

Contents

	<i>Preface</i>	xiii
	<i>List of acronyms</i>	xiv
Part I	Evolution of capital markets regulation, FSA and the European single market	1
1	Introduction	3
2	FSMA and the single market	8
2.1	Evolution	8
2.2	Up to the 1930s	9
2.2.1	The secondary market and the London Stock Exchange	9
2.2.2	Primary market new issues	10
2.3	The Prevention of Fraud Acts	12
2.4	The Financial Services Act 1986	15
2.4.1	Reform of securities regulation	15
2.4.2	Self-regulation?	17
2.4.3	Rules and principles	19
2.4.4	A complete (functional) regulatory regime	22
2.5	FSMA	27
2.5.1	The statutory objectives	33
2.5.2	Conveyance structure	36
2.5.3	Annual report	37
2.5.4	Practitioner input and consultation	38
2.5.5	Enforcement	39
2.5.6	Complaints commissioner	43
2.5.7	Accountability to Treasury	44
2.5.8	The rulebook	45
2.6	European Union directives	53
Part II	Licensing and rule application	61
3	Licensing	63
3.1	Analysing the application of regulations	63
3.2	Regulated activities	64
		vii

Cambridge University Press

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

Paul Nelson

Table of Contents

[More information](#)

Capital Markets Law and Compliance		
3.2.1	'Investments'	65
3.2.2	'Investment activities'	79
3.2.3	Activities in and/or from a UK place of business	86
3.2.4	Activities into the UK and the overseas persons exclusion	86
3.2.5	Excluded activities	88
3.2.6	The ISD/MiFID override	90
3.2.7	By way of business	92
3.2.8	A licence is required	92
3.3	Process and criteria	94
3.4	Passporting	94
3.5	Non-EEA firms	96
4	The application of FSA MiFID rules	98
4.1	Methodology	98
4.2	Rules of application	98
Part III	The firm's infrastructure	111
5	Systems and controls	113
5.1	Evolution of FSA's approach	113
5.2	Systems and controls rules	117
5.2.1	Overall requirement	118
5.2.2	Apportionment of responsibility	121
5.2.3	Control functions	123
5.2.4	Employees	125
5.2.5	Outsourcing	128
5.3	Senior management responsibility	132
5.3.1	Registration as an Approved Person	132
5.3.2	Rule responsibilities	135
5.4	Approved Persons	139
5.4.1	Registration as an Approved Person	139
5.4.2	Rule responsibilities	140
5.5	Record-keeping	140
5.6	FSA's risk assessment methodology	142
6	Conflicts of interest	146
6.1	Differences in interests and conflicts of interest	146
6.2	The general law of fiduciaries	146
6.2.1	A fiduciary relationship	146
6.2.2	A conflict of interest	148
6.2.3	Solutions	153
6.3	Regulatory rules	158
6.3.1	The general rule	158
6.3.2	Inducements	166
6.3.3	Soft commission and bundling	171

Cambridge University Press

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

Paul Nelson

Table of Contents

[More information](#)

Contents

6.3.4	Investment research	178
6.3.5	Corporate finance securities issues	189
6.3.6	Churning	191
6.3.7	Personal account dealing	191
6.3.8	Polarisation	193
7	Client property	194
7.1	Client assets and custody	194
7.1.1	Protecting the client's assets	194
7.1.2	Application of the custody rules	199
7.1.3	Procedures	203
7.2	Client money	208
7.2.1	Protecting the client's money	208
7.2.2	Defining client money	211
7.2.3	Procedures	216
Part IV	Conduct of business	223
8	Client classification and client documentation	225
8.1	Regulatory policy	225
8.2	'Clients' for regulatory purposes	226
8.2.1	The definition of 'client'	226
8.2.2	Clients acting as agent	229
8.3	Client categorisation	230
8.3.1	Private customers and retail clients	231
8.3.2	Intermediate customers and professional clients	231
8.3.3	Market counterparties and eligible counterparties	239
8.4	Terms of business	241
8.4.1	The requirement	241
8.4.2	Content	243
8.4.3	Form	249
8.4.4	Amendments	249
8.4.5	Standard terms and exclusion clauses	250
8.4.6	Enforcement	251
8.4.7	One-way and two-way notifications	251
9	Principles of conduct	254
9.1	The FSA's 11 Principles	254
9.1.1	Policy	254
9.1.2	Application	257
9.2	Treating the customer fairly	259
9.3	The MiFID Principle	264
10	Marketing investments	265
10.1	The different regulatory regimes	265

Cambridge University Press

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

Paul Nelson

Table of Contents

[More information](#)

Capital Markets Law and Compliance

10.2	Securities	265
10.2.1	Transferable securities	268
10.2.2	Offer to the public	268
10.3	Misleading etc marketing	270
10.4	Marketing by unlicensed persons	272
10.4.1	Marketing up to the end of the 20th century	272
10.4.2	The FSMA regime	276
10.5	Marketing by licensed persons	282
10.5.1	Full disclosure	282
10.5.2	Specific disclosures	289
10.5.3	Real-time promotions	293
10.5.4	Electronic Commerce Directive	293
10.5.5	Distance marketing	296
10.5.6	Collective investment schemes	298
11	Advising clients	306
11.1	General Law	306
11.2	The Regulated Activity	307
11.3	Execution-only services	318
11.4	Appropriateness	320
11.5	Margin Lending	324
11.5.1	Consumer Credit	324
11.5.2	Securities Regulation	324
12	Improper behaviour in dealing and executing orders	326
12.1	Introduction	326
12.2	Insider dealing	326
12.2.1	An individual	327
12.2.2	Territorial jurisdiction	327
12.2.3	Inside information	329
12.2.4	Connection	331
12.2.5	Dealing	332
12.2.6	Encouraging	332
12.2.7	Disclosure	333
12.2.8	Defences	333
12.3	Market manipulation	336
12.3.1	Act or course of conduct	336
12.3.2	False or misleading impression	337
12.3.3	In the UK	338
12.3.4	Purpose	339
12.3.5	Inducing	339
12.3.6	Reasonable belief	339
12.3.7	Defences	339
12.4	A principle of conduct and the need for an administrative remedy	343

Cambridge University Press

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

Paul Nelson

Table of Contents

[More information](#)

Contents

12.4.1	An administrative offence	345
12.4.2	The burden of proof	345
12.4.3	Intention	346
12.4.4	Affected persons and certainty	347
12.4.5	Multiple jeopardy	347
12.5	The market abuse regime	347
12.5.1	'Behaviour' in relation to an exchange	349
12.5.2	Territorial ambit	350
12.5.3	Misuse of information	350
12.5.4	False or misleading impression	360
12.5.5	Distortion	364
12.5.6	The reasonable and regular user	371
12.5.7	Requiring or encouraging	373
12.5.8	Safe harbours	374
12.5.9	Mitigating factors	374
12.6	The Principle	375
12.7	The future	376
13	Dealing and executing orders	378
13.1	Transactions	378
13.1.1	Pre-transaction	378
13.1.2	The order to deal	378
13.1.3	The decision on how to deal	379
13.1.4	Executing transactions	380
13.1.5	Own account dealing	388
13.2	Best execution	391
13.2.1	Policy	391
13.2.2	When the best execution obligation applies	391
13.2.3	Achieving best execution	398
13.3	Systematic internalisers	407
13.3.1	Introduction	407
13.3.2	The Investment Services Directive	408
13.3.3	MiFID	409
13.4	Reporting	413
13.4.1	Trade reporting	413
13.4.2	Transaction reporting	415
13.4.3	Reporting to clients	417
14	Exchanges and MTFs	418
14.1	Regulated markets	418
14.2	Multi-lateral trading facilities (Alternative Trading Systems)	418
14.2.1	The need for separate regulation	418
14.2.2	Regulatory standards	419
14.3	Clearing services	422

Cambridge University Press

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

Paul Nelson

Table of Contents

[More information](#)

Capital Markets Law and Compliance

Part V	Application of rules to particular businesses	423
15	Corporate finance	425
15.1	Regulatory status	425
15.2	Infrastructure rules	425
15.3	Conduct rules	426
15.3.1	Conduct rules	426
15.3.2	MiFID	427
16	Broker–dealers	429
16.1	Regulatory status	429
16.2	Infrastructure rules	429
16.3	Conduct rules	429
16.3.1	Securities and derivatives broking and dealing	429
16.3.2	Energy and oil markets	429
16.3.3	Stocklending	430
17	Asset managers	432
17.1	Portfolio managers	432
17.1.1	Regulatory status	432
17.1.2	Infrastructure rules	432
17.1.3	Conduct rules	432
17.2	Collective investment schemes	432
18	Trustees	434
18.1	Trustees of collective investment schemes	434
18.2	Custodians	434
18.2.1	Regulatory status	434
18.2.2	Infrastructure rules	434
18.2.3	Conduct rules	434
18.3	Other trustees	434
18.3.1	Regulatory status	434
18.3.2	Infrastructure rules	435
18.3.3	Pre-MiFID conduct rules	435
19	Retail intermediaries	438
19.1	Stockbrokers	438
19.1.1	Regulatory status	438
19.1.2	Infrastructure rules	438
19.1.3	Conduct rules	438
19.2	Packaged product intermediaries	438
19.2.1	Regulatory status	438
19.2.2	Infrastructure rules	438
19.2.3	Conduct rules	439
	<i>Bibliography</i>	440
	<i>Index</i>	441