COMPLIANCE

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SPECIAL POINTS OF INTEREST:

- CSSF Luxembourg publishes its 2013 Annual Report
- EIOPA publishes its Financial Stability Report May 2014
- EBA publishes its 2013 Annual Report
- ESMA publishes updated Q&As on EMIR

Beste Leden,

Chers Membres,

Voici notre dernière Newsletter du premier semestre et nous clôturons bien celui-ci puisque nous avons la chance d'avoir une contribution de Maîtres Jean-Marc Gollier et de François Koning de l'Etude Eubelius qui, je pense, séduira les Compliance Officers. Qu'ils soient ici l'un et l'autre vivement remerciés.

Je rappelle encore les publications de l'Arrêté Royal transversal ainsi que des Directives/Règlements MiFID II/ MiFIR et MAD/MAR parues le jour du Compliance Day. Celui-ci a attiré 170 collègues et, ensemble, nous avons pu profiter d'excellents exposés.

Pour ceux qui n'ont pu être présents...

Nous avons tout d'abord entendu M. Bienfait, Conseiller de la Politique prudentielle et stabilité financière au sein de la BNB. Il a évoqué pour nous les enseignements qui ont pu être dégagés des questionnaires anti-blanchiment et leur possible évolution. Il a également abordé la visite imminente du GAFI dans le cadre de l'évaluation que cet organisme est appelé à faire de la Belgique en matière de blanchiment.

Vervolgens heeft de heer Lannoy, adjunct-directeur binnen de FSMA en meer in het bijzonder bevoegd voor de MiFID gedragsregels, de circulaire AssurMiFID en de koninklijke besluiten Twin Peaks 2 toegelicht.

Le nouvel arrêté Royal, dit transversal, en matière d'informations sur les produits financiers, qui a déjà fait couler pas mal d'encre et de salive avant même sa publication, ainsi que le règlement sur le labelling et le ban de certains produits financiers aux clients de détail nous ont été présentés par MM. Bayi et Zinnen du contrôle de la conformité des produits financiers au sein de la FSMA.

M. Vanhaverbeke, Head of Product management auprès de BNP Paribas Fortis, a complété ces interventions en mettant en lumière les aspects d'implémentation de ces dispositions particulièrement au regard d'autres méthodes de classification des risques, en particulier le SRRI des fonds d'investissement.

Na de koffiepauze, was de vergadering opgedeeld tussen enerzijds de Compliance Officers van de banksector, en anderzijds die van de verzekeringssector.

Voor dit laatste onderwerp was het voor ons een eer dat de Heer Becquart ons een uiteenzetting kwam geven nopens de wet van 4 april op de verzekeringen. Deze wet bevat immers een aantal wijzigingen onder andere met betrekking tot de publicatie van segmentatie criteria die de afwezigheid van discriminatie moeten garanderen, alsmede verduidelijkingen met betrekking tot de behoeften analyse en voornamelijk de beperkingen opgelegd door artikel 4 inzake toegelaten beleggingen voor Tak 23 producten, hetgeen een hot topic is voor het ogenblik.

En parallèle, nous avons écouté l'excellent exposé de Kristof Macours, juriste de BNP Paribas Fortis sur la nouvelle loi bancaire. Celle-ci est fondamentalement orientée risques et comporte de nombreuses dispositions qui ne relèvent pas immédiatement de la fonction Compliance mais elle en contient aussi d'autres qui sont essentielles pour elle et notamment la gouvernance,

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EDITORIAL (PART II)

Les Comités de nomination et de rémunération, la scission du Comité d'audit d'avec celui de Risk et Compliance, les politiques de rémunération et l'identification des "Key Identified Staff", le "Fit and Proper" élargi, l'indépendance et bien d'autres choses encore. M. Macours témoignait d'une parfaite maîtrise du sujet et nous n'avons que le regret d'avoir dû l'interrompre au vu du retard pris sur le programme...

De eerste workshop richtte zich op de Zorgplicht binnen verzekeringsondernemingen. Deze was omkaderd door Virginia Scheurs van Assuralia en Benjamin Eyckmans van P&V Group.

Le second atelier a traité des conflits d'intérêts en matière d'assurances. Il était animé par Mélissa Thirion d'Assuralia et Caroline Veris, Partner de Deloitte.

De derde workshop omtrent de FATCA monitoring werd geleid door Yannick Ramakers, MLRO van KBC Bank en Verzekeringen.

Le dernier workshop portait lui sur le monitoring dans le cadre de la loi de financement des PME. Chantal Stragier, Head of Consumer and data protection pour la Compliance du Groupe KBC, Xavier Marquebreucq, Head of CPL marketing chez BNP Paribas Fortis et Koert Colpaert, du contrôle des risques de Belfius, nous ont édifiés sur le sujet.

Je termine en attirant votre attention sur la synthèse de Christian Berden concernant la loi sur les Financial Planners. Une présentation a récemment été faite par des représentants de la FSMA. Il est important de bien s' imprégner de la définition mais la question de savoir si les activités que l'on exerce entrent dans le champ d'application de cette définition relèvent d'un examen au cas par cas. Dans l'affirmative, les règles de conduite mentionnées dans la loi et leurs éventuels assouplissements contractuels doivent être respectés par les planificateurs financiers qui ne peuvent être qualifiés d' indépendants si l'activité est exercée par le biais du statut d'entreprise réglementée.

Il ne me reste plus, au nom du Conseil d'administration, qu'à vous souhaiter d'excellents congés à toutes et tous !

Prettige vakantie aan allen !

Marie-France De Pover

Independent control functions help the company's managers in their management duties

COMPLIANCE OFFICERS: NEW RULES FOR BANKS AND INSURANCE COMPANIES

BY JEAN-MARC GOLLIER & FRANÇOIS KONING

Compliance is a key function in credit institutions and insurance companies.

Compliance officers guard, with an independent point of view, compliance with law and regulation, the integrity of activities and compliance risks[1].

On 25 April 2014, two new Acts have further reinforced this function.

New legal framework

The Act of 25 April 2014 on the legal status and supervision of credit institutions (published in the Official Journal on 7 May 2014), hereinafter "the Banking Act", legally enshrines the concept of "independent control functions". As part of this category, the compliance functions appear alongside the internal audit and risk management functions (Article 35).

The Banking Act implements, in part, the Directive 2013/36/EU (so-called "CRD IV") and goes beyond that directive by extending the principles that it lays

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[1] For more information, see our paper "Compliance : y-a-t-il un responsable dans l'entreprise ?" in the Bulletin des Assurances, - Tijdschrift voor verzekeringen, Kluwer, 2014 (to come).

COMPLIANCE OFFICERS: NEW RULES FOR BANKS AND INSURANCE COMPANIES

BY JEAN-MARC GOLLIER & FRANÇOIS KONING (PART II)

down for the function of risk management to internal audit and compliance functions.

A similar evolution is carried out for the insurance sector, by Articles 9 and following of another Act of 25 April 2014 on various provisions. This Act amends in particular the Act of 9 July 1975 on the supervision of insurance companies, hereinafter "the Supervision Act".

Besides the three functions referred to above, a fourth function, the actuarial function, is part of the independent control functions that must be integrated into the governance of each insurance company, pursuant to the "Solvency II" Directive.

Fit and proper test

Compliance officers are henceforth legally required to be “fit & proper” (article 19 of the Banking Act and new article 90 of the Supervision Act). This was already requested under the FSMA regulation (Article 87bis of the Act of 2 August 2002) and in the NBB circular of 17 June 2013 (NBB_2013_02). Persons who, at the highest level, ensure the compliance function, occupy a key position within the institution. The Explanatory Memorandum of the new Banking Act is clear in this regard:

"The functions referred to above [i.e. the independent control functions] are critical to the effective and knowing exercise of the management of the credit institution. Through their controls, their assessments and their opinions, those in charge of these functions provide appropriate tools to the company's managers in order to help them in their management duties".

Proper enforcement of this provision is also supervised by the FSMA, in the context of the approval of compliance officers[2].

Liability

The compliance officer will be criticized for being inefficient if he does not identify a 'non-compliance' in due time. He will also be accused of inefficiency if he points out risks of 'non-compliance' too frequently. Furthermore, he may be held criminally liable if he does not denounce the infringements that he identifies, even if this passivity is looked upon favorably by his superiors. In this respect, the case-law of the Court of Cassation, (“Hof van Cassatie” / “Cour de Cassation”), should be kept in mind: "an omission may result in a punishable participation if the author of such omission has a positive duty to act and, in addition, if his abstention provides a positive incentive to commit the infraction" (decision of the Court of Cassation of 29 April 2003). Consequently, the compliance officer will aim to identify his exposure and if he does not have sufficient means to ensure the proper exercise of his functions, he will request the company to remedy this, particularly within the context of his periodic reports to the legal management body.

Appointment

This new legislation strengthens the supervisor’s control of the appointment of the compliance officer. On the one hand, prior to any appointment and renewal of persons in charge of the compliance functions, a notification of such intention must be done to the supervisory authority (depending on the case, the National Bank of Belgium or the European Central Bank). On the other hand, their appointment is subject to the prior approval of the supervisory authority (Article 60 of the Banking Act and Article 90bis of the Supervision Act). As mentioned above, in consultation with the supervisory authority, the FSMA decides on the registration of compliance officers (Article 87bis of the Act of 2 August 2002).

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Compliance officers are legally required to be “fit & proper”

[2] As a reminder, the Act of 30 July 2013 (the "Twin Peaks II Act") came into force on 30 April 2014. This acts extends to insurance companies the Belgian implementing measures of MiFID."

COMPLIANCE OFFICERS: NEW RULES FOR BANKS AND INSURANCE COMPANIES

BY JEAN-MARC GOLLIER & FRANÇOIS KONING (PART III)

Protection against 'abusive' dismissal

Compliance officers will in principle have an employee status. The new rules reinforce the stability of their position, which fairly balances the independence required from compliance officers. When the company plans to dismiss a compliance officer, it must first inform the supervisory authority. Such information was already requested in the FSMA control framework and in the NBB-FSMA common circular on the compliance function (NBB_2012 -14).

In banks, the compliance officer may be dismissed from his functions only by the legal management body of the company (Article 61 of the Banking Act). This additional protection does not exist in the insurance sector. As such, in exchange for their scrupulous work which implies an ability to independently control the directors' actions, the compliance officer receives some formal protection against the risk of 'abusive' dismissal. However, the supervisory authority is not responsible for protecting the compliance officer. The power of dismissal still belongs to the company and the supervisory authority may only issue an opinion, which, even if it is adverse, will not necessarily be brought to the attention of the concerned person.

Jean-Marc Gollier

François Koning

Avocats

The compliance officer may be dismissed from his functions only by the legal management body

PLANIFICATION FINANCIÈRE UNE ROUTINE OU UN NOUVEAU MÉTIER ?

La loi du 25 avril 2014 relative au statut et au contrôle des planificateurs financiers indépendants et à la fourniture de consultations en planification financière par des entreprises réglementées a été publiée au Moniteur belge du 27 mai 2014. Elle entrera envigueur le 1er novembre prochain.

Définition

La loi définit la planification financière comment étant l'optimalisation, notamment de la structuration, de la planification dans le temps, de la protection, de l'organisation juridique ou de la transmission, du patrimoine d'un client, en fonction des besoins et des objectifs exprimés par ce client, à l'exclusion de la fourniture de services d'investissement ou de tout conseil portant sur des transactions sur des produits financiers individuels. Il ne s'agit donc pas de n'importe quel conseil juridique, fiscal ou successoral qu'une entreprise réglementée peut donner à ses clients. Ainsi ne constituent pas, par exemple, des consultations en planification financière, les conseils fiscaux ou successoraux qui accompagnent la proposition au client d'un produit financier déterminé. Il faut noter par ailleurs que 4 éléments doivent être intégrés dans l'analyse multidisciplinaire. Ces éléments ne font, toutefois, pas partie de la définition de la planification financière mais des règles de conduite qui s'y appliquent.

Accès à la profession

L'exercice de l'activité de planificateur financier indépendant à titre professionnel est subordonné à l'obtention d'un agrément par la FSMA. Les candidats doivent justifier de l'honorabilité professionnelle nécessaire et de l'expertise adéquate à l'exercice de leur fonction. La FSMA publiera sur son site web la liste des planificateurs financiers indépendants agréés.

Les planificateurs financiers indépendants ne peuvent pas fournir de conseils en investissement. Ils ne peuvent avoir de procuration sur les comptes de clients ni recevoir, de leur part, des espèces ou des titres ou être dans une position débitrice à leur égard. Ils sont rémunérés exclusivement par leurs clients.

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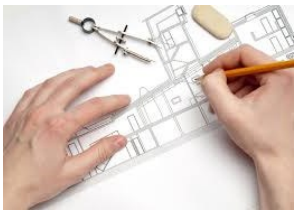
PLANIFICATION FINANCIÈRE
UNE ROUTINE OU UN NOUVEAU MÉTIER ? (PART II)



Ils ne peuvent recevoir directement ou indirectement aucune rémunération, commission, ni aucun autre avantage d'entreprises réglementées ou d'émetteurs, à l'exception des avantages non monétaires ayant pour conséquence directe d'améliorer le service presté aux clients.

Les entreprises réglementées de droit belge, dans la mesure où leur statut propre n'exclut pas l'activité de consultation en planification financière, sont de plein droit autorisées à exercer cette activité, à condition de respecter les règles de conduite inscrites dans la loi. Elles ne peuvent cependant pas se présenter comme "planificateurs financiers indépendants" ou faire usage de dénominations similaires.

Règles de conduite

Lors de la fourniture de consultations en planification financière, les planificateurs financiers indépendants et les institutions financières doivent agir d'une manière honnête, équitable et professionnelle qui sert au mieux les intérêts de leurs clients. Toutes les informations, y compris publicitaires, qu'ils adressent à des clients ou à des clients potentiels doivent être correctes, claires et non trompeuses.

Les informations publicitaires doivent être clairement identifiables en tant que telles.

Les planificateurs financiers indépendants et les institutions financières doivent se conformer aux règles relatives aux pratiques du marché et à la protection du consommateur et agir comme si leurs clients de détail étaient tous des consommateurs au sens de cette réglementation.

Le planificateur financier doit prendre toute mesure raisonnable pour éviter les conflits d'intérêts afin d'éviter de porter atteinte aux intérêts des clients. Si les mesures prises pour gérer un conflit d'intérêts ne suffisent pas à garantir que le risque de porter atteinte aux intérêts du client sera évité, le client est informé, avant qu'une consultation lui soit fournie, de manière claire et sur un support durable, de la nature générale et/ou de la source du conflit d'intérêts. L'information fournie doit être suffisamment détaillée, eu égard à la situation personnelle du client, pour que celui-ci puisse décider en toute connaissance de cause de continuer ou non à recourir aux services proposés.

Si le client décide de mettre fin à la convention de planification financière pour ce motif, aucune indemnité ne sera due dans son chef.

La politique de gestion des conflits d'intérêts adoptée par les institutions financières dans le cadre de la prestation de services d'investissement doit être étendue aux conflits d'intérêts qui surviennent dans le cadre de la fourniture de consultations en planification financière.

Formalités préalables

Préalablement à la fourniture de consultations en planification financière, les clients et clients potentiels doivent au moins recevoir les informations suivantes sur un support durable:

a) l'identité complète et les coordonnées du planificateur financier qui fournit les consultations;

b) le statut du planificateur qui fournit les consultations, ainsi que le nom et l'adresse de l'autorité compétente qui lui a délivré son agrément;

c) le fait que les consultations en planification financière doivent en principe intégrer quatre dimensions, soit le droit civil, le droit fiscal et la fiscalité, la sécurité sociale et la sécurité d'existence, et le contexte économique et financier;

d) le coût des consultations en planification financière et les conditions commerciales auxquelles la consultation en planification financière est subordonnée;

e) une description générale, éventuellement fournie sous forme résumée, de la politique suivie par le planificateur financier en matière de conflits d'intérêts;

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Les planificateurs financiers doivent agir comme si tous leurs clients étaient des consommateurs

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PLANIFICATION FINANCIÈRE
UNE ROUTINE OU UN NOUVEAU MÉTIER ? (PART III)

f) une description générale, éventuellement fournie sous forme résumée, des règles de conduite qui sont applicables à la fourniture de consultations en planification financière.

Profilage du client

Préalablement à la fourniture de consultations en planification financière, toutes les informations nécessaires sur la situation personnelle du client, dont notamment des informations sur sa situation financière, familiale et professionnelle, de même que sur ses objectifs et ses besoins en termes de planification financière, doivent être recueillies par écrit de manière à pouvoir lui fournir une consultation adéquate.

Si les informations requises ne peuvent être recueillies, aucune consultation en planification financière ne peut être fournie au client concerné.

Encadrement contractuel

Préalablement à la fourniture de consultations en planification financière, une convention écrite doit être conclue avec chaque client. Cette convention énonce les droits et obligations des parties et rappelle les règles de conduite applicables.

Si le client ne souhaite pas que sa situation fasse l'objet d'une analyse multidisciplinaire tenant compte des quatre dimensions prévues, la convention doit le prévoir expressément en précisant quelle(s) dimension(s) ne seront pas prises en compte.

Si le client ne souhaite pas que la consultation en planification financière porte sur l'optimalisation de l'ensemble de son patrimoine, mais seulement sur une partie de celui-ci, la convention doit le prévoir expressément en précisant quelle(s) partie(s) du patrimoine seront prises en compte.

Sauf demande expresse du client , les consultations en planification financière doivent être basées sur une analyse multidisciplinaire de la situation du client intégrant à la fois:

a) le droit civil,

b) le droit fiscal

c) la sécurité sociale et

d) le contexte économique et financier.

Sauf demande expresse du client, les consultations en planification financière doivent porter sur l'optimalisation de l'ensemble du patrimoine du client.

Les consultations en planification financière doivent être personnalisées et adéquates au regard des informations recueillies sur la situation personnelle du client, sur ses objectifs et sur ses besoins en termes de planification financière.

Rapport

Une consultation en planification financière doit être consignée dans un rapport écrit, clair et complet qui doit être remis au client dans les meilleurs délais.

Ce rapport justifie le caractère adéquat de la consultation fournie au regard de la situation personnelle du client et compte tenu de l'analyse multidisciplinaire.

Dossier

Un dossier doit être constitué pour chaque client, comportant une copie de la convention, du rapport et de tous autres documents probants.

Ce dossier doit être conservé pendant au moins cinq ans après la fin de la relation contractuelle.

Information des autorités

La nouvelle loi précise expressément que cette activité est soumise à la loi relative à la prévention de l'utilisation du système financier aux fins du blanchiment de capitaux et du financement du terrorisme.

Il est donc clair que si un planificateur financier devait, dans le cadre d'une consultation, obtenir des informations qui l'inciterait à soupçonner un client ou un prospect de s'être livré à des activités illégales telles qu'une fraude fiscale grave, il n'aurait d'autre choix que d'en informer les autorités ou le Compliance Officer, s'il s'agit d'une entreprise réglementée. Passer un tel soupçon sous silence est passible de sanctions pénales.

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Une consultation en planification financière doit être consignée dans un rapport écrit

PLANIFICATION FINANCIÈRE UNE ROUTINE OU UN NOUVEAU MÉTIER ? (PART IV)

Contrôle

La FSMA est chargée du contrôle du respect des dispositions de la nouvelle loi et des arrêtés et règlements pris pour son exécution. Elle peut requérir toutes les informations nécessaires à l'exécution de sa mission de contrôle dans le délai qu'elle fixe auprès des personnes qui fournissent des consultations en planification financière.

Sanctions

Ces nouvelles dispositions sont assorties de sanctions administratives et de sanctions pénales pouvant aller jusqu'à un emprisonnement d'un mois à un an.

Christian Berden

EBA PUBLISHES REPORT ON BENCHMARKING OF REMUNERATION PRACTICES IN THE EU

The European Banking Authority (EBA) published on June 13, 2014, a report providing a detailed analysis on remuneration practices across a sample of EU banks.

The report, based on data collected on a consolidated basis from 2010 to 2012, sets benchmarks for different aspects of remuneration policies, and provides additional insight into the previously published data on "high earners" (staff earning EUR one million or more per year). Overall, the report shows an increasing trend in the remuneration paid to "risk takers", as well as a material shift from variable to fixed remuneration.

In particular, practices regarding the deferral of variable remuneration differ significantly across Member States, depending on the application of the proportionality principle, which allows small and less risky institutions to be exempt from the deferral of variable remuneration when such deferral is disproportionate to their specific risk profile or where only minor amounts of variable remuneration are paid.

The EBA is currently investigating the different application of the proportionality principle across Member States and individual institutions.

The report also shows that institutions have been reviewing their remuneration policies to comply with the new requirements introduced by the Capital Requirements Directive (CRD IV) and some firms have introduced so called 'position or role-based allowances'. In general, these allowances, which are paid as fixed amounts in addition to the base salary, are considered by institutions as fixed remuneration.

However, these allowances are discretionary, as they are paid to selected members of staff and in most cases only for limited periods of time. Under exceptional circumstances, they can also be cancelled.

The EBA is currently analysing this emerging practice and will set guidance criteria to correctly assign these elements to either variable or fixed remuneration, so as to ensure that these practices do not lead to a circumvention of the newly introduced cap between the variable and fixed component of remuneration.

The report is in line with the 'EBA Guidelines on the Remuneration Benchmarking Exercise' published on 27 July 2012 to facilitate the collection of data.

This analysis, together with other additional work in the area of remuneration, will be the basis for the review of the existing "Guidelines on remuneration policies and practices" which will ensure a higher level of harmonisation of remuneration practices.

A consultation on the revised Guidelines is expected to be launched by the end of 2014.

The European Banking Authority is required to benchmark remuneration trends at Union level

EU COUNCIL ADOPTS EUROPEAN ACCOUNT PRESERVATION ORDER

The Council adopted on May 13, 2014, a regulation establishing a European Account Preservation Order procedure to facilitate cross border debt recovery in civil and commercial matters.

The aim of the regulation is to facilitate cross-border debt recovery by creating a European procedure leading to the issue of a European Account Preservation Order ("Preservation Order" or "Order").

This European procedure will be available to citizens and businesses as an alternative to national procedures, but will not replace national procedures. It will apply only to cross-border cases.

By means of this new European procedure a creditor will be able to obtain a Preservation Order which will block funds held by the debtor in a bank account in a member state and thereby prevent the debtor from dissipating such funds with the aim of frustrating the creditor's efforts to recover his debt.

The Preservation Order will be available to the creditor in two situations:

- before he obtains a judgment (that is, both before he initiates proceedings on the substance of the matter and during such proceedings) and
- after he has obtained a title on the substance of the matter.

Under specific conditions, it will also be possible for a creditor to obtain information as to whether the debtor holds one or more accounts in a specific member state.

In order to ensure the surprise effect of the Preservation Order, the Order will be issued in ex parte proceedings, i.e. without a prior hearing of the debtor. In order to counterbalance the absence of a prior hearing of the debtor, the regulation will make a series of remedies available to the debtor so that he can challenge the Order as soon as he is informed of the blocking of his accounts. Moreover, as further safeguards against a possible abuse of the Preservation Order, the regulation will contain rules on the provision of a security by the creditor and on the creditor's liability for any damage caused by the Preservation Order to the debtor.

The regulation will enter into force on the twentieth day following that of its publication in the Official Journal of the European Union. It will apply from thirty months after its entry into force with the exception of Article 48 which will apply six months before its date of application.

Cross border debt recovery in civil and commercial matters will be easier

EU COUNCIL BROADENS SANCTIONS REGARDING THE SITUATION IN UKRAINE

On May 12, 2014, the Council has widened the scope of EU restrictive measures regarding the situation in Ukraine.

The Council broadened the legal basis for EU restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine. It added the possibility to target persons associated with actions and policies undermining stability or security in Ukraine as well as with obstructing the work of international organisations in the country, and entities linked to such persons.

The Council also provided a legal basis for asset freezes on entities in Crimea and Sevastopol which have been confiscated, or entities which have benefited from such confiscation.

The Council also decided to add 13 persons to the list of those subject to a travel ban and a freeze of their assets within the EU. This brings the total number of persons subject to sanctions in connection with the crisis in Ukraine to 61.

At the same time, two confiscated entities in Crimea and Sevastopol will be subject to an asset freeze.

FCA REVIEWS HOW FUND CHARGES ARE SET OUT

The UK Financial Conduct Authority (FCA) has published on May 13, 2014, the findings from its review of how fund charges are presented.

Firms must present their fund charges clearly and consistently, so that retail investors are able to compare charges before making decisions on where to invest. The recommendation follows a review of the marketing information made available to UK retail consumers by 11 firms.

The FCA found examples of firms who provided their customers a consistent, combined charge figure across all relevant documents and platforms, but said there were still examples of firms referring to different charge figures across multiple documents, making effective comparisons difficult.

Given the importance of investors understanding and comparing charges as they contribute to fund returns along with performance and the level of risk, the FCA wanted to examine how firms communicated their charges.

Consumers are likely to find it easier to understand and compare charges if all firms involved in providing funds to investors consistently use one combined charges figure, such as the ongoing charges figure for certain funds (UCITS), in all documents. Using the annual management charge in some marketing material and a combined figure in other documents may confuse investors and hinder comparing charges.

The review found examples of good practice, where firms:

- presented the same summary charges figure on its website and fund documents, making it easier for investors to understand and compare them
- designed all marketing material for retail customers to avoid the risk of retail investors being confused by documents meant for finance professionals
- used questionnaires to develop material that helped investors to understand funds and charges

However, the FCA also found:

- some firms did not provide investors with a clear, combined figure for charges in their marketing material or on websites
- examples of poor descriptions of administration charges that did not accurately reflect the operation of the charge

The FCA expects firms to communicate with investors in a way that is clear, fair and not misleading. It will follow up this work with firms through its routine supervision and work with the Investment Management Association (IMA) who have issued voluntary guidance to the industry on the disclosure of charges and costs.

It is important for investors to clearly understand and compare charges across the market

UK OMBUDSMAN SERVICE PUBLISHES ANNUAL REVIEW

On May 20, 2014, the UK Financial Ombudsman Service published its annual review for 2013/2014. During the year, the ombudsman answered 2.3 million enquiries from consumers and settled 518,778 disputes, more than double the number last year.

Statistics from the ombudsman's annual review show:

- In 58% of the cases were resolved in the consumer's favour.
- Almost a quarter of the enquiries were about general financial problems and concerns and weren't product-specific.
- 1 in 6 people across the UK said they'd had a problem with a financial product or service.
- Four of the UK's largest banking groups accounted for 63% of all complaints.
- A fifth of people who brought a complaint to the ombudsman said they had a disability.

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BAN ON MARKETING OF CERTAIN FINANCIAL PRODUCTS TO RETAIL INVESTORS

A Royal Decree approving a regulation adopted by the FSMA which bans the marketing of certain financial products to retail inventors in Belgium has been published in the Moniteur belge on May 20, 2014.

The FSMA regulation bans the marketing of several classes of products, namely:

- financial products that depend on a life settlement, i.e., traded life assurance policies;
- derivatives based on virtual currencies such as Bitcoin; and
- notes and 'branch 23' insurance contracts where the return depends on an alternative investment fund, or internal fund, that itself invests in non-standard assets such as commodities, artworks, wine or whisky.

The FSMA has indicated that it will continue to monitor the market and expand the list of products that cannot be marketed to retail investors if necessary.

The ban will enter into force on 1 July 2014.

ESMA CONSULTS ON MIFID REFORMS

The European Securities and Markets Authority (ESMA) has launched on May 22, 2014, the consultation process for the implementation of the revised Markets in Financial Instruments Directive (MiFID II) and Regulation (MiFIR).

This is the first step in the process of translating the MiFID II/MiFIR requirements into practically applicable rules and regulations to address the effects of the financial crisis and to improve financial market transparency and strengthen investor protection.

MiFID II/MiFIR contains over 100 requirements for ESMA to draft Regulatory Technical Standards (RTS) and Implementing Technical Standards (ITS), and to provide Technical Advice to the European Commission to allow it to adopt delegated acts. In order to ensure that MIFID II achieves its objectives in practice, ESMA is publishing the following documents:

- A Consultation Paper on MiFID/MiFIR Technical Advice. ESMA needs to deliver this advice to the European Commission by December 2014 and is therefore subject to a condensed consultation process for this paper, and
- A Discussion Paper on MiFID/MiFIR draft RTS/ITS. This will provide the basis for a further consultation paper on the draft RTS/ITS which is expected to be issued in late 2014/early 2015.

The main issues covered in the Discussion and Consultation Paper are divided into those addressing the structure, transparency and regulation of financial markets, and those aimed at strengthening investor protection.

Financial Markets Structure, Transparency and Regulation

The main proposals in this area cover the following issues:

- enhanced transparency and trading obligations, increasing pre- and post-trade transparency for many categories of instruments, e.g. shares, ETFs, certificates, bonds and derivatives, limitations to trade shares OTC and new obligations to trade derivatives on trading venues;
- micro-structural issues, refining the definition of high frequency trading and direct electronic access and specifying the requirements for operating in the market using algorithmic techniques;
- data publication and access: issues related to the development of the consolidated tape including requirements for tape providers, approved publication arrangements and reporting mechanisms, and the definition of a reasonable commercial basis for data sales; and the access to CCPs, trading venues and benchmarks;

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The reform of MiFID is an integral part of the EU's strategy to restore trust in the financial markets

ESMA CONSULTS ON MIFID REFORMS (PART II)

• other organisational requirements for trading venues; and

• commodity derivatives: new regulatory tools, including position limits.

Investor Protection

The main proposals relating to the improved protection of retail investors include technical advice on:

• Inducements: new limitations on the receipt of commissions;

• independent advice: clearly distinguishing independent from non-independent advice;

• product governance: requirements on the manufacture and distribution of financial products including target market and risk identification;

• product intervention/ banning: introducing powers for both ESMA and national regulators to prohibit or restrict the marketing and distribution of certain financial instruments; and

• improved information on costs and charges – requirements to provide clients with details of all charges related to their investment (relating to both the investment service and the financial instrument provided) so they can understand the overall cost and its effect on their investment's return.

In addition, the draft regulatory technical standards in the investor protection area relate to the authorisation of investment firms, passporting, and certain best execution obligations.

The closing date for responses to both papers is Friday 1 August.

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UK FCA CALLS ON INSURANCE INTERMEDIARIES TO BETTER MANAGE CONFLICTS OF INTEREST

Inherent conflicts within insurance intermediaries are not being properly managed, a review by the Financial Conduct Authority (FCA) has found. After looking at seven of the largest intermediaries who serve small business clients, the FCA has concluded that in some firms, control frameworks and management information have not developed at the same pace as business models.

Research into the understanding of small business customers also demonstrated that few understood that there was a possibility for their insurance intermediary to be conflicted.

Insurance intermediaries can play a number of roles in the distribution chain, sometimes acting as agent for the insurer as well as the customer. These different obligations and the way intermediaries are remunerated create the potential for conflicts of interest that need to be actively managed.

The FCA focused its review on small business customers as they have more complex insurance needs than retail clients but are not always more sophisticated buyers of insurance. As a result, small businesses often rely on insurance intermediaries for advice. The FCA wanted to establish how the flow of revenue from insurers or other sources to intermediaries could affect how customers were treated. It found that:

• there was increased risk of conflicting interests where firms fulfilled multiple roles in the distribution chain and acted as agent for both the customer and insurer in the same transaction;

• the control framework and management information in some firms had not developed in line with changes in the size and complexity of the business;

• some intermediaries relied on disclosure as the main way to address conflicts of interest rather than having effective control frameworks in place;

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Small businesses are experts in their particular field but are often not experienced in buying insurance

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UK FCA CALLS ON INSURANCE INTERMEDIARIES TO BETTER MANAGE CONFLICTS OF INTEREST (PART II)

- disclosure provided to customers was sometimes very generic and unlikely to meet their information needs or enhance their understanding; and

- conflicts of interest were not always effectively mitigated in relation to add-on insurance or services, premium finance or where the cost of insurance is borne by a third party.

Consumer research also revealed that small businesses are not aware of the differing roles intermediaries can perform. Many (68%) believed that intermediaries acted as their agent when selecting and placing their insurance.

Further, a large majority (86%) of small business policyholders expected their insurance intermediary to search for more than one quote, which was not consistent with placement processes within some intermediary firms.

The FCA is concerned that if conflicts are not properly managed there is the risk that decisions are made in the interest of firms rather than their small business customers. This could result in some small businesses over-paying or buying products they don't need.

Whilst the FCA's review focused on larger firms, all intermediaries should take note of the findings and ensure any conflicts are appropriately managed. The regulator will be working closely with the industry to communicate the results of the review and, with the firms involved, will use appropriate regulatory tools to address specific issues.

UK FCA FINES BARCLAYS £26M FOR FAILINGS SURROUNDING THE LONDON GOLD FIXING

On 28 June 2012, former Barclays trader Daniel James Plunkett exploited the weaknesses in Barclays' systems and controls to seek to influence that day's 3:00 p.m. Gold Fixing and thereby profited at a customer's expense.

Plunkett was a Director on the Precious Metals Desk at Barclays and was responsible for pricing products linked to the price of precious metals and managing Barclays' risk exposure to those products.

Plunkett was responsible for pricing and managing Barclays' risk on a digital exotic options contract (the Digital) that referenced the price of gold during the 3:00 p.m. Gold Fixing on 28 June 2012. If the price fixed above US$1,558.96 (the Barrier) during the 3:00 p.m. Gold Fixing on 28 June 2012, then Barclays would be required to make a payment to its customer. But if the price fixed below the Barrier, Barclays would not have to make that payment.

During the 3:00 p.m. Gold Fixing on 28 June 2012, Plunkett placed certain orders with the intent of increasing the likelihood that the price of gold would fix below the Barrier, which it eventually did. As a result, Barclays was not obligated to make the US$3.9m payment to its customer, and Plunkett's book profited by US$1.75m (excluding hedging), which was in addition to an initial profit that his book had received upon the sale of the Digital.

Very shortly after the conclusion of the 3:00 p.m. Gold Fixing on 28 June 2012, the customer became aware that the price had fixed just below the Barrier and sought an explanation from Barclays as to what happened in the Gold Fixing. When Barclays relayed the customer's concerns to Plunkett on 28 and 29 June 2012, he failed to disclose that he had placed orders and traded during the Gold Fixing. Further, Plunkett misled both Barclays and the FCA by providing an account of events that was untruthful.

Plunkett's misconduct is particularly serious because he preferred his interests over those of a customer and his actions had the potential to have an adverse effect on the Gold Fixing and the UK and international financial markets.

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Plunkett's actions came the day after the publication of the FCA LIBOR and EURIBOR actions against Barclays

UK FCA FINES BARCLAYS £26M FOR FAILINGS SURROUNDING THE LONDON GOLD FIXING (PART II)

The FCA has fined Barclays because it failed to take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems. In particular, Barclays failed to:

- create or implement adequate policies or procedures to properly manage the way in which Barclays' traders participated in the Gold Fixing;
- provide adequate specific training to precious metals desk staff in relation to their participation in the Gold Fixing; and
- create systems and reports that allowed for adequate monitoring of traders' activity in connection with the Gold Fixing.

Barclays also failed to adequately manage certain conflicts of interest between itself and its customers. In particular, Barclays failed to adequately manage the inherent conflict of interest that existed from Barclays participating in the Gold Fixing and contributing to the price fixed during the Gold Fixing, while at the same time also selling to customers options products that referenced, and were dependent on, the price of gold fixed in the Gold Fixing.

These failings led to an increased risk of inappropriate conduct by Barclays' traders participating in the Gold Fixing.

Barclays and Plunkett agreed to settle at an early stage, qualifying for a 30% discount to their respective fines. Without this, Barclays' fine would have been £37,190,800 and Plunkett's fine would have been £136,600.

CONSUMER CREDIT FIRMS MUST RAISE ADVERTISING STANDARDS IN THE UK

The rules state that any advert must be clear, fair and not misleading for consumers. The FCA examined over 500 advertisements for a range of consumer credit products and found a number of examples where key information which should have been included in the advertisement was either missing or difficult to find.

The FCA found examples where consumers were encouraged to hit the 'apply' button for a product before having a chance to access important information.

Other examples which did not meet the regulations included firms:

- targeting young audiences with promotions for products that consumers must be over the age of 18 to use,
- claiming that their product would help repair credit ratings or clear a customer's debt, when in fact it is just substituting one debt for another.

In total, 108 promotions were identified as not meeting the rules.with examples of poor advertising across all mediums, including print, online, in-store and direct mail.

Any advert must be clear, fair and not misleading for consumers

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