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Countdown to MiFID II: Final rules for trading venues, participants and investment firms

On 31 March 2017, the Financial Conduct Authority (FCA) published its first policy statement (PS 17/5) on the implementation of the recast Markets in Financial Instruments Directive (MiFID II). The policy statement (PS) contains feedback on the proposals originally contained in the FCA's first two MiFID II consultation papers (CP 15/43 and CP 16/19), as well as some very limited feedback on one aspect of telephone taping, which was covered in the third consultation paper (CP 16/29).

PS 17/5 covers a range of issues that will be relevant to market operators and investment firms operating trading venues, as well as members or participants of such markets or venues. In addition, it also contains a number of other topics that will have an impact on MiFID investment firms more generally. However, the majority of the MiFID conduct of business rules that will affect investment firms, including difficult areas such as inducements, best execution and product governance, are expected to follow in the FCA's second MiFID II policy statement in June 2017.

In this briefing, we summarise some of the key points contained within PS 17/5 and note how the FCA intends to give effect to the various requirements in the FCA Handbook. We have divided the relevant topics between those which are primarily market issues,

SUMMARY OF PS 17/5 CONTENT

Markets issues:

- Requirements for regulated markets
- Requirements for MTF operators
- Requirements for OTF operators
- Requirements for systematic internalisers
- Transparency requirements
- Requirements for data reporting service providers
- FCA fees for OTF operators and data reporting service providers

Investment firm issues:

- Algorithmic trading requirements
- Telephone taping for Article 3 retail financial advisers
- Application of FCA Principles for Businesses to eligible counterparties
- Transaction reporting
- Systems and controls requirements for Article 3 firms
- Conflicts of interest requirements
- Governance requirements
- Remuneration
- Regulatory notifications
- Whistleblowing

principally affecting trading venue operators, systematic internalisers and data reporting service providers, and those issues which are of more general relevance to MiFID investment firms.

Given the short time available to implement the MiFID II requirements before **3 January 2018**, firms affected by any of these issues should read the PS and the "near-final" draft rules thoroughly and update their implementation processes accordingly.

MARKET ISSUES

KEY POINTS

- Regulated market operators and MTF operators will need to implement the various systems and controls requirements for trading venues, such as algorithmic trading controls or trading halt requirements.
- The FCA has provided additional guidance on the definition of an OTF and the various requirements applying to an OTF. This should be read alongside ESMA's recent Q&A on market structure issues which provides additional information on the characteristics of an OTF.
- Firms that are, or may become, systematic internalisers will need to refer to the directly applicable requirements in EU legislation, as the bulk of the FCA rules relating to systematic internalisers are being deleted from the Handbook.
- The FCA has confirmed that it will exercise its discretion to grant pre-trade transparency waivers and post-trade transparency deferrals, provided that the technical conditions are met.
- There will be no grandfathering arrangements for existing approved reporting mechanisms, so they will need to apply for authorisation under MiFID II. As approved publication arrangements and consolidated tape providers are new types of entity under MiFID II, they will also need to apply for authorisation.
- The FCA has postponed the publication of its final PERG guidance until June 2017. (See the discussion under *Issues relevant to MiFID investment firms generally* below.)

REGULATED MARKET OPERATORS

UK recognised investment exchanges (**RIEs**) are currently subject to the recognition requirements set out in the FSMA 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001 (SI 2001/995) (**Recognition Regulations**), as well as the guidance in the FCA's Recognised Investment Exchanges (**REC**) sourcebook.

In CP 15/43, the FCA proposed a number of changes to REC to reflect necessary amendments to the underlying Recognition Regulations resulting from MiFID II and to acknowledge certain new directly applicable obligations. In the PS, the FCA has confirmed that it will implement the vast majority of its consultation proposals, except for a small number of changes which broadly reflect further amendments made by HM Treasury to the Recognition Regulations in its final draft domestic implementing legislation.

The new requirements for regulated market operators will include, amongst others, those relating to algorithmic trading, direct electronic access, market making arrangements, trading halts, tick size regimes, co-location services and clock synchronisation rules.

MULTILATERAL TRADING FACILITY OPERATORS

MiFID II aims to create greater alignment between the regulatory requirements applying to regulated markets and those applying to multilateral trading facilities (**MTFs**). As a result, the PS contains a significant number of amendments to the existing rules for MTF operators in chapter 5 of the Market Conduct sourcebook (**MAR**)

in the FCA Handbook which largely mirror the trading process and organisational requirements introduced under MiFID II for regulated market operators discussed above.

The FCA also confirms in the PS, and in the final rules in MAR 5, that the prohibition on an MTF operator executing orders against proprietary capital or engaging in matched principal trading does not prevent a firm from undertaking those activities outside the MTF, provided that the firm has the necessary regulatory permissions to do so.

ORGANISED TRADING FACILITY OPERATORS

MiFID II will create a new category of trading venue, the "organised trading facility" (**OTF**). In the PS, the FCA again emphasises some of the distinctions between MTFs and OTFs that it originally outlined in CP 15/43. These include the following:

- an OTF is a venue for the trading of bonds, derivatives and other non-equity instruments, but cannot be used for the trading of equities;
- an OTF must use discretion when deciding whether to place or remove an order and whether or not to match a specific client order with another order in the system;
- provided that it has obtained client consent, an OTF can engage in matched principal trading in relation to any financial instrument, other than derivatives which have been declared subject to the clearing obligation under EMIR, and can also deal on own account in sovereign bonds which do not have a liquid market; and
- a firm that operates an OTF is prohibited from operating a systematic internaliser (**SI**) within the same entity, and OTFs may not connect with SIs in such a way as to allow orders in an OTF to interact with those in an SI.

A number of respondents to CP 15/43 asked for additional guidance on various elements inherent in the definition of an OTF, such as on the meaning of the term "discretion". In the PS, the FCA states that it is not intending to add any additional guidance on these issues in the FCA Handbook at the present time, but will instead wait for ESMA to publish additional Q&A in these areas. The FCA does, however, confirm in the PS that the exercise of discretion by the OTF must not be used in such a way as to undermine the principle of non-discriminatory access.

Amongst other issues, the FCA also confirms that:

- a firm which undertakes the MiFID activity of operating an OTF will be an IFPRU 730k firm for the purposes of the UK prudential rules. This will ensure that MTF operators and OTF operators have identical base prudential requirements;
- where non-MiFID financial instruments are traded on an OTF, the MiFID II requirements do not apply in relation to those instruments. However, the FCA notes that since trading of such instruments will take place using the same systems as those used for MiFID instruments, the OTF participants are likely to expect a similar level of service;
- if an OTF wishes to offer matched principal trading, it can obtain consent to this from its clients by making this clear in its rulebook; and
- although RIEs that operate an OTF are not technically subject to the prudential requirements in the CRD IV Directive and the EU Capital Requirements Regulation, they must still consider the risks to which they are exposed as a result of that activity and must reflect this in their financial resources requirement.

SYSTEMATIC INTERNALISERS

The FCA has confirmed its proposals from CP 15/43 to delete the majority of the rules relating to SIs in MAR 6 on the basis that most of the requirements for SIs under MiFID II are contained in directly applicable EU delegated legislation. Firms will therefore need to have regard to the relevant regulatory technical standards made under MiFID II in relation to SIs in order to determine their precise obligations.

In the PS, the FCA clarifies that any firm which exceeds the relevant SI thresholds must notify the FCA that it has become an SI. Previously, in CP 15/43 the FCA had proposed a rule that would have switched off the notification requirement where a firm exceeded the SI threshold but dealt in sizes exceeding the standard market size or the size specific to the instrument. The FCA has now confirmed that that proposed carve-out from the notification obligation will not be implemented.

TRANSPARENCY REQUIREMENTS

MiFIR introduces a number of new pre-trade transparency requirements for trading venues in relation to equity (and equity-like) and non-equity instruments, subject to the possibility of certain waivers being granted if technical conditions are met.

In the PS, the FCA confirms that it will grant waivers in relation to pre-trade transparency requirements to:

- regulated markets and MTFs in relation to equity and equity-like instruments (as such instruments cannot be traded on OTFs); and
- all trading venues in relation to non-equity instruments,

in each case, provided that the technical conditions set out in MiFIR are satisfied. In addition, the FCA has also confirmed that it will grant pre-trade waivers in relation to package orders, provided that the relevant order meets the conditions that will be specified by the Commission in the final regulatory technical standards on packages. The PS notes that ESMA will be carrying out transparency calculations to calibrate the waiver regimes during 2017 based on information provided by national regulators and trading venues.

The FCA has also emphasised that applicants wishing to use pre-trade transparency waivers must send a complete application to the FCA at least 5 months before they intend the waiver to take effect. UK trading venues are not required to re-apply in relation to existing MiFID I waivers if such waivers only require "non-substantial modifications" in order to become compliant with MiFIR.

MiFIR also imposes post-trade transparency requirements in relation to equity (and equity-like) and non-equity instruments on both trading venues and investment firms dealing OTC (i.e. outside the rules and/or systems of a trading venue). National regulators are permitted to grant deferrals of these transparency requirements if the conditions set out in MiFIR and its associated delegated legislation are satisfied. The FCA has confirmed in the PS that it will authorise post-trade transparency deferrals where such conditions are met and will exercise its direction so as not to require the publication of aggregated information or trading volume information in relation to certain deferrals.

DATA REPORTING SERVICE PROVIDERS

The FCA is introducing a new chapter of the Handbook in MAR 9 which will contain the rules applicable to data reporting service providers (**DRSPs**) – i.e.:

- approved reporting mechanisms (**ARMs**);
- approved publication arrangements (**APAs**); and
- consolidated tape providers (**CTPs**).

MAR 9 will include the FCA's rules on how to become authorised as a DRSP and the FCA's supervisory approach to DRSPs, as well as notification requirements in connection with any material changes to information about the DRSP provided at the time of authorisation.

While APAs and CTPs are new concepts under MiFID II, ARMs already exist under MiFID I. The FCA confirms in MAR 9 that there will be no grandfathering arrangements for existing ARMs and therefore any entity which wishes to act as a DRSP, including an ARM, under MiFID II will need to obtain the necessary authorisation.

The PS also confirms that:

- DRSPs will need to carry out annual compliance reviews in order to ensure that their policies and procedures achieve compliance with applicable regulatory requirements;
- trading venues may use an ARM in order to submit transaction reports to the FCA – i.e. the trading venue does not itself need to connect directly to the FCA's market data processor to submit transaction reports;
- any third party entity used by an investment firm to submit transaction reports to the FCA must be authorised as an ARM, or must itself use an ARM to report to the FCA; and
- the FCA will not extend the non-disclosure agreement to enable ARMs to share the technical specifications of the FCA's market data processor with the ARM's clients. However, the ARM may reflect "relevant parts" of the technical specifications in its own client-facing documentation, provided that it does not disclose the entire specifications.

The regulatory regime for DRSPs will be contained in the Financial Services and Markets Act 2000 (Data Reporting Service) Regulations 2017, a draft version of which was published by HM Treasury in February 2017. Alongside the PS, the FCA has also published a fifth consultation paper on the implementation of MiFID II, CP 17/8. Amongst other proposals, that CP sets out the FCA's proposed amendments to the Enforcement Guide and to the Decision Procedure and Penalties Manual to implement the new supervisory regime for DRSPs.

FCA FEES

The PS clarifies that the following fees will apply:

- for firms seeking initial FCA authorisation in connection with the activity of operating an OTF, the application fee will be £25,000 (which is the same fee that currently applies in relation to applications for authorisation as an MTF operator);
- where a firm seeks a variation of permission to add the activity of operating an OTF, the relevant application fee will be reduced by 50% to £12,500 (which, again, would be the same in relation to the activity of operating an OTF);
- in relation to ongoing periodic fees, OTF operators will be subject to a fixed fee in relation to supervision of their OTF activities, which is dependent upon whether supervision of the OTF is undertaken by a specific named "fixed portfolio" supervisor or by a team of "flexible portfolio" supervisors. (Again, identical periodic fees are charged for the supervision of an MTF operator.) The relevant fixed fees are set each year, but for the 2016/17 fee year, these were £300,000 for a fixed portfolio MTF and £28,290 for a flexible portfolio MTF. The FCA also confirms in the PS that the determination of whether an MTF or OTF is supervised on a fixed or flexible basis is undertaken by reference only to the activities of the trading facility itself and not by reference to the other activities that may be undertaken by the investment firm operating the trading facility; and
- in relation to firms connecting to the FCA's market data processor in order to submit data under MiFIR, the connection fee will be £20,000 for applications to establish conformance to submit transaction reporting data and £10,000 for applications to establish conformance to submit market data other than transaction reports.

ISSUES RELEVANT TO MIFID INVESTMENT FIRMS GENERALLY

KEY POINTS

- The FCA intends to publish all of its new MiFID II perimeter guidance in PERG in its second policy statement due in June 2017.
- Firms undertaking algorithmic trading will need to review and implement the new systems and controls requirements for algorithmic trading systems in advance of 3 January 2018.
- The FCA has confirmed that there will be flexibility for Article 3 retail financial advisers in relation to telephone taping, but will publish its final rules for MiFID investment firms in June 2017.
- Transaction reporting obligations under MiFIR will **not** be extended to non-MiFID fund managers such as AIFMs, UCITS managers or pension fund managers. This is the case even if a full-scope UK AIFM or a UCITS manager has permission to perform additional MiFID activities.
- The FCA has finalised the systems and controls requirements applying as rules or guidance to Article 3 firms in order to ensure that they are subject to requirements that are "at least analogous" to MiFID firms.
- The conflicts of interest requirements under MiFID II will require firms to carry out more internal monitoring and to ensure more senior management oversight of conflicts processes, and to use disclosure only as a measure of last resort.
- Although the CRD IV governance requirements will be cross-applied to all MiFID firms, the FCA has confirmed that these can be applied proportionately.
- The MiFID II remuneration requirements, while principally aimed at sales staff, may apply to other individuals within a firm such as partners or directors where they may have an impact on the firm's provision of investment services or corporate behaviour which could lead to a conflict of interest with the duty to act in the client's best interests. The FCA has also confirmed that a firm may be subject to the new MiFID remuneration code and other remuneration codes (e.g. the BIPRU or IFPRU remuneration codes) and then would need to ensure that the remuneration of relevant staff subject to both complies with all relevant requirements.
- Firms will need to ensure that appropriate employee whistleblowing arrangements are in place in relation to potential breaches by the firm of the MiFID requirements.

These issues are discussed in further detail below.

DELAY TO PERIMETER GUIDANCE

In CP 15/43, the FCA consulted on introducing a range of new MiFID-related guidance in its Perimeter Guidance manual (**PERG**), covering issues such as:

- the definition of a structured deposit and how certain regulated activities may apply in connection with structured deposits;
- the definition of an MTF and of an OTF;
- the meaning of a multilateral system, which is an integral concept for both MTFs and OTFs; and
- a range of amendments to the existing questions and answers on the scope of MiFID.

The PS does not contain the final settled additions to PERG in relation to the original consultation proposals. Instead, the FCA has chosen to publish all relevant amendments to PERG (including the further amendments proposed by the FCA in CP 16/29) in its second MiFID II policy statement due in June 2017.

ALGORITHMIC AND HIGH FREQUENCY TRADING REQUIREMENTS

As mentioned above, the FCA has included systems and controls requirements in relation to algorithmic and high frequency trading for RIEs in REC and for MTF and OTF operators in MAR 5 and MAR 5A.

In addition, the FCA has confirmed in the PS that it will introduce a new MAR 7A which will set out the specific requirements for MiFID investment firms which:

- engage in algorithmic trading;
- provide a client with direct electronic access (**DEA**) to a trading venue; or
- act as a general clearing member.

MAR 7A states that firms which undertake algorithmic trading will need to satisfy certain systems and controls requirements, including ensuring that they have resilient systems which are subject to appropriate trading thresholds and limits and which cannot be used to commit market abuse. They will also need to ensure that they have appropriate business continuity arrangements in place to prevent disruption to their trading systems.

Firms providing DEA services will also need to meet a range of requirements, including that they have adequate systems and controls to prevent trading by clients which could lead to a disorderly market or which could constitute market abuse. They must also monitor transactions entered into by clients using the DEA service to identify any infringements of the trading venue's rules, disorderly conduct or market abuse.

A UK MiFID investment firm or a third country MiFID investment firm with a UK establishment which is a member or participant of a trading venue and which engages in algorithmic trading, or which provides DEA services, must also notify the FCA and, if different, the national regulator of the trading venue, immediately.

Firms acting as general clearing members must ensure that they have established clear suitability criteria for the persons to whom they provide services and must impose requirements on such persons to reduce risks to the firm and to the wider market. They will also need to have a binding written agreement in place detailing the essential rights and obligations of both parties.

There are equivalent rules on algorithmic trading and DEA contained in HM Treasury's draft Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulations 2017. These apply to certain non-MiFID firms established in the UK, such as insurers, AIFMs, UCITS managers, pension fund managers and commodities dealers, which are members of, or participants in, regulated markets or MTFs.

TELEPHONE TAPING

In the PS, the FCA gives some limited feedback on its telephone taping proposals set out in CP 16/29. The FCA confirms that Article 3 firms which are retail financial advisers (**RFAs**) will benefit from additional flexibility in relation to the MiFID II telephone taping requirements such that they can either tape relevant conversations or make a written note of them instead. However, the firm must choose one of these two options to apply across the whole firm; it cannot, for example, decide to tape some conversations and make a note of others.

Firms should note that this flexibility is only available to Article 3 RFAs. If the RFA is a MiFID investment firm, it will be subject to the full MiFID II telephone taping requirements instead.

The FCA does not provide any further information in the PS in relation to its final rules for implementing telephone taping for MiFID investment firms; it merely notes that the final rules on this subject will be published in June 2017.

FCA PRINCIPLES FOR BUSINESSES – APPLICATION TO ELIGIBLE COUNTERPARTIES

The FCA's general position is that its Principles for Businesses in the FCA Handbook should apply to all of a firm's regulated business unless there is a clear reason to disapply them. Under MiFID I, certain Principles were disapplied in connection with eligible counterparty (**ECP**) business as they were deemed to overlap with certain MiFID conduct of business rules that were switched off in relation to ECPs. MiFID II modifies the application of conduct of business requirements in connection with ECPs and therefore the FCA proposed in CP 15/43 to reactivate certain previously disapplied Principles in relation to ECP business.

In the PS, the FCA confirms that from 3 January 2018, Principles 1, 2, 6, 7 and 8 will apply in full in relation to any MiFID business conducted with an ECP. The FCA also states, however, that it does not currently intend to modify the application of the Principles for Businesses for non-MiFID designated investment business. (The Principles are an exception to the general rule that a client may only be classified as an ECP in relation to activities that constitute ECP business. Therefore, a client could be classified as an ECP in relation to non-MiFID business in order to benefit from the disapplication of certain of the Principles.)

The FCA confirms in the PS that the application of the concept of fairness in Principles 6 and 7 must be considered in the context of the particular relationship with an ECP client and the type of services that the firm provides. As a result, the extension of these principles to ECP business is not intended to imply that firms should be applying the same protections that would be appropriate in relation to retail customers.

TRANSACTION REPORTING

The FCA confirms in the PS that it will not extend the transaction reporting requirements to fund managers (which include UCITS managers, AIFMs and pension fund managers). This will be the case even if the UCITS manager or full-scope AIFM is carrying out any of the permitted additional MiFID activities under Article 6(3) of the UCITS Directive or Article 6(4) AIFMD.

The PS contains a set of transitional provisions in the FCA's Supervision Manual (**SUP**) in connection with the existing MiFID I transaction reporting obligation. Where a firm is subject to a transaction reporting requirement under the MiFID I Delegated Regulation or the FCA's MiFID I transaction reporting rules in SUP 17 as at 2 January 2018, it will continue to remain subject to that obligation after that date until it has achieved effective compliance. Therefore, a firm will still need to notify the FCA of any breaches of the MiFID I transaction reporting requirements and remedy them, even where those breaches are identified after 3 January 2018 when the new transaction reporting obligation takes effect.

The FCA has declined to provide additional detail about how incorrect or missing MiFID I transaction reports would need to be submitted on or after 3 January 2018. Instead, it has noted that the transition between the two regimes is still being finalised and that its final implementation may have an impact on how the FCA requires firms to discharge their obligations in this area.

SYSTEMS AND CONTROLS REQUIREMENTS FOR ARTICLE 3 (OPTIONAL EXEMPTION) FIRMS

Under MiFID II, the FCA is required to apply organisational requirements to firms falling within the optional exemption in Article 3 MiFID II (**Article 3 firms**) that are "at least analogous" to certain requirements applying to MiFID investment firms. In order to implement this, the FCA has confirmed in the PS that it will be introducing a new table in Annex 1 to its Systems and Controls sourcebook (**SYSC**) which will set out which elements of the current common platform requirements apply as rules or as guidance to Article 3 firms. A separate table will also set out which elements of the directly applicable MiFID II delegated regulation on organisational requirements will apply to Article 3 firms. These new provisions reflect the FCA's original proposals in CP 16/19.

CONFLICTS OF INTEREST REQUIREMENTS

MiFID II strengthens the existing MiFID requirements in relation to conflicts of interest by requiring firms to take all appropriate (rather than reasonable) steps to identify and prevent or manage conflicts, by increasing the quality of the client disclosures required in connection with conflicts, and by prohibiting over-reliance on disclosure where a conflict cannot be adequately prevented or managed.

In the PS, the FCA confirms that it will be implementing changes to the existing rules on conflicts of interest in SYSC 10 and expects that as a result, firms will need to carry out more internal monitoring and senior management oversight of their conflicts processes and policies. It also states that disclosure should only be used as a measure of last resort and therefore a firm must first have taken appropriate steps to attempt to prevent or manage the conflict. Generally, where a firm cannot manage direct, self-created conflicts, it is expected to prevent them from arising in the first place.

GOVERNANCE REQUIREMENTS

MiFID II cross-applies a number of governance requirements under the CRD IV Directive to all MiFID investment firms. These include general requirements such as that members of the management body should not hold more directorships than are appropriate, or that the firm must ensure that the management body defines, oversees and is accountable for the implementation of governance arrangements that ensure effective and prudent management of the firm. Firms that are already subject to CRD IV (i.e. in the UK, IFPRU investment firms), should already be complying with these requirements, but they will impose additional obligations on BIPRU and exempt-CAD MiFID firms.

In the PS, the FCA confirms that it will implement these requirements by amending the scope of the existing rules in SYSC 4.3A so that they apply to all common platform firms. In response to specific feedback on CP 16/19, the FCA has confirmed that firms may apply these new requirements proportionately, depending upon the nature, scale and complexity of the risks inherent in the firm's business model. However, the FCA also warns that it views the new governance requirements as an important element of the MiFID II reform package and therefore that firms should treat these with appropriate seriousness.

Firms should also note the specific requirement which will be transposed into SYSC 4.1 relating to data and IT security. The FCA has confirmed in the PS that this is subject to the general proportionality principle, but notes that the rules require both a comprehensive and proportionate application of the requirements.

REMUNERATION

The PS contains the final wording of the FCA's new code on the remuneration and performance management of sales staff in SYSC 19F. The new remuneration code is relatively short, in large part because it cross refers to the directly applicable requirements on remuneration in MiFID II delegated legislation and elsewhere in the FCA Handbook, as well as other guidance published by the FCA.

The FCA has confirmed that despite the title of SYSC 19F, which refers only to sales staff, the relevant provisions may also apply to partners or directors within firms. This is because the relevant wording in the MiFID II delegated legislation refers to individuals with "*an impact, directly or indirectly, on investment and ancillary services provided by the investment firm, or on its corporate behaviour, regardless of the type of clients, to the extent that the remuneration of such persons and similar incentives may create a conflict of interest that encourages them to act against the interest of any of the firm's clients*".

The FCA also confirms in the CP that it is possible for a firm to be subject to several remuneration codes, in which case it would need to ensure that it applies all of the necessary requirements to relevant staff falling within each.

REGULATORY NOTIFICATIONS

The FCA confirms in the PS that it is implementing its proposals in CP 16/19 to introduce a requirement for FCA authorised firms to notify it of any breach of:

- any requirement under the HM Treasury regulations implementing MiFID II in the UK; or
- any directly applicable provision of MiFIR or any delegated regulation adopted under MiFID II or MiFIR.

The FCA is also introducing additional guidance in relation to passporting notifications under MiFID II, as the format and content of passporting notifications will be prescribed in EU delegated acts.

WHISTLEBLOWING

MiFID II introduces new whistleblowing rules whereby firms must put in place appropriate procedures for their employees to report potential or actual breaches of MiFID requirements. In the PS, the FCA confirms that it will be implementing these requirements through the introduction of new provisions in SYSC 18.6, which require mechanisms for reporting any breaches in connection with any FCA rules implementing MiFID II or any directly applicable requirements under MiFIR or any delegated legislation adopted under MiFID II or MiFIR. The FCA has also confirmed in the PS that firms can tailor their implementation of the whistleblowing requirements in a proportionate manner, according to the risks of their particular business.

NEXT STEPS

The publication of the PS is a significant step forward in terms of firms having access to the final UK domestic rules implementing MiFID II. In many cases, the FCA's rules cross-refer to requirements in EU legislation which has already been finalised and therefore firms should already have been making preparations based on the content of that legislation. Nonetheless, the near-final FCA rules in the areas discussed above will allow firms to revisit their implementation plans and update previously unclear elements where necessary. They also provide certainty in relation to those areas where the FCA has discretion.

Wherever possible, firms may wish to take action to address the points arising from the current PS before June 2017, as the second FCA PS expected at that time is likely to contain a very significant number of rules and guidance in technically difficult areas. The implementation of those final rules before 3 January 2018 may necessitate significant resources and therefore it may be advisable to deal with points arising from the first PS as soon as possible.

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