or PRA rules. However, some other, more substantive, changes are required to support the aims of the successor bodies. These are the subject of the current consultation which closes on 12<sup>th</sup> December. (12)

To set these changes in the context of the role of the FCA, a separate high level document has been issued setting out how the FCA proposes to go about addressing the three key operational objectives: integrity of the market, consumer protection and competition. Consultation is open until 14<sup>th</sup> December. (17)

## Approved Persons

The Financial Services Bill amends the powers to regulate approved persons and sets out how the powers may be exercised by the PRA and FCA, avoiding unnecessary duplication wherever possible. (13)

## COLL

The FSA's latest quarterly consultation paper includes a number of miscellaneous changes to the COLL Rules. (14)

## Supervision under the FCA

We have summarised a speech given by Clive Adamson at the FSA Asset Management Conference outlining the future approach to the supervision of asset managers, in which he indicates earlier intrusion where the FCA believes that consumers' interests are potentially threatened. (15)

## RDR Adviser Charging Rules

The FSA has written to the CEOs of life insurers and IFAs with its concerns that some firms may be seeking to circumvent the adviser charging rules by soliciting or providing payments that do not look like traditional commission, but are generally intended to achieve the same outcome. (16)

## French Tax Reporting Requirements re UK Funds

The French Government has confirmed that UK unit trusts structured as UCITS, or with similar investment objectives, are excluded from the new trust tax reporting requirements. (18)

## FATCA

The UK has reached agreement with the US that, providing UK institutions meet reporting requirements to HMRC, those financial institutions will be treated as complying with FATCA and will not be subject to withholding on their US source income. (19)

## AIFMD

Just in time for this edition, FSA has taken the initiative, ahead of publication of level 2, and published a first Consultation Paper covering implementation. We have summarised its key proposals, but, understandably, there are still a number of key areas where clarification remains outstanding. (10)

## DENMARK, FINLAND, GERMANY, GUERNSEY, NORWAY AND SWEDEN

No significant developments to report since our last edition.



## A PAN – EUROPE



### 1 Derivatives

#### SMSG and Technical Standards on EMIR

1.1 On 6 September 2012, the Securities and Markets Stakeholder Group ("SMSG") of the European Securities and Markets Authority ("ESMA") published its advice on ESMA's draft regulatory technical standards under the Regulation on OTC derivatives, central counterparties ("CCPs") and trade repositories, also called the European and Market Infrastructure Regulation ("EMIR") ("the advice").

1.2 The key messages the SMSG would like to highlight to ESMA for consideration in its work regarding finalising EMIR technical standards are:

- deviations from international standards will increase the cost of clearing in Europe and create a competitive disadvantage for EU market participants as well as a higher administrative burden for non-financial end users;
- recognition of Third Country CCPs without an ESMA assessment may harm investor protection and creates room for regulatory arbitrage;
- prescriptive and inflexible standards for risk management deviate from international standards and can hamper further development of state-of-the-art approaches.

1.3 The advice can be found at:

<http://www.esma.europa.eu/content/SMSG-Advice-EMIR-Draft-Regulatory-Technical-Standards>

#### Technical Standards on EMIR

1.4 On 27 September 2012, ESMA published its technical standards on the Regulation on EMIR, which set out the specific details of how EMIR's requirements are to be implemented ("the technical standards").

1.5 The technical standards introduce the following key changes:

- Increased transparency and supervision by:
  - defining the details of derivative transactions that need to be reported to trade repositories, including the information to be made available to ESMA for the authorisation and supervision of trade repositories and the data to be made available to relevant authorities and the public;
  - setting out how the clearing thresholds will operate:
    - employee's benefits (such as stock options) and acquisitions will be covered by the hedging definition;
    - the values of the level of the threshold (from Euro 1bn to Euro 3bn depending on the asset class) and the way to calculate the non-hedging positions (gross notional value).
- The reduction of counterparty risk by:
  - setting out the risk mitigation techniques for OTC derivatives that are not centrally cleared, such as timely confirmation, portfolio compression and reconciliation;
  - introducing phase-in periods for all requirements, and adjustment of the frequency of reconciliation.
- Ensuring sound and resilient CCPs by:
  - defining a set of organisational, conduct of business and prudential requirements for CCPs, including margin requirements, default fund, default waterfall, liquidity risk management; and investment policy for CCPs, as well as stress and back tests.

1.6 The European Commission ("the Commission") has three months to decide whether to endorse the technical standards. The EU Parliament and the Council may also object to the technical standards before they enter into force.

1.7 The technical standards and press release can be found at:

<http://www.esma.europa.eu/news/ESMA-defines-standards-derivatives-and-CCPs?t=326&o=home>



## EMIR FAQs

- 1.8 On 14 November 2012, the Commission published a set of frequently asked questions ("FAQs") on EMIR.
- 1.9 The FAQs are designed to provide clarity on the following topics:
- Timing of the implementation;
  - Scope of the requirements; and
  - Position regarding third country CCPs and trade repositories.
- 1.10 The FAQs can be found at:
- [http://ec.europa.eu/internal\\_market/financial-markets/docs/derivatives/doc\\_121114\\_emirfaq\\_en.pdf](http://ec.europa.eu/internal_market/financial-markets/docs/derivatives/doc_121114_emirfaq_en.pdf)

## Commodity Derivatives Market Principles

- 1.11 On 29 October 2012, the International Organisation of Securities Commissions ("IOSCO") published the final survey report on the implementation of the principles for the regulation and supervision of commodity derivatives markets ("the survey"), which reviews how market authorities comply with IOSCO's recommendations.
- 1.12 Results of the survey indicate that the majority of respondents were broadly compliant with the IOSCO principles which were published in October 2011 and endorsed by the G20 a month later.
- 1.13 The 21 IOSCO principles are grouped under the following five headings:
- Contract design;
  - Market surveillance;
  - Addressing disorderly markets;
  - Enforcement and information sharing; and
  - Enhancing price discovery.
- 1.14 The following areas highlights where there was a lower rate of positive responses by IOSCO members:
- The collection by a market authority of information on underlying warehouse stocks or other deliverable supplies;
  - The reporting to a market authority of large trader positions for relevant on-exchange commodity derivative contracts;
  - A framework that provides for detection and enforcement action against manipulative or abusive schemes that take place across multiple markets; and
  - The publication of aggregate positions of different classes of large traders, especially commercial and non-commercial participants, within the bounds of maintaining confidentiality.
- 1.15 IOSCO will use this survey to discuss approaches to assist market authorities in implementing all principles.

- 1.16 The press release and the survey can be found at:

<http://www.iosco.org/news/pdf/IOSCONEWS256.pdf>

## Fourth FSB Progress Report on Implementation of OTC derivatives market reforms

- 1.17 On 31 October 2012, the Financial Stability Board ("FSB") published its fourth six-monthly progress report on the implementation of OTC derivatives market reforms ("the report").
- 1.18 The report takes stock of the readiness of market infrastructure across the FSB's member countries to provide clearing services, collect and disseminate trade data and provide organised trading platforms for OTC derivatives. The report also reviews the progress made by standard setting bodies and national and regional authorities towards meeting the commitments made by G20 leaders that, by end-2012: all standardised OTC derivative contracts be traded on exchanges or electronic trading platforms, where appropriate, and cleared through CCPs; OTC derivative contracts be reported to trade repositories; and non-centrally cleared contracts be subject to higher capital requirements.
- 1.19 The key messages of the report are as follows:
- Market infrastructure is in place and can be scaled up;
  - The international policy work on the four safeguards for global clearing is substantially completed and implementation is proceeding at a national level;
  - Regulatory uncertainty remains the most significant impediment to further progress and to comprehensive use of market infrastructure. Jurisdictions should put in place their legislation and regulation promptly and in a form flexible enough to respond to cross-border consistency and other issues that may arise.

- 1.20 FSB's report and press release can be found at:

[http://www.financialstabilityboard.org/publications/r\\_121031a.pdf](http://www.financialstabilityboard.org/publications/r_121031a.pdf)

[http://www.financialstabilityboard.org/press/pr\\_121031.pdf](http://www.financialstabilityboard.org/press/pr_121031.pdf)

## 2 Short Selling & CDS

### Q&A on the Implementation of the Regulation

- 2.1 On 13 September 2012, ESMA published Questions & Answers on the Implementation of the Regulation on short selling ("the Regulation") and certain aspects of credit default swaps ("CDS") ("the Q&A document").

2.2 The purpose of the Q&A document is to promote common supervisory approaches and practices amongst the EU's national securities markets regulators on the requirements of the Regulation once it came into force on 1 November 2012. It will also provide clarity on the requirements of the new regime to market participants and investors.

2.3 The Q&A document provides responses to questions posed by market participants, national securities markets regulators, and the general public in relation to the practical application of the short selling regime. It addresses issues related to:

- territorial scope;
- transparency requirements;
- calculation of net short positions;
- uncovered short sales; and
- enforcement regime.

2.4 On 10 October 2012, ESMA published an update of the initial Q&A document.

2.5 Additional Q&As cover the duration adjustment issue for calculating net short positions in sovereign debt, and the calculation and reporting regarding group and fund management activities.

2.6 The updated Q&A document can be found at:

<http://www.esma.europa.eu/news/ESMA-publishes-update-QA-Short-Selling-Regulation?t=326&o=home>

#### Consultation on Market Maker and Primary Dealer Exemption

2.7 On 17 September 2012, ESMA published a consultation on exemption for market making activities and primary market operations under the short selling regulation, which contains draft guidelines on market making and the application of the exemptions under the Regulation ("the consultation").

2.8 The guidelines are intended to support the creation of a level-playing field, consistency of market practices and convergence of supervisory practices amongst national securities market regulators across the European Economic Area.

2.9 The guidelines set out and clarify:

- the scope of the exemption for market making activities including the required link between the relevant financial instrument, the trading venue or "equivalent" third country venue and the membership of the notifying entity;
- how the relevant competent authority for notification is defined;
- the process of notification of the intent to use the exemption and its content, including common templates for notification, as well as the approach

to processing notifications received by relevant competent authorities and assessing conditions of the exemption; and

- transitional measures relating to the sending of a notification of intention to use the exemption as of 1 September 2012.

2.10 The consultation period ended on 5 October 2012.

2.11 The press release and consultation can be found at:

<http://www.esma.europa.eu/news/ESMA-consults-market-maker-and-primary-dealer-exemption-short-selling?t=326&o=home>

#### Publication of the Implementing Measures

2.12 On 18 September 2012, the following implementing measures in relation to the regulation on short selling and CDSs were published in the EU Official Journal:

- Commission Delegated Regulation (EU) No 826/2012 of 29 June 2012 supplementing Regulation (EU) 236/2012 with regard to regulatory technical standards on notification and disclosure requirements with regard to net short positions, the details of the information to be provided to ESMA in relation to net short positions and the method for calculating turnover to determine exempted shares; and
- Commission Implementing Regulation (EU) No 827/2012 of 29 June 2012 on the implementing technical standards with regard to the means for public disclosure of net position in shares, the format of the information to be provided to ESMA in relation to net short positions, the types of agreements, arrangements and measures to adequately ensure that shares or sovereign debt instruments are available for settlement and the dates and period for the determination of the principal venue for a share.

2.13 Both regulations entered into force on 19 September 2012 and applied from 1 November 2012, except for certain provisions on the principal trading venue which applied from the date of entry into force (19 September 2012).

2.14 The regulations can be found at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:251:0001:0010:EN:PDF>

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:251:0011:0018:EN:PDF>

## Publication of the List of Exempted Shares

2.15 On 4 October 2012, ESMA published a list of exempted shares under the Regulation on short selling and certain aspects of CDSs ("the Regulation").

2.16 According to the provisions of the Regulation, ESMA will have to provide for public access to certain types of information, noted below:

- Significant net short position thresholds for each sovereign issuer;
- Links to central websites operated or supervised by competent authorities where the public disclosure of net short position is posted;
- The list of shares for which the principal trading venue is located in the third country;
- A list of market makers and authorised primary dealers;
- A list of existing penalties and administrative measures applicable to Member States.

The information listed above will be provided in the relevant section of the ESMA website.

2.17 The list of exempted shares and press release can be found at:

<http://www.esma.europa.eu/page/Short-selling>

## Publication of Delegated Regulations

2.18 On 9 October 2012, the following implementing measures were published in the Official Journal:

- Definitions;
- The calculation of net short positions;
- Covered sovereign CDS;
- Notification thresholds;
- Liquidity thresholds for suspending restrictions;
- Significant falls in the value of financial instruments and adverse events;
- Regulatory technical standards for the method of calculation of the fall in value for liquid shares and other financial instruments.

2.19 The delegated Regulations can be found at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:274:0001:0015:EN:PDF>

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:274:0016:0017:EN:PDF>

## Net Short Position Notification Thresholds for Sovereign Issuers

2.20 On 11 October 2012, ESMA published net short position notification thresholds for sovereign issuers for the purpose of the notification to competent authorities of significant net short position in sovereign debt.

2.21 The way these notification thresholds are defined is further specified in the Commission Delegated Regulation No. 918/2012 ("the Regulation"). The Regulation specifies that initial threshold categories are:

- 0.1% where the total amount of outstanding issued sovereign debt is between 0 and 500 billion euro;
- 0.5% where the total amount of outstanding issued sovereign debt is above 500 billion euro or where there is a liquid futures market for the particular sovereign debt.

The additional incremental levels are set at 50% of the initial thresholds. The reporting thresholds are monetary amounts fixed by applying the percentage thresholds to the outstanding sovereign debt of the sovereign issuer. They will be revised and updated quarterly to reflect changes in the total amount of outstanding sovereign debt of each sovereign issuer. In addition, the Regulation states that the amount of outstanding debt should be calculated using a duration adjusted approach.

2.22 At this stage, the figures are indicative and aimed at assisting investors in preparing for implementation.

2.23 The press release can be found at:

<http://www.esma.europa.eu/news/ESMA-publishes-notification-thresholds-sovereign-issuers?t=326&o=home>

## Notification and disclosure of net short positions

2.24 On 19 October 2012, ESMA published two lists of links to national websites relating to the notification and disclosure of net short positions.

2.25 According to Article 9(4) of Regulation (EU) No 236/2012 on short selling and certain aspects of CDSs, ESMA has to post on its website the addresses of the central websites operated or supervised by each competent authority where the net short position in shares should be publicly disclosed. In addition, ESMA published the list of the links to the websites in the different Member States where the information on the national process for submitting notifications and disclosure of net short positions is specified.

2.26 These lists of web links will be updated when ESMA receives new information from national competent authorities.

2.27 The press release can be found at:

<http://www.esma.europa.eu/news/ESMA-publishes-two-lists-links-national-websites-relating-notification-and-disclosure-net-short?t=326&o=home>

### 3 MiFID

#### Remuneration Guidelines for Firms providing Investment Services

3.1 On 17 September 2012, ESMA published a consultation paper on proposed guidelines on remuneration policies and practices under the Markets in Financial Instruments Directive ("MiFID") ("the guidelines").

3.2 The key elements of the guidelines include the following:

#### *General obligations*

- Firms should ensure that remuneration is not paid in a manner that aims at circumventing the MiFID requirements and / or the guidelines;
- Firms should design and monitor their remuneration policies and practices to take account of conduct of business and conflicts of interest risks;
- Firms should set up adequate controls on the implementation of their remuneration policies and practices.

#### *Type of remuneration*

- Remuneration consists of all forms of payments or benefits provided directly or indirectly by firms to relevant persons involved in the provision of investment and / or ancillary services to clients;
- Remuneration can be divided into either fixed remuneration or variable remuneration.

#### *Staff covered*

- All staff involved in the provision of investment and / or ancillary services. This includes:
  - Client-facing front-line staff;
  - Sales force staff; and
  - Other staff indirectly involved in the provision of investment services whose remuneration may create inappropriate incentives to act against the best interests of their clients.

3.3 The consultation period for the guidelines closes on 7 December 2012. The final guidelines should be published by the second quarter 2013.

3.4 The draft guidelines and press release can be found at:

<http://www.esma.europa.eu/news/ESMA-proposes-remuneration-guidelines-firms-providing-investment-services?t=326&o=home>

#### Guidelines on certain aspects of the MiFID compliance function requirements

3.5 On 28 September 2012, ESMA published the official translations of the guidelines on certain aspects of the MiFID compliance function requirements ("the guidelines").

3.6 The publication triggers a transitional period of two months within which national competent authorities have to confirm to ESMA whether they intend to comply with the guidelines, or otherwise explain the reasons for non-compliance.

3.7 The translated guidelines are available at:

<http://www.esma.europa.eu/news/ESMA-publishes-official-translations-%E2%80%9CGuidelines-certain-aspects-MiFID-compliance-function-requ?t=326&o=home>

### 4 Q&As on Key Investor Information Document ("KIID")

4.1 On 25 September 2012, ESMA published a questions and answers document ("Q&A document") on the KIID for Undertakings for Collective Investment in Transferable Securities ("UCITS").

4.2 The purpose of the Q&A document is to promote common supervisory approaches and practices in the application of the UCITS Directive and its implementing measures. Its content is aimed at competent authorities to ensure that, in their supervisory activities, their actions converge along the lines of the responses adopted by ESMA. The answers are also intended to help UCITS management companies by providing clarity as to the content of the UCITS rules, rather than creating an extra layer of requirements.

4.3 This Q&A document is intended to be continually edited and updated as and when new questions are received.

4.4 The Q&A document is available at:

<http://www.esma.europa.eu/news/ESMA-publishes-QA-KIID-UCITS?t=326&o=home>

### 5 Recommendations for Money Market Funds

5.1 On 9 October 2012, IOSCO published a final report on *Policy Recommendations for Money Market Funds ("MMFs")*, which proposes recommendations to the basis for common standards on the regulation and management of money market funds across jurisdictions.

5.2 The 15 recommendations cover principles for valuation, liquidity management, use of ratings, disclosure to investors, and repurchase agreements, and they seek to supplement the existing frameworks where IOSCO considers there is still room for further reforms and

improvements. This follows reforms undertaken on MMFs both in the United States and in Europe in 2010. Other reforms were also adopted in countries such as Canada, China, India and South Africa.

5.3 The present recommendations address vulnerabilities arising from the liability side, as well as the crucial issue of valuation and the display of a constant net asset value ("CNAV"). In particular, the IOSCO recommendations seek to address the vulnerabilities around the risk of "run and first mover advantage" which could have broader consequences for the financial system. All the recommendations are important for the safety and robustness of the MMF industry. However, the implementation of some recommendations may need to be phased in, in order to avoid disruptive impacts on the MMF industry and the functioning of the financial system.

5.4 IOSCO proposes to conduct a review of the application of these recommendations within two years with a view to assessing whether the recommendations should be revised, complemented or strengthened. IOSCO will also consider other market or regulatory developments which may have impacted money market funds over this period.

5.5 IOSCO's press release and recommendations are available at:

<http://www.iosco.org/news/pdf/IOSCONEWS255.pdf>

## 6 Updated Statistics in the CEREP Database

6.1 On 15 October 2012, the Central Rating Repository ("CEREP") database was updated with new statistical data on the performance of credit ratings including transition matrices and default rates. The new set of statistics covers ratings data up to 30 June 2012.

6.2 The database allows investors to assess on a single platform the performance and reliability of credit ratings on different types of ratings, asset classes and geographical regions over a time period of choice.

6.3 The access to the database is available at:

<http://cerrep.esma.europa.eu/cerep-web>

## 7 EFAMA Releases

### Monthly Statistical Releases

7.1 On 14 September 2012, EFAMA published its monthly statistical release for July 2012.

7.2 The main developments in July 2012 can be summarised as follows:

- Net inflows into UCITS totalled EUR 6 billion;
- Net sales of long-term UCITS reached 25 billion;
- Money Market funds recorded net outflows of

EUR 18 billion;

- Total net sales of non-UCITS recorded a significant increase of EUR 42 billion;
- Total net assets of UCITS increased by 3.1 percent to EUR 6,183 billion, whilst non-UCITS net assets increased by 2.4 percent to stand at 2,447 billion.

7.3 On 11 October 2012, EFAMA published its monthly statistical release for August 2012.

7.4 The main developments in August 2012 can be summarised as follows:

- Net sales of UCITS recorded net inflows of EUR 24 billion;
- Long term UCITS (excluding money market funds) registered net inflows of EUR 13 billion;
- Money market funds experienced a turnaround in net outflows of EUR 11 billion;
- Total net sales of non-UCITS reduced to EUR 5 billion;
- Total net assets of UCITS increased by 0.3% to EUR 6,200 billion, whilst non-UCITS net assets increased 0.5% in the month to stand at EUR 2,458 billion.

7.5 The releases can be found at:

<http://www.efama.org/SitePages/Home.aspx>

### Quarterly Statistical Releases

7.6 On 14 September 2012, EFAMA published its statistical release for the second quarter 2012.

7.7 The main developments in the second quarter can be summarised as follows:

- UCITS recorded net inflows of EUR 7 billion;
- The combined assets of UCITS and non-UCITS increased by 0.9 percent to stand at 8,437 billion at end June 2012, marking a 6.0 percent increase over the first half of 2012. Since end 2011, UCITS have increased 5.6 percent, whilst non-UCITS have enjoyed growth of 7.1 percent.

7.8 EFAMA's release can be found at:

<http://www.efama.org/Pages/Press-Release-Monthly-Fact-Sheet-July-2012--Q2-2012-European-Statistics.aspx>

### Worldwide Statistical Releases

7.9 On 4 October 2012, EFAMA published the latest quarterly international statistical release. The worldwide asset management industry had the following highlights to report for Q2 2012:

- Investment fund assets worldwide increased by



2.7 percent during the second quarter to stand at EUR 21.42 trillion end of June 2012;

- Total net inflows into investment funds amounted to EUR 99 billion, down from EUR 193 billion in the previous quarter;
- Net inflows to long-term funds (excluding money market funds) decreased to EUR 141 billion, from EUR 248 billion in the first quarter;
- Money market funds experienced reduced net outflows during the second quarter of 42 billion, compared to EUR 55 billion in the first quarter of 2012.

7.10 The press release with the full statistics can be found at:

<http://www.efama.org/Pages/International%20Statistical%20Release%20Q2%202012.aspx>

### ISO Standardisation Rates for Funds

7.11 On 10 October 2012, EFAMA published, in co-operation with SWIFT, a mid-year report on the evolution of automation and standardisation rates for fund orders received by transfer agents ("TAs") in the cross-border centres of Luxembourg and Ireland for the first half of 2012; details as follows:

- In Q2 2012, the total automation rate (ISO and proprietary files) of orders received by Luxembourg and Irish TAs reached 77% compared to 75.6% in Q4 2011;
- The total automation rate increase is driven by increased adoption of the ISO messaging standard and a decrease in the use of proprietary file transfer protocols;
- ISO adoption continued to increase in both fund domiciles;
- The total number of orders has stabilised at 11.9 million orders in the first half of 2012, and the number of manually processed orders decreased by 7% to 2.8 million received faxes.

7.12 The press release can be found at:

<http://www.efama.org/Pages/EFAMA-SWIFT-midyear-report.aspx>



## B BELGIUM

### 1 Unregulated Markets and Products – IOSCO Task Force Meeting

- 1.1 At the invitation of the Financial Services and Markets Authority ("FSMA"), a Task Force of IOSCO met in Brussels during the second week of September for the purpose of preparing a report on structured products.
- 1.2 This meeting served as an opportunity for the different regulators to share their experiences with regard to structured products. The meeting also focused on securitisation-related issues.
- 1.3 The press release can be found at:

[http://www.fsma.be/en/News/Article/press/div/2012/2012-09-06\\_iosco.aspx](http://www.fsma.be/en/News/Article/press/div/2012/2012-09-06_iosco.aspx)



## C CHANNEL ISLANDS

### JERSEY

#### 1 Funds Business Statistics

- 1.1 Jersey Finance Limited ("JFL") issued funds business statistics for the quarter ending 30 June 2012. These statistics, collated and prepared by the Jersey Financial Services Commission ("the Commission"), show a decrease in both the total value of funds under administration and the total number of regulated funds for the period.
- 1.2 As at 30 June 2012, the Net Asset Value ("NAV") of funds was £189.4bn. The number of regulated funds was 1,380 with a total of 2,410 separate pools.
- 1.3 Data includes both Jersey and non-Jersey domiciled funds administered in Jersey, including private schemes. However, excluded from the statistics are collective investment funds for which only minor services (e.g. distribution) are provided in Jersey, such funds being regarded as non-Jersey funds.
- 1.4 The data does not include funds established under the Unregulated Funds Regime, of which there was an increase to 172 during the second quarter.

#### 2 The Collective Investment Funds (Certified Funds – Prospectuses) Order 2012 ("the CFPO")

- 2.1 As mentioned in a previous bulletin the CFPO came into force on 17 November 2012, with a transitional period of up to one year.
- 2.2 Prospectuses for existing Open-ended Certified Funds will need to be revised prior to November 2013 should there be a significant change in matters stated in the prospectus or a significant new matter that should be included.
- 2.3 For existing Closed-end Certified Funds constituted as a company the Companies (General Provisions) (Jersey) Order 2008 will continue to apply until the Fund markets a new issue of shares.
- 2.4 Closed-ended Certified Funds constituted as a unit trust, limited partnership, incorporated limited partnership or a separate limited partnership will be required to update their prospectuses from whichever is the earlier of:
  - 17 November 2013;
  - a significant new matter / change occurs that should be included in the prospectus;
  - units are marketed.

- 2.5 Full details can be found on the following link:

<http://www.jerseylaw.je/Law/display.aspx?url=lawsinforce%5chtm%5cROFiles%5cR%26OYear2012%2fR%26O-065-2012.htm>

#### 3 US Foreign Account Tax Compliance Act ("FATCA")

- 3.1 On 9 October the Governments of Jersey, Guernsey and the Isle of Man issued a press release announcing their intention to negotiate inter-government agreements ('IGAs') with the US in relation to FATCA; the IGAs to be similar to that executed between the UK and the US on 12 September 2012.
- 3.2 The full news release can be viewed on:
 

[http://www.jerseyfunds.org/\\_blog/JFA\\_News/post/FATCA\\_Press\\_Release/](http://www.jerseyfunds.org/_blog/JFA_News/post/FATCA_Press_Release/)
- 3.3 Subsequent to the above press release, it was announced on 25 October that America's tax authorities have delayed the starting dates of key parts of FATCA for those non-US financial institutions in countries that have not yet signed IGAs with the US. These institutions will now have until January 2017 to start the process of withholding US tax, when necessary, from income received by their US account holders.

#### 4 Tax Agreement with Singapore

- 4.1 On 17 October the Government of Jersey signed a Double Tax Agreement ("DTA") with the Government of Singapore.
- 4.2 The DTA incorporates the internationally agreed standard for the exchange of information for tax purposes.



## D FRANCE

### 1 Application of MiFID Guidelines

1.1 On 5 October 2012, the Autorité des Marchés Financiers ("the AMF") issued a press release on the application of ESMA guidelines regarding the suitability requirements for financial services and products provided to clients pursuant to the MiFID requirements ("the guidelines").

1.2 In our Bulletin published in early October 2012, we informed about the guidelines which aimed at enhancing the protection of investors in the EU.

1.3 The AMF integrated the guidelines in its position No. 2012-13 and the provisions apply from 22 December 2012.

1.4 The guidelines provide details on the following:

- Information to clients on the purpose of the suitability assessment and on its practical application;
- Resources to be deployed;
- Information to be collected from clients;
- Reasonable steps to assess the reliability of client information and update client information;
- Special cases of legal entities or groups;
- Record-keeping.

1.5 The press release is available at:

[http://www.amf-france.org/documents/general/10615\\_1.pdf](http://www.amf-france.org/documents/general/10615_1.pdf)

### 2 Amended Regulation on Service Providers and Collective Investment Products

2.1 In the framework of the transposition of the UCITS IV directive, the AMF proposed a series of amendments to Book III and Book IV of the General Regulation. On 15 October 2012, a ministerial order ratified these amendments which were published in the Official Journal on 25 October 2012.

2.2 The amendments intend to:

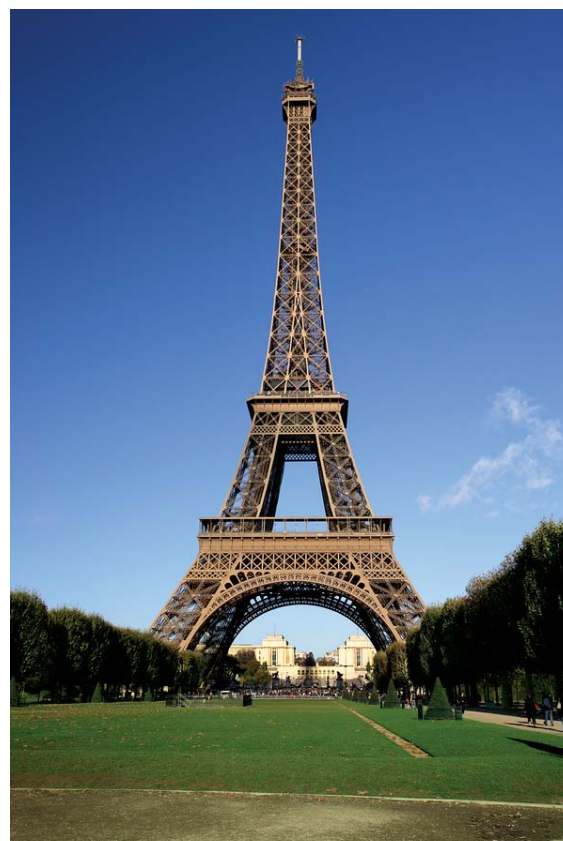
- standardise UCITS rules on the deadlines for approval by the regulator, including the time to approve fund mergers;
- enable preparation of a KIID for OPCI ("Organisme de Placement Collectif dans l'immobilier");
- remove the requirement for the statutory auditor's quarterly certificate for non-UCITS with assets under management in excess of 80 million euro;
- remove the equivalence rule of treatment and information between unitholders of feeder UCITS and unitholders of master UCITS, as this provision

is not foreseen by the UCITS directive;

- clarify the role of the centralising correspondent when shares or units of a foreign UCITS marketed in France are not accepted by a local central depository.

2.3 The AMF press release can be found, in French only, at:

[http://www.amf-france.org/documents/general/10626\\_1.pdf](http://www.amf-france.org/documents/general/10626_1.pdf)



## E IRELAND

### 1 Implementation of AIFMD

1.1 The Central Bank of Ireland ("CBI") has launched a public consultation on the implementation of the AIFMD in Ireland. The CBI is proposing to replace the existing non UCITS Notices and Guidance Notes with a single 'AIF Handbook' comprising of six chapters:

- Retail Investor AIF (RIAIF) Requirements;
- Qualifying Investor (QIAIF) Requirements;
- AIFM Requirements;
- AIF Management Company Requirements (registration requirements);
- Fund Administration Requirements;
- AIF Depositary Requirements.

1.2 In addition to implementing the provisions of the AIFMD, the CBI is also proposing the following changes:

- Promoter Approval regime to be removed;
- Professional Investor Fund regime to be discontinued;
- Ability to create side pockets to be enhanced;
- Additional prime broker requirements and counterparty credit rating requirements to be removed;
- Initial offer period for real estate and private equity funds to be extended from 1 to 2 years, subject to certain conditions;
- A retail investment fund which will be subject to less investment and eligible asset restrictions than the UCITS regime is to be created;
- Existing restriction on QIFs with regard to investment in unregulated funds to be tightened.

1.3 Furthermore the CBI has asked for views on certain issues including, but not limited to, the following:

- Should RIAIFs be permitted to provide for the issue of partly paid shares?
- What party, other than the Depositary, should verify the calculation of a performance fee?
- Should a condensed portfolio statement listing positions / exposures greater than 5% of NAV be permitted for periodic reports of QIAIFs?
- Under what circumstances / conditions should fund administrators be permitted to publish an indicative NAV?
- How should rules on a RIAIF's use of financial derivative instruments differ from that of a UCITS?

1.4 From a Depositary perspective, the CBI proposes to apply the AIFMD Depositary regime to all authorised AIFs, including those AIFMs with AIFs below the thresholds outlined in the AIFMD. In addition, the CBI is proposing to retain certain requirements which exist today for both UCITS and non UCITS funds - e.g. provision of annual

report to unitholders on how the CIS is managed; provision of letter of safekeeping to the CBI for an RIAIF; and prompt reporting of material breaches of CIS legislation.

1.5 The consultation is open until 11 December 2012 and a copy of the consultation paper can be found here [CP 60](#).



### 2 CBI feedback on CP 59

2.1 The CBI has issued a feedback statement following Consultation Paper 59 ("CP 59") on proposed changes to the regulatory reporting requirements of Irish authorised collective investment schemes.

2.2 CP59 was issued by the CBI in May of this year and dealt with the filing of:

- annual and interim financial statements;
- the auditor statutory duty confirmation;
- the FDI report;
- the KIID; and
- regulatory returns.

Overall, the CBI is of the view that the additional reporting requirements will lead to efficiencies in how it discharges its supervisory function and the long term benefits will outweigh any costs associated with providing the information.

2.3 With regard to the regulatory report, the CBI notes that the UCITS and non UCITS Notices already place the responsibility on the trustee to promptly notify the CBI of any material breach of CIS legislation, conditions imposed by the CBI, or provisions in the CIS's prospectus.

Furthermore, the CBI has advised that it is not its intention to define materiality. It considers this to be a matter for, and within the discretion of, the Trustee. However, it warns that the Trustee must be in a position to defend its justification of material, if challenged.

There is also an obligation on the trustee to report 'significant' matters which are not material errors or breaches. In this regard, the CBI considers that the

trustee and / or the CIS should exercise discretion in determining what it considers a significant matter.

Breaches of investment policies are captured within the parameters of CP59. The CBI makes the point that Trustees are not its only source of information - other sources include other regulators, the media, auditor reports, investor complaints, etc. Furthermore, the CIS and other parties may wish to exercise their own discretion to also report these matters, if they wish.

2.4 The CBI advises that it is planning a release date in Quarter 1 2013 for the electronic submission of returns detailed in CP59.

2.5 The feedback statement can be found at [CP 59 Feedback](#).

### 3 Anti-Money Laundering ("AML")

3.1 The CBI has issued a Dear CEO letter to all CEOs of Irish-regulated credit and financial institutions regarding compliance with anti-money laundering and counter-terrorism financing ("AML-CFT") legislation.

3.2 The letter addresses the current level of compliance by firms with AML-CFT legislation and provides an overview of the control failures identified in the course of recent CBI inspections. The letter highlights the importance of good governance in this area and the necessity for firms to anticipate changes to legislation and international standards. It also reminds credit and financial institutions of the wider context of Ireland's membership of FATF and the reputational risks Ireland faces from poor governance and compliance in respect of AML-CTF.

3.3 A copy of the letter can be found here: [AML Letter](#).



## F LUXEMBOURG

### 1 Grand-ducal regulation relating to fees to be levied by the CSSF

1.1 The Grand-ducal regulation of 29 September 2012 relating to fees to be levied by the Commission de Surveillance du Secteur Financier ("the CSSF") ("the regulation") will replace the Grand-ducal regulation of 18 December 2009 and will be applicable as from 1 January 2013.

1.2 The regulation shall also apply to:

- undertakings for collective investment set up under the law of 17 December 2010 ("the law of 2010");
- specialised investment funds (SIFs);
- sociétés d'investissement en capital à risque (SICARs);
- UCITS and non-UCITS management companies.

1.3 The regulation is available, in French only, at:

[http://www.cssf.lu/fileadmin/files/Lois\\_reglements/Legislation/Reglements/rgd\\_taxes\\_CSSF\\_290912.pdf](http://www.cssf.lu/fileadmin/files/Lois_reglements/Legislation/Reglements/rgd_taxes_CSSF_290912.pdf)

### 2 New CSSF Circular on Authorisation and Organisation of Luxembourg UCITS Management Companies

2.1 On 24 October 2012, the CSSF issued Circular 12/546 on the authorisation and organisation of Luxembourg management companies subject to Chapter 15 of the Law of 2010 ("UCITS management companies") and self-managed investment companies ("self-managed SICAVs") ("the Circular").

2.2 The purpose of the Circular is to:

- replace the CSSF Circulars 03/108 and 05/185 applicable to UCITS management companies and self-managed SICAVs;
- incorporate CSSF Circular 11/508 so that the conditions for obtaining and maintaining the authorisation will be presented within one single text;
- provide clarifications on certain conditions for authorisation, more particularly in the area of the use of own funds, administrative bodies, arrangements concerning the central administration and rules of delegation.

2.3 The following information provides an overview of the requirements proposed by the Circular:

Management company whose activity is limited to collective portfolio management

#### Shareholding

The shareholders who have qualified holdings (direct or indirect holding of at least 10% of the capital or of the voting rights, or can exercise a significant influence over the management of the undertaking) must exercise their powers in such a way that a sound and prudent management of the management company is ensured. Each company entering into the direct shareholding of a management company must, in principle, dispose of own funds at least equivalent to the amount it intends to invest in the capital of the management company after deduction of other holdings held.

The CSSF may request a letter of intent. The issuer of the letter shall undertake that the sponsored entity complies with the prudential requirements, particularly regarding the requirement relating to own funds.

#### Own funds

At the moment of its incorporation, the management company must have an initial capital of at least Euro 125,000. At any time, a management company must be able to prove an amount of own funds at least equal to the greater of the two following amounts:

- UCITS capital requirements taking into account all the managed portfolios;
- One quarter of the preceding year's fixed overheads (staff and administration bodies and operating costs).

The own funds can neither be used for investment in the shareholder of the management company nor for granting a loan to that shareholder. Own funds can be invested in liquid assets or assets easily convertible into liquid short term assets and not containing any speculative positions.

#### The governing bodies

##### *a) The board of directors*

The members of the board of directors must be of sufficiently good repute and sufficiently experienced in relation to the type of UCITS and UCI concerned. A board member must dedicate the required time and attention to his / her duties and must ensure that he / she limits the number of other professional engagements, in particular, mandates held in other companies.

The shareholders of the management company must ensure that there is a solid governance arrangement when composing its board of directors.

##### *b) The conducting officers*

The two conducting officers, forming a management



committee, must be of good repute and have the required professional experience. In principle, they must permanently reside in Luxembourg or have their domicile in a place permitting them to come to Luxembourg every day. However, the CSSF may agree that only one of the conducting officers of the management company shall permanently reside in Luxembourg. This request for derogation will depend on the nature, scale and complexity of the activities of the management company.

The management committee is, among other things, responsible for:

- the implementation of strategies and guiding principles for central administration and internal governance, and the implementation of adequate internal control mechanisms;
- ensuring that the management company has the technical infrastructure and human resources necessary for performing its activity;
- the implementation of the investment policy for each UCITS;
- the supervision of the adoption of the investment strategies for each UCITS it manages;
- adopting and filing, for regular review, the risk management policy and implementing the techniques of this policy;
- the implementation and follow-up of the marketing policy and the distribution network of UCITS / UCIs managed by the management company.

The conducting officers shall be in regular contact with each other and hold periodic meetings. They must regularly inform the board of directors, in an exhaustive manner and in writing, on the activities of the management company and the UCITS / UCIs they manage. The split of tasks between the two conducting officers must be organised so as to avoid conflicts of interest. They are not necessarily required to be employees of the management company. Also, they can manage the business of several management companies on the condition that the CSSF has proof that the exercise of multiple functions is not likely to prevent the conducting officers from discharging any one particular function.

### **Central Administration and internal governance**

Every management company must have a head office in Luxembourg, consisting of a "decision-making centre" and "administrative centre". The decision-making centre comprises the activity of conducting officers, but also the persons responsible for the different administrative and control functions or the different departments or occupations existing inside the management company. The administrative centre comprises sound administrative and accounting organisation. The concept of central administration also implies that the management company must have its own office in Luxembourg.

The management company must have its own computers and relevant computer programs at its premises in

Luxembourg. It does not prevent a management company from having recourse to the services of a third party specialised in the advice, programming, maintenance or management of electronic systems. If the management company has delegated the portfolio management and / or the administration to a third party, it must monitor continuously from the start of the relationship that every delegate has suitable systems in order to satisfy the different legal and regulatory requirements. This monitoring may take the form of receiving the procedures and policies of the delegates, regular confirmations, the ISAE 3402 reports (or equivalent) and on-site visits at the delegate.

The accounting records of the management company must always be available and / or accessible at the registered office of the management company.

Every management company must put in place "management information" permitting the follow-up of its activity and that of its delegates. As the management information must also provide information about the controls made on the delegated activities, the management company must ensure that it receives from the delegates all necessary information in order to effect an efficient control of its delegates.

#### *a) Complaints handling*

Every management company must implement and maintain procedures for the handling of complaints received from investors. It must communicate to the CSSF the list of third parties authorised to handle complaints and an annual report (one month after the annual general meeting ("AGM")) indicating the number of complaints filed by investors, the reason for these complaints as well as the progress made in handling them.

#### *b) Permanent compliance and internal audit function*

These two functions cannot be undertaken by the same person. Both functions must submit annual reports to the CSSF (one month after the AGM).

The principle of proportionality, as detailed below, can be applied in the organisation of the compliance and internal audit functions.

The compliance function can be delegated to a third party. However a management company providing, in addition to collective management, one or more services, is not authorised to delegate the compliance function. The compliance function cannot be exercised by a member of the board of directors of the management company.

The internal audit function may be delegated to an external expert specialised in internal audit, as long as the external expert is independent from the approved statutory auditor of the management company.

### c) *The permanent risk management function*

The permanent risk management function must be independent from operating units. The CSSF may allow a management company to derogate from that requirement where such derogation is appropriate and proportionate in view of the nature, scale and complexity of the management company's activities and the UCITS it manages, and provided that appropriate measures of protection have been taken against conflicts of interest.

The exercise of part or all of the risk management may be delegated by contract to a specialised third party. By virtue of the principle of proportionality, one of the conducting officers of the management company may also be appointed as the person responsible for the permanent risk management function. The permanent risk management function may not be combined with the internal audit function. By contrast, it is permissible to combine the compliance function with the permanent risk management function. This function cannot be exercised by a member of the board of directors of the management company.

### d) *Establishment of written procedures and policies regarding:*

- personal transactions;
- conflicts of interest;
- strategy for the exercise of voting rights;
- rules of conduct;
- remuneration.

### e) *Verification of internal governance regarding delegates*

The management company must verify that the delegates have taken suitable measures so as to comply with the requirements in the area of organisation, conflicts of interest and rules of conduct.

### Conditions for authorisation to delegate

Every management company may be authorised to delegate to third parties the following activities:

- Portfolio management, administration and marketing;
- Risk management;
- Complaints handling;
- Compliance and audit functions;
- Operation of the electronic system.

The management company must inform the CSSF if the delegate also proceeds to a partial or total sub-delegation of its activity. Every use of an external service provider must be preceded by written due diligence by the management company on the provider.

A management company must implement arrangements

for control which allow the conducting officers and their staff access to data documenting the activities performed by the delegate(s) for and on behalf of the management company and the UCITS under its management.

### *Specific conditions for the delegation of the administration function*

In the case where a Luxembourg management company manages a Luxembourg UCITS, it is authorised to delegate the administration of this UCITS to a service provider established in the territory of Luxembourg. In the case where a Luxembourg management company intends to manage UCITS established in a Member State other than Luxembourg, it can entrust the administration of this UCITS to a specialised third party established either in Luxembourg or in the home Member State of this UCITS.

### Programme of activities

The request for authorisation of a management company includes a programme of activity which provides a description of the business development plan covering the:

- scope of the services for the next three financial years concerning collective management;
- investment policies pursued by the UCITS managed, as well as the instruments and financial markets concerned;
- risk management process; and
- provisional accounts for three financial years as well as the development strategy for the management company.

### **Management company which carries out activities of collective management and management of portfolios of investments on a client-by-client basis**

The same conditions are applicable. The management company has to provide additional information for the programme activity requested by the CSSF, concerning the scope of services for each of the next three financial years as regards the:

- management on a client-by-client basis of portfolios of investments;
- indication of the banks where assets of the clients are deposited;
- risk management policy applied to discretionary management; and
- proposed ancillary services, where applicable.

Certain provisions of the MiFID Directive are applicable to management companies providing the services of discretionary management. It must participate, for these services, in an investor compensation system set up in Luxembourg and recognised by the CSSF. It is therefore obliged to join the AGDL (*Association pour la Garantie des Dépôts Luxembourg*).

## Principle of freedom of establishment and freedom to provide services

Every management company wishing to exercise activities or to provide services within the territory of another Member State by way of a branch or under the freedom to provide services, must submit to the CSSF the following information:

- the Member State in which the management company plans to establish a branch or intends to operate;
- a programme of operations setting out the activities and services envisaged as well as the organisation structure of the branch;
- the address, in the management company's host Member State from which documents may be obtained (for the branch only); and
- the name of the conducting officer(s) responsible for the branch.

## Principle of proportionality

A management company may be authorised to apply, subject to a prior and motivated application, the principle of proportionality in the organisation of its compliance, internal audit and risk management functions. Furthermore, every management company may, in the application of the:

- general requirements regarding procedures and organisation;
- operating staff of a management company; and
- conflicts of interest policy;

take into account the nature, scale and complexity of its activity, as well as the nature and range of services and activities undertaken.

## Self-managed SICAV

A self-managed SICAV is required to comply with all the requirements of the Circular applicable to management companies in relation to the letter of intent, governing bodies, external audit, complaints handling, permanent risk management function and risk management method, conflicts of interest, rules of conduct, remuneration policy, delegation (except in relation to the delegation of the administration) and programme of activities. A self-managed SICAV may delegate the administration of its portfolio(s) to a service provider established in Luxembourg.

## Entry into force and transitional provisions

The Circular enters into force with immediate effect. Every management company existing at the moment of entry into force of the Circular has until 30 June 2013 to

comply with the provisions relating to:

- the use of own funds;
- management bodies;
- central administration; and
- rules of delegation.

Every self-managed SICAV existing at the moment of the entry into force of the Circular has until 30 June 2013 to comply with the provisions relating to:

- management bodies; and
- the rules of delegation.

It must also take the necessary measures to implement a decision-making centre and administrative centre in Luxembourg.

### 2.4 The Circular is available in French only at:

[http://www.cssf.lu/fileadmin/files/Lois\\_reglements/Circulars/Hors\\_blanchiment\\_terrorisme/cssf12\\_546.pdf](http://www.cssf.lu/fileadmin/files/Lois_reglements/Circulars/Hors_blanchiment_terrorisme/cssf12_546.pdf)



## 3 CSSF Press Release on UCI and Promoter

- 3.1 On 31 October 2012, the CSSF issued a press release on the concept of a promoter in the context of the publication of the new CSSF Circular 12/546 of 24 October 2012 on the authorisation and organisation of Luxembourg UCITS management companies and self managed SICAVs ("the Circular") (see the 2<sup>nd</sup> article above).
- 3.2 The CSSF considers that the concept of promoter is no more applicable to UCITS management companies or self-managed SICAVs when they comply with the requirements of the Circular.
- 3.3 The CSSF has the following approach with regards to Luxembourg UCITS:

### *For an FCP or SICAV having appointed a UCITS management company*

- Chapter 15 management companies existing at the time of the entry into force of the Circular need to comply with the new requirements of the Circular by 30 June 2013 and must therefore submit an application to the CSSF by 15 April 2013;

- If the management company has obtained, before 30 June 2013, confirmation from the CSSF that it complies with the Circular, its promoter may formally renounce its promoter status before that date;
- New UCITS approved between 24 October 2012 and 1 July 2013 must appoint a UCITS management company complying with the requirements of the Circular or must have a promoter until 30 June 2013.

#### *For a self-managed SICAV*

The same requirements and deadlines apply to self-managed SICAVs.

#### *UCIs subject to Part II of the 2010 Law*

UCIs subject to Part II of the law of 2010 remain subject to a promoter requirement except when managed by a Chapter 15 management company complying with the Circular.

3.4 A full review of the status of UCITS and UCIs subject to Part II of the law of 2010 will be undertaken after the transposition of the EU Directive 2011/61/EU on Alternative Investment Fund Managers ("the AIFMD").

3.5 The CSSF press release can be found, in French only, at:

[http://www.cssf.lu/fileadmin/files/Publications/Communiqués/Communiqués\\_2012/CP\\_1245\\_OPC\\_Promoteur\\_FR.pdf](http://www.cssf.lu/fileadmin/files/Publications/Communiqués/Communiqués_2012/CP_1245_OPC_Promoteur_FR.pdf)

## **4 CSSF Press Release on the entry into force of the EU Regulation on Short Selling and certain aspects of CDS**

4.1 On 31 October 2012, the CSSF published a press release regarding its new Circular CSSF 12/548 relating to the entry into force on 1 November 2012 of Regulation (EU) N° 236/2012 of the EU Parliament and of the Council of 14 March 2012 on short selling and certain aspects of CDSs ("the Circular").

4.2 The Circular sets out details on certain practical aspects of notification, disclosure and exemption procedures.

4.3 The CSSF drew the attention to the fact that, taking into account the EU regulation, the decisions of the CSSF published on 19 and 29 September 2008 on the prohibition of uncovered ("naked") short selling in relation to publicly quoted banks and insurance companies are repealed as from 1 November 2012.

4.4 The press release and the Circular can be found at:

[http://www.cssf.lu/fileadmin/files/Publications/Communiqués/Communiqués\\_2012/CP\\_1243\\_shortselling\\_eng.pdf](http://www.cssf.lu/fileadmin/files/Publications/Communiqués/Communiqués_2012/CP_1243_shortselling_eng.pdf)

## G NETHERLANDS



### 1 AIFMD Bill of Law

- 1.1 On 2 October 2012, the Lower House of the Dutch Parliament adopted a Bill transposing the AIFMD into Dutch Law ("the Bill"). At the same time the Bill was adopted, the Lower House of the Parliament adopted an amendment ("the amendment").
- 1.2 The amendment provides for an exemption for managers of investment funds in which the units or shares can solely be acquired by pension funds. Managers of those fund types are not required to comply with Netherlands regulations relating to the AIFMD.
- 1.3 The Bill has been submitted to the Upper Chamber of Parliament.



## H SWITZERLAND

### 1 Partial Revision of the Collective Investment Schemes Act ("CISA")

1.1 Following on from the Council of States in June, the National Council also approved the partial revision of the CISA on 28 September 2012. The remaining differences were resolved.

1.2 The Swiss Funds Association ("SFA") regards the solution reached as a balanced compromise between investor protection, market access, and competitiveness. It welcomes the approval of the partial revision of the CISA by both chambers of parliament. It also welcomes the amendments that have been accepted, which take on board many of the points the SFA has raised. This partial revision will make an important contribution to the long-term goal of strengthening asset management as a key mainstay of the Swiss financial sector.

1.3 The new provisions of the CISA will most likely enter into force in early 2013 with the goal of preserving the quality and competitiveness of Swiss asset management services.

The next step will be to add specific detail to these good principles at the ordinance level.

1.4 Further details are available at:

[http://www.parlament.ch/ab/frameset/d/s/4904/384296/d\\_s\\_4904\\_384296\\_384314.htm](http://www.parlament.ch/ab/frameset/d/s/4904/384296/d_s_4904_384296_384314.htm)

### 2 Guidelines for Money Market Funds

2.1 On 19 May 2010, CESR – the forerunner to the current European Securities and Markets Authority ("ESMA") – published its "Guidelines on a common definition of European money market funds". These guidelines entered into force on 1 July 2011, and are aimed, in particular, at improving the transparency of money market funds, drawing on the lessons learned from the financial crisis. To this end, a distinction is now drawn between "Short-Term Money Market Funds", which have a very short weighted average maturity ("WAM") and weighted average life ("WAL"), and "Money Market Funds" with a longer WAM and WAL.

2.2 Given that these are European standards for money market funds, the Swiss Funds Association ("SFA") agreed, at FINMA's request, to incorporate the European guidelines in its self-regulation regime. Therefore, corresponding guidelines have been issued to implement this; these guidelines complying with the pertinent legal provisions in Switzerland.

2.3 At its meeting on 31 May 2012, the FINMA Board of Directors recognised the Guidelines for Money Market Funds as a minimum standard pursuant to Art. 7 III

FINMASA and Art. 20 II CISA. The SFA Board of Directors approved these new guidelines on 6 June 2012, and set the date for their entry into force as 1 July 2012.

2.4 The Guidelines are aimed at adding more specific detail to the statutory protection for investors against confusion or deception (Art. 12 I CISA), in that only those collective investment schemes under Swiss law that comply with the Guidelines may call themselves "money market funds".

2.5 Further details are available at:

<https://www.sfa.ch/self-regulation/fund-management>

### 3 More Transparency in Asset Management Costs for Pension Funds

3.1 In Spring 2012, the SFA took part in the second hearing held by the Swiss Federal Social Insurance Office ("FSIO") into the consultation paper drawn up by C-ALM AG. This covered the modalities for applying Art. 48 lit. a para. 3 of the Swiss Federal Ordinance Concerning Occupational Retirement, Survivors' and Disability Pension Schemes ("BVV 2").

3.2 Specific recommendations have now been drawn up, taking into account the results of the hearings. In the coming months, the Swiss occupational pension schemes regulator OAK BV plans to issue rules aimed at ensuring more transparency in the asset management costs of pension funds.

3.3 A report published at the beginning of September 2012 indicates which direction this might take. It proposes criteria for distinguishing between the different types of investment, and for determining which investment products are to be deemed transparent and which are not. Pension funds should in future have to list every untransparent investment in the notes to their annual financial statements. They should also be able to list the costs of the investment products deemed to be transparent as a capital-weighted overall amount.

3.4 The report indicates that these measures would be aimed at achieving greater transparency with respect to the actual costs, adding that this could also lead indirectly to more efficiency. The recommended rules should also encourage the issuers of untransparent investment products to "reduce information asymmetries detrimental to investors".

3.5 Further details are available at:

[http://www.bsv.admin.ch/dokumentation/publikationen/00\\_098/index.html?lang=de#sprungmarke0\\_6](http://www.bsv.admin.ch/dokumentation/publikationen/00_098/index.html?lang=de#sprungmarke0_6)



## 4 Collective Investment Schemes Bankruptcy Ordinance

- 4.1 On 10 July 2012, FINMA started consultations on the Collective Investment Schemes Bankruptcy Ordinance ("CISBO-FINMA"). The background to this is that FINMA has, since 1 September 2011, been responsible for initiating and conducting bankruptcy proceedings concerning fund management companies, SICAVs, limited partnerships for collective investment, and SICAFs. Furthermore, CISA provides only a rudimentary framework for bankruptcy proceedings.
- 4.2 The objective of the CISBO-FINMA, which provides further clarification and specific details to CISA, is to establish efficient proceedings geared specifically to the requirements of individual cases, thereby also improving legal certainty and predictability. Both the content and the entry into force of the draft CISBO-FINMA are to be aligned with the revised CISA.
- 4.3 In their joint statement of 22 August 2012, the Swiss Funds Association ("SFA") and the Swiss Bankers Association ("SBA") noted that the draft CISBO-FINMA is largely based on the Banking Insolvency Ordinance ("BIOFINMA"). The bankruptcy proceedings used have, therefore, already been tried and tested in other financial sectors, which is to be welcomed.
- 4.4 The provisions that take account of the specific characteristics of collective investment schemes correspond to the principles of the CISA, or are compatible with these principles. However, the name of the CISBO-FINMA should be changed given that it deals more with the bankruptcy of institutions but not their "collective investment schemes". To avoid any confusion, a name such as "FINMA CISA Bankruptcy Ordinance" ("CISABO-FINMA") would be more appropriate. Furthermore, the CISBO-FINMA does not sufficiently emphasise the fact that fund assets are segregated in the event of a fund management company going bankrupt, and that, in the case of a SICAV, the assets of an investor's / shareholder's sub-fund are only available for the liabilities of the other sub-funds in exceptional cases.
- 4.5 Finally, the CISBO-FINMA should also apply to the general partner of a limited partnership, even if such partner is not a licensee pursuant to Art. 13 II CISA. It would be expedient if it were possible to liquidate an over indebted limited partnership in the same proceedings as the over indebted general partner.

- 4.6 Further details are available at:

[http://www.admin.ch/ch/d/gg/pc/documents/1608/Vorlage\\_FINMA\\_GebV.pdf](http://www.admin.ch/ch/d/gg/pc/documents/1608/Vorlage_FINMA_GebV.pdf)



## I UK

## 1 Policy Statement ("PS") 12 / 15: Efficiency related changes to the Financial Services Compensation Scheme ("FSCS")

1.1 In Consultation Paper ("CP") 12 / 07, the FSA proposed the following changes to the FSCS, designed to allow the Scheme to handle claims more speedily:

- **Quantification of compensation:** allowing the FSCS to pay full compensation and disregard the residual value of the investment;
- **Simplification of eligibility criteria:** FSCS would no longer need to carry out individual assessments of the eligibility status of most claimants;
- **Settlement of claims:** in some cases, e.g. small claims, the cost to the FSCS of making a precise assessment of the claim may be disproportionate to the size of the claim;
- **Application forms:** permitting the FSCS to pay compensation without having received an application form where, for example, information has already been provided by an insolvency practitioner;
- **Automatic assignment:** allowing the FSCS the option of taking an automatic assignment of the claimant's rights against the failed firm;
- **Compensation for client money shortfalls:** providing the FSCS with the ability to pay compensation to a firm taking over the business rather than to individual clients;
- **Removing duplication of declarations of default:** amending the rules so that the FSCS does not need to determine the firm in default if the FSA or a court has already done so;
- **Clarification of deposits protected by the FSCS:** confirming that a deposit that has been transferred to another firm under a transfer of banking business, after the failure of the firm with which the deposit had originally been made, is covered;
- **Disclosure requirements for deposit takers:** removing the FSCS phone number from disclosures as the FSCS currently receives a number of calls for information on products.

1.2 We provided our summary of these changes in our May Bulletin.

1.3 Following feedback, the FSA has opted to proceed on the basis of its original approach, but with two policy modifications:

- Proposals to include directors of former failed firms within the relaxed eligibility criteria have been dropped, with the FSA acknowledging this is sensitive. There will, however, be a limited discretion to include such directors, if excluding them would prevent efficient performance of the FSCS's functions;
- The proposal to remove the FSCS phone number will also be revised: the phone number will remain,

but additional text will clarify when consumers should contact the FSCS rather than the firm.

1.4 The rules, as amended in this Policy Statement, generally came into effect on 1 October 2012, but the disclosure change will come into effect on 1 April 2013.

1.5 The Policy Statement is available via the FSA website at:

<http://www.fsa.gov.uk/static/pubs/policy/ps12-15.pdf>

## 2 CP 12 / 24: PRA and FCA regimes for Authorisation and Supervision

2.1 In this consultation, the FSA proposes a package of handbook changes necessitated by the Financial Services Bill, which will replace the existing tripartite structure with a new regime composed of the Financial Policy Committee ("FPC"), Prudential Regulation Authority ("PRA") and Financial Conduct Authority ("FCA"). The consultation has been prepared in association with the Bank of England.

2.2 The FSA is working with the FCA and PRA to create new rulebooks. As per previous updates, the majority of provisions in the current handbook will be designated as PRA or FCA rules. However, some other, more substantive changes are required to support the aims of the successor bodies. These are the subject of the current consultation, and comprise:

- **General Provisions and Common Definitions (GEN 2 and the Glossary):** these include text so that provisions that are adopted by both of FSA's successor bodies are interpreted by firms as applying only to the extent that they are within the respective regulator's powers;
- **Status Disclosure and use of the regulators' logos: Changes to General Provisions (GEN) Chapters 4 and 5:** firms will still be required to disclose which body regulates them to retail investors, and will be unable to use the FSA logo from six months after cut-over. There is no current intention to allow firms to use the FCA or PRA logo;
- **Skilled Persons: Changes to Supervision Manual (SUP) Chapter 5:** the FCA will be able to require a report from a skilled person in respect of recognised investment exchanges, and regulators will be able to appoint a skilled person directly in future, rather than requiring a firm to appoint one. The firm will still cover the fees;
- **Applications to vary and cancel permissions and requirements (SUP 6):** firms will in future apply for a Part 4A permission rather than a Part IV permission. A dual regulated firm should apply via the PRA. There are also rules governing how the PRA and FCA should consult or obtain consent from

each other when processing variations, which will be separated from the requirements rules;

- **Waiver and modification of rules (SUP 8):** the PRA can waive or modify rules it applies to dual regulated firms, and the FCA can waive or modify rules it applies to dual-regulated and FCA regulated firms, subject to any required PRA consents. The preferred method is via e-mail. A waiver cannot be granted if it would adversely affect the regulators objectives, but there will no longer be a requirement around preventing undue risk to persons the rule was intended to protect, and publication is not required if this would be detrimental to the UK financial system;
- **Controllers and close links (SUP 11):** the Bill requires that a person who decides to acquire, or alter control over a dual-regulated firm must notify the PRA, who must then consult the FCA when assessing the proposal. In respect of an FCA only firm, notifications must be made to the FCA, which must consult the PRA in some circumstances. A single notification can be made in some cases;
- **Passporting under EU Directives (SUP 13/14):** although the overall framework for passporting is set by European legislation, UK responsibilities are split between the PRA and FCA. The meaning of 'appropriate UK regulator' will be stipulated by the Treasury for the purposes of advising the EC who the relevant authority is for each single market directive. In relation to outward passporting, the 'appropriate UK regulator' is defined in the Bill as the PRA, where the UK firm is a PRA authorised person, and the FCA in any other case. For inward passporting, for both MiFID and UCITS, the FCA will be the lead regulator. SUP 13 will be updated to reflect the new responsibilities;
- **Notifications to the FSA (SUP 15):** amendments to SUP will reflect that for dual regulated firms, appropriate regulator means both the PRA and FCA. A table will set out which notifications for serious incidents (e.g. failing to meet threshold conditions) a dual regulated firm should advise to each regulator;
- **Reporting requirements (SUP 16):** the Bill does not specify a new process for notifications, but the existence of two regulators necessitates some clarification of the appropriate regulator and the submission mechanism;
- **Insurance transfers of business (SUP 18):** the Bill sets out the intended revised process for transfers of insurance business, and a supporting MoU will be used;
- **Other amendments to the PRA and FCA Handbooks (including deletions):** as part of the designation process, the FCA and PRA have

identified some rules where a formal designation would not be appropriate. In these cases, one regulator will adopt the provision, or neither regulator will opt to keep them. Various written concessions from pre-FSA regulators are included in the rules falling away, as well as COLL 6.6.18G, which provides guidance about collective investment scheme management and conflicts of interest – the underlying Transitional Provision ("TP") has now been deleted.

- 2.3 There are also a number of related changes, e.g. addresses, cross-references and references to specific regulatory bodies. The consultation closes on 12 December 2012, and subject to any changes to the Bill made through the parliamentary process, will be made effective by the FCA and PRA when they take their legal powers. The consultation is available via the FSA website at:

<http://www.fsa.gov.uk/static/pubs/cp/cp12-24.pdf>

### 3 CP 12 / 26: The PRA and FCA regimes for Approved Persons

- 3.1 This consultation proposes a set of changes to existing regulatory rules and guidance which are necessitated by the new UK regulatory regime. FSMA gives the FSA responsibilities over individuals carrying out certain roles within firms. These roles are described as 'controlled functions' and the individuals themselves are described as 'approved persons'. The existing categories of approved person are set out in Chapter 10 of the Supervision Manual (SUP 10) in the FSA Handbook.
- 3.2 The Financial Services Bill amends the powers to regulate approved persons and sets out how the powers may be exercised by the PRA and FCA. The main aspects of change are:
- a split of the current list of controlled functions for firms regulated by both the PRA and FCA (dual-regulated firms), seeking to minimise unnecessary duplication;
  - an extension of the Statements of Principle in APER to a wider set of activities, and their application to people approved by either regulator – meaning that both regulators will have the ability to discipline certain categories of approved person.
- 3.3 The consultation does not consider the status of individuals who already have approval, as the Government has not yet finalised proposals in this regard. The FSA expects that current approvals will be 'grandfathered', without the need for individuals to re-apply.
- 3.4 Under the proposed new arrangements only the FCA will be able to specify customer dealing functions (for any type of firm), and only the FCA may specify significant



influence functions ("SIFs") for single-regulated firms. The Bill makes it clear that the PRA and the FCA should not specify the same controlled functions for dual-regulated firms, and therefore the FSA has split the list of existing SIF functions between the two regulators. The PRA must obtain the FCA's consent before approving an application for a PRA SIF function.

3.5 The Bill states that the FCA should exercise its powers so as to minimise the likelihood that approvals fall to be given by both the FCA and the PRA regarding the performance by a person of significant influence functions. The FSA has designed the rules so that common situations in which a person will be carrying out a combination of the PRA and FCA functions are catered for, but some dual approval situations will remain.

3.6 The FSA has invited comments which should be provided by 7 December 2012. The consultation paper is available via the FSA website at:

<http://www.fsa.gov.uk/static/pubs/cp/cp12-26.pdf>

## 4 CP 12 / 27: Quarterly Consultation Paper: Changes to COLL

4.1 The quarterly consultation paper released in October included a number of proposals which will be of interest:

- **Prospectus disclosure for PAIFs:** removal of a glitch in the current rules, that currently means either all, or none, of the funds in an ICVC umbrella have to be a Property Authorised Investment Fund ("PAIF"). The proposal means one sub-fund can be a PAIF and the rest follow another tax regime;
- **'Absolute return' and 'total return' funds – or similar:** such funds would need to include comments in the investment objectives section of their prospectus that returns are not guaranteed. A six month TP would apply unless the prospectus was updated for other reasons prior to this. There may be a need for industry guidance on what constitutes 'similar';
- **Government and Public Securities ("GAPs"):** updates to spread rules confirming that securities 'guaranteed by' a GAP can be included, but also excluding those issued by a non-EEA local authority;
- **Netting of issues and cancellations:** changes to COLL 6.2.6A to permit netting of issues and cancellations across share classes with different charges, subject to the depositary being satisfied with the controls in place;
- **Preliminary Charges:** new rules to require that preliminary charges should be calculated as a percentage of the unitholder's investment, to align with the rules governing KIIDs;

- **Equalisation transfers:** changes to COLL 6.8.3R(3A)(c)(v) to state that equalisation transfers can be made on conversions between unit classes. HMRC has given its OK. This was widely expected and supports the RDR process. Fund managers will need to consider their approach to the conversions process, in consultation with their transfer agent and fund accounting providers, if any, and depositary;
- **Fund Mergers:** confirmation that when mergers take place under the UCITS IV rules, if unitholders request a copy of the report of the independent auditor or depositary, the report is the one set out in Art 42 of the UCITS directive;
- **Recognised Schemes:** amendments to COLL 9 so that all investors in all types of "recognised scheme" are able to obtain annual and half-yearly reports free of charge.

4.2 The consultation is available via the FSA website at:

<http://www.fsa.gov.uk/static/pubs/cp/cp12-27.pdf>



## 5 Supervision of Asset Managers under the FCA: a speech by Clive Adamson, Director of Supervision, Conduct Business Unit, FSA at the FSA Asset Management Conference

5.1 In this speech, Clive Adamson set out the FCA's approach to the supervision of asset managers and highlighted what the FSA sees as key risks in the sector. Adamson summarises the strategic objective of the FCA as 'making markets work well', and notes that ensuring competition in the interests of consumers is a primary objective.

- 5.2 Firms are already aware that the FCA is proposed to be a more forward looking regulator, making judgements about business models and strategies. To enable this, firms will be categorised into four groups, C1, C2, C3 or C4 – according to their impact on consumers and the market. C1 firms will be larger and more complex vs those in C4, and the FCA expects to write to all firms in early 2013 to advise what category they will be in, and to provide a measure of how prudentially significant they are seen as.
- 5.3 Supervisors will be allocated to the firms with the greatest potential to cause risk to consumers or markets. As a result, some firms will no longer have a dedicated supervisor. Supervision will be based on three pillars:
- A forward-looking assessment of a firm's conduct risks, undertaken by the new Firm Systematic Framework;
  - Issues that are emerging or have happened and are unforeseen in their nature. This is to be termed 'event driven work' and will cover areas such as mergers, spikes in complaints and whistleblowing;
  - Issues and Products, which will be largely driven by analysis made by sector teams, looking at cross-firm and / or product issues driving poor outcomes for consumers or endangering market integrity.
- 5.4 The prudential ratings will be titled CP1, CP2 and CP3. CP1 and 2 firms will have a significant impact on the markets in which they operate, with CP1 firms those the FCA believes could not be wound down in an orderly manner.
- 5.5 The protection of client assets is to remain a key priority and the FCA will work with HM Treasury on ways to strengthen the regime.
- 5.6 Adamson also remarks that the FCA views wholesale and retail markets as interconnected and does not intend to make artificial distinctions between them, noting that a retail consumer is likely to be at the end of many wholesale transactions. The FCA does intend to retain the overall 'caveat emptor' principle for wholesale markets, and does not intend to introduce the redress and consumer detriment concepts to these markets.
- 5.7 In terms of conduct risk, the FCA has concerns that investment performance is seen as a focus rather than firms thinking about what consumers need. The FCA believes that many firms have structured themselves to avoid clear responsibility for this. The FCA is changing the way it operates to apply additional scrutiny.
- 5.8 Another area of concern surrounds the growth of absolute return funds, and whether end consumers are provided with all the information needed to understand the product, its purpose and its risk. The current QCP (see I.4 above) includes actions in this regard. The FCA wants firms to consider whether launching such products is in the best interests of their customers.
- 5.9 The full text of the speech is available via the FSA

website at:

<http://www.fsa.gov.uk/library/communication/speeches/2012/0925-ca.shtml>

## 6 FSA writes to CEO's on Inducements and Circumventing the RDR Adviser Charging Rules

- 6.1 In October, the FSA issued a *Dear CEO* letter to life insurers and IFAs to set out concerns that some firms may be seeking to circumvent the adviser charging rules by soliciting or providing payments that do not look like traditional commission, but are generally intended to achieve the same outcome.
- 6.2 The FSA has particular concern with non-commission payments and benefits included within 'distribution agreements', and is requesting confirmation that any such agreements in place, or under negotiation, comply with the inducements and adviser charging rules in COBS. It is also requesting other information set out in an annex.
- 6.3 The letter is available via the FSA website at:

[http://www.fsa.gov.uk/Pages/Library/Publications\\_by\\_date/index.shtml](http://www.fsa.gov.uk/Pages/Library/Publications_by_date/index.shtml)

## 7 Journey to the FCA

- 7.1 This document sets out the high level vision for the FCA and provides a more detailed explanation for how this will be achieved. The FCA has a [number of] statutory objective to ensure that relevant markets work well, which is underpinned by three key operational objectives: integrity of the market, consumer protection and competition.
- 7.2 The FCA will increase its focus on delivering good market conduct. The three key priorities here will be a renewed focus on wholesale conduct, increasing trust in the integrity of markets, and preventing market abuse.
- 7.3 Product governance and intervention will also change due to the new style of supervision. The FCA sees a lesson in previous market issues such as payment protection insurance, and believes that it will be much more effective to intervene earlier. It will scrutinise firms product governance, assessing whether target consumers needs were taken into account in product design, what monitoring is made of consumer outcomes, and whether distribution strategies are appropriate. Firms should consider making their product pre-approval processes more transparent.
- 7.4 The FCA will have powers to ban products that pose unacceptable risks, in some cases for up to 12 months without consultation. It can also ban misleading financial promotions. The FCA does not, however, intend to offer a

product pre-approval process at this stage. It will also be able to publicly announce that it has launched disciplinary action against a firm or individual, provided it consults the firm on the subject of the notice.

7.5 The FCA competition duties and objectives require it to identify and address competition problems and it poses a number of questions in the consultation. It recognises that competition concerns can be complex, and can arise due to combinations of issues, quoting concentration and inertia in retail banking as an example. It will take action to address undue barriers to entry or expansion, increase consumer engagement, and ensure that no firm or group can dominate a market. To achieve this, it will expand market reviews and weigh up the impact of proposed new rules.

7.6 The paper also covers the FCA authorisation process, expanding on the detail in CP 12 / 26. Individuals in higher impact firms will continue to be interviewed, and there will continue to be only one combined register for all firms, available via either the PRA or FCA website. "In-flight applications" will not need to be re-submitted at switchover. Waivers for rules should be made to the relevant regulator. The FCA will manage all inward passporting applications, except for banking and insurance which will be handled by the FCA.

7.7 The FCA expects to be the conduct regulator for 26,000 firms, and the prudential supervisor for 23,000 firms not regulated by the PRA. Its new approach will focus on firms with the potential to create the greatest risks to its objectives, underpinned by judgement based supervision. It will intervene if it sees risks to the fair treatment of consumers, using the Treating Customers Fairly ("TCF") principles as a foundation. Firms will not be allowed to place consumers at risk to achieve financial success.

7.8 The consultation is open until 14 December 2012, and a feedback publication is expected in early 2013. It is available via the FSA website at:

[www.fsa.gov.uk/about/what/reg\\_reform/fca](http://www.fsa.gov.uk/about/what/reg_reform/fca)

## 8 French Wealth Tax: Impact on non-UCITS Trusts

8.1 The French Government has issued guidance confirming that UK unit trusts structured as UCITS, or with similar investment objectives, are excluded from the new trust tax reporting requirements (set up by the First Revised French Finance Bill for 2011).

8.2 UCITS funds and other widely held collective investment schemes were expected to be out of scope, as the tax is generally targeted at high net worth individuals with, for example, family trusts. However, this was not confirmed in the Implementation Decree published on September 14, 2012, leading to some uncertainty in the market.

8.3 This uncertainty is resolved in this guidance. The guidance confirms that UCITS are excluded, and non-UCITS are also out of scope provided that they are established in a country that has concluded a convention on administrative assistance to combat against fraud and tax evasion, and exhibit characteristics similar to UCITS – specifically meeting sections (2) and (3) of Article 1 of the UCITS Directive.

8.4 The guidelines are available (in French) at:

<http://bofip.impots.gouv.fr/bofip/7886-PGP/version/14>

## 9 FATCA: UK agrees Inter-Governmental Agreement ("IGA") with US and consults on Implementation

9.1 In September, the UK and US signed an agreement to improve tax compliance and allow UK firms to implement FATCA. The signing follows the Joint Statement made in July 2012 by the governments of France, Germany, Italy, Spain, the United Kingdom and the United States, and is based on the model agreement with a specific UK Annex.

9.2 The Government has agreed the IGA following receipt of a large number of representations from the financial services sector regarding legal difficulties in complying with FATCA reporting, in particular due to data protection concerns, and the onerous reporting requirements. UK financial institutions unable to comply with FATCA could suffer a 30% withholding tax on payments received from the US.

9.3 Under the intergovernmental approach, financial institutions would instead report information to their respective tax authorities, who will exchange the information to the US under the legal framework provided by existing double taxation and tax information exchange agreements. Withholding is not imposed on payments to UK financial institutions and they will not be required to withhold on downstream payments - the documentation requirements are more closely aligned to local AML / KYC requirements.

9.4 The definition of UK financial institution is quite wide, capturing essentially all financial institutions resident in the UK for tax purposes, excluding branches (and subsidiaries) located outside the UK.

9.5 The definition of 'investment entity' is also wide, raising concerns about the prospect of multiple reporting in the case of funds, with potentially both the manager and fund having to report on investors. HMRC has concluded that, after an initial assessment, centralising compliance in the hands of the manager is a sensible solution to reduce the compliance burden and costs for funds. The fund would be the financial institution with responsibility for ensuring the obligations under the Agreement are carried out, but the manager would report as a service provider.



9.6 The reporting to be provided to HMRC is essentially the same as set out in FATCA. UK financial institutions will still need to obtain an identifying number from the US authorities, in line with the US deadlines, although this will be a registration process rather than entering into an FFI agreement.

9.7 If the UK and its financial institutions meet the obligations set out in the Agreement then those financial institutions will be treated as complying with FATCA and will not be subject to withholding on their US source income.

9.8 HMRC expects to issue draft legislation in late 2012.

9.9 The IGA is available via the HM Treasury website at:

[http://www.hm-treasury.gov.uk/press\\_82\\_12.htm](http://www.hm-treasury.gov.uk/press_82_12.htm)

9.10 The HMRC consultation is available at:

[http://customs.hmrc.gov.uk/channelsPortalWebApp/downloadFile?contentID=HMCE\\_PROD1\\_032308](http://customs.hmrc.gov.uk/channelsPortalWebApp/downloadFile?contentID=HMCE_PROD1_032308)

## 10 CP 12 / 32: Implementation of the Alternative Investment Fund Manager's Directive

10.1 This consultation follows Discussion Paper ("DP") 12 / 01 released earlier this year. It provides feedback on the DP and provides policy proposals on implementing those aspects of the European legislation that the FSA believes there is now "sufficient certainty" on – generally the Level 1 directive. The consultation is part one of a two part process, with a second CP ("CP2") expected in February 2013.

10.2 The FSA's general approach is based on copy-out of the directive, which was made on a maximum harmonisation basis with no ability to re-open policy discussions. It proposes to implement the fund specific rules via a new FUND sourcebook, which will replace COLL, and incorporate UCITS and AIF fund rules. AIFMs only managing AIFs and selling to professional investors will only need to consider chapters 1-3. Other matters will be distributed between the most suitable parts of the Handbook; for example, rules for systems and controls in SYSC and rules for conduct of business in COBS.

### *NURS, QIS, recognised schemes*

10.3 The FSA confirms that NURSs will be treated as AIFs that may be marketed to 'retail investors' within the meaning of Article 43 of AIFMD. The existing NURS rules will be retained except where modification is needed to meet the AIFMD requirements. The FSA will provide more detail on required modifications in CP2. The QIS regime will continue on a similar basis to the proposed changes to NURS, with modifications only made where necessary at this time. There will also be no alignment of UCITS and retail AIF regimes at this time, and so any required

changes to NURS will not be replicated for UCITS. The FSA is leaving the treatment of recognised schemes until CP2.

### *Scope of Directive*

10.4 The FSA expects that the directive will apply to most unregulated collective investment schemes ("UCIS"), which it notes will extend to unauthorised unit trusts and limited partnerships investing in a range of assets such as transferable securities, derivatives, real estate, private companies, fine art and wine. It also expects that managers of offshore investment funds marketed to retail or professional investors in the UK will be subject to the Directive.

10.5 The FSA views real estate investment trusts ("REITs") as a type of property investment firm, and, therefore, it believes that these may or may not be AIFs depending on the specific activities they carry on. The presence of a defined investment policy, etc, is likely to be a key test, which we believe to be in line with industry views.

10.6 The way the Regulated Activities Order ("RAO") categorises fund management activities will be altered to comply with the directive, with four new activities replacing the current system:

- Managing an AIF;
- Managing a UCITS;
- Acting as a depositary of an AIF; and
- Acting as a depositary of a UCITS.

10.7 The activity of establishing and operating a CIS will be retained, but will only need to be held where a firm operates a CIS that is neither an AIF nor a UCITS. The activity of sole director of an OEIC will be abolished, as the activities of managing an AIF or a UCITS will replace it entirely.

10.8 AIFMs will not need to have separate permission for investment management where this is carried out in connection with the fund, and a grandfathering process may be applied to the activity of scheme management. The FCA does not expect to start accepting applications before 23 July 2013. Asset managers structured as limited partnerships subject to the law of England and Wales will not be able to become AIFMs.

### *Prudential rules*

10.9 AIFMs will be subject to prudential and conduct rules set by the FCA. Depositaries will generally also be subject to FCA rules, but, systemically important depositaries, such as major banks, will be prudentially regulated by the PRA. The CP reflects that the capital requirements of the AIFMD and the UCITS Directive are broadly the same, with both based on funds under management and expenditure and the same types of capital instrument

allowed. Common terms will therefore be applied. Firms will be categorised as a:

- **Collective portfolio management firm ("CPM firm"):** that can undertake external portfolio management of AIFs, UCITS, or both, but does not provide MiFID services (e.g. a current UCITS firm). The initial capital requirement for a CPM firm is €125,000, plus 0.02% of the portfolio, based on Article 9(2) of the AIFMD or Article 7(1)(a) of the UCITS Directive;
- **Internally managed AIF:** with initial capital of at least €300,000; or
- **Collective portfolio management investment firm ("CPMI firm"):** that can undertake external portfolio management of AIFs, UCITS, or both and provides MiFID services (e.g. a current UCITS investment firm). Here, the requirement is based on that of a BIPRU limited licence firm, but only subject to the pillar 1 requirements of BIPRU for designated investment business.

10.10 The FSA has not included any provision to use a guarantee in the proposed rules, but will reconsider if firms respond that they would want to use one. There will be some fee changes, but this is not expected to impact arrangements for 2013-4.

### *Transparency, Management and Operational Rules*

10.11 FUND, Chapter 3, will transpose most of the AIFMD Level 1 directive requirements - e.g. disclosure, annual reports, reporting to authorities. Most of the organisational requirements in the Level 1 Directive are aligned with those in the UCITS Directive and the FSA believes that there will not be many significant differences for firms seeking dual authorisation.

10.12 The FSA notes that certain aspects have been left to the L2 text, for example, whether an AIFM will be required to establish an independent and separate internal audit function, frequency of Risk Management Process ("RMP") reviews, and how the FSA will assess delegation, including what level of delegation would make the AIFM a "letterbox entity". The FSA envisages that the assessment of a "letterbox entity" should, principally, be a qualitative rather than a quantitative test. The existing NAV calculation guidance for authorised funds will be retained.

### *Depositories*

10.13 The existing regulated activity of acting as trustee or depository of an authorised fund will be replaced by two activities – acting as depository of an AIF, and acting as depository of a UCITS (in line with the split for management activities). Existing depository providers will have grandfathering for UCITS activities, with FSA considering if grandfathering can be applied to acting as depository of an AIF (e.g. for NURSs).

10.14 An AIF depository can be structured as a UK credit institution, one of certain types of MiFID firm, or can be an existing entity providing services to UCITS as of July 2011. An AIF other than an authorised fund (i.e. NURS / QIS) should be able to appoint an affiliate of the AIFM as depository if it meets the Directive requirements and there is proper management of any conflicts of interest. The AIFM cannot perform any function of a depository as its delegate. There will potentially be restrictions on affiliated depositories regarding the means used to hold title to assets.

10.15 There will be no change to the existing capital requirements rules until the UCITS V negotiations are complete. New providers structured as MiFID firms will have to hold £4m if they provide services to an authorised AIF (e.g. NURS / QIS), otherwise the standard EU credit institution or MiFID rules will apply, which involve lower capital in some cases.

10.16 There are special provisions in place for some scheme types (e.g. private equity) not generally investing in "custody assets".

10.17 Article 36 of AIFMD imposes a limited depository requirement on a UK AIFM managing a non-EEA AIF marketed under national private placement. The FSA's view is that firms offering this type of depository service will need to be authorised as a full AIF depository, although it will only be subject to the rules on cash monitoring, safekeeping of assets and oversight. UK AIFs other than authorised funds (i.e. NURS / QIS) will be able to appoint a non-UK credit institution to act as depository for a transitional period of four years until July 2017.

### *Other topics in the CP*

10.18 The UK transposition of the marketing requirements will primarily be by Treasury regulations. Respondents to DP12/1 generally supported the current private placement regime in the UK, and suggested that only minimal changes be made to the regime as a result of AIFMD, such as a public register of privately placed funds.

### *Cost / Benefit Analysis*

10.19 The paper covers compliance, prudential and authorisation costs for AIFMs, which vary based on the scale and nature of the funds under management.

10.20 The FSA notes industry feedback that the depository related provisions are the area of greatest concern to many AIFMs. Those that will have to appoint a depository are likely to incur staff costs and costs of seeking external advice, of around £50,000-£100,000.

10.21 The CP acknowledges that fee increases may be modest for some managers due to low risk or competition factors, but also makes reference to Ernst & Young's analysis for

AIMA indicating potentially significant increases in fees.

- 10.22 The FSA believes that securitisation position rules will have limited impact on business models as the market is impacted by the same rules in CRD and Solvency II.
- 10.23 Also, the FSA believes that internally managed investment trusts will not typically face an AIFMD capital requirements shortfall as investment trusts tend to have large amounts of cash and cash equivalent assets on their balance sheet.

*Transitional provisions and response date*

- 10.24 The AIFMD allows firms, that are already managing or marketing AIFs before 22 July 2013, a transitional period of 12 months to comply with the relevant laws and regulations, and HM Treasury is expected to allow this transitional provision.
- 10.25 Responses to the CP are due by 1 February 2013, with the 2<sup>nd</sup> paper expected in February 2013. The consultation is available via the FSA website at:

<http://www.fsa.gov.uk/static/pubs/cp/cp12-32.pdf>

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