

# The Investment Network

## Change is the law of life ...

Elizabeth Budd  
24 June 2016

**FT** INNOVATIVE  
FINANCIAL LAWYERS 2015  
TIMES AWARD WINNER  
The Most Innovative Law Firm in Europe

  
Pinsent Masons

*“Change is the law of life. And those who look only to the past or present are certain to miss the future”*

John F. Kennedy

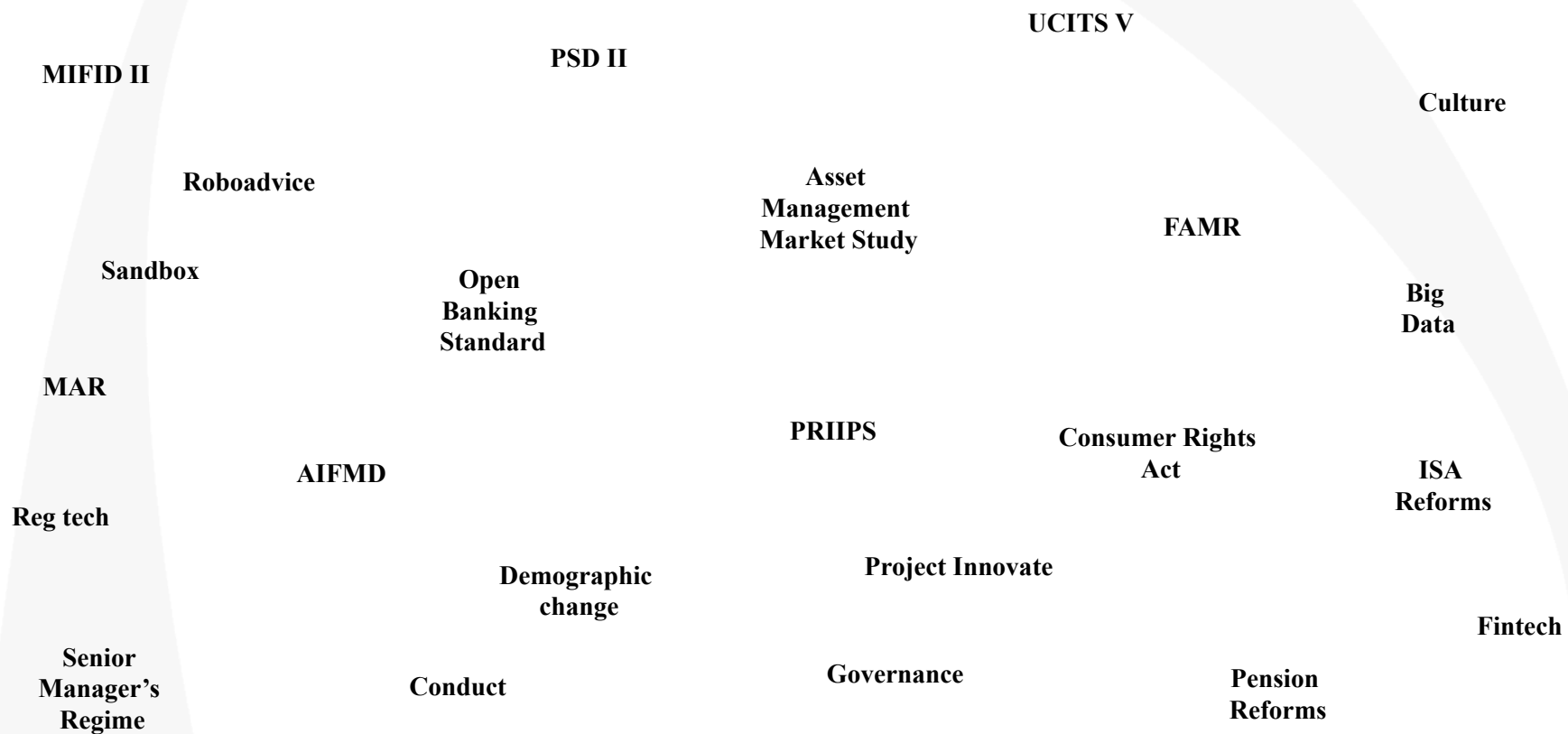
# Backdrop

## FCA's statutory objectives

- Consumer Protection
- Integrity of the UK financial system
- Competition

Acting in the best interests of the client.

# Changes



# Focus

- Market Abuse Regulation
- Consumer Rights Act
- FAMR



# Market Abuse Regulation

# Why does it matter?

- Statutory obligation on FCA
- Increasing co-operation between national regulators
- Greater success by regulators in bringing legal and regulatory action
- W.H. Ireland - £1.2m fine; restriction on business

# Thematic Review 15/1 Asset Management Firms and the risk of market abuse

## Findings

- 1. Managing the risk that inside information could be received but not identified.** Firms generally had effective policies to identify and control inside information in clear situations. Practices to avoid inside information or identify its receipt when it is not expected to be received were often informal and inconsistently applied.
- 2. Controlling access to inside information and managing the risk of improper disclosure.** All firms had a policy to limit the sharing of inside information to those who need to know it. However, only a minority of firms monitored the effectiveness of this policy.
- 3. Pre-trade controls to prevent market manipulation and insider dealing.** Firms generally had good pre-trade controls to reduce the risk of market abuse. In most firms a segregated dealing function conducted a review to flag potentially manipulative transactions prior to execution.



# Thematic Review 15/1 Asset Management Firms and the risk of market abuse (Contd)

4. **Post-trade surveillance.** Only two firms in sample demonstrated post-trade surveillance that effectively highlighted and properly investigated potentially suspicious trades.
5. **Personal account dealing policies.** All of the firms in our review had a personal account dealing policy with procedures to reduce the risk of market abuse.
6. **Training.** All except for one firm conducted training to ensure employees' understanding of market abuse rules was up to date and to discuss recent market abuse cases.

# From MAD to MAR

- From 3 July 2016 the Market Abuse Regulation will replace the Market Abuse Directive
- 28 ways of implementing MAD in EU member states will be replaced by one EU-wide set of rules
- Anything in UK law or regulation inconsistent with MAR will go – e.g. the Model Code, some Listing Rules and some DTRs
- In some respects MAR is more prescriptive, in some less, but with more paperwork
- The insider dealing offence under Criminal Justice Act 1993 remains

# MAR – what it covers

- Inside information
- Insider dealing
- Market manipulation
- Prevention and detection
- Suspicious transactions
- Legitimate behaviours
- Buy-backs and stabilisation
- Market soundings
- Disclosing inside information
- Insider lists
- PDMR transactions

# Scope

- Financial instruments admitted to trading on a regulated market or MTF or OTF (or for which a request for admission to trading has been made) or whose price or value depends on or has an effect on the price or value of a financial instrument
- Spot commodity contracts (other than wholesale energy products) where the behaviour is likely to have an effect on the price or value of a financial instrument
- Behaviour in relation to benchmarks

nb - MAR refers to the definition of financial instruments in MiFID II which is wider than that in MAD

References in MAR to MiFID II are to be read as references to MiFID until MiFID II comes into force (3 January 2018)

# Inside information definition

- Inside information is:
  - information of a precise nature
  - not made public
  - relating directly or indirectly to one or more issuers or financial instruments
  - if made public would be likely to have a significant effect on the price of those financial instruments (or related derivative financial instruments)
- Information has a significant effect if it is information that a reasonable investor would be likely to use as part of the basis of an investment decision

# Market abuse – key issues

- MAR continues to apply to insider dealing, unlawful disclosure of inside information and market manipulation
- Insider dealing expanded to include cancelling or amending an order where the order was placed before the person had the inside information
- No material change to unlawful disclosure of inside information
- Market manipulation expanded to include providing false or misleading information or inputs in relation to a benchmark
- Attempting to engage in market abuse is also covered

# Market soundings

- MAR recognises that for the proper functioning of the financial markets market soundings should not be market abuse - subject to certain conditions
- Consider if market sounding will involve disclosure of inside information and record conclusion and reasons why
- Obtain consent of recipient to receive inside information
- Inform the recipient that he is prohibited from using the information to deal or amend or cancel an order and must keep confidential
- Notify the recipient when the information ceases to be inside information
- Keep records

# Market soundings – a caution for MSRs

- Recipient of the market sounding must independently consider whether it receives inside information
- Subsequent disclosure of information gained from market soundings by the recipient may not fall within the market sounding provision and may constitute unlawful dissemination of inside information
- ESMA market soundings templates
- ESMA proposals that MSR has to create and maintain own records



# Insider lists

- Companies and those acting on their behalf must keep lists of all who have access to inside information – employees, advisers, accountants, credit reference agencies, and keep it updated
- Two prescribed formats for the list to be kept electronically –
  - deal-specific or event-based inside information (one for each deal/event)
  - permanent insiders with access to all inside information at all times (who won't also appear on the deal/event list)
- Dates and times and home addresses and telephone numbers required



# Unfair Contract Terms

# Unfair Contract Terms

- The Consumer Rights Act 2015 consolidates the Unfair Terms in Consumer Contracts 1999 (UTCCRs) and the business to consumer provisions of the Unfair Contract Terms Act 1977 (UCTA).
- Covers goods, services and digital content
- FCA's the Unfair Contract Terms Regulatory Guide

# The fairness test

- All terms must be fair – whether negotiated or standard
- An unfair term will not be binding on the consumer
- Unfairness – if contrary to good faith requirements, a term causes a significant imbalance in the rights and obligations of the trader and the consumer to the detriment of the consumer
- Term cannot be reviewed for fairness if they reflect mandatory terms or provisions of an international convention
- Core exemption for subject matter and price

# Test of prominence

- Prominent if brought to consumer's attention in such a way that an Average Consumer would be aware of term
- Who is the Average Consumer?
  - He is reasonably well-informed, observant and circumspect
  - But he doesn't always read everything (CMA guidance)
- CMA vision of test
  - Layers of prominence
  - Different levels for different levels of risk
  - More prominence for onerous, difficult to understand or unusual terms

# The 'core terms' exclusion

- A term of a consumer contract may not be assessed for fairness ... to the extent that
  - (a) it specifies the main subject matter of the contract; or
  - (b) the assessment is of the appropriateness of the price payable under the contract by comparison with the goods, digital content or services supplied under it.
  - The scope of the exclusion has been restricted :-
    - (i) prominence and transparency
    - (ii) the 'Grey List'

# Variation clauses

- FCA focus on unilateral right to vary (Grey list item)
- Valid reasons for variation should be set out in the contract – 2 ‘exceptions’ for FS contracts
  - Interest rates can change without notice, where there is a valid reason, provided
    - Customer informed at earliest opportunity
    - Customer is free to terminate immediately
  - Change to term in contract of indeterminate duration provided
    - Customer informed with reasonable notice
    - Customer is free to terminate immediately



FAMR



# FAMR - Aim

“Affordable and accessible financial advice and guidance for everyone, at all stages of their lives.”

n.b. FG15/1 – Retail investment advice: Clarifying the boundaries and exploring the barriers to market development.

# FAMR Final Report 16 March 2016

<b>Affordability</b>	<b>Accessibility</b>	<b>Liabilities and Consumer Redress</b>
Harness technology	Harness the work place	FSCS Levy
Redefine advice	Pensions dashboard	FOS – Best Practice roundtables – Disclosure
Financial Advice Working Group	Nudges	No long-stop

28 recommendations

# FAMR – proposal to amend the definition of investment advice

## UK Investment advice

- relate to a particular investment
- be given to an investor/potential investor
- relate to the merits of buying, selling, subscribing for or underwriting the investment

## MiFID investment advice

- personal recommendation to an investor or potential investor
- recommendation presented as suitable for that investor
- recommendation relates to buying, selling, subscribing for, exchanging or redeeming the financial instrument

# Harness Technology

- Project Innovate
  - Hub
  - Advice Unit
  - Sandbox
- Use of e-ID and e-Signatures
- Blockchain technology
- Does technology make things cheaper?
- Issues arising from:
  - Digital Natives v Digital Immigrants
  - Role of IT Director

n.b. Consider Open Banking Standard and Application Programme Interfaces

# Accessibility

- Accessing pension pot to pay for advice
- Increased tax break for advice - £500
- Pension dashboard – Pensions Finder Alpha White Paper

# Conclusions

- Which market(s) are you in?
- How will the regulatory environment adapt?
- What systems and controls will you need?
- How will you train your staff?
- How will you ensure that you act in the best interests of your clients?

# Contact



**Elizabeth Budd**

Partner

Financial Services Regulation

T: +44 7054 2657

M: +44 7469 377 289

E: [elizabeth.budd@pinsentmasons.com](mailto:elizabeth.budd@pinsentmasons.com)



## Pinsent Masons

Pinsent Masons LLP is a limited liability partnership registered in England & Wales (registered number: OC333653) authorised and regulated by the Solicitors Regulation Authority, and by the appropriate regulatory body in the other jurisdictions in which it operates. The word 'partner', used in relation to the LLP, refers to a member of the LLP or an employee or consultant of the LLP or any affiliated firm of equivalent standing. A list of the members of the LLP, and of those non-members who are designated as partners, is displayed at the LLP's registered office: 30 Crown Place, London EC2A 4ES, United Kingdom. We use 'Pinsent Masons' to refer to Pinsent Masons LLP, its subsidiaries and any affiliates which it or its partners operate as separate businesses for regulatory or other reasons. Reference to 'Pinsent Masons' is to Pinsent Masons LLP and/or one or more of those subsidiaries or affiliates as the context requires. © Pinsent Masons LLP 2016

For a full list of our locations around the globe please visit our websites: [www.pinsentmasons.com](http://www.pinsentmasons.com) and [www.Out-Law.com](http://www.Out-Law.com)