

Capital Markets - Sweden

One Year With MiFID: The FSA's Assessment

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Introduction

The Financial Supervisory Authority (FSA) has investigated over 100 financial institutions (including investment firms and banks) with licences to conduct services under the Securities Markets Act. The investigation related to the act and the FSA's regulations on investment services and activities, which implemented the EU Markets in Financial Instruments Directive (2004/39/EC) (MiFID) (for further details please see "[New Securities Market Act Enters into Force](#)"). Its purpose was to identify problems and issues arising from the new regulations and to assess whether the financial institutions to which they apply have adapted sufficiently. The FSA's overall evaluation is that the institutions examined have taken steps to adapt to MiFID and that most fulfil the regulations' requirements. The FSA found serious deficiencies in four of the institutions, which led to an assessment of penalties.

MiFID is an EU-harmonized regulatory regime and the FSA's interpretations and assessments are often made within the scope of its cooperation with the Committee of European Securities Regulators. The FSA, like the other members, has pledged to adhere to the committee's interpretations and recommendations, unless there are legal obstacles at national level. Thus, the FSA's interpretations and assessments may be changed if the committee issues an EU-wide interpretation.

Where the same opinions have been conveyed to several financial institutions, the FSA has chosen to describe the existing provisions in more detail and discuss their application. These include opinions on the following areas.

Key Points

Outsourcing

The starting point should be that all activities associated with the financial institution's licensed operations comply with the FSA's safeguarding requirements on outsourcing agreements. The safeguards include:

- obtaining and documenting client information for appropriateness and suitability assessments;
- conducting appropriateness and suitability assessments; and
- implementing functions for compliance and risk control.

Compliance function

A well-organized function with clear guidelines contributes to increased client protection and therefore constitutes a significant part of the financial institution's organization. Among other things, the new regulations provide that the compliance function is responsible for checking and regularly assessing whether the financial institution's measures and procedures for compliance are suitable and effective. This means that the compliance function's work must include monitoring and assessment, which must be evident from the function's guidelines. For some firms, an increased monitoring responsibility may necessitate the expansion of the compliance function and the commitment of additional resources.

Conflicts of interest

The report highlights the need for a more comprehensive and critical investigation of operations in order to identify conflicts of interest that may jeopardize client interests. Financial institutions must:

- continuously survey and document potential conflicts of interest which have been identified in their operations;

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- ensure that actual conflicts of interests are identified, including indirect conflicts; and
- ensure that structures are in place to manage such conflicts.

Appropriate guidelines

In some cases a financial institution's guidelines may not be well adapted to the organization, despite this being necessary to their operational applicability and to their effectiveness as a control measure. It is the board of directors' responsibility to ensure that guidelines are in place and to review and evaluate them regularly; therefore, guidelines should be adopted by the board.

Adequate assessment of clients

The report underlines the need for further development of appropriateness assessments based on the client's background, expertise and experience. One common failing is that the questions addressed to clients are too general and therefore are an insufficient basis on which to assess whether the product is appropriate for the client.

Suitability assessment of existing clients

In many cases the FSA found that documentation drawn up for suitability assessments (1) for clients before the new legislation entered into force had not been updated and therefore did not meet the requirements of the new regulations. If a client has not provided information that constitutes a sufficient basis for the suitability assessment, the financial institution must supplement earlier information before the investment service can be provided.

Summarized inducement information

The report indicates a need for further development of summarized inducement information so that the client is aware of the situations in which inducements may arise and the extent to which they may apply. Suitable information includes:

- an indication of the products or services covered by inducements and the types of inducement associated with them;
- an indication of the parties in respect of which the financial institution is a recipient or provider of inducements;
- clear statements of the terms on which inducements are usually calculated, enabling the client personally to assess the scope of the inducement; and
- any deviations from the above.

The FSA is planning several investigations based on its results (eg, a review of branch operations and the application of the regulations' provisions regarding best order execution).

The FSA has previously stated that primary market transactions fall under the MiFID regulations. Corporate finance operations normally require a licence. However, a primary market transaction can also encompass licensed operations in relation to investors that subscribe to a share issue by virtue of the fact that the financial institution executes orders on the investor's behalf. Thus, the MiFID regulations on client protection apply. However, the decisive factor is whether the investor and the financial institution can be considered to have entered into a client relationship in connection with the transaction.

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Endnotes

(1) The report explains that a suitability assessment, as opposed to an appropriateness assessment, is "an overall client assessment... which is more extensive and imposes stricter requirements of the firm's ability to understand the client's needs and conditions".

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