

Mandates

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Background

The identification of a mandate and whether or not it falls within the scope of the CASS 8 Mandate Rules set out in the FCA Handbook has proven to be problematic for many firms. As a practical starting point, for a firm to have a mandate which falls within the scope of the Mandate Rules, that mandate must be entered into in the course of, or in connection with, the firm's designated investment business (or insurance mediation or debt management activity, if relevant).

The Mandate Rules do not apply to client money held in accordance with CASS 5, CASS 7 or CASS 11, or custody assets held by the firm which the firm safeguards and administers (without arranging) in accordance with CASS 6. However, if the firm has the ability to control client money held by another person, (for example the firm has control over the client's bank account by way of being able to exercise a direct debit), or custody assets held by a custodian (for example, in a Model B TPA relationship where the firm acts purely as a wealth manager and arranges for its TPA to act as the client's custodian), the Mandate Rules would still apply even though the firm is not holding client money or assets itself.

What is a mandate?

Mandates are standing client instructions, that the firm can then action without obtaining the client's permission for each transaction. Mandates arise where a firm **controls** (but does not hold) client money and/or custody assets for a client and can **control** an asset or **create** a liability in the client's name.

Set out in the table below are some examples of the types of transactions that are typically in and out of scope of the CASS 8 Rules.

CASS 8 Mandates – typically in scope

- The ability to make payments from a client's bank account or building society account.
- The ability to take payments under direct debits executed in favour of the firm.
- Taking a direct debit from another bank is a mandate (regardless of whether the firm itself is a bank).
- An ongoing authority over credit or debit cards.
- Retention of sufficient credit or debit card data to enable the firm to make future payments, even where this has not been agreed with the client (as explained by CASS 8.3.2D G).
- Authority over a client's external custody account e.g. stock lending.
- Discretionary portfolio management movements from external bank and custodian accounts, including when the firm's client appoints their own custodian and the firm provides discretionary wealth management services.

CASS 8 Mandates – typically not in scope

- Movements from cash or stock which are already held under CASS 6 or CASS 7.
- Operators of regulated collective investment schemes are exempt in relation to property held for or within the scheme.
- Where the firm is a bank, direct debits or payments made from an account with the bank (ie, your customer's account).
- Standing orders (these are initiated by the customer, not the investment firm).

Key requirements

The purpose of the Mandate Rules is to ensure that firms adequately control the authority that they have over customers' assets. It should be noted that a mandate can take any form and does not need to state it is a mandate, or be in written form (CASS 8.2.2 R).

The key requirements of the rules are that firms establish and maintain a system of internal controls and maintain adequate records to prevent any misuse of the authority granted by the client (CASS 8.1.4 R). Specifically, under CASS 8.3.2 R firms must maintain:

- an up-to-date list of all mandates that the firm holds;
- a record of all transactions undertaken under each mandate;
- internal controls to ensure that each transaction under a mandate complies with the mandate's requirements; and
- details of the procedures and internal controls around the giving of instructions under each mandate.

In addition, a firm must:

- maintain the list of mandates in a medium which allows the information to be stored in a way accessible for future reference (CASS 8.3.2A R (1))
- maintain an audit trail of corrections and amendments made to the list (CASS 8.3.2A R (2));
- record specific details in relation to mandates received in non-written form, eg, a telephone call (CASS 8.3.2C R); and
- maintain the record for each mandate for a period of at least 1 year (and 5 years for mandates entered into in the course of MiFID business) after it ceases to have the mandate (CASS 8.3.2 G).

In what circumstances does a CASS auditor have to provide an opinion on mandates?

Auditors are required to give an opinion on compliance with the CASS 8 Mandates Rules only when the firm holds mandates and the auditor is giving a reasonable assurance opinion on client money and/or custody assets¹.

Where the auditor is giving a reasonable assurance opinion on client money and/or custody assets and the firm asserts that it does not hold mandates, the auditor should still perform sufficient procedures to determine if that assertion is reasonable. If no matters are identified that indicate the firm is holding a mandate, then the auditor would not report on compliance with the CASS 8 rules.

If only a limited assurance opinion is provided, the auditor will not have to give an opinion on compliance with the Mandate Rules².

Common challenges and points to watch out for

Although the rules in and of themselves are relatively short and appear straightforward, auditors typically come across a number of challenges when assessing whether a firm is in compliance with the rules. In many cases, the firm simply fails to identify an area of its business which is in scope of the CASS rules and holds mandates, for example a call recording system that captures clients' card details and retains these (meaning that, as per CASS 8.3.2D G, the firm has the ability to use the details for further transactions without continued client involvement). Examples of further points to watch out for are described below.

Administrative errors

There are a number of administrative errors that typically occur, particularly where mandate volumes are high. For example:

- Failure to set up a direct debit on a timely basis or at all
- Failure to action direct debit amendments requested by the client

¹ This is the effect of SUP3.1.5R and NOT the FRC Assurance Standard para 14.

² This is the effect of SUP3.1.5R and NOT the FRC Assurance Standard para 14.

- Cancellation of a direct debit in error
- Duplication of a direct debit in error

The question is whether errors should be assessed against the rules in the same way? For example, does failing to set up a direct debit (i.e. the failure to do something) result in a CASS breach when the customer's money is not at risk? The key points to consider are that even where there is no loss to the customer, or evidence that the mandate has been used inappropriately (for example by taking a duplicate mandate), the firm may not be in compliance with the rules as:

- The firm failed to follow the customer instruction (referred to within the CASS 8 rules as a "condition") to carry out the mandate; and
- The record of mandate is not accurate, which demonstrates that the firm did not maintain adequate internal controls to enable the firm to comply with the CASS 8.3.1 R.

Record retention?

A common breach is failure to retain records for the required period after the mandate ended, as specified in CASS 8.3.2 G. This may arise from records being archived off-site and the firm not being able to locate those records when required, or the records being known to be lost or destroyed (eg, in a fire at the off-site storage facility).

For terminated mandates, the firm may be unable to perform remediation actions. However, for active mandates firms have sought to remediate this through various actions, as described below.

Remediation – communications with clients

Over recent years a significant number of firms have undertaken reviews of their mandate records and have discovered that in some cases they no longer retain the original mandate authority from the customer. There are a number of options that firms have been seen to take:

- a) Obtain positive consent - the firm sends a letter to the customer requesting the customer to review the mandate details and confirm back in writing that the details are correct, thereby providing evidence of 'authority' to the firm. In the event the customer does not reply, the firm may cancel the mandate (eg, the direct debit).

This approach would be consistent with the rules which set out that a mandate is '*obtained from the client*' and '*with the client's consent*'.

- b) Send a one way communication - the firm sends a letter to the customer requesting the customer to review the mandate details, but only asking them to contact the firm on an exception basis if any of the details on the mandate are incorrect. The lack of a response is taken to be agreement, thereby creating an 'authority'.

It is not clear that this would meet the requirement for the mandate to be obtained '*with the client's consent*'. However, the rule only requires consent, not express or explicit consent, and so an argument can be made that consent is evidenced through the firm being able to continue to operate the mandate, and the client not responding to the one-way communication to cancel the mandate. Firms may argue this is evidence of implied consent from the customer. This is a difficult area and requires judgement by the auditor taking into account all the relevant circumstances, for example it may be appropriate to expect a higher degree of evidence to support implied consent where the customer is an individual rather than an institutional investor, and the robustness of the firm's contact programme. It may also be appropriate for the firm to obtain a legal opinion to support its position.

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