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CUMMINGS PEPPERDINE ON THE APPOINTED REPRESENTATIVE CHANGES DUE ON 8 DECEMBER 2022

What are they and how do I meet them?

PART 2 – FCA EXPECTATIONS

1 INTRODUCTION

Last year we wrote about the changes which the FCA wanted to impose on both appointed representatives ("ARs") and their principal firms ("Principal").

The FCA has been busy in the intervening time.

In August they published their policy statement PS22/11, "Improvements to the appointed representatives regime".

The statement looks back at both the consultation and the responses and sets out the changes which will need to be put in place once the new rules come into force, next month, on 8 December 2022

Most of the reforms deal with two topics:

1. the provision of information about ARs by Principals; and
2. the FCA's expectations of Principals and their responsibilities.

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In this Cummings Pepperdine Publication, we have set out a summary of the issues covered in these two topics. Our aim is not just to make the issues clear, but also to guide you on how you can meet these new demands.

The requirements in each section are reasonably extensive and so we have produced two publications, one on each topic of the reform.

In this publication, we look at the FCA's expectations of Principals and their responsibilities.

So read on, learn about what you need to do and then call us for any clarifications so that we can work together to keep you compliant.

2.1 Clarifying principals' responsibilities for their ARs and the FCA's expectations

There are three requirements in this topic: (i) delegation; (ii) senior management assessment; and (iii) the scope of an AR's appointment. Below we have set out each of these three requirements and the action which the Principal must take.

i. The delegation requirement:

Where a Principal delegates functions or tasks to an AR or tied agent, they must put appropriate safeguards in place. * To meet this requirement the Principal must ensure that delegated functions or tasks do not represent a conflict of interests and are subject to enhanced monitoring.

ii. The senior management assessment requirement:

Principals must assess senior management at ARs for competence and capability. To meet this requirement the Principal must consider guidance in SUP 12.4.4G on how to practically assess senior management at ARs.

iii. The scope requirement:

Principals must ensure their ARs act within the scope of their appointment. * To meet this requirement the Principal must consider guidance in SUP 12.4.4GG on what the FCA considers "reasonable steps" to be.

2.2 Overseeing ARs effectively

These responsibilities relate closely to systems, controls and reviews. This is very much in line with the FCA's recent thinking on the importance of this type of internal governance and its increasing demand for robust systems which are not just put in place but used correctly.

Below are the underlying issues in this topic, together with the solution the FCA wants to see:

i. Controls and resources – initial assessment*:

Principals must ensure their controls and resources are adequate at all times.

To do this, Principals can make this part of the annual self-assessment. Where controls and resources are inadequate, Principals should consider notifying the FCA under Principle 11 and if the issue cannot be resolved, the Principal should postpone appointment of the prospective AR or otherwise terminate the existing AR relationship.

ii. Controls and resources – re-assessment

Principals should re-assess whether their controls and resources remain adequate in certain circumstances. *

To do this, Principals must consider the guidance in SUP 12.4.4FG which sets out on the circumstances in which this review would be triggered. Additionally, Principals must review all contractual relationships with an AR where it, or its business, grows rapidly in a short time.

iii. Controls and resources – anticipatory

Principals must have systems and controls in place that anticipate the oversight of ARs to a comparable standard as if they were an individual directly employed by the principal. *

To do this, Principals must consider the practical expectations of how they might achieve this standard of oversight through systems and controls.

iv. The risk of harm

Principals must ensure, when appointing an AR on an on-going basis, that the activities the AR carries on do not, or would not, result in an undue risk of harm to consumers or market integrity.*

To do this, Principals must meet the expectations in SUP 12.4.4CG and 12.4.4EG of how they might identify harm.

v. Regular reviews

Principals must conduct a review of each of their ARs, at least every 12 months, consisting of:

- the fitness and propriety of senior management at ARs and in particular, their ability to carry out the regulated activities for which the firm has accepted responsibility;
- the AR's financial position; and,
- the adequacy of the Principal's controls and resources to effectively oversee the AR.

To do this, Principals must carry out the annual review more regularly in certain circumstances, as set out in SUP 12.6A.3. Any significant issues identified at a specific AR should be reviewed by the Principal's governing body.

vi. On-going oversight

Principals must arrange effective on-going oversight of their ARs.*

To do this, Principals must consider the practical guidance in SUP 12.4.4GG on how to achieve this.

2.3 Termination of AR contracts and winding down

It is a requirement that when an AR is appointed, the Principal and the AR enter into an agreement which sets out certain mandatory terms. These are explained in our publication www.cummingspepperdine.com/wp-content/uploads/2022/01/Cummings-Pepperdine-on-Appointed-Representatives.pdf.

Now, requirements are introduced for the end of a relationship.

i. Clarity on the situation

Principals must have clarity on the circumstances in which they should terminate an AR relationship.

To do this, Principals must consider the guidance found in SUP 12.6.1-A which deals with the circumstances and termination of relationships if necessary.

ii. Orderly termination

Principals must ensure, when terminating a relationship with an AR, that they do this in an orderly way.

To do this, Principals need to take reasonable steps to ensure they assist ARs with orderly wind down where they decide this is necessary.

2.4 Self Assessment

Again, these requirements can be found in SUP. They are set out in a new SUP 12.6A

i. The self-assessment document

Principals to annually prepare a self-assessment document demonstrating their compliance with aspects of the appointed representative regime and their methodologies used to complete the assessment.*

To do this, the Principal must ensure that they use a self-assessment document which focuses on the Principal itself, in relation to all of its ARs. It must be a single document which has been designed to identify any risks and gaps in compliance with the firm's obligations as a Principal. The self-assessment document must be reviewed and signed-off by the Principal's governing body at least every 12 months and, if requested, the Principal must submit the self-assessment document to its FCA supervisor.

THE TEAM

Cummings Pepperdine is a leading advisor in crypto. We are one of a select few that advises a large and diverse global client base in the crypto space and the only to provide a complete crypto solution building on the three key areas of law, tax and FCA with legal underpinning at every point.

In law, we have a team of qualified and regulated solicitors and a barrister who retains right of audience.

In tax, we have one of the only crypto tax advisors who is both a qualified solicitor and qualified chartered accountant.

In regulation, our team comprises specialists in crypto compliance monitoring structures and governance oversight who are known to the FCA for the quality of their work.

The team is led by Claire Cummings, a leading solicitor specialising in crypto law and the current and evolving regulation. Claire is on the advisory boards of a crypto exchange and an NFT gaming guild and is also a member of the Global Digital Finance working group on



Claire Cummings

stablecoins. Claire has also acted as compliance officer, MLRO and director of an FCA regulated fund manager and qualified under SIB to trade derivatives. As a leading expert in crypto, Claire is a sought after speaker and has published multiple articles on the legal and regulatory issues surrounding cryptocurrencies and the crypto eco-system. Claire is named at the Top 10 influencer in London for hedge funds (2&20, 2022) and is included in the CityWealth Crypto Top 100

The Cummings Pepperdine Online Training Programme, includes sections focussing on Appointed Representative changes, has been designed by a specialist board of compliance consultants, solicitors, chartered accountants, tax advisors and regulatory consultants. We believe that we are the only firm which offers training created by this range of qualified advisors.

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