

Chapter 14

Collective Investment Schemes

14.1 Exercise of the powers in respect of Authorised Unit Trust Schemes (AUT) and authorised contractual schemes (ACS): sections 254 (Revocation of authorisation order otherwise than by consent), 257 (Directions), 258 (Applications to the court), 261U (Revocation of authorisation order otherwise than by consent), 261X (Directions) and 261Y (Applications to the court) of the Act

14.1.1

The *FCA* will consider all the relevant circumstances of each case and may take a number of factors into account when it decides whether to use these powers. The following list is not exhaustive; not all these factors may be relevant in a particular case and there may be other factors that are relevant.

- (1) The seriousness of the breach or likely breach by an *authorised fund manager* or *depository* of a requirement imposed by or under the *Act*. The following may be relevant:
 - (a) the extent to which the *breach* was deliberate or reckless;
 - (b) the extent of loss, or risk of loss, caused to existing, past or potential participants in the *AUT* or *ACS* as a result of the *breach*;
 - (c) whether the *breach* highlights serious or systemic weaknesses in the management or control of either the *AUT*, *ACS* or *scheme property*;
 - (d) whether there are grounds for believing a *breach* is likely to be continued or repeated;
 - (e) the length of time over which the *breach* happened; and
 - (f) whether existing and/or past participants in the *AUT* or *ACS* have been misled in a material way, for example about the investment objectives or policy of the *scheme* or the level of investment risk.
- (2) The consequences of a failure to satisfy a requirement for the making of an order authorising an *AUT* or *ACS*. The *FCA* will expect the non-compliance to be resolved as soon as possible. Important factors are likely to be whether existing and/or past *participants* have suffered loss due to the non-compliance and whether remedial steps will be taken to satisfy all the requirements of the order.

- (3) Whether it is necessary to suspend the issue and redemption of units to protect the interests of existing or potential *participants* in the *AUT* or *ACS*. For example, this may be necessary if:
 - (a) information suggests the current price of units under the *AUT* or *ACS* may not accurately reflect the value of *scheme property*; or
 - (b) the *scheme property* cannot be valued accurately.
- (4) The effect on the interests of *participants* within the scheme of the use of any of its powers under sections 254, 257, 261U and 261X. However, the *FCA* will also consider the interests of past and potential *participants*.
- (5) Whether the *FCA*'s concerns can be resolved by taking enforcement action against the *authorised fund manager* and/or *depository* of the *AUT* or *ACS*. In some instances, the *FCA* may consider it appropriate to deal with a *breach* by an *authorised fund manager* or *depository* by taking direct enforcement action against the *authorised fund manager* and/or *depository* without using its powers under sections 254, 257, 258, 261U, 261X or 261Y. In other instances, the *FCA* may combine direct enforcement action against a *depository* and/or *authorised fund manager* with the use of one or more of the powers under sections 254, 257, 258, 261U, 261X or 261Y.
- (6) Whether there is information to suggest that a *depository* or *authorised fund manager* has knowingly or recklessly given the *FCA* false information. Giving false information is likely to cause very serious concerns, particularly if it shows there is a risk of loss to the *scheme property* or that *participants*' interests have been or may be affected in some other way.
- (7) The conduct of the *authorised fund manager* or *depository* in relation to, and following the identification of, the issue, for example:
 - (a) whether the *authorised fund manager* or *depository* discovered the issue or problem affecting the *AUT* or *ACS* and brought it to the *FCA*'s attention promptly;
 - (b) the degree to which the *authorised fund manager* or *depository* is willing to cooperate with the *FCA*'s investigation and to take protective steps, for example by suspending the issue and redemption of units in the *AUT* or *ACS*;
 - (c) whether the *authorised fund manager* or *depository* has compensated past and existing participants who have suffered loss.
- (8) The compliance history of the *depository* or *authorised fund manager*, including whether the *FCA* has previously taken disciplinary action against the *depository* or *authorised fund manager* in relation to the *AUT*, *ACS* or any other *collective investment scheme*.
- (9) Whether there is information to suggest that the *AUT* or *ACS* is being used for criminal purposes and/or that the *authorised fund manager* or *depository* is itself involved in *financial crime*.

	<p>14.2 Choice of powers</p>
<p>14.2.1</p>	<p>The <i>FCA</i> may use its powers under sections 254, 257 and 258 (in the case of <i>AUTs</i>) and sections 261U, 261X and 261Y (in the case of <i>ACSs</i>) individually, together, and as well as direct enforcement action against a <i>depository</i> or <i>authorised fund manager</i> in their capacity as <i>firms</i>.</p>
<p>14.2.2</p>	<p>Where the <i>FCA</i> has a concern about an <i>AUT</i> or <i>ACS</i> that must be dealt with urgently, it will generally use its power to give directions under section 257 (in the case of an <i>AUT</i>) or section 261X (in the case of an <i>ACS</i>) in the first instance.</p>
<p>14.2.3</p>	<p>The following are examples of situations where the <i>FCA</i> may consider it appropriate to seek a court order under section 258 (in the case of an <i>AUT</i>) or section 261Y (in the case of an <i>ACS</i>) to remove the <i>authorised fund manager</i> or <i>depository</i>:</p> <ul style="list-style-type: none"> (1) Where there are grounds for concern over the behaviour of the <i>authorised fund manager</i> or <i>depository</i> in respect of the management of the <i>scheme</i> or of its assets. (2) Where an <i>authorised fund manager</i> or <i>depository</i> has breached a requirement imposed on him under the <i>Act</i> or has knowingly or recklessly given the <i>FCA</i> false information.
<p>14.2.4</p>	<p>The <i>FCA</i> recognises that participants in an <i>AUT</i> or <i>ACS</i> have a direct financial interest in the <i>scheme property</i>. It follows that in cases where it considers it appropriate to use its section 254 power (in the case of an <i>AUT</i>) or its section 261U power (in the case of an <i>ACS</i>) to revoke an authorisation order, the <i>FCA</i> will generally first require the <i>authorised fund manager</i> or <i>depository</i> to wind up the <i>AUT</i> or <i>ACS</i> (or seek a court order for the appointment of a firm to wind up the <i>AUT</i> or <i>ACS</i>).</p>
<p>14.2.5</p>	<p>[deleted]</p>

14.3 Exercise of the powers in respect of recognised schemes: section 267 of the Act - power to suspend promotion of a scheme recognised under section 264: the FCA's policy

14.3.1

When it decides whether a suspension order under section 267 is appropriate, the *FCA* will consider all the relevant circumstances. General factors that the *FCA* may consider include, but are not limited to:

- (1) the seriousness of the breach of *financial promotion rules* by the *operator* (the matters listed at ■ paragraph 14.1.1 (a) to (f) may be relevant in this context); and
- (2) the conduct of the *operator* after the *breach* was discovered including whether the *operator* has compensated past and existing *participants* who have suffered loss.

14.3.2

In addition to or instead of suspending the promotion of a *scheme* recognised under section 264, the *FCA* may ask the *competent authorities* of the *EEA State* in which the *scheme* is constituted who are responsible for the authorisation of *collective investment schemes*, to take such action in respect of the *scheme* and/or its *operator* as will resolve the *FCA*'s concerns. Also, Schedule 5 to the *Act* states that a *person* who for the time being is an *operator*, *trustee* or *depository* of a *scheme* recognised under section 264 of the *Act* is an *authorised person*. So, it will also be open to the *FCA* to take direct enforcement action against those *persons*.

14.4 Exercise of the powers in respect of recognised schemes: sections 279 and 281 of the Act – powers to revoke recognition of schemes recognised under section 272: the FCA's policy

14.4.1 The *FCA* will consider all the relevant circumstances of each case. The general factors which the *FCA* may consider include, but are not limited to, those set out in ■ paragraph 14.1.1 (1) to (9) (the conduct of the *operator* of the *scheme* and of the *trustee* or *depository* will also, of course, be taken into account in relation to each of these factors).

14.4.2 As well as or instead of using these powers, the *FCA* may ask the relevant *regulatory body* of the country or territory in which the *scheme* is authorised to take such action in respect of the *scheme* and/or its *operator*, *trustee* or *depository* as will resolve the *FCA*'s concerns.

14.4.3 Decisions about whether to apply to the civil courts for *collective investment scheme* related orders under the *Act* will be made by the *RDC* Chairman or, in an urgent case and if the Chairman is not available, by an *RDC* Deputy Chairman. In an exceptionally urgent case the matter will be decided by the director of Enforcement or, in his or her absence, another member of the *FCA*'s executive of at least director of division level.

14.4.4 An exceptionally urgent case in these circumstances is one where the *FCA* staff believe that a decision to begin proceedings

- (1) should be taken before it is possible to follow the procedure described in ■ paragraph 14.4.3; and
- (2) it is necessary to protect the interests of consumers or potential consumers.