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978-1-107-40466-3 - Capital Markets Law and Compliance: The Implications of MiFID

Paul Nelson

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Capital Markets Law and Compliance

The Markets in Financial Instruments Directive (MiFID) is a detailed re-writing of the regulation of capital markets. To the extent those rules permit, the Financial Services Authority (FSA) is also introducing high-level 'principles-based regulation'. In response to this, Paul Nelson presents practical guidance on the regulation of the capital markets, ranging from new issues and IPOs to investment banking, broker-dealing and asset management. All laws and rules relevant to the regulation of the capital markets are explained and put into context within the economic operation of markets, institutions and products, the European Single Market, the FSA's policies and objectives, the historical evolution of the regulations and the general civil and criminal law. Drawing on 30 years' experience as a practitioner, and referring to a vast range of supporting materials, the author provides an insightful analysis and critique of the rules, the rule makers and the institutions.

PAUL NELSON is a partner at Linklaters, London. He is also the FINRA Professor of Capital Markets Regulation and Compliance at the ICMA Centre, University of Reading.

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For Myrtle, Aubrey, Dora, Saul, Joel,
with love and respect

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Preface

This book, like all books, is a product of time, place, circumstances and personality. My aims in writing it are explained in Chapter 1; why I did it is, ultimately, a psychological question which I will not answer here. Instead, I want to acknowledge a number of debts which are important to me in its creation, although most will not recognise it and none have read the result in advance: Robert Orme, Head of History of Art at Latymer Upper School, Hammersmith, who taught me that history is the foundation of explanation; Graham Routledge, late Fellow of Corpus Christi College Cambridge, who taught me law as an analytic discipline; Iain Murray, late Partner of Linklaters, who showed me not only that all aspects of law are interconnected, but also that the socio-economic consequences are profound; Charles Allen-Jones, retired Senior Partner of Linklaters, who showed me law as a creative tool in solving commercial problems; Professor John Board, Director ICMA Centre, University of Reading, who has shown me not only great understanding but also how an economist's view of the Capital Markets can immeasurably enhance a lawyer's view; and my friend Dora Lawson who continues to teach me that in a world of relative, ever-shifting and, ultimately, futile values it is possible to live according to the highest standards of integrity. In the production of this book I have had the privilege of working with Andrea Philo, whose support over many years I cannot repay.

The law, or at least the regulation, is stated as at 20 September 2007.

Paul Nelson
West Hampstead

List of acronyms

APER	FSA’s Statements of Principle and Code of Practice for Approved Persons
ATS	Alternative Trading System
AUTH	FSA’s Authorisation Manual, part of its Handbook of Rules, in force on and after 1 November 2007
BCD	The Banking Consolidation Directive, 2000/12/EC
BN	Board Notice
CA	Companies Act
CCA	Consumer Credit Act 1974
CASS	FSA’s Client Asset Rules, part of its Handbook of Rules, in force on and after 1 November 2007
CEBS	The Committee of European Banking Supervisors
CESR	The Committee of European Securities Regulators
CIS FPO	The FSMA (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060
CJA	Criminal Justice Act 1993
COAF	FSA’s Complaints against the FSA Rules, part of its Handbook of Rules, in force on and after 1 November 2007
COBS	FSA’s Conduct of Business Rules, part of its Handbook of Rules, in force on and after 1 November 2007
COLL	FSA’s Collective Investment Scheme Sourcebook, part of its Handbook of Rules, in force on and after 1 November 2007
COMP	FSA’s Compensation Rules, part of its Handbook of Rules, in force on and after 1 November 2007

List of acronyms

COND	FSA's Threshold Conditions, part of its Handbook of Rules, in force on and after 1 November 2007
CP	Consultation Paper
DEPP	FSA's Decision Procedure and Penalties Manual, part of its Handbook of Rules, in force on and after 28 August 2007.
DISP	FSA's Dispute Resolution, Complaints Rules, part of its Handbook of Rules, in force on and after 1 November 2007
DP	Discussion Paper
DTR	FSA's Disclosure and Transparency Rules, part of its Handbook of Rules, in force on and after 1 November 2007
EC	The European Commission
EG	FSA's Enforcement Guide, part of its Handbook of Rules, in force on and after 28 August 2007
ENF	FSA's Enforcement Manual, part of its Handbook of Rules, in force up to 27 August 2007
FIT	The FSA's Fit and Proper Test for Approved Persons, part of its Handbook of Rules, in force on and after 1 November 2007
FS	Feedback Statement
FSA	The Financial Services Authority
FSA CP 06/9	Organisational systems and controls, FSA Consultation Paper 06/9, May 2006
FSA CP 06/14	Implementing MiFID for Firms and Markets, FSA Consultation Paper 06/14, July 2006
FSA CP 06/15	Reforming the Approved Persons Regime, FSA Consultation Paper 06/15, August 2006
FSA CP 06/19	Reforming Conduct of Business Regulation, FSA Consultation Paper 06/19, October 2006
FSA CP 06/20	Financial Promotion and Other Communications, FSA Consultation Paper 06/20, October 2006
FSA CP 07/2	Review of the Enforcement and Decision making manuals, FSA Consultation Paper 07/2, January 2007
FSA CP 07/4	The Training and Competence Sourcebook Review, FSA Consultation Paper 07/4, February 2007

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FSA CP 07/8	Quarterly Consultation No. 12, FSA Consultation Paper 07/8, April 2007
FSA CP 07/9	Conduct of Business Regime: Non-MiFID Deferred Matters, FSA Consultation Paper 07/9, May 2007
FSA CP 07/16	Consequential Handbook Amendments, FSA Consultation Paper 07/16, July 2007
FSA DP 07/1	A Review of Retail Distribution, FSA Discussion Paper 07/1, June 2007
FSA FS 06/1	Reviewing our Training and Competence Regime, FSA Feedback Statement 06/1, March 2006
FSA PM CASS	FSA's Client Assets Rules, part of its Handbook of Rules, in force up to 31 October 2007
FSA PM COB	FSA's Conduct of Business Rules, part of its Handbook of Rules, in force up to 31 October 2007
FSA PM ECO	FSA's Electronic Commerce Directive Rules, part of its Handbook of Rules, in force up to 31 October 2007
FSA PM GLOSSARY	FSA's Glossary of Definitions, part of its Handbook of Rules, in force up to 31 October 2007
FSA PM MAR	FSA's Market Conduct Rules, part of its Handbook of Rules, in force up to 31 October 2007
FSA PM SUP	FSA's Supervision Manual, part of its Handbook of Rules, in force up to 31 October 2007
FSA PM SYSC	FSA's Senior Management Arrangements, Systems and Controls, part of its Handbook of Rules, in force up to 31 October 2007
FSA PM TC	FSA's Training and Competence Rules, part of its Handbook of Rules, in force up to 31 October 2007
FSA PS 06/13	Organisational Systems and Controls: Common Platform for Firms, FSA Policy Statement 06/13, November 2006
FSA PS 07/2	Implementing the Markets in Financial Instruments Directive, FSA Policy Statement 07/2, January 2007
FSA PS 07/3	Reforming the Approved Persons regime, FSA Policy Statement 07/3, January 2007

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FSA PS 07/6	Reforming Conduct of Business Regulation, FSA Policy Statement 07/6, May 2007
FSA PS 07/14	Reforming Conduct of Business Regulation, FSA CP 07/14, July 2007
FSA PS 07/15	Best Execution, FSA Policy Statement 07/15, August 2007
FSMA or 2000 FSMA GEN	The Financial Services and Markets Act 2000 FSA's General Provisions, part of its Handbook of Rules, in force on and after 1 November 2007
GLOSS	FSA's Glossary of Definitions, part of its Handbook of Rules, in force on and after 1 November 2007
GN	Guidance Note
GR	Guidance Release
IOSCO	The International Organisation of Securities Commissions
ISD	The Investment Services Directive 1993, 93/22/EEC
JMLSG Guidance Notes	The Guidance Notes issued by the Joint Money Laundering Steering Group, January 2006
LC	The Law Commission
Level 1 Directive	MiFID
Level 2 Directive	Commission Directive 2006/73/EC of 10 August 2006 implementing MiFID
Level 2 Regulation	Commission Regulation (EC) 1287/2006 of 10 August 2006 implementing MiFID
LIBA	The London Investment Banking Association
LIFFE	The London International Financial Futures Exchange
LME	The London Metal Exchange
LSE	The London Stock Exchange
MAR	FSA's Market Conduct Rules, part of its Handbook of Rules, in force on and after 1 November 2007
MiFID	The Markets in Financial Instruments Directive of 21 April 2004, 2004/39/EC
MLRO	Money Laundering Reporting Officer
MTF	Multi-lateral Trading Facility
1939 LDRs	The Licensed Dealers Conduct of Business Rules, 26 July 1939, SI 1939/787
1960 LDRs	The Licensed Dealers (Conduct of Business) Rules 1960, SI 1960/1216

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1983 LDRs	The Licensed Dealers (Conduct of Business) Rules 1983, SI 1983/585
1986 FSAAct	The Financial Services Act 1986
OEIC	An open-ended investment company
PERG	FSA's Perimeter Guidance Manual, part of its Handbook of Rules, in force on and after 1 November 2007
PFI	The Prevention of Fraud (Investments) Act 1939, re-enacted in 1958
PN	Press Notice
PR	Press Release
PRIN	FSA's Principles for Businesses, part of its Handbook of Rules, in force on and after 1 November 2007
Prospectus Rules	FSA's Prospectus Rules, part of its Handbook of Rules, in force on and after 1 November 2007
PS	Policy Statement
RAO	The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, as amended, including by the FSMA 2000 (Regulated Activities) (Amendment No. 3) Order 2006, SI 2006/3384
Reader's Guide	FSA's Reader's Guide: an introduction to its Handbook of Rules, August 2007
REC	FSA's Recognised Investment Exchanges and Recognised Clearing House Rules, part of its Handbook of Rules, in force on and after 1 November 2007
SIB	The Securities and Investments Board
SUP	FSA's Supervision Manual, part of its Handbook of Rules, in force on and after 1 November 2007
SYSC	FSA's Senior Management Arrangements, Systems and Controls, part of its Handbook of Rules, in force on and after 1 November 2007
TC	FSA's Training and Competence Sourcebook, part of its Handbook of Rules, in force on and after 1 November 2007
2005 FPO	The FSMA (Financial Promotion) Order 2005, 2005/1529
TRUP	Transaction Reporting User Pack, Version 1, FSA, July 2007
UCIT/UCITs/UCITS	Undertakings for Collective Investment in Transferable Securities