

# This week at the UK regulators

## Thirty second guide: The week in overview

The main enforcement development last week was the imposition of a fine on an institution for transaction reporting failings. In other (separate) enforcement related developments, the FCA took the unusual steps of publishing a summary of the findings of a skilled persons report and confirming the commencement of an investigation concerning a data loss incident.

In other developments, the FCA announced final rules aimed at ensuring the effectiveness of UK primary markets and released a feedback statement setting out future areas of focus. It also welcomed clarifications from US regulators on the interaction between US rules on inducements and those set out in MiFID II, issued an appeal for investors to come forward with details of fraudulent investment schemes and published final rules on position limits for commodity derivative contracts. Meanwhile, the PRA published a note aimed at assisting non-executive directors with preparing for new reporting requirements.

Further afield, in a case with potential future relevance to enforcement action where regulators argue that individuals lack integrity based on dishonesty, the UK Supreme Court has made substantial revisions to the legal definition of dishonesty.

## FCA imposes fine for transaction reporting failings

The FCA has (in a Final Notice dated 18 October, published on 23 October) imposed a financial penalty of £34,524,000 on Merrill Lynch International ("MLI") for breaches of Principle 3 (management and control) of the Principles for Businesses and article 9 of the European Markets Infrastructure Regulation ("EMIR") between 12 February 2014 and 6 February 2016. The FCA found that it failed to report 68.5 million transactions required to be reported under article 9 of EMIR and that there were shortcomings in relation to oversight, testing and resourcing arrangements in place in relation to reporting requirements for exchange traded derivatives.

The financial penalty imposed was reduced by 30 per cent as MLI agreed to settle at an early stage of the investigation. The FCA acknowledged that the seriousness of the breaches was mitigated by a number of facts including that MLI self-reported the breaches and cooperated fully with the FCA's investigation, and it "welcomed" MLI's open and transparent approach in addressing the issues.

<https://www.fca.org.uk/publication/final-notice/merrill-lynch-international-2017.pdf>

## FCA provides an update on commercial lending skilled person report

In an unusual move, the FCA has (on 23 October) published an interim summary of the findings of a report prepared by a skilled person under section 166 of the Financial Services and Markets Act 2000 in relation to the treatment by Royal Bank of Scotland of SME customers transferred to its Global Restructuring Group between 2008 and 2013. The summary now released by the FCA has been reviewed by independent counsel to ensure that it reflects the skilled person's report in a fair and balanced manner. The FCA has made clear that it has released the summary in recognition of the significant public interest in the case but has made clear that there are legal and practical factors preventing the publication of the report. The FCA has indicated in a statement on its website that the full report and other relevant documents have been provided to counsel appointed by the Treasury Select Committee, who will now assess whether the interim summary published is a fair and balanced summary. The FCA will publish an amended version if necessary following that assessment.

<https://www.fca.org.uk/news/press-releases/update-fca-review-rbs-treatment-sme-customers-global-restructuring-group>

## FCA announces investigation into data loss incident

The FCA announced on 24 October that it is investigating the circumstances surrounding a cybersecurity incident that led to the loss of UK customer data held by Equifax Ltd on the servers of its US parent.

<https://www.fca.org.uk/news/statements/statement-fca-investigation-equifax-ltd>

## FCA reforms to enhance the effectiveness of UK primary markets

On 26 October, the FCA set out a package of measures designed to ensure that the UK's primary capital markets remain effective. Over the past 18 months, the FCA has published several papers exploring potential enhancements to the regulatory framework. Following consultation, the FCA is setting out final rules to: reform the availability of information during the UK equity initial public offering (IPO) process; and clarify and enhance some elements of the Listing Rules. These are set out in two policy statements (PS 17/22 and PS 17/23 – see summary table below for full details), which have been accompanied by a feedback statement (FS 17/3) identifying areas where the FCA considers that further exploration and stakeholder engagement will be worthwhile. The FCA has stated that it will consult more fully on the areas discussed in the feedback statement in due course.

<https://www.fca.org.uk/news/press-releases/fca-reforms-enhance-effectiveness-uk-primary-markets>

<https://www.fca.org.uk/publication/policy/ps17-22.pdf>

<https://www.fca.org.uk/publication/policy/ps17-23.pdf>

<https://www.fca.org.uk/publication/feedback/fs17-03.pdf>

## FCA welcomes MiFID II inducements clarifications

On 26 October, the FCA's CEO Andrew Bailey released a statement welcoming the announcement made by the European Commission and the US Securities and Exchange Commission in relation to the MiFID II inducements and research reforms and their interaction with US regulation. The clarifications provided ensure that firms can continue to access US research from 3 January 2018, while also maintaining the investor protection safeguards of the MiFID II regime.

<https://www.fca.org.uk/news/statements/fca-statement-mifid-ii-inducements-and-research>

## FCA urges public to report fraudulent investment schemes

On 25 October, the FCA issued a press release urging the public to get in touch if they have been contacted by a company offering what they think could be a fraudulent investment. This plea comes as new research shows more than a fifth (22%) of over 55s surveyed who suspect they have been contacted about a fraudulent investment in the last three years, did not tell anyone about it.

<https://www.fca.org.uk/news/press-releases/speak-out-against-fraudulent-investments>

## FCA publishes position limits for commodity derivative contracts

On 26 October, the FCA published position limits on certain commodity derivative contracts which are traded on UK trading venues. The limits have been established by exercising their power of direction under Regulation 16 of The Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulations 2017 (MIFI Regs) in accordance with Article 57 of MiFID II and the methodology set out in RTS 21. The limits will apply from 3 January 2018 to positions held in the Spot Month and the Other Months' periods for each commodity derivative.

<https://www.fca.org.uk/news/statements/fca-publishes-position-limits-commodity-derivative-contracts>

## PRA flags priorities for non-executive directors on new reporting requirements

On 27 October, the PRA published a note aimed at non-executive directors ("NEDs") setting out the key milestones for implementation of IFRS 9 ahead of the standard being introduced on 1 January 2018. The note also lists four questions for NEDs to discuss with their boards relating to transitional arrangements, stress testing and capital planning, governance arrangements and the handling of forward-looking credit data and disclosures. It has also identified particular priorities for NEDs on audit committees.

<http://www.bankofengland.co.uk/pradocuments/publications/reports/ifrs9neds271017.pdf>

## FCA warnings

| Name of firm  | Date of warning | Details  |
|---|-----------------|--|
| Century Finance/Century Finance Services Limited/Century Finance UK Limited | 23 October 2017 | Clone firm<br><a href="https://www.fca.org.uk/news/warnings/century-finance-services-limited-uk-clone">https://www.fca.org.uk/news/warnings/century-finance-services-limited-uk-clone</a>  |
| Trading Trinity   | 23 October 2017 | Unauthorised firm<br><a href="https://www.fca.org.uk/news/warnings/trading-trinity">https://www.fca.org.uk/news/warnings/trading-trinity</a>   |
| UK Financial Investment Ltd   | 24 October 2017 | Clone firm<br><a href="https://www.fca.org.uk/news/warnings/uk-financial-investment-ltd-clone-uk-registered-company">https://www.fca.org.uk/news/warnings/uk-financial-investment-ltd-clone-uk-registered-company</a>  |
| Greenshields Capital Group  | 24 October 2017 | Unauthorised firm<br><a href="https://www.fca.org.uk/news/warnings/greenshields-capital-group">https://www.fca.org.uk/news/warnings/greenshields-capital-group</a>   |
| Heritage Property Fund/Heritage Property Plc/Heritage Developments          | 25 October 2017 | Unauthorised firm<br><a href="https://www.fca.org.uk/news/warnings/heritage-property-fund-heritage-property-plc-heritage-developments-clone-uk-registered-company-0">https://www.fca.org.uk/news/warnings/heritage-property-fund-heritage-property-plc-heritage-developments-clone-uk-registered-company-0</a> |
| Six Swiss Exchange Ltd  | 27 October 2017 | Clone firm<br><a href="https://www.fca.org.uk/news/warnings/six-swiss-exchange-ltd-clone-authorized-firm">https://www.fca.org.uk/news/warnings/six-swiss-exchange-ltd-clone-authorized-firm</a>  |
| Bizzy Loans   | 27 October 2017 | Clone firm<br><a href="https://www.fca.org.uk/news/warnings/bizzy-loans-clone-authorized-firm">https://www.fca.org.uk/news/warnings/bizzy-loans-clone-authorized-firm</a>  |

## Policy developments

| FCA                        |  | PRA                    |  |
|----------------------------|--|------------------------|--|
| Proposed developments      |  |                        |  |
|                            |  | Deadline for responses |  |
| <b>Consultation papers</b> |  |                        | 31 January 2018  |
|                            |  |                        | <p><b>Solvency II: Matching adjustment (CP21/17)</b></p> <p>The PRA sets out its proposed expectations of firms in respect of the application of the matching adjustment (MA). The MA allows firms to adjust the relevant risk-free interest rate term structure for the calculation of a best estimate of a portfolio of eligible insurance obligations. This CP has been developed by the PRA as part of its work on adjustments to the insurance prudential framework in the light of experience following the UK introduction of Solvency II, including in areas recommended for reform by the Association of British Insurers and discussed with the Treasury Committee.</p> <p><a href="http://www.bankofengland.co.uk/p/ra/Documents/publications/cp/2017/cp2117.pdf">http://www.bankofengland.co.uk/p/ra/Documents/publications/cp/2017/cp2117.pdf</a></p> |

| Finalised policy and guidance |  |                               |  |
|-------------------------------|--|-------------------------------|--|
|                               |  | Implementation/effective date |  |
| <b>Policy statements</b>      | <p><b>Reforming the availability of the information in the UK equity IPO process (PS17/23)</b></p> <p>This Policy Statement sets out final rules which seek to ensure that, before any connected</p> | 1 July 2018                   |  |

|                            |   |                 |  |  |
|----------------------------|---|-----------------|--|--|
|                            | <p>research is released, a prospectus or registration document is published and providers of unconnected research have access to the issuer's management. The Policy Statement also sets out new guidance to address the underlying conflicts of interest arising when analysts within prospective syndicate banks interact with the issuer's representatives when an underwriting or placing mandate and subsequent syndicate positioning are being considered.</p> <p><a href="https://www.fca.org.uk/publication/policy/ps17-23.pdf">https://www.fca.org.uk/publication/policy/ps17-23.pdf</a></p>   |                 |  |  |
|                            | <p><b>Review of the Effectiveness of Primary Markets: Enhancements to the Listing Regime (PS17/22)</b></p> <p>The FCA is making a number of enhancements to the Listing Regime including clarifying the eligibility requirements for a premium listing, introducing a concessionary route to premium listing for property companies, updating how premium listed issuers may classify transactions and changing their approach to the suspension of listing for reverse takeovers. The policy statement states that these proposals received overwhelming support from market participants who responded to the consultation exercise.</p> <p><a href="https://www.fca.org.uk/publication/policy/ps17-22.pdf">https://www.fca.org.uk/publication/policy/ps17-22.pdf</a></p> | 1 January 2018  |  |  |
| <b>Feedback statements</b> | <p><b>Feedback Statement to DP17/2 Review of the Effectiveness of Primary Markets: the UK Primary Markets Landscape (FS17/3)</b></p>  | 26 October 2017 |  |  |

|  |  |  |  |  |
|--|--|--|--|--|
|  | <p>This Feedback Statement provides an overview on the feedback received in response to Discussion Paper DP17/4. The FCA has identified three areas that it thinks merit further exploration and stakeholder engagement including: the relative positioning of standard versus premium listing; the provision of patient capital to companies that require long-term investment; and retail access to debt markets. It will publish proposals for consultation where appropriate in due course.</p> <p><a href="https://www.fca.org.uk/publication/feedback/fs17-03.pdf">https://www.fca.org.uk/publication/feedback/fs17-03.pdf</a></p> |  |  |  |
|--|--|--|--|--|

## Further Afield

### UK Supreme Court redraws test for dishonesty

In a decision that may have implications in cases where individuals are alleged to lack integrity based on dishonesty, the UK Supreme Court has (on 25 October) effectively lowered the threshold to be overcome by criminal prosecutors seeking to establish that the actions of an individual were dishonest. The Court has stated that the longstanding test propounded in *R v Ghosh* [1982] EWCA Crim 2, which set out a two limb test based on assessments of (1) whether the individual's conduct was dishonest by ordinary standards and (2) whether the individual realised that his or her conduct was dishonest by ordinary standards, does not accurately reflect the law. Stating that it is in fact not necessary for the individual to realise that what he or she was doing was dishonest and harmonising the tests applicable to civil and criminal proceedings, the Court stated:

*"there can be no logical or principled basis for the meaning of dishonesty (as distinct from the standards of proof by which it must be established) to differ according to whether it arises in a civil action or a criminal prosecution. Dishonesty is a simple, if occasionally imprecise, English word. It would be an affront to the law if its meaning differed according to*

*the kind of proceedings in which it arose. It is easy enough to envisage cases where precisely the same behaviour, by the same person, falls to be examined in both kinds of proceeding."*

Case reference: *Ivey v Genting Casinos (UK) Limited t/a Crockfords* [2017] UKSC 67

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