FINANCIAL CONDUCT AUTHORITY

Payment for Order Flow (PFOF)

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1 Introduction

What is Payment for Order Flow (PFOF)?

1.1 PFOF occurs when an investment firm (typically a broker) that sources liquidity and executes orders for its clients receives a fee/commission from both the client that originates the order and the counterparty the trade is then executed with (typically a market maker or other liquidity provider).

1.2 These payments create a conflict of interest between the firm and its clients. This is because they incentivise the firm to execute its clients' orders with counterparties based on their willingness to pay commissions. A broker can make a financial gain at the expense of its clients and have an interest in a transaction that is contrary to its clients' interests, which risks inferior execution outcomes and other potential consumer harms.

1.3 PFOF makes it more likely that extra costs will be passed on to the broker's client, through wider bid-ask spreads from market makers and other liquidity providers who agree to pay PFOF to attract order flow from brokers. While the impact of PFOF may not be visible in bid-ask spreads for each transaction, it is likely to affect aggregate spreads as liquidity providers need to account for the payments made to brokers. These hidden costs make the price formation process less transparent and efficient. They can also distort competition by forcing liquidity providers to use a 'pay-to-play' model. Brokers may concentrate order flow to specific liquidity providers, while avoiding others, which may lead to poorer outcomes for clients and reduce market integrity.

Background

1.4 This document is an update on our recent supervisory work on conflicts of interest and payment for order flow. Our work focused on how firms manage conflicts of interest where they continue to charge a commission from market makers or liquidity providers with respect to eligible counterparty (ECP) client business.

1.5 We published guidance on PFOF in 2012, and published our supervisory findings in TR 14/13 – 'Best execution and payment for order flow'. In TR14/13, we explained that PFOF in relation to retail and professional client business is incompatible with our rules on conflicts of interest and inducements, and risks compromising firms' compliance with best execution.

1.6 In Market Watch 51, we noted that, following our policy and supervisory work, the practice of PFOF had largely ceased for retail and professional client business. We also said we were taking supervisory action for a few residual cases of non-compliance. We noted, however, that while investment banks had stopped this practice across all client categories, some independent brokers continued to routinely charge liquidity providers a commission with respect to ECP business. We explained that, to date, we had not seen examples of any practices that effectively manage the conflict of interest that these commission payments create when dealing with ECP clients.

1.7 We also explained that the Markets in Financial Instruments Directive II (MiFID II) further tightens the requirements on firms to manage conflicts of interest, which is particularly relevant for ECP business. MiFID II requires firms to take all appropriate – rather than reasonable – steps to identify and prevent or manage conflicts of interest. MiFID II also explicitly states that firms need to prevent conflicts of interest in the first instance and to rely on disclosure only as a last resort. As we stated in Market Watch 51:

In this context, when dealing with a direct, self-created conflict of interest which characterises PFOF arrangements, the most straightforward method of complying with the updated rules (as is the case today in respect of the current rules), would be to prevent the conflict from arising in the first place – that is, by not entering into such arrangements at all.

1.8 Our market intelligence showed that some firms were planning to continue charging PFOF using different pretexts, potentially in breach of our rules on conflicts of interest, inducements and best execution. As a result, we issued a Dear CEO letter in December 2017. Our Dear CEO letter specifically focused on ECP business, and underlined our expectation that firms need to ensure that they comply with the new MiFID II framework.

1.9 Our Business Plan 2018/2019 set out supervisory work on PFOF as one of our priorities to address conflicts of interest in the wholesale sector.

Our 2018/2019 supervisory work

1.10 We requested information from 15 firms and carried out a review of this information.

1.11 We subsequently visited 12 firms that undertake a range of activities. These included brokers whose activities involve arranging and execution services for clients, as well as firms that provide liquidity as a core business activity.

1.12 During these visits, we assessed how robustly these firms' systems and controls monitored the effectiveness of firms' compliance with the regulatory obligations on conflicts of interests, inducements and best execution. We also examined firms' controls to ensure that they correctly classify the capacity in which they act in individual transactions.

1.13 This report sets out our final findings and conclusions from this supervisory work, and provides an update to the preliminary findings published in Market Watch 56 in September 2018.

Focus of our work

1.14 Our initial concerns about PFOF focused on brokers' activities in relation to listed derivative contracts on the former London International Financial Futures and Options Exchange (LIFFE). Listed derivatives remain the core focus of our PFOF work, although these contracts are now mainly traded on Eurex, ICE Futures Europe, and other regulated markets.

1.15 The regulatory obligations on conflicts of interests, inducements and best execution which are relevant to PFOF apply across all financial instruments. So we will consider further supervisory work to examine firms' compliance with these same regulatory obligations when arranging and executing transactions in financial instruments outside of listed markets.

2 Supervisory findings and conclusions

2.1 This chapter describes the findings from our visits. It reviews how firms determine the capacity in which brokers act and how they identify and prevent or manage conflicts of interest depending on the nature of a transaction. It also looks at how their systems and controls aim to ensure their compliance with regulatory requirements.

Broker activities during a transaction

2.2 When a broker arranges or executes a listed derivatives transaction, and there is not sufficient liquidity or competitive pricing available on the central limit order book, the transaction lifecycle nearly always follows a similar pattern. This is true regardless of the instrument traded. The broker will (see Steps 1 – 4 in Graph 1 below):

i. receive or generate a 'trading interest' from an initial client (which can be a market maker or liquidity provider when these firms engage a broker to source liquidity)
ii. source liquidity for that specific client's trading interest by contacting potential liquidity providers (which can include registered market makers, banks, and other liquidity providers)
iii. give the initial client an exclusive opportunity ('Right of First Refusal', ROFR) to trade on the quotes the liquidity providers have provided, and
iv. in some cases, enable further negotiation between the initial client and one or more liquidity providers, while still maintaining a ROFR for the initial client.

A trade will occur if the initial client agrees to transact on the prices the broker has sourced.

2.3 We note that a 'trading interest' does not necessarily contain sufficient detail to amount to an 'order' and may initially only identify a certain contract. Nor is an 'interest' necessarily received ***from*** a client, since brokers will at times proactively seek to generate client interests and then act to source liquidity for those client interests.

2.4 If a transaction does not occur with the initial client, depending on the broker's approach to order execution, the broker may either:

a. stop pursuing the transaction or,
b. continue to develop a market in the instrument by disseminating the best bid/ offer (BBO) price it has sourced to all relevant clients that have a potential interest in the instrument (see Step 5 in Graph 1). The disseminated BBO may or may not reflect the trading interest of the initiating client at this stage.

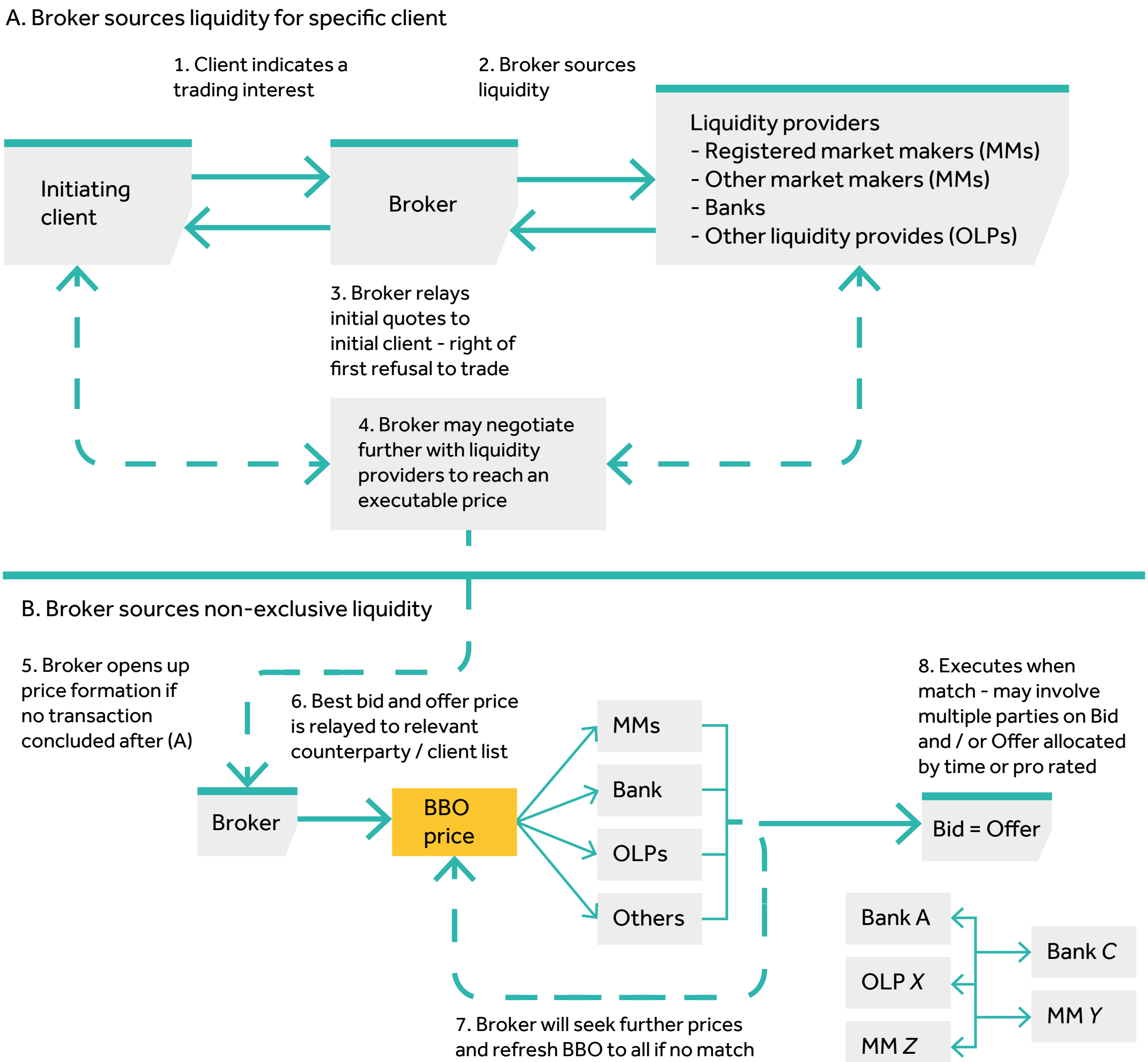
2.5 Firms applied discretion in determining the relevant universe of clients to whom prices were disseminated, but typically sought to ensure all clients who may have a trading interest in a particular instrument were included in this process.

How firms identify the capacity in which they act

2.6 Our supervisory work saw brokers distinguish between activity where:

- the broker is sourcing exclusive liquidity (and executing orders) for a specific client (typically, the initial client; see Steps 1 – 4 in Graph 1), and
- the broker's role is akin to offering a platform where all its clients can interact and trade at prices disseminated widely by the broker (Steps 5 - 6 in Graph 1).

Graph 1: Broker activities during a transaction lifecycle



Sourcing exclusive liquidity for a specific client

2.7 Until the point that the initial client relinquishes its exclusive right, or ROFR, to trade on the best bid or offer sourced by the broker, most brokers identified that their role was to source liquidity for that specific client, protecting and acting for that client's specific trading interest. Brokers noted that, aside from seeking the best price, they also protect client interests by preserving the confidentiality of their identity and any market-sensitive information regarding their trading interest. Most firms did not charge commissions to liquidity providers in respect of trades executed following this type of activity, regardless of how they categorised the client.

2.8 We found that brokers tended to execute trades while sourcing exclusive liquidity for a specific (usually the initial) client in more liquid market segments, such as parts of the fixed income derivatives markets. In these market segments, tight spreads were typically available on-screen, and brokers could regularly source actionable liquidity for client orders from market makers and other liquidity providers. Firms consistently described their broking activity in these segments as acting on an instruction or interest from a specific client, for whom they would source exclusive liquidity. Most firms indicated that they sought to achieve the best possible execution result for that client.

2.9 Sourcing exclusive liquidity for a specific client, as described here, corresponds with our reference to 'agency-like' activity in previous publications (see Market Watch 56), however we recognised during our work that the latter term was not interpreted consistently by firms in line with our intention.

Broad dissemination of non-exclusive liquidity

2.10 Firms generally considered that broadly disseminating the current BBO to their entire relevant client base so those clients could participate in a transaction was one key feature in deciding when a broker was no longer sourcing exclusive liquidity for a specific client. Firms indicated that disseminating this information usually involved a combination of electronic channels and call-arounds. The electronic channels cited include Bloomberg chat and third-party platforms, such as C-Screen, Finder Pro, or Trayport, depending on the particular market segment. In this way, their client list simultaneously receives the prevailing best bid / offer that the broker has generated on a specific instrument.

2.11 The second key feature was that a specific client no longer maintained a ROFR to transact on the relevant market. This usually coincided with the broker's decision to broadcast pricing widely. That is, the broker would only widely communicate the BBO once the initial client had waived its right to act first on the price the broker had generated.

2.12 Firms told us that this broad dissemination process gives all clients the opportunity (including adequate time) to improve the BBO and narrow the spread to the point that clients' interests can be crossed and a trade may occur. The broker would typically enable negotiations between the clients who submit the best bid and offer prices at further stages. However, following the first broad price dissemination, the broker ceases to offer priority to any specific client. This means that concluded trades will often not involve the initiating client. Trades may also involve more than one client on either or both sides of a transaction.

2.13 As such, firms effectively described a type of internalised order book of price interests. Here, once the specific client has given up its ROFR, the firm is bringing client interests together in a neutral role based on price and time priority. Firms felt that this process removes any implication that they are sourcing exclusive liquidity for, and protecting the interest of, either side of a resulting transaction. In these circumstances, brokers considered that they provide a symmetrical service to both sides of a transaction and that they could potentially manage the inherent conflict in charging both sides through appropriate systems and controls. However, as discussed below, firms had not necessarily put these systems and controls in place.

2.14 Firms indicated that this broad dissemination of non-exclusive liquidity is most common in less liquid market segments. In these segments, there is limited liquidity available on the central lit order book and initial prices sourced from liquidity providers often do not result in actionable bids and offers. Examples of these market segments include single stock equity derivatives and certain commodity derivatives. But it was also clear that brokers would still sometimes source exclusive liquidity for a specific client in these market segments, sometimes executing trades via the initiating client's ROFR and before disseminating prices broadly.

2.15 While most broking desks only distributed interests broadly once the initiating client had given up its ROFR, a handful of desks in less liquid products did so immediately. This meant that all clients with potential interest in the instrument had an opportunity to interact with, and trade on, the prices displayed. In these cases, no specific client had a ROFR at any stage.

Our view on how firms identify the capacity in which they act

2.16 If a firm is sourcing exclusive liquidity (and executing orders) for a specific client (Steps 1 – 4 in Graph 1), charging the counterparty to the client's transaction creates a conflict the firm cannot manage effectively and so should prevent (ie by ceasing to charge PFOF), regardless of the client's categorisation. This enables them to comply with the MiFID II conflicts of interest rules. Most firms in our sample had adopted this general approach, and had systems and controls to identify exceptions where a counterparty may have been incorrectly charged.

2.17 However, we also found some exceptions to this approach among firms, including firms:

- Only stopping charging PFOF to counterparties who are exchange-registered market makers, but continuing to charge if the counterparty was another type of liquidity provider, such as a bank or a wholesale energy supplier.
- Deciding they could charge the liquidity provider if they conducted any negotiation with it to get a better price or deeper liquidity for the initiating client (who maintained its ROFR).
- Not explicitly requesting prices from liquidity providers and instead presenting them with client bids or offers that brokers expected the liquidity providers to transact on. In this way, brokers tried to argue the liquidity providers were taking liquidity, rather than providing it.
- Deciding that, because some commodity derivatives markets tend not to have regular liquidity providers, payments a broker received from the counterparty to their client's transaction could not constitute PFOF, without taking account of the capacity in which they acted.
- Routinely charging liquidity providers commission when sourcing exclusive liquidity for a specific client under the guise of a 'service charge'.

2.18 Our view is that each of these practices does not change the economic substance of the broker's role in sourcing exclusive liquidity for a specific client. We believe that where the broker's actions are consistent with an execution service sourcing exclusive liquidity for a specific client, it should not charge a liquidity provider. We will take action where we find firms charging commission to liquidity providers in these circumstances.

2.19 We also found that some firms identified themselves as 'inter-dealer brokers' for certain products or market segments. As such, they reasoned that payments made to the broker by the counterparty to their client's transaction could not constitute PFOF. They did not take account of the specific circumstances of individual transactions or client interactions. This blanket categorisation led some firms to charge both the client and its counterparty in transactions that they executed via the initiating client's ROFR, without having broadly disseminated non-exclusive liquidity.

2.20 References to the inter-dealer broker market in previous FCA publications, such as our 2012 guidance, do not constitute a general exemption for 'inter-dealer' brokers'. Rather, these references highlight that payments by the counterparty can still amount to a PFOF arrangement if a client is relying on the broker to act on its behalf, such as by providing exclusive liquidity. Accordingly, we consider there is no exception for firms that simply characterise themselves, or subsets of their staff, as inter-dealer brokers.

2.21 A broker may be able to manage the conflict of interest from dual-sided charging with respect to trades involving ECPs if those trades follow the fact-pattern of non-exclusive liquidity and are subject to appropriate controls. For example, where a broker:

- **i.** sources liquidity and distributes trading interests broadly to all relevant clients
- **ii.** ensures that any relevant client has a reasonable opportunity, including adequate time, to interact with and trade on the disseminated trading interests
- **iii.** does not directly or indirectly provide a ROFR to any specific client, and therefore is not providing exclusive liquidity, and
- **iv.** applies robust systems and controls to ensure it is genuinely acting in this capacity and has policies and procedures in place to manage the conflicts from this approach (see further findings and feedback below).

We view these factors as cumulative. However, it is an important judgement for the firm to come to any conclusion that it is possible to adequately manage conflicts of interest.

2.22 It is therefore of the utmost importance that firms correctly identify the nature of their activities, on a transaction by transaction basis, to ensure the appropriate prevention or management of conflicts of interest from charging both sides of transactions. Blanket approaches to assessing the capacity in which brokers act, based on either a firm's business model or the nature of a market segment, are likely to result in weaknesses in how firms subsequently identify and prevent or manage conflicts of interest. In particular, a firm may not charge PFOF on transactions where it is clear they sourced exclusive liquidity for a specific client.

How firms identify and manage conflicts of interest

2.23 Firms recognised that potential conflicts of interest arise when charging both sides of a transaction, regardless of the nature of the broker's activity. For example, conflicts occur where the firm has a financial or other incentive to favour one client over another, or to put its own commercial interests ahead of its clients. Firms accepted that brokers need to identify and prevent or manage these conflicts (see SYSC 10.1.3R and SYSC 10.1.7R).

2.24 Nearly all firms also recognised that for transactions involving professional (and retail) clients, MiFID II requirements on inducements and best execution apply. As a result, they did not charge the counterparties to their clients' transactions, regardless of the nature of the broker's activity.

2.25 For business involving ECPs, several firms recognised the importance of having a robust and compliant approach to assessing the capacity in which they act for a given transaction when deciding if and how they could manage the conflict from charging both sides of a transaction. In particular, they showed their approach to order handling and price dissemination could reasonably distinguish between sourcing exclusive liquidity for a specific client and broadly disseminating non-exclusive liquidity. They also recognised that the conflict of interest from charging both sides of a transaction was far greater when sourcing exclusive liquidity for a specific client. In these cases, they prevented the conflict by not charging the liquidity provider on these transactions.

2.26 However, most brokers we visited did not consistently identify the capacity in which they act in individual transactions. As a result, it was unclear whether they could identify the conflicts of interest that were specific to a given transaction, and so take all necessary steps to prevent or manage them through their policies and procedures.

2.27 Where firms identified their capacity as providing non-exclusive liquidity to their full client base, most felt that applying 'unwritten rules and protocols' designed to prioritise price interests and allocate orders in an objective and fair manner (akin to venue rules) could help ensure that they did not unduly favour one client's interests over another.

2.28 These 'unwritten rules and protocols' that govern the broking process seem designed to reduce the potential conflict of interest and risk of client harm from different clients paying fees to the broker. This harm could, for example, occur by incentivising the broker to:

- **i.** exclude certain clients from the distribution of trading interests or updated pricing or
- **ii.** give favourable trade allocations to its most profitable clients where there are several interested parties in the transaction.

2.29 Brokers told us that these 'unwritten rules and protocols' govern, for example, how the broker determines who to display the prices to, how the broker will display the prices, how the broker determines which client, if any, has the right of first refusal on prices quoted, who is approached first for a quote and what the queuing process is for interacting with the best bid/offers.

2.30 Brokers explained that these unwritten rules also require them to:

- **i.** distribute trading interests broadly and simultaneously. This gives all relevant clients an equal and realistic opportunity to interact with and trade on the prices displayed by the broker, and
- **ii.** match and allocate the different trading interests in a fair and orderly way. This ensures that all participants have clear expectations of the execution process, including how brokers prioritise orders and use their discretion when necessary.

2.31 Some firms decided that, even for transactions that involved the dissemination of non-exclusive liquidity under these 'rules', they also needed to limit the range of, or harmonise, their charges for all or some counterparties to more fully manage the conflicts of interest from charging both sides of a transaction.

Firms' systems and controls for monitoring compliance

2.32 Our supervisory work found that firms had implemented limited systems and controls to detect and prevent inappropriate charging of PFOF, or to monitor their adherence to the relevant regulatory requirements and internal policies and rules on PFOF.

2.33 Given the nature of voice broking, most compliance functions relied almost exclusively on risk-sensitive manual sampling of broker communications and resource-intensive trade reconstruction. The resource intensity of this approach meant that firms would generally sample less than 1% of their total transactions.

2.34 At several firms, compliance staff scrutinised any commissions applied to counterparties that typically act as liquidity providers. They did this to verify on a case by case basis whether the liquidity providers were genuine clients in the transactions (rather than acting in a liquidity provider capacity) before approving the charge.

Our view on how firms identify and manage conflicts and their systems and controls for monitoring compliance

2.35 In all circumstances, where a broker charges both sides of a transaction, SYSC 10 requires:

a. that it has accurately identified the inherent conflict, including assessing its capacity based on the characteristics of the transaction
b. that it is satisfied that it is able either to manage the associated conflict of interest such as to avoid harm to its clients or, if not, to prevent it (eg when providing exclusive liquidity) and
c. that it maintains and operates effective organisational and administrative arrangements to ensure delivery of the outcomes under (a) and (b) above.

2.36 Under the requirements of SYSC 10.1 and the relevant articles in the MIFID Organisational Requirements Regulation, a firm's conflicts of interest policy should explicitly identify the potential conflicts from double-sided charges. The policy should also clearly set out the steps the firm has taken to manage the conflicts of interest it has identified. A firm's conflicts of interest policy must be set out in writing (see Article 34(1) of the MIFID Organisational Requirements Regulation).

2.37 Consistent with these requirements, we would expect firms that provide broadly disseminated non-exclusive liquidity to formally codify within their written conflicts of interest policy any 'unwritten rules and protocols' that explain the firm's approach to order handling, execution and allocations. They also need to be satisfied that these controls are effective in preventing the risk of harm to their clients.

2.38 Firms should also consider how they explain to clients how they act when sourcing exclusive or non-exclusive liquidity, and how they handle trading interests and allocate orders accordingly. This would allow the broker to indicate how they ensure clients are treated honestly and fairly, and to enable clients to challenge the firm if they feel they have received a poor outcome. This is consistent with a firm's duties under COBS 2.1.1R and COBS 2.1.1A R.

2.39 When broadly disseminating non-exclusive liquidity, we also recognise that limiting the range of, or harmonising, charges for some or all clients can be a helpful extra measure for managing the conflict of interest from charging both sides of a transaction. Such actions can help mitigate the conflict by removing the financial incentive to favour one client over another due to different fee levels (see Article 33(c) and Article 34 of the MIFID Organisational Requirements Regulation). However, these actions would not be sufficient on their own.

2.40 We were not satisfied that the manual sampling most firms carried out was sufficient to give us or the firms confidence that their brokers were complying with the firm's policies and procedures on PFOF. In fact, no broker highlighted any instance where this sampling approach identified a breach of internal PFOF policies or other failure to manage conflicts of interest, inducements or best execution requirements.

2.41 When monitoring transactions and ensuring that brokers correctly identify the capacity in which they act, compliance functions may want to pay added attention to charges levied on exchange-registered market makers and other traditional liquidity providers. This is because the sourcing of exclusive liquidity is often (although not always) characterised by traditional liquidity providers acting as counterparties to a client's transaction. Regular charges applied to these market participants may therefore indicate that a broker is providing exclusive liquidity to specific clients, rather than broadly disseminating non-exclusive liquidity.

2.42 Firms also did not demonstrate that they have systems and controls to identify whether a broker has actually disseminated trading interests broadly in a way that allows any relevant client to trade on the published prices. For example, there were no processes which could allow compliance departments to assess the capacity in which their brokers act more systematically, such as comparing the timing of these broad communications with the timing of executions.

Firms routing orders overseas

2.43 Shortly after we published our Dear CEO letter in December 2017, some firms told us that our pursuit of firms that undertake PFOF was driving business overseas. We therefore scrutinised any arrangements that firms had established with overseas entities to determine if they were circumventing our rules.

2.44 Most firms we visited carry out broking activities across multiple jurisdictions, both within and beyond the EU. Most often, firms undertake overseas broking activities within separately-licensed subsidiaries, although in some cases firms operate from foreign branches of a UK entity.

2.45 The business rationale for establishing overseas entities ranges widely from improved client service and access to local markets, to Brexit planning, personal taxation and brokers' individual lifestyle choices. Some brokers also highlighted PFOF as a contributing factor in individual brokers' decisions to move abroad.

2.46 Our firm visits identified a small number of instances where UK brokers regularly transmitted their UK client orders to overseas affiliates who in turn charged PFOF when sourcing liquidity for these orders. In one case, a firm also received payments from its affiliate for directing order flow to it. The firm would do this regardless of the classification of its clients. While these brokers typically cited the expertise of those affiliated entities as best serving their clients, they did not assess the impact on their clients of directing order flow to firms that charge PFOF. As a result, these firms failed to comply with the MiFID II-based requirements on conflicts of interest, best execution and inducements. Where we have identified this behaviour, we have taken, or are considering, further action to address it.

2.47 As we stated in Market Watch 56, if a UK broker is involved at any stage in handling client orders, then our conflicts of interest rules (and inducements and best execution rules, where relevant) will apply. This includes our position on PFOF. A UK firm should not charge a liquidity provider if a transaction it facilitates amounts to the sourcing of exclusive liquidity for a specific client. Nor should a UK broker pass orders on to an affiliated overseas entity which levies PFOF, as this creates the same conflict of interest.

2.48 We would also note that UK firms that operate within group structures should ensure they have robust systems and controls in place to determine which entity or entities are handling an order. Their clients (including liquidity providers) should also be clear which entity they are dealing with.

3 Conclusions and next steps

3.1 In summary, we found that:

- nearly all firms have stopped charging liquidity providers when sourcing exclusive liquidity for a specific client, regardless of client classification
- firms found it difficult to consistently determine whether their activity legitimately constitutes the broad dissemination of non-exclusive liquidity which may allow them to effectively manage the conflicts of charging both sides of a trade
- firms could take further steps to improve the systems and controls they use to manage conflicts of interest for specific areas of their businesses
- some firms routed client orders to overseas affiliates which charged liquidity providers PFOF.

3.2 We expect firms to consider the findings of this report and improve their practices, policies, systems and controls where necessary to comply with their obligations under MiFID II.

3.3 We will continue to prioritise and monitor firms' compliance on PFOF as part of our ongoing firm supervision. Where we find failings, we will use all available tools, including potential enforcement action where we identify serious breaches of our rules.

3.4 We will provide individual feedback to the firms that participated in our review. In some cases, we will require them to implement measures to ensure they comply with the relevant regulatory requirements, including ceasing to charge PFOF.

3.5 We will also continue to engage closely with EU regulators on both supervisory and policy issues raised by PFOF with the aim of ensuring a consistent international approach.

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