

**For Immediate Release – 8 October 2018**

**Freedom of Information Act (FOIA) requests reveal shocking failure of the FCA's supervisory and enforcement functions regarding new costs and charges legislation.**

**As a result, SCM Direct calls on Mr Bailey to make a public statement that the FCA will now act to enforce these important laws. SCM is also calling for an investigation by the Treasury.**

**SCM is aware that at least one major litigation funder is investigating the merits of a group action to recover losses by investors via High Court litigation.**

On 3 January 2018 the UK investment industry became subject to new legislation under MiFID II requiring providers and distributors of investment products to disclose all costs and charges to consumers; in one number.

**The importance of implementing cost transparency to ensure better consumer outcomes cannot be underestimated.** Transparency of costs and charges would allow consumers to make true comparison of products and providers and encourage more price competition which **would save the public at least £903m a year or £4.5 bn over a five-year period.**

Due to the FCA failing to enforce legally required cost transparency regulation under MiFID II, which was passed in April 2014 and came into force on 3 January 2018, it is fragrantly breaching its statutory strategic objective to ensure that markets function well; and its operational objectives regarding consumer protection, integrity and competition.

In April 2018 SCM undertook a review of the market and sent the resulting detailed dossier to the FCA evidencing breaches by over 50 major firms.

In May 2018 SCM submitted a follow up dossier to the FCA, evidencing that many of the same firms identified in its earlier report continued to break the law. SCM had found little evidence that this situation has improved to date.

It is the view of SCM Direct that the Treasury should require the FCA to urgently investigate and report back to the Treasury regarding the FCA's lack of enforcement activity in this matter.

SCM Direct has been told by a major litigation funder that it believes that investors who have suffered loss due to the failure of firms to disclose the full costs and fees, are entitled to recoup any losses via High Court litigation. The firm is investigating the merits of a group action to claim such compensation on behalf of individual and institutional investors.

SCM makes these claims having served the FCA with three statutory requests for information under the Freedom of Information Act 2000 ("FOIA"). The FCA attempted to delay one request by saying it needed more time to consider whether it was in the public interest, even though the time exceeded the prescribed time limits.

This led to the Information Commissions Office (ICO) writing to the FCA *"I have written to the public authority and instructed them to respond to you within 10 working days from the date of receipt of our letter."* The FCA then belatedly answered the FOIA request.

It is clear from one FOIA response that the FCA does not have proper oversight over the activities of its supervision division, admitting that half the answers in its previous FOIA response were false. If the FCA cannot be trusted to properly record its own supervisory and enforcement activities, it cannot be trusted to properly undertake its role as a regulator.

**The FCA's responded to a FOI request that by 10 August 2018:**

- no firms have been referred to FCA Enforcement for investigation of their non-compliance with the costs disclosure requirements and no investigation has ever even been formally considered at the FCA's internal referral meetings;
- the FCA has received self-reports of non-compliance with the cost disclosure requirements from only 6 firms – this is despite clear rules which require firms to self-report material non-compliance to the FCA;
- the FCA has written to only 8 other firms despite SCM's April dossier finding over 50 firms were in breach.

It appears that the threat of an application for judicial review by SCM Direct has finally prompted the FCA to take some action, even though the effort is derisory given that the FCA is tasked with regulating more than 3,000 asset managers, more than 5,000 financial advice firms and numerous investment platforms.

The FCA now claims that in the week following service of SCM Direct's FOIA request on 10 August 2018 it was prompted to contact a further 27 firms concerning potential breaches of the cost disclosure rules. One can only speculate whether a single firm would have been contacted, had it not been for the follow up FOI request from SCM Direct.

Gina Miller of SCM Direct said:

*"The FCA has had numerous opportunities to publicly state that it will take enforcement action against firms that breach new costs disclosure laws and has failed to do so. The message this failure is sending to the market is that the FCA does not consider breach of such laws to be important.*

*"In addition, the FCA has a statutory objective to promote effective competition in the interest of consumers. But if consumers don't know what they are paying for their investments, competition can never be effective. It's time for Mr Bailey to demonstrate that the FCA is willing to be the industry enforcer rather than the industry lapdog."*

Alan Miller of SCM Direct added:

*"The FCA may foolishly believe that it is helping the industry by turning a blind eye. Instead the FCA is creating a landscape for multi-million-pound claims from litigation funds, who can step in on behalf of thousands of clients, who have been misled in relation to the costs and charges of their savings and investments."*

END

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**Notes to Editors:**

The MiFID II rules came into law on 3 January 2018. It requires firms to disclose all costs and charges related to financial instruments and ancillary services. The costs must be presented as an aggregate figure, with an itemised breakdown available on request.

**MiFID II - Article 24 General principles and information to clients**

*(d) all costs and associated charges related to both investment or ancillary services which must include the cost of advice, where relevant, the cost of the financial instrument recommended or marketed to the client and how the client may pay for it, also encompassing any third-party payments.*

*The information about all costs and charges, including costs and charges in connection with the investment service and the financial instrument, (which are not caused by the occurrence of underlying market risk), shall be aggregated to allow the client to understand the overall cost, as well as the cumulative effect on return of the investment, and where the client so requests, an itemised breakdown. Where applicable, such information shall be provided to the client on a regular basis, at least annually, during the life of the investment.*<sup>1</sup>

- The information on all costs and associated charges must include information relating to both investment and ancillary services, including the cost of advice, where relevant, the cost of the financial instrument recommended or marketed to the client and how the client may pay for it, also encompassing any third-party payments.
- Firms are repeatedly failing to include all costs and charges in their disclosure (for example the costs which funds incur when buying and selling investments within the fund). Customers are therefore misled as to the true cost of the investment.

SCM Direct is a DIY digital wealth manager offering investors access to 3 core ETF model portfolios, and 3 blended ETF model portfolios, in 3 currencies - £, € and US\$; as well as 3 ways to invest – GIA, ISA and SIPP.

SCM Direct was established in 2009 by Alan and Gina Miller, the aim was to launch an honest investment company that would respect investors as well as put their best interests at the heart of all it does, stripping away layers of costs and inefficiencies; and providing 100% transparency on costs and holdings.

Through their True and Fair Campaign launched in February 2012, Alan and Gina have raised awareness of anti-consumer practices including lack of fee transparency, conflicts of interest, closet indexation and research costs. They have also either contributed or influenced text in 3 EU Directives – MiFID II, PRIIPs and the Share Holder Directive.

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<sup>1</sup> <http://register.consilium.europa.eu/doc/srv?l=EN&t=PDF&gc=true&sc=false&f=ST%206406%202014%20ADD%201>

**Appendix 1 - 6<sup>th</sup> August 2018 Freedom of Information: Right to know request**

Turning now to your request, we will address each point in turn.

- 1. Provide details of how many firms the FCA has written to in order to notify the firm that they may be or appear to be in breach of any of the Relevant Rules. Please provide details of which of the Relevant Rules is applicable in each case.**

We have contacted one firm where we thought it was not disclosing Performance Fees (and therefore breaching COBS 2.2A2). This issue was notified to us by the firm in December 2017.

You have also asked that in providing our response to questions 1 to 5, where possible, to provide a breakdown of the numbers in respect of the types of firms in question (for example "investment funds", "wealth managers", "advisor platforms", "D2C platforms" or other categorisation as used by the FCA).

However, we are unable to specify what type of firm it is as doing so could reveal its identity. In turn, this disclosure would, or would be likely to, prejudice the exercise by the FCA of its functions for the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise. Therefore, the information you have requested is exempt from disclosure under section 31 (Law enforcement) of the Act.

In addition, we consider that disclosure of this information could prejudice the commercial interests of the firm in question were any of the details to be made public, and therefore section 43 (Commercial interests) applies.

For a detailed explanation of why these exemptions apply, please refer to Annex B below.

- 2. Provide details of how many firms have self-reported to the FCA for breach of each of the relevant Rules. Since 3 January, no firms have self-reported breaches in that period of time.**
- 3. Provide details of how many instances a potential breach by a firm of any of the relevant rules has been communicated to the Enforcement Referral Team by a Referring Area / Supervision Division.**

We have identified one case which could potentially relate to COBS 2.2.

For the reasons outlined in point 1 above, we are unable to specify what type of firm it is.

- 4. Provide details of how many firms have been considered at the joint Enforcement / Referring Area Heads of Department meeting for a potential breach by a firm of any of the Relevant Rules.**

One firm has been considered for a potential breach of any of the Relevant Rules at a joint meeting on 26 April 2018.

For the reasons outlined in point 1 above, we are unable to specify what type of firm it is.

- 5. Provide the number of occasions the FCA has appointed investigators in order to investigate a potential breach of the Relevant Rules.**

The FCA has not appointed any investigators to investigate a potential breach of the Relevant Rules.

However, it should be noted that MiFID II only came into force on 3 January 2018. The FCA will act proportionately and not take a strict liability approach in relation to Enforcement of MiFID II, given the size, complexity, and magnitude of the changes that are required to be in place in firms. This means we have no intention of taking enforcement action against firms for not meeting all the requirements straight away where there is evidence they have taken sufficient steps to meet the new obligations by 3 January 2018 – rather the FCA will work with such firms to enable them to meet the requirements. However, where firms have made no real or genuine attempt to be ready, or where key obligations are deliberately flouted, the FCA will take a much stricter approach.

**6. Provide details of meetings/correspondence between the FCA and industry trade bodies or representatives concerning implementation of the Relevant Rules.**

We are able to provide you with some information that falls within the scope of this part of your request. Details of meetings between the FCA and industry trade bodies or representatives concerning implementation of the Relevant Rules can be found in the table below.

<b>Name of entity</b>	<b>Type of meeting</b>	<b>Date of meeting</b>
Quoted Companies Alliance – secondary markets experts group	Roundtable	17 January 2018
HFM MiFID II and GCPR Compliance Summit	Conference	1 February 2018
FCA Trade Association and Firms Roundtable	Roundtable	7 March 2018
Norton Rose MiFID II Post Implementation Review	Conference	7 March 2018
Association of Foreign Banks MiFID II post implementation event	Seminar	22 March 2018
Temple Grange Partners MiFID II What Happens Next	Roundtable	19 April 2018
Informa MiFID II Post Implementation Review	Conference	24 May 2018

In respect of correspondence between the FCA and industry trade bodies or representatives concerning implementation of the relevant rules, we are able to provide you with a redacted version of this information, which can be found in the attached document.

Some of the information falling within the scope of this part of your request comprises the personal data of individuals other than yourself and therefore section 40 (personal information) of the Act applies.

**Appendix 2 - 10<sup>th</sup> September 2018 Freedom of Information: Right to know request**

*Turning to your request each point will be answered in turn.*

***We repeat the requests contained in our request of 18 May 2018 (number 1 to 5) and ask that you provide the same information as at the date of our meeting (27 June 2018) and as at the date of this letter.***

**The period 18 May 2018 to 27 June 2018.**

***1. Provide details of how many firms the FCA has written to in order to notify the firm that they may be or appear to be in breach of any of the Relevant Rules. Please provide details of which of the Relevant Rules is applicable in each case.***

*The FCA wrote to 2 firms during the period 18 May 2018 to 27 June 2018 in order to notify the them that they may be or appear to be in breach of any of the Relevant Rules. These 2 firms are in additional to the firms contacted between 3 January 2018 and 18 May 2018.*

***2. Provide details of how many firms have self-reported to the FCA for breach of each of the relevant Rules.***

*One firm self-reported during the period 18 May 2018 to 27 June 2018.*

***3. Provide details of how many instances a potential breach by a firm of any of the relevant rules has been communicated to the Enforcement Referral Team by a Referring Area / Supervision Division.***

*There have been no instances of a potential breach by a firm of any of the relevant rules that have been communicated to the Enforcement Referral Team by a Referring Area / Supervision Division for the period 18 May 2018 to 27 June 2018.*

***4. Provide details of how many firms have been considered at the joint Enforcement / Referring Area Heads of Department meeting for a potential breach by a firm of any of the Relevant Rules.***

*No firms have been considered at the joint Enforcement / Referring Area Heads of Department meeting for a potential breach by a firm of any of the Relevant Rules for the period 18 May 2018 to 27 June 2018.*

***5. Provide the number of occasions the FCA has appointed investigators in order to investigate a potential breach of the Relevant Rules.***

*No investigators have been appointed to investigate a potential breach of the Relevant Rules for the period 18 May 2018 to 27 June 2018*

**The period 27 June 2018 to 10 August 2018.**

***1. Provide details of how many firms the FCA has written to in order to notify the firm that they may be or appear to be in breach of any of the Relevant Rules. Please provide details of which of the Relevant Rules is applicable in each case.***

*The FCA wrote to 4 firms during the period 27 June 2018 to 10 August 2018 in order to notify the them that they may be or appear to be in breach of any of the Relevant Rules.*

*Whilst outside the dates of your request, you should be aware that a further 27 firms have been contacted in the period 11 August 2018 to 20 August 2018.*

***2. Provide details of how many firms have self-reported to the FCA for breach of each of the relevant Rules.***

*No firms have self-reported for the period 27 June 2018 to 10 August 2018.*

**3. Provide details of how many instances a potential breach by a firm of any of the relevant rules has been communicated to the Enforcement Referral Team by a Referring Area / Supervision Division.**

*There have been no instances of a potential breach by a firm of any of the relevant rules that have been communicated to the Enforcement Referral Team by a Referring Area / Supervision Division for the period 27 June 2018 to 10 August 2018.*

**4. Provide details of how many firms have been considered at the joint Enforcement / Referring Area Heads of Department meeting for a potential breach by a firm of any of the Relevant Rules.**

*No firms have been considered at the joint Enforcement / Referring Area Heads of Department meeting for a potential breach by a firm of any of the Relevant Rules for the period 27 June 2018 to 10 August 2018.*

**5. Provide the number of occasions the FCA has appointed investigators in order to investigate a potential breach of the Relevant Rules.**

*No investigators have been appointed to investigate a potential breach of the Relevant Rules for the period 27 June 2018 to 10 August 2018.*

**In an accompanied letter from the FCA received on the same date, the FCA restated some of the answers to its former 6<sup>th</sup> August 2018 FOI request:**

- *In relation to item 1 in your FOIA request of 18 May (the first request), we have carried out a detailed review of our systems and I can confirm that we contacted one other firm about what you call the 'Relevant Rules'.*
- *In relation to item 2 in the first request, we have identified that 5 firms 'self reported' possible non-compliance with the 'Relevant Rules'. I am sorry these firms were not picked up in our response of 6 August.*
- *I should also clarify our response to item 3 of the first request. While it was correct that the case potentially related to COBS 2.2, our further review has indicated that it did not relate to the Relevant Rules you have identified. I am sorry if this has caused any confusion.*