

The Investment Network

Change is the law of life ...

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*“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

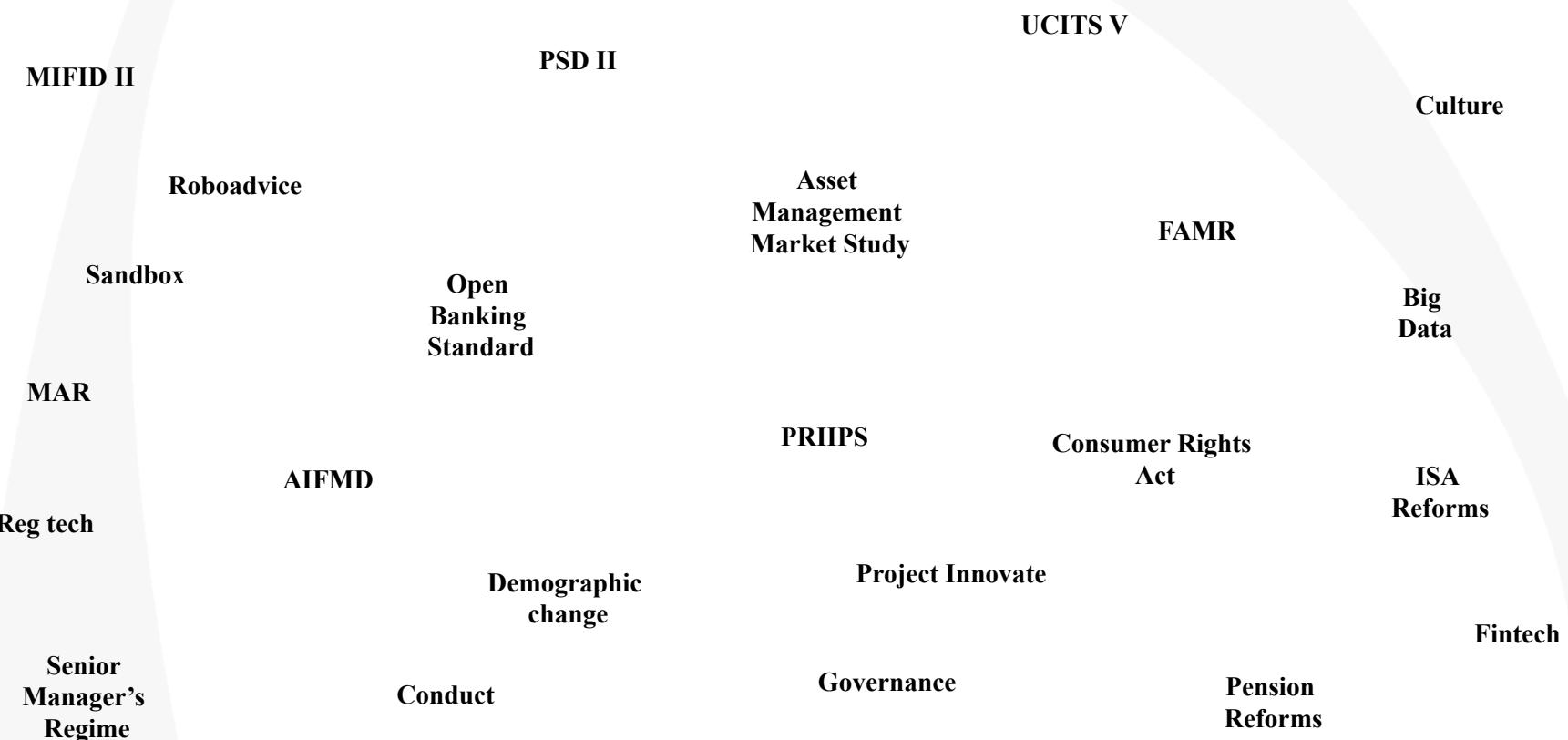
Backdrop

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

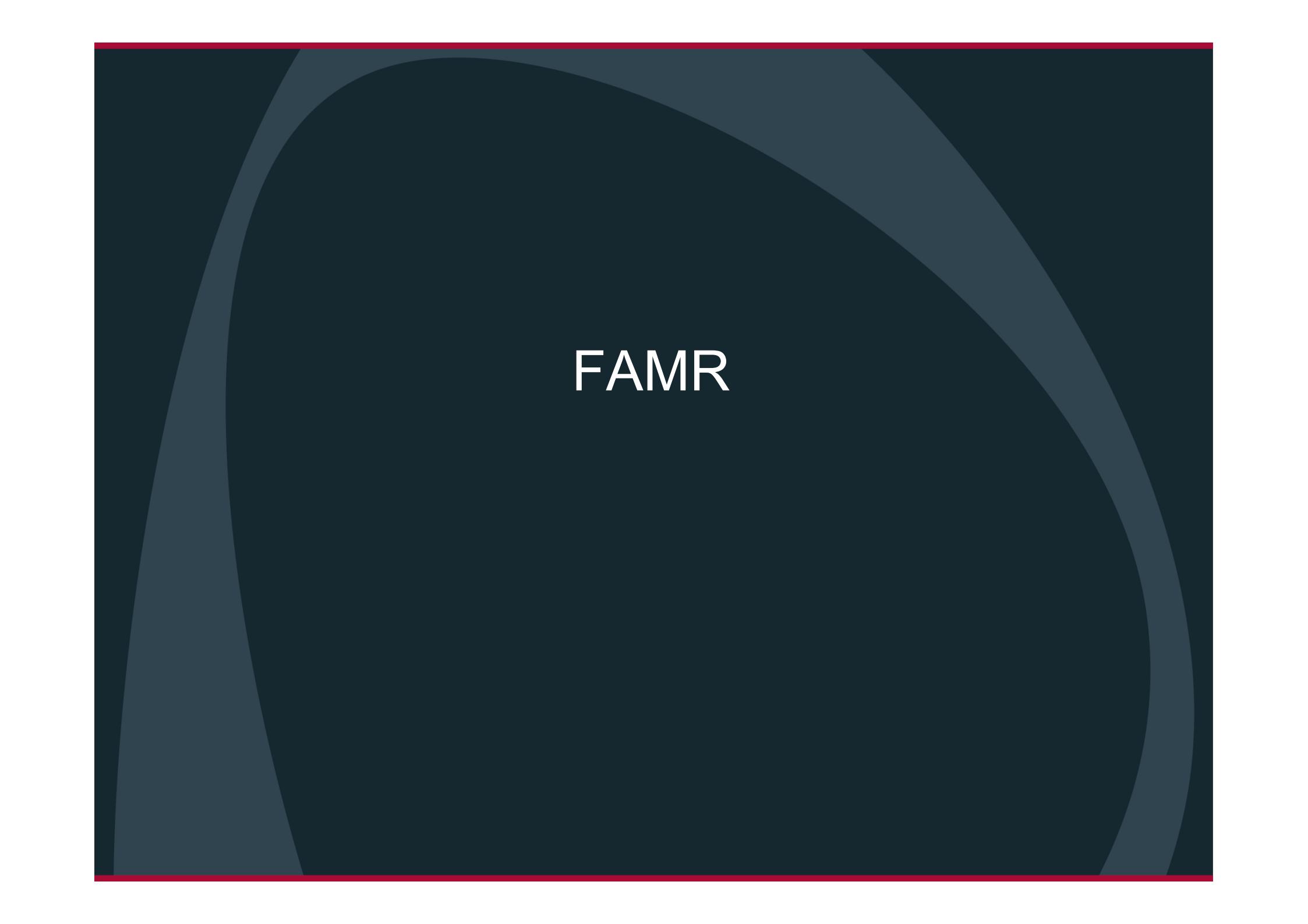
- Prominent if brought to consumer's attention in such a way that an Average Consumer would be aware of term
- Who is the Average Consumer?
 - He is reasonably well-informed, observant and circumspect
 - But he doesn't always read everything (CMA guidance)
- CMA vision of test
 - Layers of prominence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

The background of the image features a dark, almost black, surface. It is punctuated by several concentric, dark grey circles that create a sense of depth and motion. The circles are irregular in shape, suggesting a stylized representation of a celestial body like a planet or a star. The entire composition is framed by a thick, solid red border, which provides a sharp contrast to the dark background.

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

Affordability	Accessibility	Liabilities and Consumer Redress
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



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