Leaman Crellin Limited
Regulatory Compliance Consultants

Compliance Reliance after Brexit

1 July 2020

What is substituted compliance?

COMMODITY FUTURES TRADING COMMISSION

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Commodity Exchange Act

Comparability Determinations for Substituted Compliance Purposes

The Commodity Futures Trading Commission has approved a series of broad comparability determinations that would permit substituted compliance with non-U.S. regulatory regimes as compared to certain swaps provisions of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act and the Commission's regulations.

View Cross-Border Application of Swaps Provisions

As jurisdictions outside the U.S. continue to strengthen their regulatory regimes, the Commission may determine that additional foreign regulatory requirements are comparable to and as comprehensive as certain requirements under the Commodity Exchange Act and the Commission's regulations.

Additional Information

Business Conduct Rules for Swap Dealers and Major Swap Participants Summary of Entity-Level Comparability Determinations

CFTC Press Release 6802-13

Publication Date	Comparability Determination
10/18/2017	82 FR 48394 // PDF Version 17 CFR Chapter I Comparability Determination for the European Union: Margin

FCA Intention

The effect of the general approach is that a TP firm that operates on both a branch and a cross-border services basis, or on a cross-border services basis from more than one EEA country, should only need to keep complying with:

1. the relevant rules with which it currently complies in relation to each aspect of its business

2. the limited additional requirements we are applying to TP firms.

The position for fees is addressed separately in this chapter.

PS19/05, FCA

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Availability of Substituted Compliance

We are therefore proposing a balanced approach, requiring firms while they are in the TPR to comply, in respect of their UK business, with:

- **all FCA rules which currently apply to them**
- **all FCA rules which implement a requirement of an EU directive** which are currently reserved to the TP firm's home state and which therefore we do not currently apply to EEA firms (home state rules). We intend to accept 'substituted compliance' in respect of these rules. If firms can demonstrate they continue to comply with the equivalent home state rules in respect of their UK business (including where this is on a voluntary basis if the relevant rules cease to cover UK business) they will be deemed to comply with our rules
- **certain additional FCA rules which we believe are necessary to provide appropriate consumer protection or relate to funding requirements**

and to consider guidance on the rules above.

CP18/29, FCA

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How it works today

SUP 13A Annex 1 Application of the Handbook to Incoming EEA Firms

- The table below summarises the application of the Handbook to an incoming EEA firm. Where the table indicates that a particular module of the Handbook may apply, its application in relation to any particular activity is dependent on the detailed application provisions in that module.
- In some cases, the application of the Handbook depends on whether responsibility for a matter is reserved under an EU instrument to the incoming EEA firm's Home State regulator. Guidance on the reservation of responsibility is contained in SUP 13A Annex 2 (Matters reserved to a Home State regulator). Guidance on the territorial application of MiFID is contained in PERG 13.6 and PERG 13.7 and SUP 13A Annex 2.

SUP 13A Annex 2 Matters reserved to a Home State Regulator

- The Single Market Directives, and the Treaty (as interpreted by the European Court of Justice) adopt broadly similar approaches to reserving responsibility to the Home State regulator. To summarise, the FCA or PRA, as Host State regulator, is entitled to impose requirements with respect to activities carried on within the United Kingdom if these can be justified in the interests of the "general good" and are imposed in a non-discriminatory way.
- It is necessary to refer to the case law of the European Court of Justice to interpret the concept of the "general good". To summarise, to satisfy the general good test, Host State rules must come within a field which has not been harmonised at EU level, satisfy the general requirements that they pursue an objective of the general good, be non-discriminatory, be objectively necessary, be proportionate to the objective pursued and not already be safeguarded by rules to which the firm is subject in its Home State.

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FCA Rules that will be switched on

- The Principles for Businesses
- Fees
- Status disclosure
- CASS
- Compensation
- Complaints handling
- SMCR

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New Guidance

GEN 2.2.36(2)

The approach to what rules apply to TP firms is broadly to apply rules to TP firms which applied to them immediately prior to the UK's exit from the EU, whether those rules applied in the UK (as was the case for host state rules) or, where rules are directive-based, in the firm's Home State, or where relevant under an EU measure in relation to which the law of the country of origin applies, the state where the establishment is located and from which the firm's service is provided.

GEN 2.2.37(5)

GEN 2.2.26R(2) refers to a rule which deals with a matter which immediately before exit day was reserved to the Home State of the firm. These rules include both rules that under an EU directive are always the responsibility of that state, such as rules concerning the safeguarding of client assets, and also rules the responsibility for which depends on whether the service or activity takes place at a branch or establishment in a state other than the Home State of the firm or is provided cross border from a branch or establishment in the Home State. For example, it would cover all of the rules which implement the provisions which are the responsibility of the Home State under, as the case may be, article 34 or article 35 of MIFID.GEN 2.2.26R(2)(b) and the words in (4) and (6) concerning the EEA State where the TP firm has its establishment will be applicable in a situation where an EU directive includes a country of origin provision (one which generally requires compliance with the law of he state where the establishment from which the service is provided), such as the E-Commerce Directive or the Distance Marketing Directive. In that case GEN 2.2.26R(2)(b) and the related words in (4) and (6) would apply to an FCA rule which deals with a matter reserved, under such a directive, to the law of the state where the TP firm has its establishment from which the service is provided, an example of which is the rules in COBS 5.2.

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FCA Expectations

We do not believe that relying on the Principles alone is enough for the purposes of consumer protection or providing clarity for TP firms or their customers, given their high-level nature. We felt it was necessary for these firms to switch on home state rules which implement EU directives as a matter of UK law (and then allow substituted compliance with the UK requirements). This would ensure appropriate protections for UK consumers during the TPR where home state supervision does not extend to UK business.

The general approach is subject to some limited areas where we proposed additional requirements, which are now listed in GEN 2.2.37G(2) for clarity. We are only applying additional requirements where we believe these to be necessary.

We recognise that, on paper, this increases the complexity of the approach and that it would require additional work to determine the exact rules that apply to TP firms. However, firms can take as their starting point that they can generally keep complying with the rules as they do now. We do not expect firms to undertake an extensive implementation exercise on entering the TPR. Firms will only be required to make changes to reflect the limited additional requirements we proposed, assuming their existing systems and controls comply with the rules that already apply.

PS19/05, FCA

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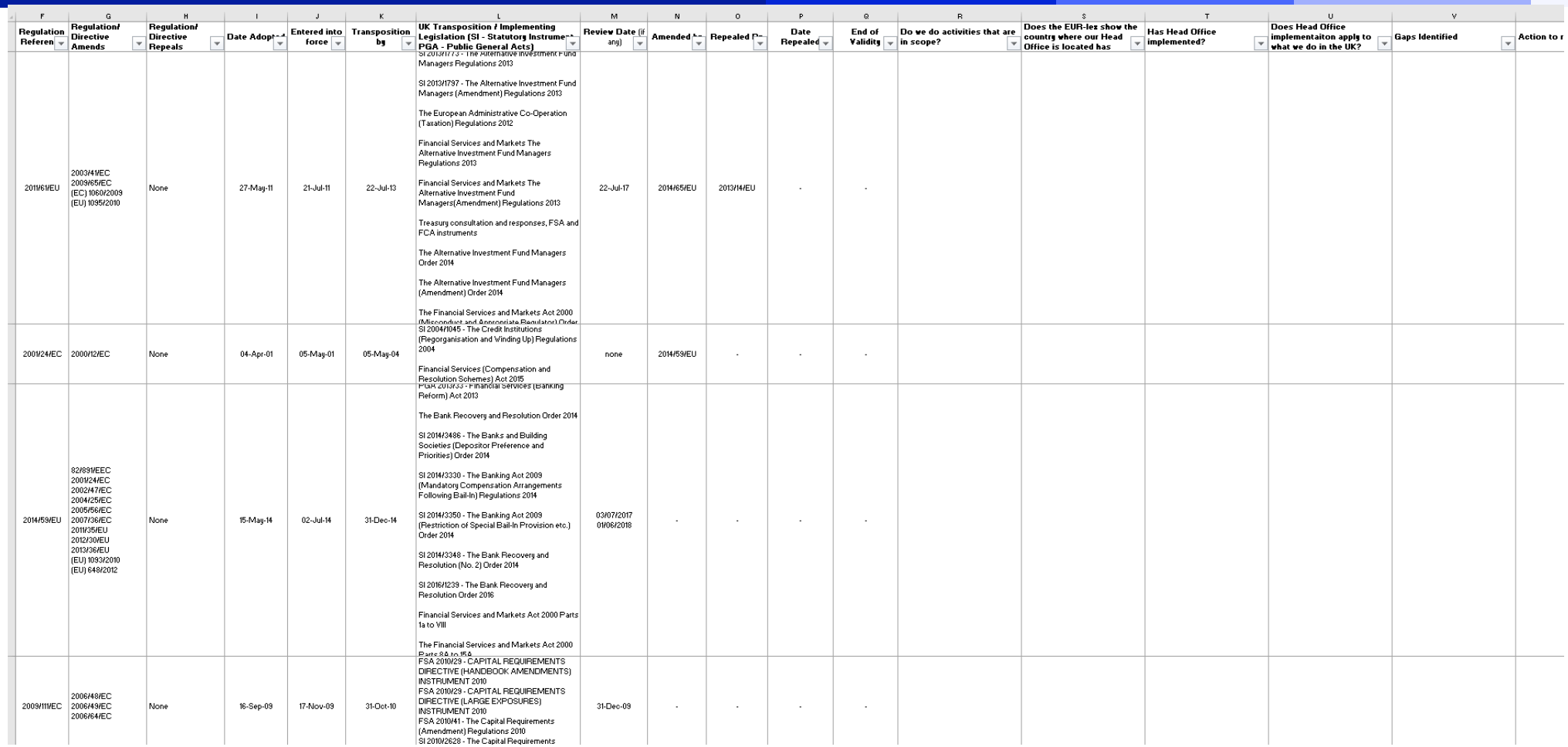
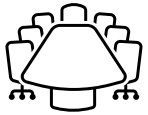
Ready made option



F	G	H	I	J	K	L	M	N	O	P	Q	R	S	T	U	V	
Regulation Referen	Regulation/ Directive Amends	Regulation/ Directive Repeals	Date Adopted	Entered into force	Transposition by	UK Transposition / Implementing Legislation (SI - Statutory Instrument PGA - Public General Acts)	Review Date (if any)	Amended by	Repealed By	Date Repealed	End of Validity	Do we do activities that are in scope?	Does the EUR-lex show the country where our Head Office is located has	Has Head Office implemented?	Does Head Office implementaiton apply to what we do in the UK?	Gaps Identified	Action to r
2011/61/EU	2003/41/EC 2009/65/EC (EC) 1060/2009 (EU) 1095/2010	None	27-May-11	21-Jul-11	22-Jul-13	SI 2013/1773 - The Alternative Investment Fund Managers Regulations 2013 SI 2013/1797 - The Alternative Investment Fund Managers (Amendment) Regulations 2013 The European Administrative Co-Operation (Taxation) Regulations 2012 Financial Services and Markets The Alternative Investment Fund Managers Regulations 2013 Financial Services and Markets The Alternative Investment Fund Managers(Amendment) Regulations 2013 Treasury consultation and responses, FSA and FCA instruments The Alternative Investment Fund Managers Order 2014 The Alternative Investment Fund Managers (Amendment) Order 2014 The Financial Services and Markets Act 2000 (Misconduct and Appropriate Regulator) Order	22-Jul-17	2014/65/EU	2013/14/EU	-	-						
2001/24/EC	2000/12/EC	None	04-Apr-01	05-May-01	05-May-04	SI 2004/1045 - The Credit Institutions (Regorganisation and Winding Up) Regulations 2004 Financial Services (Compensation and Resolution Schemes) Act 2015	none	2014/59/EU	-	-	-						
2014/59/EU	82/891/EEC 2001/24/EC 2002/47/EC 2004/25/EC 2005/56/EC 2007/36/EC 2011/35/EU 2012/30/EU 2013/36/EU (EU) 1093/2010 (EU) 648/2012	None	15-May-14	02-Jul-14	31-Dec-14	PGA 2013/33 - Financial Services (Banking Reform) Act 2013 The Bank Recovery and Resolution Order 2014 SI 2014/3486 - The Banks and Building Societies (Depositor Preference and Priorities) Order 2014 SI 2014/3330 - The Banking Act 2009 (Mandatory Compensation Arrangements Following Bail-In) Regulations 2014 SI 2014/3350 - The Banking Act 2009 (Restriction of Special Bail-In Provision etc.) Order 2014 SI 2014/3348 - The Bank Recovery and Resolution (No. 2) Order 2014 SI 2016/1239 - The Bank Recovery and Resolution Order 2016 Financial Services and Markets Act 2000 Parts 1a to VIII The Financial Services and Markets Act 2000 Parts 9A to 19A	03/07/2017 01/06/2018	-	-	-	-						
2009/111/EC	2006/48/EC 2006/49/EC 2006/64/EC	None	16-Sep-09	17-Nov-09	31-Oct-10	FSA 2010/29 - CAPITAL REQUIREMENTS DIRECTIVE (HANDBOOK AMENDMENTS) INSTRUMENT 2010 FSA 2010/29 - CAPITAL REQUIREMENTS DIRECTIVE (LARGE EXPOSURES) INSTRUMENT 2010 FSA 2010/41 - The Capital Requirements (Amendment) Regulations 2010 SI 2010/2628 - The Capital Requirements	31-Dec-09	-	-	-	-						

About Us

Katharine has worked in financial services for thirty years in insurance, distribution, banking, and regulation, including with Standard Chartered Bank and the UK's regulator, the FSA. During that time Katharine developed a passion for supporting firms that don't have unlimited resources because they so often find they are expected to be across a broad range of regulations sometimes to a technical depth that takes time to understand and implement. As a result, Katharine develops materials that are practical and uses language that is more readily understood. Katharine's areas of expertise are Conduct, Privacy, CASS, SMCR, Global FX Code, conflicts, non-financial misconduct, and Outsourcing. More information here: https://www.leamancrellin.co.uk/about-us



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