

Bird & Bird

Capital Markets Group: PLC update

November 2017

FCA Prohibition on Restrictive Clauses contained in Investment/Corporate Banking Engagement Letters

The Financial Conduct Authority published a policy statement on 27 June 2017, containing the final form of the prohibitions on the use of provisions that restrict a client's choice of future providers for primary market services (i.e. ECM, DCM and M&A services)

With effect from 3 January 2018, firms regulated in the UK will be prohibited under the FCA's Conduct of Sourcebook from entering into written agreements containing clauses that give them a:

- “right to act”: these clauses give the firm the right to provide any future primary market and M&A services to the client, i.e. preventing a client from sourcing future services from third parties, regardless of terms; and
- “right of first refusal”: these clauses give the right to provide future services to the client before the client is able to accept any offer from a third party to provide those services, i.e. preventing a client from accepting a third party offer of services unless it has first offered the mandate to the bank or broker on the same terms.

The prohibition applies to all primary market services which comprise equity capital and debt capital markets type services (including structuring, underwriting and/or placing an issue of shares, warrants, depositary interests or bonds for an issuer) or M&A type services (advice and services relating to mergers and the purchase or disposal of undertakings).

It is worth noting that the prohibition will not apply to existing agreements or to specific future pieces of work that firms know they will undertake. As such, ‘tailgunner’ type clauses that are included in existing mandate agreements which are designed to recuperate fees for work already undertaken by a financial institution if the client decides to use another firm for the same service will continue to be valid and enforceable. Rights for an investment bank/broker to pitch for future business, be considered alongside other providers for future business or to match quotes from other providers (provided the client is not obligated to award the mandate to the existing bank/broker) are likewise not prohibited.

The prohibition applies where the relevant primary market services are provided from a UK establishment, irrespective of where the client is located. This may give rise to certain practical difficulties where the investment bank/broker is to provide the services from a number of different jurisdictions or if it is not clear where the services will be provided from at the time the mandate agreement is entered into. In such circumstances, the prohibition may still apply to mandate agreements entered into in an overseas jurisdiction that contain a right to act or right of first refusal, if the services are subsequently provided in the UK.

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