

# Chapter 6

## Custody rules

## 6.2 Holding of client assets

### Requirement to protect clients' safe custody assets

- 6.2.1 **R** A *firm* must, when holding *safe custody assets* belonging to *clients*, make adequate arrangements so as to safeguard *clients'* ownership rights, especially in the event of the *firm's* insolvency, and to prevent the use of *safe custody assets* belonging to a *client* on the *firm's* own account except with the *client's* express consent.

[Note: article 16(8) of *MiFID*]

### Requirement to have adequate organisational arrangements

- 6.2.2 **R** A *firm* must introduce adequate organisational arrangements to minimise the risk of the loss or diminution of *clients' safe custody assets*, or the rights in connection with those *safe custody assets*, as a result of the misuse of the *safe custody assets*, fraud, poor administration, inadequate record-keeping or negligence.

[Note: article 2(1)(f) of the *MiFID Delegated Directive*]

### Registration and recording of legal title

- 6.2.3 **R** Subject to **■** CASS 6.2.3A-1R, a *firm* must effect appropriate registration or recording of legal title to a *safe custody asset* belonging to a *client* in the name of:

- (1) the *client*, unless the *client* is an *authorised person* acting on behalf of its *client*, in which case it may be registered in the name of the *client* of that *authorised person*;
- (2) a *nominee company* which is controlled by:
  - (a) the *firm*;
  - (b) an *affiliated company*;
  - (c) a *recognised investment exchange*; or
  - (d) a third party with whom *financial instruments* are deposited under **■** CASS 6.3 (Depositing assets and arranging for assets to be deposited with third parties);
- (3) any other third party, if the *firm* is not a *trustee firm* but is prevented from registering or recording legal title in the way set out in (1) or (2) and provided that:

- (a) the *safe custody asset* is subject to the law or market practice of a jurisdiction outside the *United Kingdom* and the *firm* has taken reasonable steps to determine that it is in the *client's* best interests to register or record it in that way, or that it is not feasible to do otherwise, because of the nature of the applicable law or market practice; and
  - (b) the *firm* has notified the *client* in writing;
- (4) the *firm* if either:
- (a) it is not a *trustee firm* but is prevented from registering or recording legal title in the way set out in (1), (2) or (3) and provided that:
    - (i) the *safe custody asset* is subject to the law or market practice of a jurisdiction outside the *United Kingdom* and the *firm* has taken reasonable steps to determine that it is in the *client's* best interests to register or record it in that way, or that it is not feasible to do otherwise, because of the nature of the applicable law or market practice; and
    - (ii) the *firm* has notified the *client* if a *professional client*, or obtained prior written consent if a *retail client*.
  - (b) it is a *trustee firm* and is prevented from registering or recording legal title in the way set out in (1) or (2).

- 6.2.3A-1** **R** A *firm* need not comply with **■ CASS 6.2.3 R** for any *safe custody asset*:
- (1) that it has deposited with a third party in accordance with **■ CASS 6.3** (Depositing assets and arranging for assets to be deposited with third parties); and
  - (2) for which, because of the arrangements with that third party for depositing the *safe custody asset*, it is not practicable for the *firm* to effect appropriate registration or recording of legal title itself.

- 6.2.3A** **R** If:
- (1) the *safe custody asset* is an *emission auction product* that is a *financial instrument*; and
  - (2) it is not practicable or possible for a *firm* to effect registration or recording of legal title in this asset in the manner set out in **■ CASS 6.2.3 R**,

the *firm* must register or record legal title in its name provided it has notified the *client* in writing.

- 6.2.3B** **G** A *firm*, when complying with **■ CASS 6.2.3R (3)** or **■ CASS 6.2.3R (4)(a)**, will be expected to demonstrate that adequate investigations have been made of the jurisdiction concerned by reference to local sources, which may include an appropriate legal opinion.

- 6.2.4** **R** A *firm* must accept the same level of responsibility to its *client* for any *nominee company* controlled by the *firm*, or any *nominee company* controlled by an *affiliated company* of the *firm*, with respect of any requirements of the *custody rules*.
- 6.2.5** **R** A *firm* may only register or record legal title to its own *applicable asset* in the same name as that in which legal title to a *client's safe custody asset* is registered or recorded if the *firm's applicable asset* is separately identified from the *client's safe custody asset* in the *firm's records*, and either or both of the conditions in (1) and (2) are met.
- (1) The *firm's* holding of its own *applicable asset* arises incidentally to:
    - (a) *designated investment business* it carries on for the account of any *client*; or
    - (b) steps taken by the *firm* to comply with an applicable *custody rule*; and, in the case of either (a) or (b), the situation where registration or recording of legal title of the *firm's applicable asset* is in the same name as the *client's safe custody asset* under this *rule* remains in place only to the extent that it is reasonably necessary.
  - (2) The registration or recording of legal title of the *firm's own applicable asset* in the same name as the *client's safe custody asset* is only as a result of the law or market practice of a jurisdiction outside of the *United Kingdom*.
- 6.2.6** **G**
- (1) Consistent with a *firm's* requirements to protect *clients' safe custody assets* and have adequate organisation arrangements in place (■ CASS 6.2.1 R and ■ CASS 6.2.2 R), before a *firm* registers or records legal title to its own *applicable asset* in the same name as that in which legal title to a *client's safe custody asset* is registered or recorded under ■ CASS 6.2.5 R, it should consider whether there are any means to avoid doing so.
  - (2) Examples of where the conditions under ■ CASS 6.2.5R (1) might be met include in the course of a *firm*:
    - (a) correcting a dealing error that relates to a transaction for the account of a *client*; or
    - (b) maintaining a small balance of the *firm's own applicable assets* for purely operational or compliance purposes (eg, as a float to cover potential custody *shortfalls*) in an amount that is proportionate to the total amount of *safe custody assets* held for *clients*; or
    - (c) allocating *safe custody assets* to *clients* following settlement of a bulk order; or
    - (d) facilitating a *client* transaction that involves fractional entitlements; or
    - (e) making good a *shortfall*.
- 6.2.7** **R** A *firm* must ensure that any documents of title to *applicable assets* in *bearer form*, belonging to the *firm* and which it holds in its physical possession, are

kept separately from any document of title to a *client's safe custody assets* in *bearer form*.

### Allocated but unclaimed safe custody assets

- 6.2.7A** **R** ■ CASS 6.2.8G to ■ CASS 6.2.16G do not apply to a *firm* following its *failure*.
- 6.2.7B** **G** ■ CASS 6.7.2R to ■ CASS 6.7.7R (Disposal of safe custody assets) applies to a *firm* following its *failure* in respect of allocated but unclaimed *safe custody assets*.
- 6.2.8** **G** The purpose of ■ CASS 6.2.10 R is to set out the requirements a *firm* must comply with if it chooses to divest itself of a *client's unclaimed safe custody assets*.
- 6.2.9** **G** Before acting in accordance with ■ CASS 6.2.10 R to ■ CASS 6.2.16 G, a *firm* should consider whether its actions are permitted by law and consistent with the arrangements under which the *safe custody assets* are held. These provisions relate to a *firm's* obligations as an *authorised person*.
- 6.2.10** **R** A *firm* may either (i) liquidate an unclaimed *safe custody asset* it holds for a *client*, at market value, and pay away the proceeds or (ii) pay away an unclaimed *safe custody asset* it holds for a *client*, in either case, to a registered charity of its choice provided:
- (1) this is permitted by law and consistent with the arrangements under which that *safe custody asset* is held;
  - (2) it has held that *safe custody asset* for at least 12 years;
  - (3) in the 12 years preceding the divestment of that *safe custody asset*, it has not received instructions relating to any *safe custody assets* from or on behalf of the *client* concerned;
  - (4) it can demonstrate that it has taken reasonable steps to trace the *client* concerned and return that *safe custody asset*; and
  - (5) the *firm* complies with ■ CASS 6.2.14 R: the undertaking requirement.
- 6.2.11** **E** (1) Taking reasonable steps in ■ CASS 6.2.10R (4) includes following this course of conduct:
- (a) determining, as far as reasonably possible, the correct contact details for the relevant *client*;
  - (b) writing to the *client* at the last known address either by post or by electronic mail to inform it:
    - (i) of the name of the *firm* with which the *client* first deposited the *safe custody asset* in question;
    - (ii) of the *firm's* intention to pay the *safe custody asset* to charity under ■ CASS 6.2.10 R if it does not receive instructions from the *client* within 28 days;

- (c) where the *client* has not responded after the 28 days referred to in (b) attempting to communicate the information set out in (b) to the *client* on at least one further occasion by any means other than that used in (b) including by post, electronic mail, telephone or media advertisement;
- (d) subject to (e) and (f), where the *client* has not responded within 28 days following the most recent communication, writing again to the *client* at the last known address either by post or by electronic mail to inform them that:
  - (i) as the *firm* received no instructions from the *client*, it will in 28 days pay the *safe custody asset* to charity under ■ CASS 6.2.10 R; and
  - (ii) an undertaking will be provided by the *firm* or a member of its *group* to pay to the *client* concerned a sum equal to the value of the *safe custody asset* at the time it was liquidated or paid away in the event of the *client* seeking to claim the *safe custody asset* in future;
- (e) if the *firm* has carried out the steps in (b) or (c) and in response has received positive confirmation in writing that the *client* is no longer at a particular address, the *firm* should not use that address for the purposes of (d);
- (f) if, after carrying out the steps in (a), (b) and (c), the *firm* has obtained positive confirmation that none of the contact details it holds for the relevant *client* are accurate or, if utilised, the communication is unlikely to reach the *client*, the *firm* does not have to comply with (d); and
- (g) waiting a further 28 days following the most recent communication under this *rule* before divesting itself of the *safe custody asset* under ■ CASS 6.2.10 R.

(2) Compliance with (1) may be relied on as tending to establish compliance with ■ CASS 6.2.10R (4).

(3) Contravention of (1) may be relied on as tending to establish contravention of ■ CASS 6.2.10R (4).

**6.2.12** **G** For the purpose of ■ CASS 6.2.11E (1)(a), a *firm* may use any available means to determine the correct contact details for the relevant *client*, including telephoning the *client*, searching internal records, media advertising, searching public records, mortality screening, using credit reference agencies or tracing agents.

**6.2.13** **R** Where a *firm* liquidates a *safe custody asset* under ■ CASS 6.2.10 R, it must pay away the proceeds to charity as soon as practicable.

**6.2.14** **R** Where a *firm* divests itself of a *client's safe custody asset* under ■ CASS 6.2.10 R, it must comply with either (1)(a) or (1)(b) and, in either case, (2).

(1) (a) The *firm* must unconditionally undertake to pay to the *client* concerned a sum equal to the value of the *safe custody asset* at

the time it was liquidated or paid away in the event of the *client* seeking to claim the *safe custody asset* in future.

- (b) The *firm* must ensure that an unconditional undertaking in the terms set out in (1)(a) is made by a member of its *group* and there is suitable information available for relevant *clients* to identify the member of the *group* granting the undertaking.

(2) Any undertaking under this *rule* must be:

- (a) authorised by the *firm's governing body* where (1)(a) applies or the *governing body* of the *group* member where (1)(b) applies;
- (b) legally enforceable by any *person* that had a legally enforceable claim to the unclaimed *safe custody asset* in question at the time it was divested by the *firm*, or by an assign or successor in title to such claim; and
- (c) retained by the *firm*, and, where (1)(b) applies, by the *group* member, indefinitely.

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(1) If a *firm* pays away a *client's* unclaimed *safe custody assets* to charity or liquidates a *client's* unclaimed *safe custody assets* and pays the proceeds to charity under ■ CASS 6.2.10 R it must make and retain, or where the *firm* already has such records, retain:

- (a) records of all *safe custody assets* divested under ■ CASS 6.2.10 R (including details of the value of each asset at that time and the identity of the *client* to whom the asset was allocated);
- (b) all relevant documentation (including charity receipts); and
- (c) details of the communications the *firm* had or attempted to make with the *client* concerned pursuant to ■ CASS 6.2.10R (4).

(2) Records in (1) must be retained indefinitely.

(3) If a member of the *firm's group* has provided an undertaking under ■ CASS 6.2.14R (1)(b) then the records in (1) must be readily accessible to that *group* member.

### Costs associated with divesting allocated but unclaimed client assets

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Any costs associated with the *firm* divesting itself of *safe custody assets* pursuant to ■ CASS 6.2.10 R to ■ CASS 6.2.15 R should be paid for from the *firm's* own funds, including:

- (1) any costs associated with the *firm* carrying out the steps in ■ CASS 6.2.10R (4) or ■ CASS 6.2.11 E; and
- (2) the cost of any insurance purchased by a *firm* or the relevant member of its *group* to cover any legally enforceable claim in respect of the assets divested under ■ CASS 6.2.10 R.