

2016 No. 225

FINANCIAL SERVICES AND MARKETS

The Undertakings for Collective Investment in Transferable Securities Regulations 2016

<i>Made</i>	- - - -	<i>25th February 2016</i>
<i>Laid before Parliament</i>		<i>25th February 2016</i>
<i>Coming into force</i>	- -	<i>18th March 2016</i>

The Treasury are a government department designated(a) for the purposes of section 2(2) of the European Communities Act 1972(b) in relation to financial services.

The Treasury, in exercise of the powers conferred by section 2(2) of that Act, make the following Regulations:

Citation and commencement

1. These Regulations may be cited as the Undertakings for Collective Investment in Transferable Securities Regulations 2016 and come into force on 18th March 2016.

Amendments to the Financial Services and Markets Act 2000

2.—(1) The Financial Services and Markets Act 2000(c) is amended as follows.

(2) In section 55J(d) (variation or cancellation on initiative of regulator), after subsection (7) insert—

“(7ZA) Without prejudice to the generality of subsections (1) and (2), if it appears to the FCA that there has been a serious failure, by a person with permission to carry on the regulated activity specified in article 51ZA of the Financial Services and Markets Act (Regulated Activities) Order 2001 (managing a UCITS), to comply with the requirements imposed—

(a) by or under this Act in pursuance of the UCITS Directive(e), or

(a) S.I. 2012/1759.

(b) 1972 c.68. Section 2(2) was amended by section 27 of the Legislative and Regulatory Reform Act 2006 (c. 51) and by section 3 of, and the Schedule to, the European Union (Amendment) Act 2008 (c. 7). By virtue of the amendment of section 1(2) by section 1 of the European Economic Area Act 1993 (c.51), regulations may be made under section 2(2) of the European Communities Act 1972 to implement obligations of the United Kingdom created or arising by or under the Agreement on the European Economic Area signed at Oporto on 2nd May 1992 (Cm 2073) and the Protocol adjusting the Agreement signed in Brussels on 17th March 1993 (Cm 2183).

(c) 2000 c.8.

(d) Section 55J was substituted by section 11(2) of the Financial Services Act 2012 (c. 21) and was subsequently amended by S.I. 2013/1773, S.I. 2013/3115, S.I. 2015/575, S.I. 2015/910 and S.I. 2015/1882.

(e) OJ L 302, 17.11.2009, p. 32. The term “UCITS Directive” is defined in paragraph 4B of Part I of Schedule 3 to the Financial Services and Markets Act 2000 (c.8).

(b) by the Undertakings for Collective Investment in Transferable Securities Regulations 2011(a),

the FCA may exercise its powers under this section to vary the Part 4A permission of the person concerned by removing that activity from those to which the permission relates, or to cancel the person's Part 4A permission.”.

(3) In section 66A(4)(b) (misconduct: action by the FCA)—

(a) omit the “or” at the end of paragraph (aa);

(b) after paragraph (aa), insert—

“(ab) imposed by the Undertakings for Collective Investment in Transferable Securities Regulations 2011, or”.

(4) In section 168(4)(ja)(c) (appointment of persons to carry out investigations in particular cases)—

(a) omit the “or” at the end of sub-paragraph (i), and at the end of sub-paragraph (ii);

(b) after sub-paragraph (ii), insert—

“(iii) any provision made by or under this Act for the purpose of implementing the UCITS Directive; or

(iv) any provision made by the Undertakings for Collective Investment in Transferable Securities Regulations 2011; or.”.

(5) In section 204A (meaning of “relevant requirement” and “appropriate regulator”)—

(a) in subsection (2)(d)—

(i) omit the “or” at the end of paragraph (b);

(ii) at the end of paragraph (c), insert—

“; or

(d) by the Undertakings for Collective Investment in Transferable Securities Regulations 2011.”.

(b) for subsection (6), substitute—

“(6) The FCA is “the appropriate regulator” in the case of a contravention of any other requirement imposed—

(a) by or under this Act;

(b) by the Alternative Investment Fund Managers Regulations 2013; or

(c) by the Undertakings for Collective Investment in Transferable Securities Regulations 2011.”.

(6) In section 380(6)(a)(e) (injunctions)—

(a) omit the “or” at the end of sub-paragraph (ii);

(b) omit the “or” at the end of the second sub-paragraph (iii);

(c) renumber the second sub-paragraph (iii) as (iv);

(d) at the end of sub-paragraph (v), insert—

(a) S.I. 2011/1613, amended by S.I. 2012/2015, S.I. 2013/472 and S.I. 2013/1388.

(b) Section 66A was inserted by section 32(2) of the Financial Services (Banking Reform) Act 2013 (c.33) and was amended by S.I. 2015/1864.

(c) Section 168(4) was amended by section 41 of, and paragraphs 8(1) and 8(4)(a) to (g) of Part 1 of Schedule 12 to, the Financial Services Act 2012 (c.21), by section 62 of, and paragraph 33(3) of Part 7 of Schedule 7 to, the Counter-Terrorism Act 2008 (c.28), by section 24(1) and (2) of, and paragraph 1 and 16 of Part 1 of Schedule 2 to, the Financial Services Act 2010 (c.28), and by S.I. 2007/126, S.I. 2012/2554 and S.I. 2013/1773.

(d) Section 204A was inserted by section 37(1) of, and paragraph 1 of Part 1, and paragraph 10 of Part 4 of Schedule 9 to, the Financial Services Act 2012. Subsection (2) was amended by S.I. 2013/1773.

(e) Section 380(6) was amended by section 141 of, and paragraph 3(1) and (2) of Schedule 10 to, the Financial Services (Banking Reform) Act 2013, by section 37(1) of, and paragraph 1 of Part 1 of Schedule 9, and paragraphs 19(1) and (3) of Part 5 of Schedule 9 to, the Financial Services Act 2012, and by S.I. 2013/1773 and S.I. 2015/1755.

“, or

(vi) which is imposed by the Undertakings for Collective Investment in Transferable Securities Regulations 2011.”.

(7) In section 391(4A)(a), for “and 391B” substitute “, 391B and 391C”.

(8) After section 391B(b) (publication: special provisions relating to the transparency obligations directive), insert—

“Publication: special provisions relating to the UCITS directive

391C.—(1) This section applies where a supervisory notice, decision notice or final notice relates to the imposition of a sanction or measure to which Article 99 of the UCITS directive applies.

(2) Where the FCA publishes information under section 391(4) or (5) about a matter to which a decision notice or supervisory notice relates and the person to whom the notice is given refers the matter to the Tribunal, the FCA must, without undue delay, publish on its official website information about the status of the appeal and its outcome.

(3) Subject to subsection (4), where the FCA gives a final notice, it must, without undue delay, publish on its official website information on the type and nature of the breach and the identity of the person on whom the sanction or measure is imposed.

(4) Subject to subsection (6), information about a matter to which a final notice relates must be published anonymously where—

- (a) the sanction or measure is imposed on an individual and, following an obligatory prior assessment, publication of personal data is found to be disproportionate;
- (b) failing to publish anonymously would jeopardise the stability of financial markets or an ongoing investigation; or
- (c) failing to publish anonymously would cause, insofar as it can be determined, disproportionate damage to the persons involved.

(5) Where subsection (4) applies, the FCA may make such arrangements as to the publication of information (including as to the timing of publication) as are necessary to preserve the anonymity of the person on whom the sanction or measure is imposed.

(6) Information about a matter to which a final notice relates must not be published where anonymous publication under subsection (4) is considered by the FCA to be insufficient to ensure—

- (a) that the stability of the financial markets would not be put in jeopardy; or
- (b) that the publication would be proportionate with regard to sanctions or measures which are considered by the FCA to be of a minor nature.

(7) Where the FCA publishes information in accordance with subsections (2) to (5), the FCA must—

- (a) ensure the information remains on its official website for at least five years, unless the information is personal data and the Data Protection Act 1998 requires the information to be retained for a different period; and
- (b) promptly report the information to ESMA.”.

(9) In Part 1 of Schedule 3 (EEA passport rights), at the end of paragraph 4B, insert “, as amended by Directive 2014/91/EU of the European Parliament and of the Council of 23rd July 2014(c).”.

(a) Section 391(4A) was inserted by S.I. 2013/3115 and amended by S.I. 2015/1755.
(b) Section 391B was inserted by S.I. 2015/1755.
(c) OJ L 257 28.8.2014, p.186.

Amendments to the Undertakings for Collective Investment in Transferable Securities Regulations 2011

3.—(1) The Undertakings for Collective Investment in Transferable Securities Regulations 2011(a) are amended as follows.

(2) In regulation 7(1)(b)—

(a) insert in the appropriate places the following definitions—

““EEA management company” means a management company that is established in an EEA State other than the UK;”;

““implementing provision” means a requirement that is imposed—

(a) by these Regulations; or

(b) by or under the Act, if the provision implements the UCITS directive;”;

““UK management company” means a management company that is established in the UK;”;

(b) in the definition of “UCITS directive”, at the end insert “, as amended by Directive 2014/91/EU of the European Parliament and of the Council of 23rd July 2014;”

(c) replace regulation 7(2) with—

“(2) Expressions used in this Part which are defined in the UCITS directive have the same meaning as in the UCITS directive and, subject to paragraph (1), expressions used in this Part shall have the same meaning as in the Act.”.

(3) After Part 5 (Divisions) insert—

“PART 5A DEPOSITARIES

Interpretation

15A. The interpretative provisions in regulation 7 shall apply to this Part.

Depository liability: general provisions

15B.—(1) This regulation, and regulations 15C and 15D, apply in relation to the depository of a UCITS.

(2) Any liability of the depository to the UCITS, or to unit-holders of the UCITS, under regulation 15C or 15D is not affected by—

(a) any delegation by the depository of its functions as referred to in Article 22a of the UCITS directive;

(b) any contractual provision that purports to exclude or limit the depository’s liability for losses under regulation 15C or 15D; or

(c) any exclusion or limitation by agreement of the depository’s liability for losses under regulation 15C or 15D.

(3) Any provision or agreement that falls within paragraph (2)(b) or (c) will be void.

(4) Any obligation or liability of a depository under regulation 15C or 15D to the unit-holders of the UCITS may be invoked either directly or indirectly through the management company provided that this does not lead to a duplication of redress or to unequal treatment of unit-holders.

(a) S.I. 2011/1613, amended by S.I. 2012/2015, S.I. 2013/472 and S.I. 2013/1388.

(b) Regulation 7 was amended by S.I. 2013/472 and S.I. 2013/1388.

Depository liability for loss of financial instruments held in custody

15C.—(1) This regulation applies where a financial instrument held in custody in accordance with Article 22.5(a) of the UCITS directive by—

- (a) the depository, or
- (b) a third party to whom custody of the financial instrument has been delegated or sub-delegated,

has been lost in the conditions or circumstances described in any directly applicable regulation made under Article 26b(f) of the UCITS directive.

(2) Subject to paragraph (3), the depository is liable to the UCITS and to the unit-holders of the UCITS for loss of the financial instrument and must return a financial instrument of an identical type or the corresponding amount to the UCITS, or to the management company acting on behalf of the UCITS, without undue delay.

(3) The depository is not liable under paragraph (2) nor is it required to comply with the obligation in that paragraph if it can prove that the loss has arisen as a result of an external event beyond the depository's reasonable control, the consequences of which would have been unavoidable despite all reasonable efforts to the contrary.

Depository liability for other losses

15D. If a UCITS, or unit-holders of a UCITS, have suffered losses other than a loss of a financial instrument referred to in regulation 15C, the depository is liable to the UCITS or to the unit-holders of the UCITS for those losses, if the losses are as a result of the depository's negligent or intentional failure to comply with any implementing provision that applies to it.

PART 5B

REQUIREMENTS ON THE FINANCIAL CONDUCT AUTHORITY

Interpretation

15E. The interpretative provisions in regulation 7 shall apply to this Part.

FCA requirement to share depository information

15F. If the FCA receives information—

- (a) from the depository of—
 - (i) an EEA UCITS managed by a UK management company or an EEA management company, or
 - (ii) a UK UCITS managed by an EEA management company;
- (b) which the depository has obtained while performing its duties as the depository of the EEA UCITS or UK UCITS; and
- (c) which may be necessary for the competent authority of the EEA UCITS or the EEA management company;

the FCA must share such information with that competent authority without delay.

FCA's ability to refuse to act on requests for information

15G. The FCA may only refuse to act on a request for information or a request to cooperate with an investigation into possible infringements of the UCITS directive from a competent authority of an EEA UCITS or an EEA management company, where—

- (a) communication of the relevant information may adversely affect the security of the United Kingdom, in particular the fight against terrorism or other serious crimes;
- (b) compliance with the request is likely to affect adversely the FCA’s own investigation, enforcement activities, or where applicable, a criminal investigation;
- (c) judicial proceedings have already been initiated in respect of the same actions and against the same persons before the courts of the United Kingdom; or
- (d) a final judgment has already been delivered in relation to such persons for the same actions in the United Kingdom.

Reporting of infringements

15H. The FCA must establish specific procedures for the receipt and follow-up of reports on potential or actual infringements of any implementing provision, in accordance with Article 99d of the UCITS directive.

Disclosure of information regarding penalties

15I. The FCA must provide ESMA annually with aggregated information regarding all penalties and measures imposed in accordance with Article 99 of the UCITS directive.”.

Amendments to the Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001

4.—(1) The Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001(a) are amended as follows.

(2) In regulation 2 (interpretation), in paragraph (f) of the definition of “single market restrictions”, after “article 102” insert “and 104a.1”.

Amendments to the Public Interest Disclosure (Prescribed Persons) Order 2014

5.—(1) The Public Interest Disclosure (Prescribed Persons) Order 2014(b) is amended as follows.

(2) In the Schedule—

- (a) in the appropriate place in the first column, insert “The European Securities and Markets Authority”; and
- (b) in the corresponding place in the second column, insert “Matters relating to compliance with Directive 2009/65/EC of the European Parliament and of the Council of 13th July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities, as amended by Directive 2014/91/EU of the European Parliament and of the Council of 23rd July 2014.”.

Review

6.—(1) The Treasury must from time to time—

- (a) carry out a review of regulations 2 to 5,
- (b) set out the conclusions of the review in a report, and
- (c) publish the report.

(2) In carrying out the review the Treasury must, so far as is reasonable, have regard to how Directive 2014/91/EU of the European Parliament and of the Council of 23rd July 2014 amending

(a) S.I. 2001/2188. The definition of “single market restrictions” was inserted by S.I. 2012/916 and amended by S.I. 2013/504, S.I. 2013/1773, S.I. 2013/3115, S.I. 2014/3348, S.I. 2015/575 and S.I. 2015/910.

(b) S.I. 2014/2418, to which there are amendments not relevant to these Regulations.

Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards depositary functions, remuneration policies and sanctions^(a) (which is partly implemented by means of regulations 2 to 5) is implemented in other member States.

(3) The report must in particular—

- (a) set out the objectives intended to be achieved by the regulatory provision made by regulations 2 to 5,
- (b) assess the extent to which those objectives are achieved, and
- (c) assess whether those objectives remain appropriate and, if so, the extent to which they could be achieved with a system that imposes less regulation.

(4) The first report under this regulation must be published before the end of the period of five years beginning with the day on which these Regulations come into force.

(5) Reports under this regulation are afterwards to be published at intervals not exceeding five years.

Mel Stride
Charlie Elphicke

25th February 2016

Two of the Lords Commissioners of Her Majesty's Treasury

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations implement in part Directive 2014/91/EU of the European Parliament and of the Council of 23rd July 2014 (OJ L 257, 28.8.2014, p.186) amending Directive 2009/65/EC (“the UCITS Directive”) on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards depositary functions, remuneration policies and sanctions (“the UCITS V Directive”).

Regulation 2 makes amendments to the Financial Services and Markets Act 2000 (“FSMA”) (c.8) to transpose Article 1.16 of the UCITS V Directive, providing that the disciplinary powers in FSMA that are exercisable against authorised persons, approved persons and senior managers can be applied in the case of contraventions of requirements in the Undertakings for Collective Investments in Transferable Securities Regulations 2011 (S.I. 2011/1613) (“UCITS Regulations 2011”), in addition to contraventions of requirements imposed “by or under” FSMA. It also seeks to transpose Article 1.16 of the UCITS V Directive by providing that the FCA can exercise its power to cancel an authorised person’s Part 4A permission in the case of serious breaches of requirements imposed by or under FSMA, or by the UCITS Regulations 2011.

Regulation 2 also transposes the requirements in Article 1.17 of the UCITS V Directive relating to the reporting and publication of sanctions and measures to which Article 99 of the UCITS Directive applies.

Regulation 3 inserts Parts 5A and 5B (regulations 15A to 15I) into the UCITS Regulations 2011. Regulations 15B-15D transpose Article 1.7 of the UCITS V Directive by making provision as to the liability of a depositary to the UCITS, or the management company of the UCITS, in the case of a loss of a financial instrument held in custody, or in respect of other losses suffered by them as a result of the depositary’s negligent or intentional failure to properly fulfil its obligations pursuant to the UCITS Directive.

(a) OJ L 257, 28.8.2014, p.186.

Regulation 15F transposes Article 1.10 of the UCITS V Directive by making provision for the Financial Conduct Authority to share information received from a UK or EEA depositary with competent authorities of other EEA States that are responsible for the UCITS or of the management company of the UCITS.

Regulation 15G transposes Article 1.16(4) of the UCITS V Directive by setting out the limited circumstances in which the FCA may refuse to act on a request for information or a request to cooperate with an investigation into possible infringements of the directive from the competent authority of another EEA State.

Regulation 15H and 15I also transposes Article 1.17 of the UCITS V Directive by requiring the FCA to establish specific procedures for the receipt and follow-up of reports on infringements in accordance with Article 99d of the directive, and to provide ESMA annually with aggregated information regarding all penalties and measures imposed in accordance with Article 99e of the directive.

Regulation 4 makes an amendment to the Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001 (S.I. 2001/2188) (“DCI Regulations”) to transpose the requirement in Article 1.18 of the UCITS V Directive that the processing of personal data be carried out subject to Directive 95/46/EC of the European Parliament and of the Council of 24th October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23/11/1995, p.31). It inserts Article 104a.1 of the UCITS Directive into the definition of “single market restrictions” in the DCI Regulations, meaning that disclosure of confidential information (including disclosures by the FCA) must not contravene the requirement in Article 104a.1.

Regulation 5 makes amendments to the Public Interest Disclosure (Prescribed Persons) Order 2014 (S.I. 2014/2418) to transpose the requirement in Article 1.17 of the UCITS V Directive. This provides that any “whistle-blowing” reports to ESMA by employees of UCITS management companies or depositaries (in addition to reports to the competent authorities) must not subject the person reporting to liability of any kind relating to the report. By adding ESMA to the list of prescribed persons, reports as to infringements of the UCITS Directive will be considered to be qualifying disclosures for the purposes of the Employment Rights Act 1996 (c. 18) and will be afforded the protections under that Act.

A full impact assessment of the effect that these Regulations will have on the costs of business and the voluntary sector will be available from Her Majesty’s Treasury, 1 Horse Guards Road, London, SW1A 2HQ or on www.gov.uk and will be published alongside these Regulations on www.legislation.gov.uk.

A transposition note setting out how these Regulations transpose the provisions of the UCITS V Directive is available from Her Majesty’s Treasury, 1 Horse Guards Road, London, SW1A 2HQ and is published on www.legislation.gov.uk alongside these Regulations.

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