

UPDATES

# UK/EU Investment Management Update (February 2024)

February 6, 2024

In this Sidley Update we cover, on the UK side, the Financial Conduct Authority (FCA) publication of Market Watch 76, the end of the temporary permissions regime (TPR), the government's decision to grant equivalence to European Economic Area (EEA) jurisdictions under the Overseas Fund Regime (OFR), and recent enforcement actions, among other things. On the EU side, we cover the publication of the European Sustainability Reporting Standards (ESRS), the inter-institutional agreement on the new anti-money-laundering (AML) package, the removal of the Cayman Islands from the EU AML list, and other legislative developments.

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## 1. UK — FCA Updates

### **Market abuse — FCA Market Watch 76**

On 30 January 2024, the FCA [published](#) the 76th edition of Market Watch, its newsletter on market conduct and transaction reporting issues.

The latest newsletter sets out the FCA's observations on "flying" and "printing." This is when firms mislead the market by communicating the receipt of non-existent bids/offers or the execution of non-existent trades, creating a false impression of an instrument's liquidity and price.

The FCA notes that it continues to observe instances of flying and printing in several markets, including fixed income and commodities. The FCA has also seen examples of management failing to respond adequately to these practices.

To mitigate the risks of flying and printing, the FCA advises firms to ensure that compliance manuals prohibit staff from engaging in these behaviours; deliver targeted training to staff and obtain annual attestations of compliance; ensure that surveillance and reporting procedures are robust; and put in place clear and consistent disciplinary processes.

### ***EMIR/financial promotion***

On 26 January 2024, the FCA [published](#) Handbook Notice 115, summarising recent changes made by the FCA to its Handbook and other materials. Changes to note include the following.

- **Technical Standards (Bilateral Margining) Instrument 2023**

- This instrument, which came into force on 18 December 2023, extended the temporary exemptions for single-stock equity options and index options from the UK bilateral margining requirements under the UK onshored version of the European Market Infrastructure Regulation (UK EMIR) until 4 January 2026.
- This instrument also contained confirmation of the approach to pre-approval of bilateral initial margin models.
- This follows the publication of the joint FCA and Prudential Regulation Authority (PRA) Policy Statement (PS18/23) discussed in our Sidley Update of [January 2024](#).

- **Perimeter Guidance (PERG) Instrument 2024**

- This instrument, which came into force on 31 January 2024, amends the guidance in PERG 8 on the exemptions in the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005 (FPO) relating to high net worth individuals and sophisticated investors.
- The updated guidance reflects legislative changes to the FPO made by the Financial Services and Markets Act 2000 (Financial Promotion) (Amendment) (No.2) Order 2023 — see our Sidley Updates of [January 2024](#) and [December 2023](#).
- The changes to the FPO included increasing the financial thresholds for individuals to satisfy the high net worth individual exemption (Article 48, FPO), amending the criteria for categorisation of individuals as self-certified sophisticated investors (Article 50, FPO), and amending the statements required in connection with each of these exemptions.

### ***Consumer Duty — FCA webinar***

On 5 January 2024, the FCA [published](#) on its website a recording and transcript of its recent webinar

on the Consumer Duty, entitled “Consumer Duty: the next steps.” The webinar, which was held on 6 December 2023, includes an introductory speech, panel discussion, and Q&A.

The Consumer Duty came into force on 31 July 2023, as announced in our Sidley Update of [August 2023](#). For more information on the scope of the duty, see our Sidley Updates of [February 2023](#), [January 2023](#), and [May 2022](#).

### ***Diversity and inclusion — FCA evidence from Sexism in the City inquiry published***

On 22 January 2024, the Treasury Committee of the House of Commons [published](#) the transcript of oral evidence given on 17 January to its Sexism in the City inquiry by four leading figures from the FCA and PRA.

The witnesses are Nikhil Rathi, CEO of the FCA; Sarah Pritchard, FCA executive director for markets and international; Sam Woods, CEO of the PRA; and Vicky Saporta, PRA executive director for prudential policy.

The inquiry, launched in July 2023, is examining the barriers faced by women in financial services, including gender pay gaps, sexual harassment, and misogyny.

## **2. UK — Brexit**

On 2 January 2024, the FCA [updated](#) its temporary permissions regime (TPR) webpage to note that the TPR ended on 30 December 2023.

The TPR allowed EEA-based firms that were passporting into the UK at the end of the Brexit transition period (31 December 2020) to continue operating in the UK within the scope of their previous passport permission for a three-year period (to 31 December 2023), subject to having notified the FCA of their intention to use the TPR prior to the end of the transition period.

While the TPR has ended, the temporary marketing permissions regime (TMPR) remains in place (and its extension to the end of 2026 has recently been announced, as discussed below). The TMPR allows EEA-based investment funds that were being marketed in the UK via a passport at the end of the transition period to continue to be marketed in the UK (subject to having notified the FCA before the end of the transition period), pending recognition under the upcoming OFR.

Likewise, the financial services contracts regime (FSCR) remains in place. The FSCR allows EEA firms that previously passported into the UK and that did not enter the TPR, or that left the TPR without being authorised or registered in the UK, to wind down their UK business in an orderly fashion. The FSCR is time-limited depending on the type of regulated activity being performed (or the services being provided) and applies for a maximum of five years for all types of contracts other than insurance contracts.

### ***FCA publishes TPR data for solo-regulated firms***

On 29 January 2024, the FCA [published](#) summary data on solo-regulated firms and the TPR. The data indicates that in total, 1,191 solo-regulated firms entered the TPR, coming from 29 EU jurisdictions and passporting under nine different EU Directives.

Of those, 212 solo-regulated firms secured full UK authorisation via a UK branch or new UK entity, while

104 firms failed to meet the FCA's standards and were not authorised. The remaining 875 firms did not seek full UK authorisation.

### **3. UK — Overseas Funds Regime (OFR)**

#### ***UK grants equivalence to EEA UCITS under OFR***

On 30 January 2024, the UK government [announced](#) the completion of its equivalence assessment of EEA states (including EU Member States) under the new UK OFR. The government confirmed that it will grant equivalence to the Undertakings for Collective Investment in Transferable Securities (UCITS) fund regimes of all 30 EEA jurisdictions. This means that EEA-based UCITS funds can apply to be recognised under the OFR to be marketed to UK retail investors, with no additional requirements.

The government will put forward secondary legislation to enact this decision “when parliamentary time allows,” according to Bim Afolami, Economic Secretary to the Treasury. Afolami also confirmed that the TMPR, which was due to expire at the end of 2025, will be extended for another year until the end of 2026, to ensure a smooth transition to the OFR.

### **4. UK — Enforcement**

#### ***FCA issued fines totalling £52.8 million in 2023***

On 28 December 2023, the FCA [announced](#) statistics from its 2023 enforcement investigations. The FCA announcement indicates that it issued over £52.8 million in fines in 2023 against financial services firms breaching regulatory standards.

The FCA also notes that it cancelled the authorisations of 1,266 firms in 2023 that failed to meet its minimum standards for authorisation, which is double the number of firm authorisations cancelled in 2022. Also, FCA prosecutions have led to seven criminal convictions for fraud or related offences, and six prison sentences in 2023.

#### ***PRA issues £119,000 fine for breaches of SMCR conduct rules***

On 11 January 2024, the PRA [announced](#) a fine of £118,808 against Iain Hunter, the former CEO of Wyelands Bank plc, for several breaches of the Senior Manager and Individual Conduct Rules under the Senior Managers and Certification Regime (SMCR).

Hunter was found to have failed to act with due skill, care, and diligence and to have failed to take reasonable steps to ensure that Wyelands had adequate systems and controls in relation to the large exposures regime and PRA record-keeping obligations, resulting in Wyelands' breaching a number of its obligations under the PRA Rulebook. The fine follows on from the PRA April 2023 decision to publicly censure Wyelands for significant regulatory failings.

While the specific breaches relate to PRA rules applicable to UK banks, the case will be of general interest to FCA-authorised investment management firms subject to the SMCR and to their Senior Managers in respect of their individual obligations under the Conduct Rules.

### **5. UK — Short Selling Regulation**

#### ***Net short position threshold changes from 0.1% to 0.2% on 5 February 2024***

The UK Government has introduced the Short Selling (Notification Threshold) Regulations 2023 ([SI 2023/1258](#)). This SI increases the notification threshold for the reporting of net short positions in shares to the FCA from 0.1% to 0.2% of total issued share capital of an issuer. These regulations come into force on 5 February 2024.

Until the threshold change is implemented on 5 February 2024, firms are required to continue to report positions that are at or above 0.1% and below 0.2%. For those positions, no closing reports will be required from 5 February 2024.

For open positions at 0.2% and above reached before, on, or after 5 February 2024, closing reports will be required as usual *when the position falls below 0.2%*.

### ***FCA publishes Primary Market Bulletin 47***

On 26 January 2024, the FCA [published](#) the 47th edition of the Primary Market Bulletin (PMB), its newsletter for primary market participants.

The latest PMB covers, among other things, recent developments in the UK regulatory regime for short selling, including key points arising from the publication of the Draft Short Selling Regulations in November 2023 (as discussed in our Sidley Update of [December 2023](#)), and the change in the reporting threshold for the notification of net short positions in shares to the FCA, as discussed above.

### ***FCA quarterly update of UK sovereign debt net short notification thresholds***

On 15 January 2024, the FCA [provided](#) its quarterly update to the notification thresholds for net short positions on UK sovereign debt and uncovered positions in UK sovereign credit default swaps for the purposes of the UK Short Selling Regulation.

## **6. UK — ESG**

### ***FCA publishes webpage on SDR and labelling regime***

On 2 February 2024, the FCA [published](#) a new webpage on the UK Sustainability Disclosure Requirements (SDR) and investment labels regime. This follows the publication on 23 November 2023 of policy statement PS23/16, setting out the FCA's final rules on the UK SDR, as discussed in our Update [Final Rules on UK Sustainability Disclosure Requirements and Investment Labels — Key Takeaways for Asset Managers](#).

The FCA's new webpage sets out a brief summary of the key elements of the regime as well as implementation timeframes and steps firms should take ahead of the rules' coming into effect.

### ***New sustainability working group for financial advisers***

On 16 January 2024, the FCA [launched](#) the Advisers' Sustainability Group, an industry-led working group focused on building capability and good practice in sustainable finance in the financial advice sector. The group will support financial advisers in meeting their regulatory obligations when advising consumers on products making claims about sustainability.

The FCA announced its intention to launch the new group in November 2023 as part of its package of measures to improve the trust and transparency of sustainable investment products, including the SDR

and the investment labelling regime (as to which see our Sidley Update of [December 2023](#)).

The working group's membership will include representatives from a wide range of industry participants. The FCA itself will sit as an active observer, while the Personal Investment Management and Financial Advice Association will provide the secretariat. The group will also engage with other stakeholders, including consumers.

The group will report in the second half of 2024.

### ***ClientEarth fails in FCA prospectus challenge in High Court***

On 13 December 2023, the High Court [handed down](#) its judgment in *ClientEarth v. FCA*. The court refused ClientEarth's renewed application for permission to judicially review FCA approval of the prospectus of Ithaca Energy plc. The court had initially denied ClientEarth permission on the papers in April 2023.

Ithaca, an oil and gas company, floated on the London Stock Exchange in the UK's largest IPO of 2022. ClientEarth claimed that the FCA decision to approve Ithaca's prospectus in November 2022 was unlawful, arguing that the prospectus did not contain adequate disclosure or assessment of Ithaca's climate-related risks as required under the onshored UK Prospectus Regulation.

The court dismissed ClientEarth's application as having no realistic prospect of success, holding that the FCA did not err in its assessment that the climate-related risks were adequately described in Ithaca's prospectus. The court declined to substitute its view or that of ClientEarth for the "considered judgment" of the FCA, an "expert regulator."

## **7. EU — ESG**

### ***ESRS come into force***

On 1 January 2024, the first set of ESRS came into force for financial years beginning on or after 1 January 2024. This follows their [publication](#) in the *Official Journal (OJ) of the EU* on 22 December 2023.

The ESRS are a set of mandatory concepts, requirements, and principles for companies in scope of the EU Corporate Sustainability Reporting Directive (CSRD) to follow for non-financial reporting.

For further detail on the ESRS, please see our Sidley Update of [August 2023](#).

### ***Report on early adoption of EU sustainable finance framework***

On 29 January 2024, the Platform on Sustainable Finance, an advisory body to the European Commission, [published](#) a report entitled "A Compendium of Market Practices: How the EU's Taxonomy and sustainable finance framework are helping financial and non-financial actors transition to net zero" (the Report).

The Report focuses on the early practices of seven groups of market participants (large corporates, credit institutions, investors, insurers, auditors and consultants, small and medium-sized enterprises, and public institutions). The Report finds that companies and other stakeholders are using the EU Taxonomy Regulation and other EU sustainable finance tools (including the Sustainable Finance

Disclosure Regulation, CSRD, and climate-related benchmarks) to set transition strategies, structure financial products, and monitor and report on sustainability efforts.

The report concludes that the EU Taxonomy and sustainable finance framework are working and provides peer-to-peer recommendations for further improvements.

### ***ISDA launches sustainability-linked derivatives clause library***

On 17 January 2024, the International Swaps and Derivatives Association (ISDA) [launched](#) a digital clause library for sustainability-linked derivatives (SLDs), designed to eliminate unnecessary differences in terms and increase language standardisation in the SLD market.

The searchable ISDA SLD Clause Library offers standard-form provisions for parties to use when drafting SLD transactions. The aim is to aid the development of the nascent SLD market by improving the efficiency of the negotiations process and reducing risks.

The library includes drafting options covering the delivery of sustainability performance indicators and evidence, mechanisms adjusting cashflow based on ESG targets, and responses to disruption and review events.

## **8. EU — AML**

### ***EU removes Cayman Islands from AML list***

On 18 January 2024, Commission Delegated Regulation (EU) 2024/163 was [published](#) in the OJ, removing the Cayman Islands from the EU's list of high-risk third countries pursuant to the EU AML Directive (Directive (EU) 2015/849) (the AML List). The Cayman Islands had been listed on the AML List since March 2022.

The Commission adopted the regulation in December 2023 (as discussed in our Sidley Update of [January 2024](#)), replicating the October 2023 decision of the Financial Action Task Force to remove Cayman from its “grey” list of jurisdictions subject to increased monitoring, as reported in our Sidley Update of [November 2023](#).

The regulation enters into force on 7 February 2024.

The immediate impact of the regulation is that the securitisation special purpose vehicles established by EU originators, or whose bonds are sold into the EU, can once again be established in the Cayman Islands. Article 4 of the EU Securitisation Regulation provides, *inter alia*, that securitisation special purpose entities shall not be established in non-EU countries that are on the AML List.

The longer-term impact of the regulation is that Cayman alternative investment funds (AIFs) will not be prohibited from being marketed into the EU once the revised EU Alternative Investment Fund Managers Directive (AIFMD II) comes into effect (likely Q2 2026).

### ***Institutions reach agreement on new AML package***

On 18 January 2024, the European Parliament and Council [reached](#) an agreement on the new Directive on AML and counter-terrorist financing (CTF), MLD6. The institutions simultaneously [reached](#) an



agreement on the AML/CTF Single Rulebook Regulation.

This follows the agreement reached in December 2023 between the Parliament and Council on creating a new EU-wide AML/CTF supervisory authority, AMLA, on which see our Sidley Update of [January 2024](#).

These measures are part of the Commission's long-awaited AML package. For more details, see our Sidley Update of [May 2020](#).

## **9. EU — Cryptoassets**

### ***ESMA consults on MiCA guidelines***

On 29 January 2024, the European Securities and Markets Authority (ESMA) [launched](#) two consultation papers on guidelines under the Markets in Crypto Assets Regulation (MiCA). The draft guidelines cover (i) the reverse solicitation exemption, and (ii) the conditions and criteria governing the classification of cryptoassets as financial instruments. For further details on MiCA, please see our Update [How Will the EU Markets in Crypto-Assets Regulation Affect Crypto and Other Financial Services Firms?](#)

The consultations are open for responses until 29 April 2024.

## **10. EU — MiFID II/MiFIR**

### ***Parliament adopts MiFID II and MiFIR amendments***

On 16 January 2024, the European Parliament [announced](#) that its members had voted to adopt amendments to the Markets in Financial Instruments Directive (MiFID II) and the Markets in Financial Instruments Regulation (MiFIR) to enhance financial market data transparency, optimise orderly trading, and prohibit payments for forwarding client orders. The amendments had been agreed between the Parliament and Council in June 2023; see our Sidley Update of [August 2023](#).

The amendments are designed to reduce information asymmetries among market participants and improve orderly trading in commodity derivatives concerning energy and food.

Significantly, to protect investors from suboptimal trading decisions, the practice of receiving payments for forwarding client orders for execution (“payment for order flows”) will be banned across the EU.

### ***ESMA and NCAs launch CSA on pre-trade controls used by algorithmic trading firms***

On 11 January 2024, ESMA [launched](#) a Common Supervisory Action (CSA) with national competent authorities (NCAs) to assess the implementation of pre-trade controls (PTCs) by EU investment firms using algorithmic trading techniques.

ESMA notes that PTCs are used by investment firms to carry out checks at order entry to limit and prevent the sending of erroneous orders for execution to trading venues.

The goal of the CSA is to gather detailed insights on how firms are using PTCs across the EU, and will cover (i) implementation of PTCs, including their calibration methodology and the use of hard and soft blocks in the design of PTCs; (ii) establishment of credit and risk limits and their interaction with PTCs;



(iii) monitoring and governance framework related to PTCs; and (iv) implementation and monitoring of PTCs in case of outsourcing of trading activity to third countries.

The CSA will be carried out in the course of 2024.

## **11. EU — EMIR**

### ***Council note on EMIR benchmarks transition***

On 10 January 2024, the Council [published](#) a note regarding the 20 December 2023 corrigendum to the Annex of Commission Delegated Regulation (EU) 2024/363. The Delegated Regulation, which was published in the OJ on 21 January 2024, supplements EMIR by amending the regulatory technical standards as regards the transition to the Tokyo overnight average rate and secured overnight financing rate benchmarks referenced in certain over-the-counter derivatives subject to the clearing obligation.

## **12. EU — AIFMD and ELTIF**

### ***ESMA publishes market report on AIFs***

On 30 January 2024, ESMA [published](#) a report on the EU AIFs market. In its report, ESMA highlights the following.

- Statistics on the size of, and leverage levels within, the EU AIF market in 2022, broken down by sector: Overall, AIFs accounted for around 36% of the net asset value (NAV) of the EU fund industry at the end of 2022. Among AIF types, funds of funds accounted for 17% of the NAV, followed by real estate funds (16%), private equity funds (11%), and hedge funds (2%).
- The risks posed by real estate funds in the context of a changing market landscape for commercial real estate: This includes risk related to leverage, market footprint, valuation discrepancies, and liquidity mismatches — the latter remaining a key vulnerability for open-ended funds, especially those that offer redemptions at a high frequency.

### ***EFAMA FAQs on ELTIF 2.0***

On 18 January 2024, the European Fund and Management Association (EFAMA) [published](#) FAQs on the new European Long-Term Investment Fund Regulation (ELTIF 2.0). The FAQs cover questions asset managers may have about the new regime.

ELTIF 2.0 became applicable on 10 January 2024 and is designed to give EU fund managers the flexibility to make long-term investment funds more attractive to investors. For more details on the updated framework, see our Sidley Update of [April 2023](#).

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