The Enforcement Guide

Contents list

1. Introduction

1.1 This guide describes the FSA's approach to exercising the main enforcement powers given to it by the Financial Services and Markets Act 2000 (the *Act*) and by regulation 12 of the *Unfair Terms Regulations*. It is broken down into two parts. The first part provides an overview of enforcement policy and process, with chapters about the FSA's approach to enforcement (chapter 2), the use of its main information gathering and investigation powers under the *Act* (chapter 3), the conduct of investigations (chapter 4), settlement (chapter 5) and publicity (chapter 6). The second part contains an explanation of the FSA's policy concerning specific enforcement powers such as its powers to: vary a *firm's Part IV permission* on its own initiative (chapter 8); make *prohibition orders* (chapter 9); prosecute criminal offences (chapter 12); and powers which the FSA has been given under legislation other than the *Act* (chapter 19).

1.2 In the areas set out below, the *Act* expressly requires the FSA to prepare and publish statements of policy or procedure on the exercise of its enforcement and investigation powers and in relation to the giving of *statutory notices*.

(1) sections 69 and 210 require the FSA to publish statements of policy on the imposition, and amount, of financial penalties on *firms* and *approved persons*;

(2) section 93 requires the FSA to publish a statement of its policy on the imposition, and amount, of financial penalties under section 91 of the *Act* (penalties for breach of Part 6 rules);

(3) section 124 requires the FSA to publish a statement of its policy on the imposition, and amount, of financial penalties for *market abuse*;

(4) section 169 requires the FSA to publish a statement of its policy on the conduct of certain interviews in response to requests from *overseas regulators*; and

(5) section 395 requires the FSA to issue a statement of procedures relating to the giving of *supervisory notices*, *warning notices* and *decision notices*.

These policies are set out in the Decision Procedure and Penalties manual (*DEPP*), a module of the FSA Handbook. References to the policies are made at appropriate places in the guide.

1.3 This guide includes material on the investigation, disciplinary and criminal prosecution powers that are available to the FSA when it is performing functions as the competent authority under Part VI of the *Act* (Official listing). The *Act* provides a separate statutory framework within which the FSA must operate when it acts in that capacity. When determining whether to exercise its powers in its capacity as competent authority under Part VI, the FSA will have regard to the matters and objectives which apply to the competent authority function.

1.4 The FSA has a range of enforcement powers, and in any particular enforcement situation, the FSA may need to consider which power to use and whether to use one or more powers. So in any particular case, it may be necessary to refer to a number of chapters of the guide.

1.5 Since most of the FSA's enforcement powers are derived from it, this guide contains a large number of references to the *Act*. Users of the guide should therefore refer to the *Act* as well as to the guide where necessary. In the event of a discrepancy between the *Act*, or other relevant legislation, and the description of an enforcement power in the guide, the provisions of the *Act* or the other relevant legislation prevail. Defined terms used in the text are shown in italic type. Where a word or phrase is in italics, its definition will be the one used for that word or phrase in the glossary to the FSA Handbook.

1.6 [deleted]

1.7 This guide will be kept under review and amended as appropriate in the light of further experience and developing law and practice.

1.8 The material in this guide does not form part of the FSA Handbook and is not guidance on rules, but it is 'general guidance' as defined in section 158 of the *Act*. If you have any doubt about a legal or other provision or your responsibilities under the *Act* or other relevant requirements, you should seek appropriate legal advice from your legal adviser.

2. The FSA’s approach to enforcement

2.1 The FSA's effective and proportionate use of its enforcement powers plays an important role in the pursuit of its *regulatory objectives* of protecting *consumers*, maintaining confidence in the *financial system*, promoting public awareness and reducing *financial crime*. For example, using enforcement helps to contribute to the protection of *consumers* and to deter future contraventions of FSA and other applicable requirements and *financial crime*. It can also be a particularly effective way, through publication of enforcement outcomes, of raising awareness of regulatory standards.

2.2 There are a number of principles underlying the FSA's approach to the exercise of its enforcement powers:

(1) The effectiveness of the regulatory regime depends to a significant extent on maintaining an open and co-operative relationship between the FSA and those it regulates.

(2) The FSA will seek to exercise its enforcement powers in a manner that is transparent, proportionate, responsive to the issue, and consistent with its publicly stated policies.

(3) The FSA will seek to ensure fair treatment when exercising its enforcement powers.

(4) The FSA will aim to change the behaviour of the *person* who is the subject of its action, to deter future non-compliance by others, to eliminate any financial gain or benefit from non-compliance, and where appropriate, to remedy the harm caused by the non-compliance.

2.3 Enforcement is only one of a number of regulatory tools available to the FSA. As a risk based regulator with limited resources, throughout its work the FSA prioritises its resources in the areas which pose the biggest threat to its *regulatory objectives*. This applies as much to the enforcement tool as it does to any other tool available to it. The next section of this chapter summarises how in practice the FSA takes a risk based approach towards its use of the enforcement tool, and the subsequent sections comment on other aspects of the FSA's approach to enforcement.

2.4 Where a *firm* or other *person* has failed to comply with the requirements of the *Act*, the *rules*, or other relevant legislation, it may be appropriate to deal with this without the need for formal disciplinary or other enforcement action. The proactive supervision and monitoring of *firms*, and an open and cooperative relationship between *firms* and their supervisors, will, in some cases where a contravention has taken place, lead the FSA to decide against taking formal disciplinary action. However, in those cases, the FSA will expect the *firm* to act promptly in taking the necessary remedial action agreed with its supervisors to deal with the FSA's concerns. If the *firm* does not do this, the FSA may take disciplinary or other enforcement action in respect of the original contravention.

Case selection: Firms and approved persons, market abuse cases and listing matters

2.5 Other than in the area of a *firm's* failure to satisfy the FSA's *Threshold Conditions* for authorisation (as to which, see paragraph 2.11), the selection method for cases involving *firms* and *approved persons, market abuse* and listing matters (for example, breaches of the listing, prospectus or disclosure rules) occurs at two main levels:

(1) strategic planning; and

(2) decisions on individual cases.

2.6 The FSA does not have a set of enforcement priorities that are distinct from the priorities of the FSA as a whole. Rather, the FSA consciously uses the enforcement tool to deliver its overall strategic priorities. The areas and issues which the FSA as an organisation regards as priorities at any particular time are therefore key in determining at a strategic level how enforcement resource should be allocated. FSA priorities will influence the use of resources in its supervisory work and as such, make it more likely that the FSA will identify possible breaches in these priority areas. Further, should evidence emerge of potential breaches, these areas are more likely to be supported by enforcement action than non-priority areas.

2.7 One way in which the FSA focuses on priority areas is through its thematic work. This work involves the FSA looking at a particular issue or set of issues across a sample of *firms*. Themes are, in general, selected to enable the FSA to improve its understanding of particular industry areas or to assess the validity of concerns the FSA has about risks those areas may present to the *regulatory objectives.* Thematic work does not start with the presumption that it will ultimately lead to enforcement outcomes. But if the FSA finds significant issues, these may become the subject of enforcement investigations as they would if the FSA had discovered them in any other circumstance. Also, by definition, the fact they are in areas that are of importance to the FSA means, following the FSA's risk-based approach through, that they are proportionately more likely to result in the FSA determining that an enforcement investigation should be carried out than issues in lower priority areas.

2.8 This does not mean that the FSA will only take enforcement action in priority strategic areas. There will always be particularly serious cases where enforcement action is necessary, ad hoc cases of particular significance in a markets, *consumer* protection or *financial crime* context, or cases that the FSA thinks are necessary to achieve effective deterrence.

2.9 The combination of the priority given to certain types of misconduct over others and the FSA's risk-based approach to enforcement means that certain cases will be subject to enforcement action and others not, even where they may be similar in nature or impact. The FSA’s choice as to the use of the enforcement tool is therefore a question of how the FSA uses its resources effectively and efficiently and how it ensures that it is an effective regulator.

2.10 Before it proceeds with an investigation, the FSA will satisfy itself that there are grounds to investigate under the statutory provisions that give the FSA powers to appoint investigators. If the statutory test is met, it will decide whether to carry out an investigation after considering all the relevant circumstances. To assist its consideration of cases, the FSA has developed a set of assessment criteria. The current criteria (which are published on the Enforcement section of the FSA web site[1]) are framed as a set of questions. They take account of the FSA's *regulatory objectives*, its strategic/supervision priorities (see above) and other issues such as the response of the *firm* or individual to the issues being referred. Not all of the criteria will be relevant to every case and there may be other considerations which are not mentioned in the list but which are relevant to a particular case. The FSA’s assessment will include considering whether using alternative tools is more appropriate taking into account the overall circumstances of the *person* or *firm* concerned and the wider context. Another consideration will be whether the FSA is under a Community obligation to take action on behalf of, or otherwise to provide assistance to, an authority from another *EU* member state. Paragraph 2.15 discusses the position where other authorities may have an interest in a case.

Case selection: Threshold Conditions cases

2.11 The FSA often takes a different approach to that described above where *firms* no longer meet the *threshold conditions*. The FSA views the *threshold conditions* as being fundamental requirements for *authorisation* and it will generally take action in all such cases which come to its attention and which cannot be resolved through the use of supervisory tools. The FSA does not generally appoint investigators in such cases. Instead, *firms* are first given an opportunity to correct the failure. If the *firm* does not take the necessary remedial action, the FSA will consider whether its *permission* to carry out regulated business should be varied and/or cancelled. However, there may be cases where the FSA considers that a formal investigation into a *threshold conditions* concern is appropriate.

Case selection: Unauthorised business

2.12 Where this poses a significant risk to the *consumer* protection objective or to the FSA's other *regulatory objectives*, *unauthorised* activity will be a matter of serious concern for the FSA. The FSA deals with cases of suspected *unauthorised* activity in a number of ways and it will not use its investigation powers and/or take enforcement action in every single instance.

2.13 The FSA's primary aim in using its investigation and enforcement powers in the context of suspected *unauthorised* activities is to protect the interests of *consumers*. The FSA's priority will be to confirm whether or not a *regulated activity* has been carried on in the United Kingdom by someone without *authorisation* or exemption, and, if so, the extent of that activity and whether other related contraventions have occurred. It will seek to assess the risk to *consumers'* assets and interests arising from the activity as soon as possible.

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[1] http://www.fsa.gov.uk/pages/Doing/Regulated/Law/criteria.shtml

2.14 The FSA will assess on a case-by-case basis whether to carry out a formal investigation, after considering all the available information. Factors it will take into account include:

(1) the elements of the suspected contravention or breach;

(2) whether the FSA considers that the *persons* concerned are willing to co-operate with it;

(3) whether obligations of confidentiality inhibit individuals from providing information unless the FSA compels them to do so by using its formal powers;

(4) whether the *person* concerned has offered to undertake or undertaken remedial action.

Cases where other authorities have an interest

2.15 Action before or following an investigation may include, for example, referring some issues or information to other authorities for consideration, including where another authority appears to be better placed to take action. For example, when considering whether to use its powers to conduct formal investigations into market misconduct, the FSA will take into account whether another regulatory authority is in a position to investigate and deal with the matters of concern (as far as a *recognised investment exchange* or *recognised clearing house* is concerned, the FSA will consider the extent to which the relevant exchange or clearing house has adequate and appropriate powers to investigate and deal with a matter itself). Equally, in some cases, the FSA may investigate and/or take action in parallel with another domestic or international authority. This topic is discussed further in *DEPP* 6.2.19 G to *DEPP* 6.2.28 G, paragraph 3.16 of this guide and in the case of action concerning criminal offences, paragraph 12.11.

Assisting overseas regulators

2.16 The FSA views co-operation with its overseas counterparts as an essential part of its regulatory functions. Section 354 of the *Act* imposes a duty on the FSA to take such steps as it considers appropriate to co-operate with others who exercise functions similar to its own. This duty extends to authorities in the UK and overseas. In fulfilling this duty the FSA may share information which it is not prevented from disclosing, including information obtained in the course of the FSA's own investigations, or exercise certain of its powers under Part XI of the *Act*. Further details of the FSA's powers to assist overseas regulators are provided at *EG* 3.12 – 3.15 (Investigations to assist overseas authorities), *EG* 4.8 (Use of statutory powers to require the production of documents, the provision of information or the answering of questions), *EG* 4.25 – 4.27 (Interviews in response to a request from an overseas regulator), and *EG* 8.18 – 8.25 (Exercising the power under section 47 to vary or cancel a firm's part IV permission in support of an overseas regulator). The FSA's statement of policy in relation to interviews which representatives of overseas regulators attend and participate in is set out in *DEPP* 7.

Sources of cases

2.17 The FSA may be alerted to possible contraventions or breaches by complaints from the public or *firms*, by referrals from other authorities or through its own enquiries and supervisory activities. *Firms* may also bring their own contraventions to the FSA's attention, as they are obliged to do under Principle 11 of the *Principles for Businesses* and *rules* in the FSA's Supervision manual.

Enforcement and the FSA's Principles for Businesses ('the Principles')

2.18 The FSA's approach to regulation involves a combination of high-level principles and detailed rules and guidance. While this broad structure is both necessary and desirable, the FSA is moving towards a more principles-based approach. This is because the FSA believes an approach that is based less on detailed rules and that focuses more on outcomes will allow it to achieve its *regulatory objectives* in a more efficient and effective way. The FSA regards the increased emphasis on the *Principles* as a development of its current approach rather than a fundamental change of direction.

2.19 This policy approach is leading to increased focus on principles-based enforcement action. The use of the *Principles* in enforcement cases is far from new. They have been used regularly in an enforcement context over many years. However, as part of its overall strategy in this area, the FSA will be giving more prominence to the *Principles* including, in appropriate cases, taking enforcement action on the basis of the *Principles* alone (see also *DEPP* 6.2.14 G). This will have the benefit of providing further clear examples of how the *Principles* work in practice.

2.20 The FSA wishes to encourage firms to exercise judgement about, and take responsibility for, what the *Principles* mean for them in terms of how they conduct their business. But we also recognise the importance of an environment in which *firms* understand what is expected of them. So we have indicated that *firms* must be able reasonably to predict, at the time of the action concerned, whether the conduct would breach the *Principles*. This has sometimes been described as the "reasonable predictability test" or "condition of predictability", but it would be wrong to think of this as a legal test to be met in deciding whether there has been a breach of FSA rules. Rather, our intention has been to acknowledge that firms may comply with the *Principles* in different ways; and to indicate that the FSA will not take enforcement action unless it was possible to determine at the time that the relevant conduct fell short of our requirements.

2.21 To determine whether there has been a failure to comply with a *Principle*, the standards we will apply are those required by the *Principles* at the time the conduct took place. The FSA will not apply later, higher standards to behaviour when deciding whether to take enforcement action for a breach of the *Principles.* Importantly, however, where conduct falls below expected standards the FSA considers that it is legitimate for consequences to follow, even if the conduct is widespread within the industry or the *Principle* is expressed in general terms.

FSA guidance and supporting materials

2.22 The FSA uses *guidance* and other materials to supplement the *Principles* where it considers this would help *firms* to decide what action they need to take to meet the necessary standard.

2.23 *Guidance* is not binding on those to whom the FSA's *rules* apply. Nor are the variety of materials (such as case studies showing good or bad practice, FSA speeches, and generic letters written by the FSA to Chief Executives in particular sectors) published to support the rules and *guidance* in the Handbook. Rather, such materials are intended to illustrate ways (but not the only ways) in which a person can comply with the relevant rules.

2.24 *DEPP* 6.2.1(4) G explains that the FSA will not take action against someone where we consider that they have acted in accordance with what we have said. However, *guidance* does not set out the minimum standard of conduct needed to comply with a rule, nor is there any presumption that departing from *guidance* indicates a breach of a rule. If a *firm* has complied with the *Principles* and other rules, then it does not matter whether it has also complied with other material the FSA has issued.

2.25 *Guidance* and supporting materials are, however, potentially relevant to an enforcement case and a decision maker may take them into account in considering the matter. Examples of the ways in which the FSA may seek to use *guidance* and supporting materials in an enforcement context include:

(1) To help assess whether it could reasonably have been understood or predicted at the time that the conduct in question fell below the standards required by the *Principles*.

(2) To explain the regulatory context.

(3) To inform a view of the overall seriousness of the breaches e.g. the decision maker could decide that the breach warranted a higher penalty in circumstances where the FSA had written to chief executives in the sector in question to reiterate the importance of ensuring a particular aspect of its business complied with relevant regulatory standards.

(4) To inform the consideration of a *firm's* defence that the FSA was judging the *firm* on the basis of retrospective standards.

(5) To be considered as part of expert or supervisory statements in relation to the relevant standards at the time.

2.26 The extent to which *guidance* and supporting materials are relevant will depend on all the circumstances of the case, including the type and accessibility of the statement and the nature of the *firm's* defence. It is for the decision maker (see paragraphs 2.37 to 2.39) - whether the *RDC*, *Tribunal* or an executive decision maker - to determine this on a case-by-case basis.

2.27 The FSA may take action in areas in which it has not issued *guidance* or supporting materials.

Industry guidance

2.28 The FSA recognises that Industry Guidance has an important part to play in a principles-based regulatory environment, and that firms may choose to follow such guidance as a means of seeking to meet the FSA's requirements. This will be true especially where Industry Guidance has been 'confirmed' by the FSA. *DEPP* 6.2.1(4) G confirms that, as with FSA *guidance* and supporting materials, the FSA will not take action against a firm for behaviour that we consider is in line with FSA-confirmed Industry Guidance that was current when the conduct took place.

2.29 Equally, however, FSA-confirmed Industry Guidance is not mandatory. The FSA does not regard adherence to Industry Guidance as the only means of complying with FSA rules and *Principles*. Rather, it provides examples of behaviour which meets the FSA's requirements; and non-compliance with confirmed Industry Guidance creates no presumption of a breach of those requirements.

2.30 Industry Guidance may be relevant to an enforcement case in ways similar to those described at paragraph 2.25. But the FSA is aware of the concern that firms must have scope to exercise their own judgement about what FSA rules require, and that Industry Guidance should not become a new prescriptive regime in place of detailed FSA rules. This, and the specific status of FSA-confirmed Industry Guidance, will be taken into account when the FSA makes judgements about the relevance of Industry Guidance in enforcement cases.

Senior management responsibility

2.31 The FSA is committed to ensuring that senior managers of *firms* fulfil their responsibilities. The FSA expects senior management to take responsibility for ensuring *firms* identify risks, develop appropriate systems and controls to manage those risks, and ensure that the systems and controls are effective in practice. The FSA will not pursue senior managers where there is no personal culpability. However, where senior managers are themselves responsible for misconduct, the FSA will, where appropriate, bring cases against individuals as well as *firms*. The FSA believes that deterrence will most effectively be achieved by bringing home to such individuals the consequences of their actions. The FSA's policy on disciplinary action against senior management and against other *approved persons* under section 66 of the *Act* is set out in *DEPP* 6.2.4 G to *DEPP* 6.2.9 G. The FSA's policy on prohibition and withdrawal of approval is set out out in chapter 9 of this guide.

2.32 The FSA recognises that cases against individuals are very different in their nature from cases against corporate entities and the FSA is mindful that an individual will generally face greater risks from enforcement action, in terms of financial implications, reputation and livelihood than would a corporate entity. As such, cases against individuals tend to be more strongly contested, and at many practical levels are harder to prove. They also take longer to resolve. However, taking action against individuals sends an important message about the FSA's *regulatory objectives* and priorities and the FSA considers that such cases have important deterrent values. The

FSA is therefore committed to pursuing appropriate cases robustly, and will dedicate sufficient resources to them to achieve effective outcomes.

Co-operation

2.33 An important consideration before an enforcement investigation and/or enforcement action is taken forward is the nature of a *firm's* overall relationship with the FSA and whether, against that background, the use of enforcement tools is likely to further the FSA's aims and objectives. So, for any similar set of facts, using enforcement tools will be less likely if a *firm* has built up over time a strong track record of taking its senior management responsibilities seriously and been open and communicative with the FSA. In addition, a *firm's* conduct in response to the specific issue which has given rise to the question of whether enforcement tools should be used will also be relevant. In this respect, relevant matters may include whether the *person* has self-reported, helped the FSA establish the facts and/or taken remedial action such as addressing any systems and controls issues and compensating any consumers who have lost out. Such matters will not, however, necessarily mean that enforcement tools will not be used. The FSA has to consider each case on its merits and in the wider regulatory context, and any such steps cannot automatically lead to no enforcement sanction. However, they may in any event be factors which will mitigate the penalty.

2.34 On its web site, the FSA has given anonymous examples of where it has decided not to investigate or take enforcement action in relation to a possible *rule* breach because of the way in which the *firm* has conducted itself when putting the matter right. This is part of an article entitled 'The benefits to firms and individuals of co-operating with the FSA'[2]. However, in those cases where enforcement action is not taken and/or a formal investigation is not commenced, the FSA will expect the *firm* to act promptly to take the necessary remedial action agreed with its supervisors to deal with the FSA's concerns. If the *firm* does not do this, the FSA may take disciplinary or other enforcement action in respect of the original contravention.

Late reporting or non-submission of reports to the FSA

2.35 The FSA attaches considerable importance to the timely submission by *firms* of reports required under FSA rules. This is because the information contained in such reports is essential to the FSA's assessment of whether a *firm* is complying with the requirements and standards of the regulatory system and to the FSA's understanding of that *firm's* business. So, in the majority of cases involving non-submission of reports or repeated failure to submit complete reports on time, the FSA considers that it will be appropriate to seek to cancel the *firm's permission*. Where the FSA does not cancel a *permission*, it may take action for a financial penalty against a *firm* that submits a report after the due date (see *DEPP* 6.6.1 G to *DEPP* 6.6.5 G).

Legal review

2.36 Before a case is referred to the *RDC*, it will be subject to a legal review by a lawyer who has not been a part of the investigation team. This will help to ensure that there

[2] http://www.fsa.gov.uk/Pages/doing/regulated/law/focus/co-operating.shtml

is consistency in the way in which our cases are put and that they are supported by sufficient evidence. A lawyer who has not been a part of the investigation team will also review w*arning notices* before they are submitted to the *settlement decision makers*.

Decision making in the context of regulatory enforcement action

2.37 When the FSA is proposing to exercise its regulatory enforcement powers, the *Act* generally requires the FSA to give *statutory notices* (depending on the nature of the action, a *warning notice* and *decision notice* or *supervisory notice*) to the subject of the action. The person to whom a *warning notice* or *supervisory notice* is given has a right to make representations on the FSA's proposed decision.

2.38 The procedures the FSA will follow when giving *supervisory notices, warning notices* and *decision notices* are set out in *DEPP* 1 to 5. Under these procedures, the decisions to issue such notices in contested enforcement cases are generally taken by the *RDC*, an FSA Board committee that is appointed by, and accountable to, the FSA Board for its decisions generally. Further details about the *RDC* can be found in *DEPP* 3 and on the pages of the FSA web site relating to the *RDC*.[3] However, decisions on settlements and *statutory notices* arising from them are taken by two members of FSA senior management of at least director level, under a special settlement decision procedure (see chapter 5).

2.39 A *person* who receives a *decision notice* or *supervisory notice* has a right to refer the matter to the *Tribunal* within prescribed time limits. The *Tribunal* is independent of the FSA and members of the *Tribunal* are appointed by the Lord Chancellors Department. Where a matter has been referred to it, the *Tribunal* will determine what action, if any, it is appropriate for the FSA to take in relation to that matter. Further details about the *Tribunal* can be found in an item on the *Tribunal* on the Enforcement pages of the FSA web site[4] and on the *Tribunal's* own web site[5].

[3] http://www.fsa.gov.uk/Pages/About/Who/board/committees/RDC/index.shtml

[4] http://www.fsa.gov.uk/pages/doing/regulated/law/focus/tribunal.shtml

[5] http://www.financeandtaxtribunals.gov.uk/

3 Use of information gathering and investigation powers

3.1 The FSA has various powers under sections 97, 165 to 169 and 284 of the *Act* to gather information and appoint investigators, and to require the production of a report by a *skilled person*. In any particular case, the FSA will decide which powers, or combination of powers, are most appropriate to use having regard to all the circumstances. Further comments on the use of these powers are set out below.

3.1A Information may also be provided to the FSA voluntarily. For example, *firms* may at times commission an internal investigation or a report from an external law firm or other professional adviser and decide to pass a copy of this report to the FSA. Such reports can be very helpful for the FSA in circumstances where enforcement action is anticipated or underway. The FSA's approach to using firm-commissioned reports in an enforcement context is set out at the end of this chapter.

Information requests (section 165)

3.2 The FSA may use its section 165 power to require information and documents from *firms* to support both its supervisory and its enforcement functions.

3.3 An officer with authorisation from the FSA may exercise the section 165 power to require information and documents from *firms*. This includes an FSA employee or an agent of the FSA.

Reports by skilled persons (section 166)

3.4 Under section 166 of the *Act*, the FSA has a power to require a *firm* and certain other persons to provide a report by a *skilled person*. The FSA may use its section 166 power to require reports by *skilled persons* to support both its supervision and enforcement functions.

3.5 The factors the FSA will consider when deciding whether to use the section 166 power include:

(1) If the FSA's objectives for making further enquiries are predominantly for the purposes of fact finding i.e. gathering historic information or evidence for determining whether enforcement action may be appropriate, the FSA's information gathering and investigation powers under sections 167 and 168 of the *Act* are likely to be more effective and more appropriate than the power under section 166.

(2) If the FSA's objectives include obtaining expert analysis or recommendations (or both) for, say, the purposes of seeking remedial action, it may be appropriate to use the power under section 166 instead of, or in conjunction with, the FSA's other available powers.

3.6 Where it exercises this power, the FSA will make clear both to the *firm* and to the *skilled person* the nature of the concerns that led the FSA to decide to appoint a *skilled person* and the possible uses of the results of the report. But a report the FSA commissions for purely diagnostic purposes could identify issues which could lead to the appointment of an investigator and/or enforcement action.

3.7 Chapter 5 of the FSA's Supervision manual (Reports by skilled persons) contains *rules* and guidance that will apply whenever the FSA uses the section 166 power.

Investigations into general and specific concerns (sections 167 and 168)

3.8 Where the FSA has decided that an investigation is appropriate (see chapter 2) and it appears to it that there are circumstances suggesting that contraventions or offences set out in section 168 may have happened, the FSA will normally appoint investigators pursuant to section 168. Where the circumstances do not suggest any specific breach or contravention covered by section 168, but, the FSA still has concerns about a *firm*, an *appointed representative*, a *recognised investment exchange* or an *unauthorised incoming ECA provider*, such that it considers there is good reason to conduct an investigation into the nature, conduct or state of the *person's* business or a particular aspect of that business, or into the ownership or control of an *authorised person*, the FSA may appoint investigators under section 167.

3.9 In some cases involving both general and specific concerns, the FSA may consider it appropriate to appoint investigators under both section 167 and section 168 at the outset. Also, where, for example, it has appointed investigators under section 167, it may subsequently decide that it is appropriate to extend the appointment to cover matters under section 168 as well.

Official listing investigations (section 97)

3.10 If the FSA has decided to carry out an investigation where there are circumstances suggesting that contraventions set out in section 97 may have happened, it will normally appoint investigators pursuant to that section. An investigator appointed under section 97 is treated under the *Act* as if they were appointed under section 167(1).

Investigations into collective investment schemes (section 284)

3.11 The FSA may appoint investigators under section 284 to conduct an investigation into the affairs of a *collective investment scheme* if it appears to it that it is in the interests of the participants or general participants to do so or that the matter is of public concern.

Investigations to assist overseas authorities (section 169)

3.12 The FSA's power to conduct investigations to assist overseas authorities is contained in section 169 of the *Act*. The section provides that at the request of an *overseas regulator*, the FSA may use its power under section 165 to require the production of documents or the provision of information under section 165 or to appoint a person to investigate any matter.

3.13 If the *overseas regulator* is a *competent authority* and makes a request in pursuance of any Community obligation, section 169(3) states that the FSA must, in deciding whether or not to exercise its investigative power, consider whether the exercise of that power is necessary to comply with that obligation.

3.14 Section 169(4) and (5) set out factors that the FSA may take into account when deciding whether to use its investigative powers. However, these provisions do not apply if the FSA considers that the use of its investigative powers is necessary to comply with a Community obligation.

3.15 When it considers whether to use its investigative power, and whether section 169(4) applies, the FSA will first consider whether it is able to assist without using its formal powers, for example by obtaining the information voluntarily. Where that is not possible, the FSA may take into account all of the factors in section 169(4), but may give particular weight to the seriousness of the case and its importance to persons in the United Kingdom, and to the public interest.

Liaison where other authorities have an interest

3.16 The FSA has agreed guidelines that establish a framework for liaison and cooperation in cases where certain other UK authorities have an interest in investigating or prosecuting any aspect of a matter that the FSA is considering for investigation, is investigating or is considering prosecuting. These guidelines are set out in Annex 2 to this guide.

FSA approach to firms conducting their own investigations in anticipation of FSA enforcement action.

Firm-commissioned reports: the desirability of early discussion and agreement where enforcement is anticipated

3.17 The FSA recognises that there are good reasons for *firms* wishing to carry out their own investigations. This might be for, for example, disciplinary purposes, general good management, or operational and risk control. The *firm* needs to know the extent of any problem, and it may want advice as to what immediate or short-term measures it needs to take to mitigate or correct any problems identified. The FSA encourages this proactive approach and does not wish to interfere with a *firm's* legitimate procedures and controls.

3.18 A *firm's* report – produced internally or by an external third party – can clearly assist the *firm*, but may also be useful to the FSA where there is an issue of regulatory concern. Sharing the outcome of an investigation can potentially save time and resources for both parties, particularly where there is a possibility of the FSA taking enforcement action in relation to a *firm's* perceived misconduct or failing. This does not mean that *firms* are under any obligation to share the content of legally privileged reports they are given or advice they receive. It is for the *firm* to decide whether to provide such material to the FSA. But a *firm's* willingness to volunteer the results of its own investigation, whether protected by legal privilege or otherwise, is welcomed by the FSA and is something the FSA may take into account when deciding what action to take, if any. (The FSA's approach to deciding whether to take action is described in more detail in *DEPP* 6.2 and paragraph 2.4 of this Guide.)

3.19 Work done or commissioned by the *firm* does not fetter the FSA's ability to use its statutory powers, for example to require a skilled person's report under section 166 of the *Act* or to carry out a formal enforcement investigation; nor can a report commissioned by the *firm* be a substitute for formal regulatory action where this is needed or appropriate. But even if formal action is needed, it may be that a report could be used to help the FSA decide on the appropriate action to take and may narrow the issues or obviate the need for certain work.

3.20 The FSA invites *firms* to consider, in particular, whether to discuss the commissioning and scope of a report with FSA staff where:

(1) *firms* have informed the FSA of an issue of potential regulatory concern, as required by *SUP* 15; or

(2) the FSA has indicated that an issue or concern has or may result in a referral to Enforcement.

3.21 The FSA's approach in commenting on the proposed scope and purpose of the report will vary according to the circumstances in which the report is commissioned; it does not follow that the FSA will want to be involved in discussing the scope of a report in every situation. But if the *firm* anticipates that it will proactively disclose a report to the FSA in the context of an ongoing or prospective enforcement investigation, then the potential use and benefit to be derived from the report will be greater if the FSA has had the chance to comment on its proposed scope and purpose.

3.22 Some themes or issues are common to any discussion about the potential use or value of a report to the FSA. These include:

(1) to what extent the FSA will be able to rely on the report in any subsequent enforcement proceedings;

(2) to what extent the FSA will have access to the underlying evidence or information that was relied upon in producing the report;

(3) where legal privilege or other professional confidentiality is claimed over any material gathered or generated in the investigation process, to what extent such material may nevertheless be disclosed to the FSA, on what basis and for what purposes the FSA may use that material;

(4) what approach will be adopted to establishing the relevant facts and how evidence will be recorded and retained;

(5) whether any conflicts of interest have been identified and whether there are proposals to manage them appropriately;

(6) whether the report will describe the role and responsibilities of identified individuals;

(7) whether the investigation will be limited to ascertaining facts or will also include advice or opinions about breaches of FSA rules or requirements;

(8) how the *firm* intends to inform the FSA of progress and communicate the results of the investigation; and

(9) timing.

3.23 In certain circumstances the FSA may prefer that a *firm* does not commission its own investigation (whether an internal audit report or a report by external advisers) because action by the *firm* could itself be damaging to an FSA investigation. This is true in particular of criminal investigations, where alerting the suspects could have adverse consequences. For example, where the FSA suspects that individuals are abusing positions of trust within financial institutions and that an insider dealing ring is operating, it might notify the relevant *firm* but would not want the *firm* to embark on its own investigation: to do so would alert those under investigation and prejudice on-going monitoring of the suspects and other action. *Firms* are therefore encouraged to be alive to the possibility that their own investigations could prejudice or hinder a subsequent FSA investigation, and, if in doubt, to discuss this with the FSA. The FSA recognises that *firms* may be under time and other pressures to establish the relevant facts and implications of possible misconduct, and will have regard to this in discussions with the *firm*.

3.24 Nothing in paragraphs 3.17 to 3.23 extends or increases the scope of the existing duty to report facts or issues to the FSA in accordance with *SUP* 15 or *Principle* 11.

Firm-commissioned reports: material gathered

3.25 Where a *firm* does conduct or commission an investigation, it is very helpful if the *firm* maintains a proper record of the enquiries made and interviews conducted. This will inform the FSA's judgment about whether any further work is needed and, if so, where the FSA's efforts should be focused.

3.26 How the results of an investigation are presented to the FSA may differ from case to case; the FSA acknowledges that different circumstances may call for different approaches. In this sense, one size does not fit all. The FSA will take a pragmatic and flexible approach when deciding how to receive the results of an investigation. However, if the FSA is to rely on a report as the basis for taking action, or not taking action, then it is important that the *firm* should be prepared to give the FSA underlying material on which the report is based as well as the report itself. This includes, for example, notes of interviews conducted by the lawyers, accountants or other professional experts carrying out the investigation.

3.27 The FSA is not able to require the production of "protected items", as defined in the *Act*, but it is not uncommon for there to be disagreement with *firms* about the scope of this protection. Arguments about whether certain documents attract privilege tend to be time-consuming and delay the progress of an investigation. If a *firm* decides to give a report to the FSA, then the FSA considers that the greatest mutual benefit is most likely to flow from disclosure of the report itself and any supporting papers. A reluctance to disclose these source materials will, in the FSA's opinion, devalue the usefulness of the report and may require the FSA to undertake additional enquiries.

Firm-commissioned reports: FSA use of reports and the protection of privileged and confidential material

3.28 For reasons that the FSA can understand, *firms* may seek to restrict the use to which a report can be put, or assert that any legal privilege is waived only on a limited basis and that the *firm* retains its right to assert legal privilege as the basis for non-disclosure in civil proceedings against a private litigant.

3.29 The FSA understands that the concept of a limited waiver of legal privilege is not one which is recognised in all jurisdictions; the FSA considers that English law does permit such "limited waiver" and that legal privilege could still be asserted against third parties notwithstanding disclosure of a report to the FSA. However, the FSA cannot accept any condition or stipulation which would purport to restrict its ability to use the information in the exercise of the FSA's statutory functions. In this sense, the FSA cannot 'close its eyes' to information received or accept that information should, say, be used only for the purposes of supervision but not for enforcement.

3.30 This does not mean that information provided to the FSA is unprotected. The FSA is subject to strict statutory restrictions on the disclosure of confidential information (as defined in section 348 of the *Act*), breach of which is a criminal offence (under section 352 of the *Act*). Reports and underlying materials provided voluntarily to the FSA by a *firm*, whether covered by legal privilege or not, are confidential for these purposes and benefit from the statutory protections.

3.31 Even in circumstances where disclosure of information would be permitted under the "gateways" set out in the Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations, the FSA will consider carefully whether it would be appropriate to disclose a report provided voluntarily by a *firm*. The FSA appreciates that *firms* feel strongly about the importance of maintaining confidentiality, and that *firms* are more likely to volunteer information to the regulator when they know that the regulator is mindful of this sensitivity and the impact of potential disclosure. Accordingly, if the FSA contemplates disclosing a report voluntarily provided by a *firm*, the *firm* will normally be notified and given the opportunity to make representations about the proposed disclosure. The exceptions to this include circumstances where disclosure is urgently needed, where notification might prejudice an investigation or defeat the purpose for which the information had been requested, or where notification would be inconsistent with the FSA's international obligations.

4 Conduct of investigations

Notifying the person under investigation where notice is a requirement under section 170

4.1 The FSA will always give written notice of the appointment of investigators to the *person* under investigation if it is required to give such notice under section 170 of the *Act*. In such cases, if there is a subsequent change in the scope or conduct of the investigation and, in the FSA's opinion, the *person* under investigation is likely to be significantly prejudiced if not made aware of this, that *person* will be given written notice of the change. It is impossible to give a definitive list of the circumstances in which a *person* is likely to be significantly prejudiced by not being made aware of a change in the scope or conduct of an investigation. However, this may include situations where there may be unnecessary costs from dealing with an aspect of an investigation which the FSA no longer intends to pursue.

Notifying the person under investigation where notice is not required under the Act

4.2 The *Act* does not always require the FSA to give written notice of the appointment of investigators, for example, where investigators are appointed as a result of section 168(1) or (4) of the *Act* and the FSA believes that the provision of notice would be likely to result in the investigation being frustrated, or where investigators are appointed as a result of section 168(2) of the *Act*.

4.3 Although the FSA is not required to give written notice of the appointment of investigators appointed as a result of section 168(2), when it becomes clear who the *person* under investigation is, the FSA will, nevertheless, normally notify them that they are under investigation when it exercises its statutory powers to require information from them, providing such notification will not, in the FSA's view, prejudice the FSA’s ability to conduct the investigation effectively.

Notification where a particular person is not yet under investigation

4.4 In investigations into possible *insider dealing*, *market abuse*, *misleading statements and practices offences*, breaches of the *general prohibition*, the restriction on *financial promotion*, or the prohibition on promoting *collective investment schemes*, the investigator may not know the identity of the perpetrator or may be looking into market circumstances at the outset of the investigation rather than investigating a particular *person*. In those circumstances, the FSA will give an indication of the nature and subject matter of its investigation to those who are required to provide information to assist with the investigation. As soon as a *person* becomes the focus of the FSA’s enquiries, the FSA will consider whether it is appropriate to notify that *person* that they are under investigation. The FSA will usually notify them when it exercises its statutory powers to require information from them unless doing so would prejudice the FSA’s ability to conduct the investigation effectively.

Appointment of additional investigators

4.5 In some cases, the FSA will appoint an additional investigator or additional investigators during the course of an investigation. If this occurs and the FSA has previously told the subject it has appointed investigators, then the FSA will normally give the person written notice of the appointment(s).

Notice of termination of investigations

4.6 Except where the FSA has issued a *warning notice*, and the FSA has subsequently discontinued the proceedings, the *Act* does not require the FSA to provide notification of the termination of an investigation or subsequent enforcement action. However, where the FSA has given a *person* written notice that it has appointed an investigator and later decides to discontinue the investigation without any present intention to take further action, it will confirm this to the *person* concerned as soon as it considers it is appropriate to do so, bearing in mind the circumstances of the case.

What a subject of investigation can say to third parties

4.7 As is explained in the chapter of this guide on publicity (chapter 6), the FSA will not normally make public the fact that it is or is not investigating a matter and its expectation is that the *person* under investigation will also treat the matter as confidential. However, subject to the restrictions on disclosure of confidential information in section 348 of the *Act*, this does not stop the *person* under investigation from seeking professional advice or making their own enquiries into the matter, from giving their auditors appropriate details of the matter or from making notifications required by law or contract.

Use of statutory powers to require the production of documents, the provision of information or the answering of questions

4.8 The FSA's standard practice is generally to use statutory powers to require the production of documents, the provision of information or the answering of questions in interview. This is for reasons of fairness, transparency and efficiency. It will sometimes be appropriate to depart from this standard practice, for example:

(1) For suspects or possible suspects in criminal or *market abuse* investigations, the FSA may prefer to question that *person* on a voluntary basis, possibly under caution. In such a case, the interviewee does not have to answer but if they do, those answers may be used against them in subsequent proceedings, including criminal or *market abuse* proceedings.

(2) In the case of third parties with no professional connection with the financial services industry, such as the victims of an alleged fraud or misconduct, the FSA will usually seek information voluntarily.

(3) In some cases, the FSA is asked by *overseas regulators* to obtain documents or conduct interviews on their behalf. In these cases, the FSA will not necessarily adopt its standard approach as it will consider with the *overseas regulator* the most appropriate method for obtaining evidence for use in their country.

4.9 *Firms* and *approved persons* have an obligation to be open and co-operative with the FSA (as a result of Principle 11 for Businesses and Statement of Principle 4 for Approved Persons respectively). The FSA will make it clear to the *person* concerned whether it requires them to produce information or answer questions under the *Act* or whether the provision of answers is purely voluntary. The fact that the *person* concerned may be a regulated person does not affect this.

4.10 The FSA will not bring disciplinary proceedings against a *person* under the above *Principles* simply because, during an investigation, they choose not to attend or answer questions at a purely voluntary interview. However, there may be circumstances in which an adverse inference may be drawn from the reluctance of a *person* (whether or not they are a *firm* or *approved person*) to participate in a voluntary interview.

4.11 If a *person* does not comply with a requirement imposed by the exercise of statutory powers, they may be held to be in contempt of court. The FSA may also choose to bring proceedings for breach of *Principle* 11 or *Statement of Principle* 4 as this is a serious form of non-cooperation.

Scoping discussions

4.12 For cases involving *firms* or *approved persons*, the FSA will generally hold scoping discussions with the *firm* or individuals concerned close to the start of the investigation (and may do so in other cases). The purpose of these discussions is to give the *firm* or individuals concerned in the investigation an indication of: why the FSA has appointed investigators (including the nature of and reasons for the FSA's concerns); the scope of the investigation; how the process is likely to unfold; the individuals and documents the team will need access to initially and so on. There is a limit, however, as to how specific the FSA can be about the nature of its concerns in the early stages of an investigation. The FSA team for the purposes of the scoping discussions will normally include the supervisor if the subject is a *firm* which is relationship-managed.

4.13 In addition to the initial scoping discussions, there will be an ongoing dialogue with the *firm* or individuals throughout the investigative process. Where the nature of the FSA's concerns changes significantly from that notified to the person under investigation and the FSA, having reconsidered the case, is satisfied that it is appropriate in the circumstances to continue the investigation, the FSA will notify the person of the change in scope.

Involvement of FSA supervisors during the investigation phase

4.14 As a general rule, the FSA supervisors of a *firm* are not directly involved in an enforcement investigation. This approach has its advantages in that it maintains a clear division between the conduct of the investigation on the one hand and the need to maintain the supervisory relationship with the *firm* on the other. However, this division of responsibility may mean that the investigation does not benefit as much as it might otherwise do from the knowledge of the *firm* or individuals that the supervisors will have built up, or from their general understanding of the *firm's* business or sector. Accordingly, the FSA takes the following general considerations into account in relation to the potential role of a supervisor in an investigation.

(1) While it is clearly essential for the day-to-day supervisory relationship to continue during the course of any enforcement action, this need not, of itself, preclude a *firm's* supervisor from assisting in an investigation.

(2) Such assistance will include: making the case team aware of the *firm's* history and compliance track record; the current supervisory approach to the area concerned; current issues with the *firm*; and acting as a sounding board on questions that emerge from the investigation about industry practices and standards.

(3) Equally, there may be circumstances where someone in the FSA other than the *firm's* supervisor can more effectively and efficiently provide information on the current supervisory approach to the area under investigation or current market standards. In this case it makes good sense for the FSA to draw on that other source of expertise.

(4) In the event that a *firm's* supervisor becomes part of the investigation team, the FSA will notify the firm of this in the normal way.

The timeframe for responding to information and document requirements

4.15 As delays in the provision of information and/or documents can have a significant impact on the efficient progression of an investigation, the FSA expects *persons* to respond to information and document requests in a timely manner to appropriate deadlines. When an investigation is complex (and the timetable allows), the FSA may decide to issue an information or document requirement in draft, allowing a specified period (of usually no more than three working days) for the *person* to comment on the practicality of providing the information or documentation by the proposed deadline. After considering any comments, the FSA will then confirm or amend the request. The FSA will not, however, send such a draft request where the request is straightforward and the FSA considers that it is reasonable to expect the information or documents to be made available within the FSA's specified timeframe.

4.16 Once it has formally issued a requirement (whether or not this has been preceded by a draft), the FSA will not usually agree to an extension of time for complying with the requirement unless compelling reasons are provided to support an extension request.

Approach to interviews and interview procedures

4.17 Paragraph 4.8 explains the FSA's approach to the use of its statutory powers to require, amongst other matters, individuals to be interviewed. The type of interview is a decision for the FSA.

4.18 A *person* required to attend an interview by the use of statutory powers has no entitlement to insist that the interview takes place voluntarily. If someone does not attend an interview required under the *Act*, then he can be dealt with by the court as if he were in contempt (where the penalties can be a fine, imprisonment or both).

4.19 Similarly, a *person* asked to attend an interview on a purely voluntary basis is not entitled to insist that he be served with a requirement. A *person* is not obliged to attend a voluntary interview or to answer questions put to them at that time. But they should be aware that in an appropriate case, an adverse inference may be drawn from the failure to attend a voluntary interview, or a refusal to answer any questions at such an interview.

Interviews generally

4.20 Where the FSA interviews a *person*, it will allow the *person* to be accompanied by a legal adviser, if they wish. The FSA will also, where appropriate, explain what use can be made of the answers in proceedings against them. Where the interview is tape-recorded, the *person* will be given a copy of the audio tape of the interview and, where a transcript is made, a copy of the transcript.

Interviews under caution

4.21 Individuals suspected of a criminal offence may be interviewed under caution. These interviews will be subject to all the safeguards of the relevant Police and Criminal Evidence Act Codes and are voluntary on the part of the suspect. The FSA will warn the suspect at the start of the interview of their right to remain silent (and the consequences of remaining silent) and will inform the suspect that they are entitled to have a legal adviser present. The FSA will also give a cautionary warning in similar terms to interviewees who are the subject of *market abuse* investigations.

Subsequent interviews

4.22 If a suspect has been interviewed by the FSA using statutory powers, before they are re-interviewed on a voluntary basis (under caution or otherwise), the FSA will explain the difference between the two types of interview. The FSA will also tell the individual about the limited use that can be made of their previous answers in criminal proceedings or in proceedings in which the FSA seeks a penalty for *market abuse* under Part VIII of the *Act*.

4.23 Conversely, where a suspect has been interviewed under caution, and the FSA later wishes to conduct a compulsory interview with them, the FSA will explain the difference between the two types of interview, and will notify the individual of the limited use that can be made of his answers in the compulsory interview.

Interviews under arrest

4.24 On occasion, where the police have a power of arrest, the FSA may make a request to the police for assistance to arrest the individual for questioning by the FSA (FSA investigators do not have powers of arrest), for example:

(1) where it appears likely that inviting an individual to attend on a voluntary basis would prejudice an ongoing investigation or risk the destruction of evidence or the dissipation of assets; or

(2) where a suspect declines an invitation to attend a voluntary interview.

The procedure the FSA may follow on such occasions in seeking assistance from the police is set out in a Memorandum of Understanding with the Association of Chief Police Officers of England, Wales and Northern Ireland dated 3 August 2005.[6]

Interviews in response to a request from an overseas regulator

[6] http://www.fsa.gov.uk/pubs/mou/fsacolp.pdf

4.25 Where the FSA has appointed an investigator in response to a request from an *overseas regulator*, it may, under section 169(7) of the *Act*, direct the investigator to allow a representative of that regulator to attend, and take part in, any interview conducted for the purposes of the investigation. However, the FSA may only use this power if it is satisfied that any information obtained by an *overseas regulator* as a result of the interview will be subject to safeguards equivalent to those in Part XXIII of the *Act* (section 169(8)).

4.26 The factors that the FSA may take into account when deciding whether to make a direction under section 169(7) include the following:

(1) the complexity of the case;

(2) the nature and sensitivity of the information sought;

(3) the FSA's own interest in the case;

(4) costs, where no Community obligation is involved, and the availability of resources; and

(5) the availability of similar assistance to UK authorities in similar circumstances.

4.27 Under section 169(9), the FSA is required to prepare a statement of policy with the approval of the Treasury on the conduct of interviews attended by representatives of *overseas regulators*. The statement is set out in *DEPP* 7.

Search and seizure powers

4.28 Under section 176 of the *Act*, the FSA has the power to apply to a justice of the peace for a warrant to enter premises where documents or information is held. The circumstances under which the FSA may apply for a search warrant include:

(1) where a *person* on whom an information requirement has been imposed fails (wholly or in part) to comply with it; or

(2) where there are reasonable grounds for believing that if an information requirement were to be imposed, it would not be complied with, or that the documents or information to which the information requirement relates, would be removed, tampered with or destroyed.

4.29 A warrant obtained pursuant to section 176 of the *Act* authorises a police constable or an FSA investigator in the company, and under the supervision of, a police constable, to do the following, amongst other things: to enter and search the premises specified in the warrant and take possession of any documents or information appearing to be documents or information of a kind in respect of which the warrant was issued or to take, in relation to any such documents or information, any other steps which may appear to be necessary for preserving them or preventing interference with them.

Preliminary findings letters and preliminary investigation reports

4.30 In cases where the FSA proposes to submit an investigation report to the *RDC* with a recommendation for regulatory action, the FSA’s usual practice is to send a preliminary findings letter to the subject of an investigation before the matter is referred to the *RDC*. The letter will normally annex the investigators' preliminary investigation report. Comment will be invited on the contents of the preliminary findings letter and the preliminary investigation report.

4.31 The FSA recognises that preliminary findings letters serve a very useful purpose in focussing decision making on the contentious issues in the case. This in turn makes for better quality and more efficient decision making. However, there are exceptional circumstances in which the FSA may decide it is not appropriate to send out a preliminary findings letter. This includes:

(1) where the subject consents to not receiving a preliminary findings letter; or

(2) where it is not practicable to send a preliminary findings letter, for example where there is a need for urgent action in the interests of consumer protection, restoring market confidence or reducing *financial crime* or if the whereabouts of the subject are unknown; or

(3) where the FSA believes that no useful purpose would be achieved in sending a preliminary findings letter, for example where it has otherwise already substantially disclosed its case to the subject and the subject has had an opportunity to respond to that case.

4.32 In cases where it is sent, the preliminary findings letter will set out the facts which the investigators consider relevant to the matters under investigation (normally, as indicated above, by means of an annexed preliminary investigation report). And it will invite the *person* concerned to confirm that those facts are complete and accurate, or to provide further comment. FSA staff will allow a reasonable period (normally 28 days) for a response to this letter, and will take into account any response received within the period stated in the letter. They are not obliged to take into account any response received outside that period.

4.33 Where the FSA has sent a preliminary findings letter and it then decides not to take any further action, the FSA will communicate this decision promptly to the person concerned.

5 Settlement

Settlement and the FSA – an overview

5.1 The FSA resolves many enforcement cases by settlement. Early settlement has many potential advantages as it can result, for example, in *consumers* obtaining compensation earlier than would otherwise be the case, the saving of FSA and industry resources, messages getting out to the market sooner and a public perception of timely and effective action. The FSA therefore considers it is in the public interest for matters to settle, and settle early, if possible.

5.2 The possibility of settlement does not, however, change the fact that enforcement action is one of the tools available to the FSA to secure our *regulatory objectives*. The FSA seeks to change the behaviour not only of those subject to the immediate action, but also of others who will be alerted to our concerns in a particular area. There is no distinction here between action taken following agreement with the subject of the enforcement action and action resisted by a firm before the *RDC*. In each case, the FSA must be satisfied that its decision is the right one, both in terms of the immediate impact on the subject of the enforcement action but also in respect of any broader message conveyed by the action taken.

5.3 Settlements in the FSA context are not the same as 'out of court' settlements in the commercial context. An FSA settlement is a regulatory decision, taken by the FSA, the terms of which are accepted by the *firm* or individual concerned. So, when agreeing the terms of a settlement, the FSA will carefully consider its *regulatory objectives* and other relevant matters such as the importance of sending clear, consistent messages through enforcement action, and will only settle in appropriate cases where the agreed terms of the decision result in acceptable regulatory outcomes. Redress to *consumers* who may have been disadvantaged by a *firm's* misconduct may be particularly important in this respect. Other than in exceptional circumstances, FSA settlements that give rise to the issue of a *final notice* or *supervisory notice* will result in some degree of publicity (see chapter 6), unlike commercial out of court settlements, which are often confidential.

5.4 In recognition of the value of early settlement, the FSA operates a scheme to award explicit discounts for early settlement of cases involving financial penalties. Details of the scheme, which applies only to settlement of cases where investigators were appointed on or after 20 October 2005, are set out in *DEPP* 6.7. This chapter provides some commentary on certain practical aspects of the operation of the scheme.

5.5 Decisions on settlements and *statutory notices* arising from them are taken by two members of FSA senior management of at least director level, rather than by the *RDC* (*DEPP* refers to these individuals as the '*settlement decision makers*'). Full details of the special decision making arrangements for settlements are set out in *DEPP* 5.

When settlement discussions may take place

5.6 Settlement discussions between FSA staff and the *person* concerned are possible at any stage of the enforcement process if both parties agree.

5.7 The FSA considers that in general, the earlier settlement discussions can take place the better this is likely to be from a public interest perspective. However, the FSA will only engage in such discussions once it has a sufficient understanding of the nature and gravity of the suspected misconduct or issue to make a reasonable assessment of the appropriate outcome. At the other end of the spectrum, the FSA expects that settlement discussions following a *decision notice* or *second supervisory notice* will be rare.

5.8 In the interests of efficiency and effectiveness, the FSA will set clear and challenging timetables for settlement discussions to ensure that they result in a prompt outcome and do not divert resources unnecessarily from progressing a case through the formal process. To this end, the FSA will aim to organise its resources so that the preparation for the formal process continues in parallel with any settlement discussions. The FSA will expect *firms* and others to give it all reasonable assistance in this regard.

The basis of settlement discussions

5.9 As described above, the FSA operates special decision-making arrangements under which members of FSA senior management take decisions on FSA settlements. This means that settlement discussions will take place without involving the *RDC*. The FSA would expect to hold any settlement discussions on the basis that neither FSA staff nor the *person* concerned would seek to rely against the other on any admissions or statements made if the matter is considered subsequently by the *RDC* or the *Tribunal*. This will not, however, prevent the FSA from following up, through other means, on any new issues of regulatory concern which come to light during settlement discussions. The *RDC* may be made aware of the fact negotiations are taking place if this is relevant, for example, to an application for an extension of the period for making representations.

5.10 If the settlement negotiations result in a proposed settlement of the dispute, FSA staff will put the terms of the proposed settlement in writing and agree them with the *person* concerned. The *settlement decision makers* will then consider the settlement under the procedures set out in *DEPP 5*. A settlement is also likely to result in the giving of *statutory notices* (see paragraphs 2.37 to 2.39).

Multiple parties and third party rights in enforcement action involving warning and decision notices

5.11 Enforcement cases often involve multiple parties, for example a *firm* and individuals in the *firm*. Enforcement action may be appropriate against just the *firm*, just the individuals or both. In some cases, it will not be possible to reach an acceptable settlement unless all parties are able to reach agreement.

5.12 Even where action is not taken against connected parties, these parties may have what the *Act* calls 'third party rights'. Broadly, if any of the reasons contained in a *warning notice* or *decision notice* identifies a *person* (the third party) other than the *person* to whom the notice is given, and in the opinion of the FSA is prejudicial to the third party, a copy of the notice must be given to the third party unless that *person* receives a separate *warning notice* or *decision notice* at the same time. The third party has the right to make representations and ultimately can refer the matter to the *Tribunal*. Any representations made by the third party in response to a *warning notice* or *decision* *notice* will be considered by the *settlement decision makers*, who will also decide whether to give the *decision notice* or *final notice*.

5.13 In practice, third party rights do not frequently cause undue difficulty for settlement, either because they do not arise at all or because the third party agrees not to exercise such rights.

The settlement discount scheme

5.14 The *settlement discount scheme* allows a reduction in a financial penalty that would otherwise be imposed on a *person* according to the stage at which the agreement is reached. Full details of the scheme are set out in *DEPP* 6.7.

5.15 Normally, where the outcome is potentially a financial penalty, the FSA will send a letter at an early point in the enforcement process to the subject of the investigation. This is what the FSA refers to as a stage 1 letter.

5.16 The scheme does not apply to civil or criminal proceedings brought in the courts, or to *public censure*, *prohibition orders*, withdrawal of *authorisation* or approval or the payment of compensation or redress.

5.17 There is no set form for a stage 1 letter though it will always explain the nature of the misconduct, the FSA's view on penalty, and the period within which the FSA expects any settlement discussions to be concluded. In some cases, a draft *statutory notice* setting out the alleged *rule* breaches and the proposed penalty may form part of the letter, to convey the substance of the case team's concerns and reasons for arriving at a particular penalty figure.

5.18 The timing of the stage 1 letter will vary from case to case. Sufficient investigative work must have taken place for the FSA to be able to satisfy itself that the settlement is the right regulatory outcome. In many cases, the FSA can send out the stage 1 letter substantially before the *person* concerned is provided with the FSA's preliminary investigation report (see paragraphs 4.30 to 4.33). The latest point the FSA will send a stage 1 letter is when the *person* is provided with the preliminary investigation report.

5.19 The FSA considers that 28 days following a stage 1 letter will normally be the 'reasonable opportunity to reach agreement as to the amount of penalty' before the expiry of stage 1 contemplated by *DEPP* 6.7.3**.** Extensions to this period will be granted in exceptional circumstances only.

Mediation

5.20 The FSA is committed to mediating appropriate cases; mediation and the involvement of a neutral mediator may help the FSA to reach an agreement with the *person* subject to enforcement action in circumstances where settlement might not otherwise be achieved or may not be achieved so efficiently and effectively.

5.21 Further information about the FSA's approach to mediation and the mediation process are set out on our web site.[7]

The relevance of settled cases to subsequent action

5.22 Decisions recorded in FSA *final notices* or *supervisory notices* will be taken into account in any subsequent case if the later case raises the same or similar issues to those considered by the FSA when it reached its earlier decision. Not to do so would expose the FSA to accusations of arbitrary and inconsistent decision-making. The need to look at earlier cases applies irrespective of whether the decisions were reached following settlement or consideration by the *RDC* or the *Tribunal*. This reflects the fact that a person's agreement to the action proposed by the FSA in the earlier case would not have relieved the FSA of the obligation to ensure that the final decision was the right regulatory outcome, both for the person concerned and more generally.

5.23 The FSA recognises the importance of consistency in its decision-making and that it must consider the approach previously taken to, say, the application of a particular rule or *Principle* in a given context. This applies equally to consideration by the *RDC* or by the *settlement decision makers* when they look at action taken by the FSA in earlier, similar, cases. This is not to say that the FSA cannot take a different view to that taken in the earlier case: the facts of two enforcement cases are very seldom identical, and it is also important that the FSA is able to respond to the demands of a changing and principles–based regulatory environment. But any decision to depart from the earlier approach will be made only after careful consideration of the reasons for doing so.

[7] http://www.fsa.gov.uk/pages/doing/regulated/law/focus/mediation.shtml

6 Publicity

Publicity during FSA investigations

6.1 The FSA will not normally make public the fact that it is or is not investigating a particular matter, or any of the findings or conclusions of an investigation except as described in other sections of this chapter. The following paragraphs deal with the exceptional circumstances in which the FSA may make a public announcement that it is or is not investigating a particular matter.

6.2 Where the matter in question has occurred in the context of a *takeover bid*, and the following circumstances apply, the FSA may make a public announcement that it is not investigating, and does not propose to investigate, the matter. Those circumstances are where the FSA:

(1) has not appointed, and does not propose to appoint, investigators; and

(2) considers (following discussion with the *Takeover Panel*) that such an announcement is appropriate in the interests of preventing or eliminating public uncertainty, speculation or rumour.

6.3 Where it is investigating any matter, the FSA will, in exceptional circumstances, make a public announcement that it is doing so if it considers such an announcement is desirable to:

(1) maintain public confidence in the *financial system* or the market; or

(2) protect *consumers* or investors; or

(3) prevent widespread malpractice; or

(4) help the investigation itself, for example by bringing forward witnesses; or

(5) maintain the smooth operation of the market.

In deciding whether to make an announcement, the FSA will consider the potential prejudice that it believes may be caused to any *persons* who are, or who are likely to be, a subject of the investigation.

6.4 The exceptional circumstances referred to above may arise where the matters under investigation have become the subject of public concern, speculation or rumour. In this case it may be desirable for the FSA to make public the fact of its investigation in order to allay concern, or contain the speculation or rumour. Where the matter in question relates to a *takeover bid*, the FSA will discuss any announcement beforehand with the *Takeover Panel*. Any announcement will be subject to the restriction on disclosure of *confidential information* in section 348 of the *Act*.

6.5 [deleted]

6.6 The FSA will not normally publish details of the information found or conclusions reached during its investigations. In many cases, statutory restrictions on the disclosure of information obtained by the FSA in the course of exercising its functions are likely to prevent publication (see section 348 of the *Act*). In exceptional circumstances, and where it is not prevented from doing so, the FSA may publish details. Circumstances in which it may do so include those where the fact that the FSA is investigating has been made public, by the FSA or otherwise, and the FSA subsequently concludes that the concerns that prompted the investigation were unwarranted. This is particularly so if the *firm* under investigation wishes the FSA to clarify the matter.

Publicity during, or upon the conclusion of regulatory action

6.7 For both *supervisory notices* (as defined in section 395(13)) which have taken effect[8] and *final notices*, section 391 of the *Act* requires the FSA to publish, in such manner as it considers appropriate, such information about the matter to which the notice relates as it considers appropriate. However, section 391 provides that the FSA cannot publish information if publication of it would, in its opinion, be unfair to the *person* with respect to whom the action was taken or prejudicial to *consumers*.

Final notices

6.8 The FSA will consider the circumstances of each case, but will ordinarily publicise enforcement action where this has led to the issue of a *final notice*. Publication will generally include placing the notice on the FSA web site and this will often be accompanied by a press release. The FSA will also consider what information about the matter should be included on the *FSA Register*. Additional guidance on the FSA's approach to the publication of information on the *FSA Register* in certain specific types of cases is set out at the end of this chapter.

6.9 However, as required by the *Act* (see paragraph 6.7 above), the FSA will not publish information if publication of it would, in its opinion, be unfair to the *person* in respect of whom the action is taken or prejudicial to the interests of *consumers*. It may make that decision where, for example, publication could damage market confidence or undermine market integrity in a way that could be damaging to the interests of *consumers*.

6.10 Publishing *final notices* is important to ensure the transparency of FSA decision-making; it informs the public and helps to maximise the deterrent effect of enforcement action. The FSA will review *final notices* and related press releases that are published on the FSA's web site after a period of six years. The FSA will determine at that time whether continued publication is appropriate, or whether notices and publicity should be removed or amended.

Supervisory notices varying a firm's Part IV permission on the FSA’s own initiative (see chapter 8 of this guide)

6.11 [deleted]

[8] Section 53(2) and section 391(8) of the *Act* define when a variation of permission under a supervisory notice takes effect

6.12 Publishing the reasons for variations of *Part IV permission* (and interventions), and maintaining an accurate public record, are important elements of the FSA's approach to its *consumer* protection objective. The FSA will always aim to balance both the interests of *consumers* and the possibility of unfairness to the *person* subject to the FSA's action. The FSA will publish relevant details of both fundamental and non-fundamental variations of *Part IV permission* and interventions which it imposes on *firms*. But it will use its discretion not to do so if it considers this would be unfair to the person on whom the variation is imposed or prejudicial to the interests of consumers. Publication will generally include placing the notice on the FSA web site and this may be accompanied by a press release. As with *final notices, supervisory notices* and related press releases that are published on the FSA's web site will be reviewed after a period of six years. The FSA will determine at that time whether continued publication is appropriate, or whether notices and related press releases should be removed or amended.

6.12A The FSA will amend the *FSA Register* to reflect a *firm's* actual *Part IV permission* following any variation.

Directions against ECA providers

6.13 This is discussed in paragraphs 19.37 and 19.38 of this guide.

Publicity in RDC cases

6.14 The Chairman of the *RDC*, or his relevant Deputy, will approve the contents of press releases to be published by the FSA in cases in which the decision to take action was made by the *RDC*, unless the *RDC's* decision is superseded by a decision of the *Tribunal*.

Publicity during, or upon the conclusion of civil action

6.15 Civil court proceedings nearly always take place in public from the time they begin. Therefore, civil proceedings for an *injunction* (see chapter 10) or a restitution order (see chapter 11), for example, will often be public as soon as they start.

6.16 The FSA considers it generally appropriate to publish details of its successful applications to the court for civil remedies including *injunctions* or restitution orders. For example, where the court has ordered an *injunction* to prohibit further illegal *regulated activity*, the FSA thinks it is appropriate to publicise this to tell *consumers* of the position and help them avoid dealing with the *person* who is the subject of the *injunction*. Similarly, a restitution order may be publicised to protect and inform *consumers* and maintain market confidence. However, there may be circumstances when the FSA decides not to publicise, or not to do this immediately. These circumstances might, for example, be where publication could damage confidence in the *financial system* or undermine market integrity in a way that would be prejudicial to the interests of *consumers*.

Publicity during, or upon the conclusion of criminal action (see chapter 12)

6.17 The FSA will normally publicise the outcome of public hearings in criminal prosecutions.

6.17A When conducting a criminal investigation the FSA will generally consider making a public announcement when suspects are arrested, when search warrants are executed and when charges are laid. A public announcement may also be made at other stages of the investigation when this is considered appropriate.

6.17B The FSA will always be very careful to ensure that any FSA publicity does not prejudice the fairness of any subsequent trial.

Behaviour in the context of takeover bid

6.18 Where the behaviour to which a *final notice*, civil action, or criminal action relates has occurred in the context of a *takeover bid*, the FSA will consult the *Takeover Panel* over the timing of publication if the FSA believes that publication may affect the timetable or outcome of that bid, and will give due weight to the *Takeover Panel's* views.

The FSA register: publication of prohibitions of individuals (see chapter 9)

6.19 Once the decision to make a *prohibition order* is no longer open to review, the FSA will consider what additional information about the circumstances of the *prohibition order* to include on the *FSA Register*. The FSA will balance any possible prejudice to the individual concerned against the interests of *consumer* protection. The FSA's normal approach to maintaining information about a *prohibition order* on the *FSA Register* is as follows:

(1) The FSA will maintain an entry on the *FSA Register* while a *prohibition order* is in effect. If the FSA grants an application to vary the order, it will make a note of the variation on the *FSA Register*.

(2) Where the FSA grants an application to revoke a *prohibition order*, it will make a note on the *FSA Register* that the order has been revoked giving reasons for the revocation. The availability to *firms* and *consumers* of a full record of FSA action taken in relation to an individual's fitness and propriety will help it in furthering its *regulatory objectives*. In particular, it will help with protecting *consumers* and the maintaining of confidence in the *financial system*.

(3) The FSA will maintain an annotated record of revoked *prohibition orders* for six years from the date of the revocation after which time it will remove the record from the *FSA Register*.

The FSA register: publication of disqualifications of auditors and actuaries (see chapter 15)

6.20 To help it fulfil its *regulatory objectives* of protecting *consumers* and promoting public awareness, the FSA will keep on the *FSA Register* a record of *firms* or individual auditors or actuaries who have been the subject of disqualification orders.

The FSA register: publication of disapplication orders against members of the professions (see chapter 16)

6.21 In general, the FSA considers that publishing relevant information about orders to disapply an exemption in respect of a member of a *designated professional body* will be in the interests of clients and *consumers*. The FSA will consider what additional information about the circumstances of the order to include on the record maintained on the *FSA Register* taking into account any prejudice to the *person* concerned and the interests of *consumer* protection.

6.22 The FSA's normal approach to maintaining information about a disapplication order on the *FSA Register* is as follows.

(1) While a disapplication order is in effect, the FSA will maintain a record of the order on the *FSA Register*. If the FSA grants an application to vary the order, a note of the variation will be made against the relevant entry on the *FSA Register*.

(2) The FSA's policy in relation to section 347(4) of the *Act* is that where an application to revoke an order is granted, it will make a note on the *FSA Register* saying that the order has been revoked giving reasons for its revocation. Having a full record of action the FSA has taken against *persons* granted an exemption under section 327 of the *Act* available will help the FSA to fulfil its *regulatory objectives* of protecting *consumers* and maintaining confidence in the *financial system*.

(3) This is why the FSA will maintain the annotated record of the disapplication order for a period of six years from the date of the revocation of the order, after which period the record will be removed from the record on the *FSA Register*.

7 Financial penalties and public censures

The FSA's use of sanctions

7.1 Financial penalties and *public censures* are important regulatory tools. However, they are not the only tools available to the FSA, and there will be many instances of non-compliance which the FSA considers it appropriate to address without the use of financial penalties or *public censures*. Having said that, the effective and proportionate use of the FSA's powers to enforce the requirements of the *Act*, the *rules* and the Statements of Principle for Approved Persons will play an important role in the FSA's pursuit of its *regulatory objectives*. Imposing financial penalties and *public censures* shows that the FSA is upholding regulatory standards and helps to maintain market confidence, promote public awareness of regulatory standards and deter *financial crime*. An increased public awareness of regulatory standards also contributes to the protection of *consumers*.

7.2 The FSA has the following powers to impose a financial penalty and to publish a *public censure*.

(1) It may publish a statement:

(a) against an *approved person* under section 66 of the *Act*;

(b) against an *issuer* under section 87M of the *Act*;

(c) against a *sponsor* under section 89 of the *Act*;

(d) where there has been a contravention of the Part VI rules, under section 91 of the *Act*;

(e) where there has been *market abuse*, against a *person* under section 123 of the *Act*; and

(f) against a *firm* under section 205 of the *Act*.

(2) It may impose a financial penalty:

(a) on an *approved person*, under section 66 of the *Act*;

(b) where there has been a contravention of the Part 6 rules, under section 91 of the *Act*;

(c) where there has been *market abuse*, on any *person*, under section 123 of the *Act*; and

(d) on a *firm*, under section 206 of the *Act*.

Alternatives to financial penalties and public censures

7.3 The FSA also has measures available to it where it considers it is appropriate to take protective or remedial action. These include:

(1) where a *firm's* continuing ability to meet the *threshold conditions* or where an *approved person's* fitness and propriety to perform the *controlled functions* to which his approval relates are called into question:

  (a) varying and/or cancelling of *permission* and the withdrawal of a *firm's* authorisation (see chapter 8); and

  (b) the withdrawal of an individual's status as an *approved person* and/or the prohibition of an individual from performing a specified function in relation to a *regulated activity* (see chapter 9).

(2) where the smooth operation of the market is, or may be, temporarily jeopardised or where protecting investors so requires, the FSA may suspend, with effect from such time as it may determine, the *listing* of any *securities* at any time and in such circumstances as it thinks fit (whether or not at the request of the *issuer* or its *sponsor* on its behalf);

(3) when the FSA is satisfied there are special circumstances which preclude normal regular dealings in any *listed securities*, it may cancel the *listing* of any *security*;

(4) where there are reasonable grounds to suspect non compliance with the *disclosure rules*, the FSA may require the suspension of trading of a financial instrument with effect from such time as it may determine; and

(5) where there are reasonable grounds for suspecting that a provision of Part VI of the *Act*, a provision contained in the *prospectus rules*, or any other provision made in accordance with the *Prospectus Directive* has been infringed, the FSA may:

  (a) suspend or prohibit the offer to the public of transferable securities as set out in section 87K of the *Act*; or

  (b) suspend or prohibit admission of transferable securities to trading on a regulated market as set out in section 87L of the *Act*.

FSA's statements of policy

7.4 The FSA's statement of policy in relation to the imposition of financial penalties is set out in *DEPP* 6.2 (Deciding whether to take action), *DEPP* 6.3 (Penalties for market abuse) and *DEPP* 6.4 (Financial penalty or public censure). The FSA's statement of policy in relation to the amount of a financial penalty is set out in *DEPP* 6.5 to *DEPP* 6.5D.

Apportionment of financial penalties

7.5 In a case where the FSA is proposing to impose a financial penalty on a *person* for two or more separate and distinct areas of misconduct, the FSA will consider whether it is appropriate to identify in the *final notice* how the penalty is apportioned between those separate and distinct areas. Apportionment will not however generally be appropriate in other cases.

Payment of financial penalties

7.6 Financial penalties must be paid within the period (usually 14 days) that is stated on the FSA's *final notice*. The FSA's policy in relation to reducing a penalty because its payment may cause a *person* serious financial hardship is set out in *DEPP* 6.5D.

7.7 [deleted]

7.8 Chapter 6 of the General Provisions module of the FSA Handbook contains rules prohibiting a *firm* or *member* from entering into, arranging, claiming on or making a payment under a *contract of insurance* that is intended to have, or has, the effect of indemnifying any *person* against a financial penalty.

7.9 Rule 1.5.33 in the FSA's Prudential Sourcebook for Insurers prohibits a *long-term insurer* (including a *firm* qualifying for *authorisation* under Schedule 3 or 4 to the *Act*), which is not a mutual, from paying a financial penalty from a long-term insurance fund.

Private warnings

7.10 In certain cases, despite concerns about a *person's* behaviour or evidence of a *rule* breach, the FSA may decide that it is not appropriate, having regard to all the circumstances of the case, to bring formal action for a financial penalty or *public censure*. This is consistent with the FSA's risk-based approach to enforcement. In such cases, the FSA may give a private warning to make the *person* aware that they came close to being subject to formal action.

7.11 Private warnings are a non-statutory tool. Fundamentally they are no different to any other FSA communication which criticises or expresses concern about a *person's* conduct. But private warnings are a more serious form of reprimand than would usually be made in the course of ongoing supervisory correspondence. A private warning requires that the FSA identifies and explains its concerns about a *person's* conduct and/or procedures, and tells the subject of the warning that the FSA has seriously considered formal steps to impose a penalty or censure. They are primarily used by the FSA as an enforcement tool, but they may also be used by other parts of the FSA.

7.12 Typically, the FSA might give a private warning rather than take formal action where the matter giving cause for concern is minor in nature or degree, or where the person has taken full and immediate remedial action. But there can be no exhaustive list of the conduct or the circumstances which are likely to lead to a private warning rather than more serious action. The FSA will take into account all the circumstances of the case before deciding whether a private warning is appropriate. Many of the criteria identified in *DEPP* 6 for determining whether the FSA should take formal action for a financial penalty or *public censure* will also be relevant to a decision about whether to give a private warning.

7.13 Generally, the FSA would expect to use private warnings in the context of *firms* and *approved persons*. However, the FSA may also issue private warnings in circumstances where the *persons* involved may not necessarily be authorised or approved. For example, private warnings may be issued in potential cases of *market abuse*; cases where the FSA has considered making a *prohibition order* or a disapplication order; or cases involving breaches of provisions imposed by or under Part VI of the *Act* (Official Listing).

7.14 In each case, the FSA will consider the likely impact of a private warning on the recipient and whether any risk that *person* poses to the *regulatory objectives* requires the FSA to take more serious action. Equally, where the FSA gives a private warning to an *approved person*, the FSA will consider whether it would be desirable and appropriate to inform the *approved person's firm* (or employer, if different) of the conduct giving rise to the warning and the FSA's response.

7.15 A private warning is not intended to be a determination by the FSA as to whether the recipient has breached the FSA's rules. However, private warnings, together with any comments received in response, will form part of the *person's* compliance history. In this sense they are no different to other FSA correspondence, but the weight the FSA attaches to a private warning is likely to be greater. They may therefore influence the FSA's decision whether to commence action for a penalty or censure in relation to future breaches. Where action is commenced in those circumstances, earlier private warnings will not be relied upon in determining whether a breach has taken place. However, if a *person* has previously been told about the FSA's concerns in relation to an issue, either by means of a private warning or in supervisory correspondence, then this can be an aggravating factor for the level of a penalty imposed in respect of a similar issue that is the subject of later FSA action.

7.16 Where the FSA is assessing the relevance of private warnings in determining whether to commence action for a financial penalty or a *public censure*, the age of a private warning will be taken into consideration. However, a long-standing private warning may still be relevant.

7.17 Private warnings may be considered cumulatively, although they relate to separate areas of a *firm's* or other *person's* business, where the concerns which gave rise to those warnings are considered to be indicative of a *person's* compliance culture. Similarly, private warnings issued to different subsidiaries of the same parent company may be considered cumulatively where the concerns which gave rise to those warnings relate to a common management team.

How a person will know they are receiving a private warning

7.18 It will be obvious from the terms of any letter written by the FSA whether it is intended to constitute a private warning. In particular, a warning letter will describe itself as a private warning and will refer to this chapter to explain the consequences of receiving it for the person.

The procedure for giving a private warning

7.19 The FSA's normal practice is to follow a "minded-to" procedure before deciding whether to give a private warning. This means that it will notify in writing the intended recipient of the warning that it has concerns about their conduct and inform them that the FSA proposes to give a private warning. The recipient will then have an opportunity to comment on our understanding of the circumstances giving rise to the

FSA's concerns and whether a private warning is appropriate. The FSA will carefully consider any response to its initial letter before it decides whether to give the private warning. The decision will be taken by an FSA head of department or a more senior member of FSA staff.

8 Variation and cancellation of permission on the FSA's own initiative and intervention against incoming firms

8.1 The FSA has powers under section 45 of the *Act* to vary or cancel an *authorised person's Part IV permission*. The FSA may use these powers where:

(1) the person is failing or is likely to fail to satisfy the threshold conditions;

(2) the person has not carried on any *regulated activity* for a period of at least 12 months; or

(3) it is desirable to vary or cancel the person's *Part IV permission* in order to protect the interests of consumers or potential consumers.

8.1A The powers to vary and cancel a person's *Part IV permission* are exercisable in the same circumstances. However, the statutory procedure for the exercise of each power is different and this may determine how the FSA acts in a given case. Certain types of behaviour which may cause the FSA to cancel permission in one case, may lead it to vary, or vary and cancel, permission in another, depending on the circumstances. The non-exhaustive examples provided below are therefore illustrative but not conclusive of which action the FSA will take in a given case.

Varying a firm's Part IV permission on the FSA's own initiative

8.1B When it considers how it should deal with a concern about a *firm*, the FSA will have regard to its *regulatory objectives* and the range of regulatory tools that are available to it. It will also have regard to:

(1) the responsibilities of a *firm's* management to deal with concerns about the *firm* or about the way its business is being or has been run; and

(2) the principle that a restriction imposed on a *firm* should be proportionate to the objectives the FSA is seeking to achieve.

8.2 The FSA will proceed on the basis that a *firm* (together with its directors and senior management) is primarily responsible for ensuring the *firm* conducts its business in compliance with the *Act*, the *Principles* and other *rules*.

8.3 In the course of its supervision and monitoring of a *firm* or as part of an enforcement action, the FSA may make it clear that it expects the *firm* to take certain steps to meet regulatory requirements. In the vast majority of cases the FSA will seek to agree with a *firm* those steps the *firm* must take to address the FSA's concerns. However, where the FSA considers it appropriate to do so, it will exercise its formal powers under section 45 of the *Act* to vary a *firm's* permission to ensure such requirements are met. This may include where:

(1) the FSA has serious concerns about a *firm*, or about the way its business is being or has been conducted;

(2) the FSA is concerned that the consequences of a *firm* not taking the desired steps may be serious;

(3) the imposition of a formal statutory requirement reflects the importance the FSA attaches to the need for the firm to address its concerns;

(4) the imposition of a formal statutory requirement may assist the *firm* to take steps which would otherwise be difficult because of legal obligations owed to third parties.

8.3A *SUP* 7 provides more information about the situations in which the FSA may decide to take formal action in the context of its supervision activities.

8.4 [deleted]

8.5 Examples of circumstances in which the FSA will consider varying a *firm's Part IV permission* because it has serious concerns about a *firm*, or about the way its business is being or has been conducted include where:

(1) in relation to the grounds for exercising the power under section 45(1)(a) of the *Act*, the firm appears to be failing, or appears likely to fail, to satisfy the *threshold conditions* relating to one or more, or all, of its *regulated activities,* because for instance:

(a) the *firm's* material and financial resources appear inadequate for the scale or type of *regulated activity* it is carrying on, for example, where it has failed to maintain professional indemnity insurance or where it is unable to meet its liabilities as they have fallen due; or

(b) the *firm* appears not to be a fit and proper *person* to carry on a *regulated activity* because:

(i) it has not conducted its business in compliance with high standards which may include putting itself at risk of being used for the purposes of *financial crime* or being otherwise involved in such crime;

(ii) it has not been managed competently and prudently and has not exercised due skill, care, and diligence in carrying on one or more, or all, of its *regulated activities*;

(iii) it has breached requirements imposed on it by or under the *Act* (including the *Principles* and the *rules*), for example in respect of its disclosure or notification requirements, and the breaches are material in number or in individual seriousness;

(2) in relation to the grounds for exercising the power under section 45(1)(c), it appears that the interests of *consumers* are at risk because the *firm* appears to have breached any of *Principles* 6 to 10 of the FSA’s *Principles* (see *PRIN*

2.1.1R) to such an extent that it is desirable that *limitations*, restrictions, or prohibitions are placed on the *firm's regulated activity*.

Use of the own-initiative power in urgent cases

8.6 The FSA may impose a variation of permission so that it takes effect immediately or on a specified date if it reasonably considers it necessary for the variation to take effect immediately (or on the date specified), having regard to the ground on which it is exercising its *own-initiative power*.

8.7 The FSA will consider exercising its *own-initiative power* as a matter of urgency where:

(1) the information available to it indicates serious concerns about the *firm* or its business that need to be addressed immediately; and

(2) circumstances indicate that it is appropriate to use statutory powers immediately to require and/or prohibit certain actions by the *firm* in order to ensure the *firm* addresses these concerns.

8.8 It is not possible to provide an exhaustive list of the situations that will give rise to such serious concerns, but they are likely to include one or more of the following characteristics:

(1) information indicating significant loss, risk of loss or other adverse effects for *consumers*, where action is necessary to protect their interests;

(2) information indicating that a *firm's* conduct has put it at risk of being used for the purposes of *financial crime*, or of being otherwise involved in crime;

(3) evidence that the *firm* has submitted to the FSA inaccurate or misleading information so that the FSA becomes seriously concerned about the *firm's* ability to meet its regulatory obligations;

(4) circumstances suggesting a serious problem within a *firm* or with a *firm's controllers* that calls into question the *firm's* ability to continue to meet the *threshold conditions*.

8.9 The FSA will consider the full circumstances of each case when it decides whether an urgent variation of *Part IV permission* is appropriate. The following is a non-exhaustive list of factors the FSA may consider.

(1) The extent of any loss, or risk of loss, or other adverse effect on *consumers*. The more serious the loss or potential loss or other adverse effect, the more likely it is that the FSA's urgent exercise of *own-initiative powers* will be appropriate, to protect the *consumers'* interests.

(2) The extent to which *customer* assets appear to be at risk. Urgent exercise of the FSA's *own-initiative power* may be appropriate where the information

available to the FSA suggests that *customer* assets held by, or to the order of, the *firm* may be at risk.

(3) The nature and extent of any false or inaccurate information provided by the *firm*. Whether false or inaccurate information warrants the FSA's urgent exercise of its *own-initiative powers* will depend on matters such as:

(a) the impact of the information on the FSA's view of the *firm's* compliance with the regulatory requirements to which it is subject, the *firm's* suitability to conduct *regulated activities*, or the likelihood that the *firm's* business may be being used in connection with *financial crime*;

(b) whether the information appears to have been provided in an attempt knowingly to mislead the FSA, rather than through inadvertence;

(c) whether the matters to which false or inaccurate information relates indicate there is a risk to *customer* assets or to the other interests of the *firm's* actual or potential *customers*.

(4) The seriousness of any suspected breach of the requirements of the legislation or the *rules* and the steps that need to be taken to correct that breach.

(5) The financial resources of the *firm*. Serious concerns may arise where it appears the *firm* may be required to pay significant amounts of compensation to *consumers*. In those cases, the extent to which the *firm* has the financial resources to do so will affect the FSA's decision about whether exercise of the FSA's *own-initiative power* is appropriate to preserve the *firm's* assets, in the interests of the *consumers*. The FSA will take account of any insurance cover held by the *firm*. It will also consider the likelihood of the *firm's* assets being dissipated without the FSA's intervention, and whether the exercise of the FSA's power to petition for the winding up of the *firm* is more appropriate than the use of its *own-initiative power* (see chapter 13 of this guide).

(6) The risk that the *firm's* business may be used or has been used to facilitate *financial crime*, including *money laundering*. The information available to the FSA, including information supplied by other law enforcement agencies, may suggest the *firm* is being used for, or is itself involved in, *financial crime*. Where this appears to be the case, and the *firm* appears to be failing to meet the *threshold conditions* or has put its *customers'* interests at risk, the FSA's urgent use of its *own-initiative powers* may well be appropriate.

(7) The risk that the *firm's* conduct or business presents to the *financial system* and to confidence in the *financial system*.

(8) The *firm's* conduct. The FSA will take into account:

(a) whether the *firm* identified the issue (and if so whether this was by chance or as a result of the *firm's* normal *controls* and monitoring);

(b) whether the *firm* brought the issue promptly to the FSA's attention;

(c) the *firm's* past history, management ethos and compliance culture;

(d) steps that the *firm* has taken or is taking to address the issue.

(9) The impact that use of the FSA's *own-initiative powers* will have on the *firm's* business and on its *customers*. The FSA will take into account the (sometimes significant) impact that a variation of *permission* may have on a *firm's* business and on its *customers'* interests, including the effect of variation on the *firm's* reputation and on market confidence. The FSA will need to be satisfied that the impact of any use of the *own-initiative power* is likely to be proportionate to the concerns being addressed, in the context of the overall aim of achieving its *regulatory objectives*.

Limitations and requirements that the FSA may impose when exercising its section 45 power

8.10 When varying *Part IV permission* at its own-initiative under its section 45 power (or section 47 power), the FSA may include in the *Part IV permission* as varied any *limitation* or restriction which it could have imposed if a fresh *permission* were being given in response to an application under section 40 of the *Act*.

8.11 Examples of the *limitations* that the FSA may impose when exercising its *own-initiative power* in support of its enforcement function include *limitations* on: the number, or category, of *customers* that a *firm* can deal with; the number of specified investments that a *firm* can deal in; and the activities of the *firm* so that they fall within specific regulatory regimes (for example, so that *oil market participants, locals, corporate finance advisory firms* and service providers are permitted only to carry on those types of activities).

8.12 Examples of *requirements* that the FSA may consider including in a *firm's Part IV permission* when exercising its *own-initiative power* in support of its enforcement function are: a *requirement* not to take on new business; a *requirement* not to hold or control *client money*; a *requirement* not to trade in certain categories of *specified investment*; a *requirement* that prohibits the disposal of, or other dealing with, any of the *firm's* assets (whether in the United Kingdom or elsewhere) or restricts those disposals or dealings; and a *requirement* that all or any of the *firm's* assets, or all or any assets belonging to investors but held by the *firm* to its order, must be transferred to a *trustee* approved by the FSA.

Cancelling a firm's Part IV permission on the FSA's own initiative

8.13 The FSA will consider cancelling a *firm's Part IV permission* using its *own-initiative powers* contained in sections 45 and 47 respectively of the *Act* in two main circumstances:

(1) where the FSA has very serious concerns about a *firm*, or the way its business is or has been conducted;

(2) where the *firm's regulated activities* have come to an end and it has not applied for *cancellation* of its *Part IV permission*.

8.14 The grounds on which the FSA may exercise its power to cancel an authorised person's permission under section 45 of the *Act* are the same as the grounds for variation. They are set out in section 45(1) and described in *EG* 8.1. Examples of the types of circumstances in which the FSA may cancel a *firm's Part IV permission* include:

(1) non-compliance with a *Financial Ombudsman Service* award against the *firm*;

(2) material non-disclosure in an application for authorisation or approval or material non-notification after authorisation or approval has been granted. The information which is the subject of the non-disclosure or non-notification may also be grounds for cancellation;

(3) failure to have or maintain adequate financial resources, or a failure to comply with regulatory capital requirements;

(4) non-submission of, or provision of false information in, regulatory returns, or repeated failure to submit such returns in a timely fashion;

(5) non-payment of FSA fees or repeated failure to pay FSA fees except under threat of enforcement action;

(6) failure to provide the FSA with valid contact details or failure to maintain the details provided, such that the FSA is unable to communicate with the *firm*;

(7) repeated failures to comply with rules or requirements;

(8) a failure to co-operate with the FSA which is of sufficient seriousness that the FSA ceases to be satisfied that the *firm* is fit and proper, for example failing without reasonable excuse to:

(a) comply with the material terms of a formal agreement made with the FSA to conclude or avoid disciplinary or other enforcement action; or

(b) provide material information or take remedial action reasonably required by the FSA.

Section 45(2A) of the *Act* sets out further grounds on which the FSA may cancel the permission of *authorised persons* which are *investment firms*.

8.15 Depending on the circumstances, the FSA may need to consider whether it should first use its *own-initiative powers* to vary a *firm's Part IV permission* before going on to cancel it. Amongst other circumstances, the FSA may use this power where it considers it needs to take immediate action against a *firm* because of the urgency and seriousness of the situation.

8.16 Where the situation appears so urgent and serious that the *firm* should immediately cease to carry on all *regulated activities*, the FSA may first vary the *firm's Part IV permission* so that there is no longer any *regulated activity* for which the *firm* has a *Part IV permission*. If it does this, the FSA will then have a duty to cancel the *firm's Part IV permission* - once it is satisfied that it is no longer necessary to keep the *Part IV permission* in force.

8.17 However, where the FSA has cancelled a *firm's Part IV permission*, it is required by section 33 of the *Act* to go on to give a direction withdrawing the *firm's authorisation*. Accordingly, the FSA may decide to keep a *firm's Part IV permission* in force to maintain the *firm's* status as an *authorised person* and enable it (the FSA) to monitor the *firm's* activities. An example is where the FSA needs to supervise an orderly winding down of the *firm's* regulated business (see *SUP* 6.4.22 (When will the FSA grant an application for cancellation of *permission*)). Alternatively, the FSA may decide to keep a *firm's Part IV permission* in force to maintain the *firm's* status as an *authorised person* to use administrative enforcement powers against the *firm*. This may be, for example, where the FSA proposes to impose a financial penalty on the *firm* under section 206 of the *Act*.

Exercising the power under section 47 to vary or cancel a firm's part IV permission in support of an overseas regulator: the FSA's policy

8.18 The FSA has a power under section 47 to vary, or alternatively cancel, a *firm's Part IV permission*, in support of an *overseas regulator*. Section 47(3), (4) and (5) set out matters the FSA may, or must, take into account when it considers whether to exercise these powers. The circumstances in which the FSA may consider varying *a firm's Part IV permission* in support of an *overseas regulator* depend on whether the FSA is required to consider exercising the power in order to comply with a Community obligation. This reflects the fact that under section 47, if a relevant *overseas regulator* acting under prescribed provisions has made a request to the FSA for the exercise of its *own-initiative power* to vary or cancel a *Part IV permission*, the FSA must consider whether it must exercise the power in order to comply with a Community obligation.

8.19 Relevant Community obligations which the FSA may need to consider include those under the Banking Consolidation Directive, the Insurance Directives, the Investment Services Directive/Markets in Financial Instruments Directive; and the Insurance Mediation Directive. Each of these Directives imposes general obligations on the relevant *EEA competent authority* to cooperate and collaborate closely in discharging their functions under the Directives.

8.20 The FSA views this cooperation and collaboration as essential to effective regulation of the international market in financial services. It will therefore exercise its *own-initiative power* wherever:

(1) an *EEA Competent authority* requests it to do so; and

(2) it is satisfied that the use of the power is appropriate (having regard to the considerations set out at paragraphs 8.1B to 8.5) to enforce effectively the

regulatory requirements imposed under the *Single Market Directives* or other Community obligations.

8.21 The FSA will actively consider any other requests for assistance from relevant *overseas regulators* (that is requests in relation to which it is not obliged to act under a Community obligation). Section 47(4), which sets out matters the FSA may take into account when it decides whether to vary or cancel a *firm's Part IV permission* in support of the *overseas regulator*, applies in these circumstances.

8.22 Where section 47(4) applies and the FSA is considering whether to vary a *firm's Part IV permission*, it may take account of all the factors described in paragraphs 8.18 to 8.25 but may give particular weight to:

(1) the matters set out in paragraphs (c) and (d) of section 47(4) (seriousness, importance to persons in the United Kingdom, and the public interest); and

(2) any specific request made to it by the *overseas regulator* to vary, rather than cancel, the *firm's Part IV permission*.

8.23 The FSA will give careful consideration to whether the relevant authority's concerns would provide grounds for the FSA to exercise its *own-initiative power* to vary or cancel if they related to a UK *firm*. It is not necessary for the FSA to be satisfied that the overseas provisions being enforced mirror precisely those which apply to UK *firms*. However, the FSA will not assist in the enforcement of regulatory requirements or other provisions that appear to extend significantly beyond the purposes of *UK regulatory provisions*.

8.24 Similarly, the FSA will not need to be satisfied that precisely the same assistance would be provided to the United Kingdom in precisely the same situation. However, it will wish to be confident that the relevant authorities in the jurisdiction concerned would have powers available to them to provide broadly similar assistance in aid of UK authorities, and would be willing properly to consider exercising those powers. The FSA may decide, under section 47(5), not to exercise its *own-initiative power* to vary or cancel in response to a request unless the regulator concerned undertakes to make whatever contribution towards the cost of its exercise the FSA considers appropriate.

8.25 Paragraphs 8.10 and 8.12 set out some examples of *limitations* and *requirements* the FSA may impose when exercising its section 47 power to vary *a firm's Part IV permission*.

The FSA's policy on exercising its power of intervention against incoming firms under section 196 of the Act

8.26 The FSA adopts a similar approach to the exercise of its *power of intervention* under section 196 as it does to its *own-initiative powers* to vary *Part IV permission*, but with suitable modification for the differences in the statutory grounds for exercising the powers. Consequently the factors and considerations set out in paragraphs 8.1B to 8.12 and 8.18 to 8.25 may also be relevant when the FSA is considering regulatory concerns about *incoming firms*.

8.27 When it is considering action against an *incoming firm*, the FSA will co-operate with the *firm's Home State regulator* as appropriate, including notifying and informing the *firm's Home State regulator* as required by the relevant section of the *Act*.

9 Prohibition Orders and withdrawal of approval

Introduction

9.1 The FSA's power under section 56 of the *Act* to prohibit individuals who are not fit and proper from carrying out functions in relation to *regulated activities* helps the FSA to work towards achieving its *regulatory objectives*. The FSA may exercise this power to make a *prohibition order* where it considers that, to achieve any of those objectives, it is appropriate either to prevent an individual from performing any function in relation to *regulated activities*, or to restrict the functions which he may perform.

9.2 The FSA's effective use of the power under section 63 of the *Act* to withdraw approval from an *approved person* will also help ensure high standards of regulatory conduct by preventing an *approved person* from continuing to perform the *controlled function* to which the approval relates if he is not a fit and proper person to perform that function. Where it considers this is appropriate, the FSA may prohibit an *approved person*, in addition to withdrawing their approval.

The FSA's general policy in this area

9.3 In deciding whether to make a *prohibition order* and/or, in the case of an *approved person*, to withdraw its approval, the FSA will consider all the relevant circumstances including whether other enforcement action should be taken or has been taken already against that individual by the FSA. As is noted below, in some cases the FSA may take other enforcement action against the individual in addition to seeking a *prohibition order* and/or withdrawing its approval. The FSA will also consider whether enforcement action has been taken against the individual by other enforcement agencies or *designated professional bodies*.

9.4 The FSA has the power to make a range of *prohibition orders* depending on the circumstances of each case and the range of *regulated activities* to which the individual's lack of fitness and propriety is relevant. Depending on the circumstances of each case, the FSA may seek to prohibit individuals from performing any class of function in relation to any class of *regulated activity*, or it may limit the *prohibition order* to specific functions in relation to specific *regulated activities*. The *FSA* may also make an order prohibiting an individual from being employed by a particular *firm*, type of *firm* or any *firm*.

9.5 The scope of a *prohibition order* will depend on the range of functions which the individual concerned performs in relation to *regulated activities*, the reasons why he is not fit and proper and the severity of risk which he poses to *consumers* or the market generally.

9.6 Where the FSA issues a *prohibition order*, it may indicate in the *final notice* that it would be minded to revoke the order on the application of the individual in the future, in the absence of new evidence that the individual is not fit and proper. If the FSA gives such an indication, it will specify the number of years after which it would be minded to revoke or vary the prohibition on an application. However, the FSA will only adopt this approach in cases where it considers it appropriate in all the circumstances. In deciding whether to adopt this approach, the factors the FSA may take into account include, but are not limited to, where appropriate, the factors at paragraphs 9.9 and at 9.17. The FSA would not be obliged to revoke an order after the specified period even where it gave such an indication. Further, if an individual's *prohibition order* is revoked, he would still have to satisfy the FSA as to his fitness for a particular role in relation to any future application for approval to perform a *controlled function*.

9.7 Paragraphs 9.8 to 9.14 set out additional guidance on the FSA's approach to making *prohibition orders* against *approved persons* and/or withdrawing such persons' approvals. Paragraphs 9.17 to 9.18 set out additional guidance on the FSA's approach to making *prohibition orders* against other individuals.

Prohibition orders and withdrawal of approval - approved persons

9.8 When the FSA has concerns about the fitness and propriety of an *approved person*, it may consider whether it should prohibit that person from performing functions in relation to *regulated activities*, withdraw its approval, or both. In deciding whether to withdraw its approval and/or make a *prohibition order*, the FSA will consider in each case whether its *regulatory objectives* can be achieved adequately by imposing disciplinary sanctions, for example, *public censures* or financial penalties, or by issuing a private warning.

9.9 When it decides whether to make a *prohibition order* against an *approved person* and/or withdraw its approval, the FSA will consider all the relevant circumstances of the case. These may include, but are not limited to those set out below.

(1) The matters set out in section 61(2) of the *Act*.

(2) Whether the individual is fit and proper to perform functions in relation to *regulated activities*. The criteria for assessing the fitness and propriety of *approved persons* are set out in *FIT* 2.1 (Honesty, integrity and reputation); *FIT* 2.2 (Competence and capability) and *FIT* 2.3 (Financial soundness).

(3) Whether, and to what extent, the *approved person* has:

(a) failed to comply with the *Statements of Principle* issued by the FSA with respect to the conduct of *approved persons*; or

(b) been knowingly concerned in a contravention by the relevant *firm* of a requirement imposed on the *firm* by or under the *Act* (including the *Principles* and other *rules*) or failed to comply with any directly applicable Community regulation made under *MiFID*.

(4) Whether the *approved person* has engaged in *market abuse*.

(5) The relevance and materiality of any matters indicating unfitness.

(6) The length of time since the occurrence of any matters indicating unfitness.

(7) The particular *controlled function* the *approved person* is (or was) performing, the nature and activities of the *firm* concerned and the markets in which he operates.

(8) The severity of the risk which the individual poses to *consumers* and to confidence in the *financial system*.

(9) The previous disciplinary record and general compliance history of the individual including whether the FSA, any *previous regulator*, *designated professional body* or other domestic or international regulator has previously imposed a disciplinary sanction on the individual.

9.10 The FSA may have regard to the cumulative effect of a number of factors which, when considered in isolation, may not be sufficient to show that the individual is fit and proper to continue to perform a *controlled function* or other function in relation to *regulated activities*. It may also take account of the particular *controlled function* which an *approved person* is performing for a *firm*, the nature and activities of the *firm* concerned and the markets within which it operates.

9.11 Due to the diverse nature of the activities and functions which the FSA regulates, it is not possible to produce a definitive list of matters which the FSA might take into account when considering whether an individual is not a fit and proper person to perform a particular, or any, function in relation to a particular, or any, *firm*.

9.12 The following are examples of types of behaviour which have previously resulted in the FSA deciding to issue a *prohibition order* or withdraw the approval of an *approved person*:

(1) Providing false or misleading information to the FSA; including information relating to identity, ability to work in the United Kingdom, and business arrangements;

(2) Failure to disclose material considerations on application forms, such as details of County Court Judgments, criminal convictions and dismissal from employment for regulatory or criminal breaches. The nature of the information not disclosed can also be relevant;

(3) Severe acts of dishonesty, e.g. which may have resulted in financial crime;

(4) Serious lack of competence; and

(5) Serious breaches of the *Statements of Principle* for *approved persons*, such as failing to make terms of business regarding fees clear or actively misleading clients about fees; acting without regard to instructions; providing misleading information to clients, consumers or third parties; giving clients poor or inaccurate advice; using intimidating or threatening behaviour towards clients and former clients; failing to remedy breaches of the general prohibition or to ensure that a firm acted within the scope of its permissions.

9.13 Certain matters that do not fit squarely, or at all, within the matters referred to above may also fall to be considered. In these circumstances the FSA will consider whether the conduct or matter in question is relevant to the individual's fitness and propriety.

9.14 Where it considers it is appropriate to withdraw an individual's approval to perform a *controlled function* within a particular *firm*, it will also consider, at the very least, whether it should prohibit the individual from performing that function more generally. Depending on the circumstances, it may consider that the individual should also be prohibited from performing other functions.

Prohibition orders against exempt persons and members of professional firms

9.15 In cases where it is considering whether to exercise its power to make a *prohibition order* against an individual performing functions in relation to *exempt regulated activities* by virtue of an exemption from the *general prohibition* under Part XX of the *Act*, the FSA will consider whether the particular unfitness might be more appropriately dealt with by making an order disapplying the exemption using its power under section 329 of the *Act*. In most cases where the FSA is concerned about the fitness and propriety of a specific individual in relation to *exempt regulated activities* by virtue of an exemption under Part XX of the *Act*, it will be more appropriate to make an order prohibiting the individual from performing functions in relation to *exempt regulated activities* than to make a disapplication order.

9.16 When considering whether to exercise its power to make a *prohibition order* against an *exempt person*, the FSA will consider all relevant circumstances including, where appropriate, the factors set out in paragraph 9.9.

Prohibition orders against other individuals

9.17 Where the FSA is considering making a *prohibition order* against an individual other than an individual referred to in paragraphs 9.8 to 9.14, the FSA will consider the severity of the risk posed by the individual, and may prohibit the individual where it considers this is appropriate to achieve one or more of its *regulatory objectives*.

9.18 When considering whether to exercise its power to make a *prohibition order* against such an individual, the FSA will consider all the relevant circumstances of the case. These may include, but are not limited to, where appropriate, the factors set out in paragraph 9.9.

Applications for variation or revocation of prohibition orders

9.19 When considering whether to grant or refuse an application to revoke or vary a *prohibition order*, the FSA will consider all the relevant circumstances of a case. These may include, but are not limited to:

(1) the seriousness of the misconduct or other unfitness that resulted in the order;

(2) the amount of time since the original order was made;

(3) any steps taken subsequently by the individual to remedy the misconduct or other unfitness;

(4) any evidence which, had it been known to the FSA at the time, would have been relevant to the FSA’s decision to make the *prohibition order*;

(5) all available information relating to the individual’s honesty, integrity or competence since the order was made, including any repetition of the misconduct which resulted in the prohibition order being made;

(6) where the FSA’s finding of unfitness arose from incompetence rather than from dishonesty or lack of integrity, evidence that this unfitness has been or will be remedied; for example, this may be achieved by the satisfactory completion of relevant training and obtaining relevant qualifications, or by supervision of the individual by his employer;

(7) the financial soundness of the individual concerned; and

(8) whether the individual will continue to pose the level of risk to *consumers* or confidence in the *financial system* which resulted in the original prohibition if it is lifted.

9.20 When considering whether to grant or refuse an application to revoke or vary a *prohibition order*, the FSA will take into account any indication given by the FSA in the *final notice* that it is minded to revoke or vary the *prohibition order* on application after a certain number of years (see paragraph 9.6).

9.21 If the individual applying for a revocation or variation of a *prohibition order* proposes to take up an offer of employment to perform a *controlled function*, the *approved persons* regime will also apply to him. In these cases, the *firm* concerned will be required to apply to the FSA for approval of that individual's employment in that capacity. The FSA will assess the individual's fitness and propriety to perform *controlled functions* on the basis of the criteria set out in *FIT* 2.1 (Honesty, integrity and reputation); *FIT* 2.2 (Competence and capability) and *FIT* 2.3 (Financial soundness).

9.22 The FSA will not generally grant an application to vary or revoke a *prohibition order* unless it is satisfied that: the proposed variation will not result in a reoccurrence of the risk to *consumers* or confidence in the *financial system* that resulted in the order being made; and the individual is fit to perform functions in relation to *regulated activities* generally, or to those specific *regulated activities* in relation to which the individual has been prohibited.

Other powers that may be relevant when the FSA is considering whether to exercise its power to make a prohibition order

9.23 In appropriate cases, the FSA may take other action against an individual in addition to making a *prohibition order* and/or withdrawing its approval, including the use of its powers to: impose a financial penalty or issue a *public censure*; apply for an *injunction* to prevent dissipation of assets; stop any continuing misconduct; order restitution; apply for an insolvency order or an order against debt avoidance; and/or prosecute certain criminal offences.

The effect of the FSA's decision to make a prohibition order

9.24 The FSA may consider taking disciplinary action against a *firm* that has not taken reasonable care, as required by section 56(6) of the *Act*, to ensure that none of that *firm's* functions in relation to carrying on of a *regulated activity* is performed by a *person* who is prohibited from performing the function by a *prohibition order*. The FSA considers that a search by a *firm* of the *FSA Register* is an essential part of the statutory duty to take reasonable care to ensure that *firms* do not employ or otherwise permit prohibited individuals to perform functions in relation to *regulated activities*. In addition, the FSA expects firms to check the *FSA Register* when making applications for approval under section 59 of the *Act*. More generally, if a *firm's* search of the *FSA Register* reveals no record of a *prohibition order*, the FSA will consider taking action for breach of section 56(6) only where the *firm* had access to other information indicating that a *prohibition order* had been made.

The effect of the FSA's decision to withdraw approval

9.25 When the FSA's decision to withdraw an approval has become effective, the position of the *firm* which applied for that approval depends on whether it directly employs the *person* concerned, or whether the *person* is employed by one of its contractors.

9.26 Section 59(1) is relevant where the *firm* directly employs the *person* concerned. Under the provision, a firm ('A') must take reasonable care to ensure that no *person* performs a *controlled function* under an *arrangement* entered into by A in relation to the carrying on by it of a *regulated activity*, unless the FSA approves the performance by that *person* of the *controlled function* to which the approval relates. Therefore, if the *firm* continues to employ the *person* concerned to carry out a *controlled function*, it will be in breach of section 59(1) and the FSA may take enforcement action against it.

9.27 Section 59(2) is relevant where the *person* is employed by a contractor of the *firm*. It requires a *firm* ('A') to take reasonable care to ensure that no *person* performs a *controlled function* under an arrangement entered into by a contractor of A in relation to the carrying on by A of a *regulated activity*, unless the FSA approves the performance by that person of the *controlled function* to which the approval relates. Therefore, if a contractor of the *firm* employs the person concerned, and the contractor continues to employ the *person* to carry out a *controlled function*, the *firm* itself will be in breach of section 59(2) unless it has taken reasonable care to ensure that this does not happen. The FSA may take enforcement action against a *firm* that breaches this requirement.

9.28 *Firms* should be aware of the potential effect that these provisions may have on their contractual relationships with *approved persons* employed by them and with contractors engaged by them, and their obligations under those contracts.

10 Injunctions

10.1 The orders the court may make following an application by the FSA under the powers referred to in this chapter are generally known in England and Wales as *injunctions*, and in Scotland as *interdicts*. In the chapter, the word *'injunction'* and the word *'order'* also mean *'interdict'*. The FSA's effective use of these powers will help it work towards its *regulatory objectives*, in particular, those of protecting *consumers*, maintaining confidence in the *financial system* and reducing *financial crime*.

10.1A Decisions about whether to apply to the civil courts for injunctions 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 FSA's executive of at least director of division level.

10.1B An exceptionally urgent case in these circumstances is one where the FSA staff believe that a decision to begin proceedings

(1) should be taken before it is possible to follow the procedure described in paragraph 10.1A; and

(2) it is necessary to protect the interests of consumers or potential consumers.

Section 380 (injunctions for breaches of relevant requirements[9]) and section 381 (injunctions in cases of market abuse): the FSA's policy

10.2 The court may make three types of order under these provisions: to restrain a course of conduct, to take steps to remedy a course of conduct and to secure assets. As is explained below, the court may also make an order freezing assets under its inherent jurisdiction. In certain cases, the FSA may seek only one type of order, although in others it may seek several.

10.3 The broad test the FSA will apply when it decides whether to seek an *injunction* is whether the application would be the most effective way to deal with the FSA's concerns. In deciding whether an application for an *injunction* is appropriate in a given case, the FSA will consider all relevant circumstances and may take into account a wide range of factors. The following list of factors is not exhaustive; not all the factors will be relevant in a particular case and there may be other factors that are relevant.

(1) The nature and seriousness of a contravention or expected contravention of a relevant requirement. The extent of loss, risk of loss, or other adverse effect on *consumers*, including the extent to which *client* assets may be at risk, may be

[9] Under sections 380(6)(a) and (7)(a), a 'relevant requirement' means a requirement: which is imposed by or under the *Act* or by any directly applicable Community regulation made under *MiFID*; or which is imposed by or under any other Act and whose contravention constitutes and offence which the FSA has power to prosecute under the *Act* (or in the case of Scotland, which is imposed by or under any other Act) and whose contravention constitutes an offence under Part V of the Criminal Justice Act 1993 or under the *Money Laundering Regulations*.

relevant. The seriousness of a contravention or prospective contravention will include considerations of:

(a) whether the losses suffered are substantial;

(b) whether the numbers of *consumers* who have suffered loss are significant;

(c) whether the assets at risk are substantial; and

(d) whether the number of *consumers* at risk is significant.

(2) In cases of *market abuse*, the nature and seriousness of the misconduct or expected misconduct in question. The following may be relevant:

(a) the impact or potential impact on the *financial system* of the conduct in question. This would include the extent to which it has resulted in distortion or disruption of the markets, or would be likely to do so if it was allowed to take place or to continue;

(b) the extent and nature of any losses or other costs imposed, or likely to be imposed, on other users of the *financial system*, as a result of the misconduct.

(3) Whether the conduct in question has stopped or is likely to stop and whether steps have been taken or will be taken by the *person* concerned to ensure that the interests of *consumers* are adequately protected. For example, an application for an *injunction* may be appropriate where the FSA has grounds for believing that a contravention of a relevant requirement, *market abuse* or both may continue or be repeated. It is likely to have grounds to believe this where, for example, the *Takeover Panel* has requested that a person stop a particular course of conduct and that *person* has not done so.

(4) Whether there are steps a *person* could take to remedy a contravention of a relevant requirement or *market abuse*. The steps the FSA may require a *person* to take will vary according to the circumstances but may include the withdrawal of a misleading *financial promotion* or publishing a correction, writing to clients or investors to notify them of FSA action, providing financial redress and repatriating funds from an overseas jurisdiction. An application by the FSA to the court under section 380(2) or 381(2) for an order requiring a *person* to take such steps may not be appropriate if, for example, that *person* has already taken or proposes to take appropriate remedial steps at his own initiative or under a ruling imposed by another regulatory authority (such as the *Takeover Panel* or a *recognised investment exchange*). If another authority has identified the relevant steps and the *person* concerned has failed to take them, the FSA will take this into account and (subject to all other relevant factors and circumstances) may consider it is appropriate to apply for an *injunction*. In those cases the FSA may consult with the relevant regulatory authority before applying for an *injunction*.

(5) Whether there is a danger of assets being dissipated. The main purpose of an application under section 380(3), sections 381(3) and (4) or pursuant to the court's inherent jurisdiction, is likely to be to safeguard funds containing *client* assets (e.g. *client* accounts) and/or funds and other assets from which restitution may be made. The FSA may seek an *injunction* to secure assets while a suspected contravention is being investigated or where it has information suggesting that a contravention is about to take place.

(6) The costs the FSA would incur in applying for and enforcing an *injunction* and the benefits that would result. There may be other cases which require the FSA's attention and take a higher priority, due to the nature and seriousness of the breaches concerned. There may, therefore, be occasions on which the FSA considers that time and resources should not be diverted from other cases in order to make an application for an *injunction*. These factors reflect the FSA's duty under the *Act* to have regard to the need to use its resources in the most efficient and economic way.

(7) The disciplinary record and general compliance history of the *person* who is the subject of the possible application. This includes whether the FSA (or a *previous regulator*) has taken any previous disciplinary, remedial or protective action against the *person*. It may also be relevant, for example, whether the *person* has previously given any undertakings to the FSA (or any *previous regulator*) not to do a particular act or engage in particular behaviour and is in breach of those undertakings.

(8) Whether the conduct in question can be adequately addressed by other disciplinary powers, for example *public censure* or financial penalties.

(9) The extent to which another regulatory authority can adequately address the matter. Certain circumstances may give rise not only to possible enforcement action by the FSA, but also to action by other regulatory authorities. The FSA will examine the circumstances of each case, and consider whether it is appropriate for the FSA to take action to address the relevant concern. In most cases the FSA will consult with other relevant regulatory authorities before making an application for an order.

(10) Whether there is information to suggest that the *person* who is the subject of the possible application is involved in *financial crime*.

(11) In any case where the FSA is of the opinion that any potential exercise of its powers under section 381 may affect the timetable or the outcome of a *takeover bid*, the FSA will consult the *Takeover Panel* before taking any steps to exercise these powers and will give due weight to its views.

Asset-freezing injunctions

10.4 Where the FSA applies to the court under section 380(3) or sections 381(3) and (4) of the *Act*, the FSA may ask the court to exercise its inherent jurisdiction to make orders on an interim basis, restraining a *person* from disposing of, or otherwise dealing with, assets. To succeed in an application for such interim relief, the FSA will have to show a good arguable case for the granting of the *injunction*. The FSA will not have to show that a contravention has already occurred or may have already occurred.

10.5 The FSA may request the court to exercise its inherent jurisdiction in cases, for example, where it has evidence showing that there is a reasonable likelihood that a *person* will contravene a requirement of the *Act* and that the contravention will result in the dissipation of assets belonging to investors.

Other relevant powers

10.6 The FSA has a range of powers it can use to take remedial, protective and disciplinary action against a *person* who has contravened a relevant requirement or engaged in *market abuse*, as well as its powers to seek *injunctions* under sections 380 and 381 of the *Act* and under the courts' inherent jurisdiction. Where appropriate, the FSA may exercise these other powers before, at the same time as, or after it applies for an *injunction* against a *person*.

10.7 When, in relation to *firms*, the FSA applies the broad test outlined in paragraph 10.3, it will consider the relative effectiveness of the other powers available to it, compared with injunctive relief. For example, where the FSA has concerns about whether a *firm* will comply with restrictions that the FSA could impose by exercising its *own-initiative powers*, it may decide it would be more appropriate to seek an *injunction*. This is because breaching any requirement imposed by the court could be punishable for contempt. Alternatively, where, for example, the FSA has already imposed requirements on a *firm* by exercising its *own-initiative powers* and these requirements have not been met, the FSA may seek an *injunction* to enforce those requirements.

10.8 The FSA's *own-initiative powers* do not apply to *unauthorised persons*. This means that an application for an *injunction* is the only power by which the FSA may seek directly to prevent *unauthorised persons* from actual or threatened breaches or *market abuse*. The FSA will decide whether an application against an *unauthorised person* is appropriate, in accordance with the approach discussed in paragraph 10.3. The FSA may also seek an *injunction* to secure assets where it intends to use its insolvency powers against an *unauthorised person*.

10.9 In certain cases, conduct that may be the subject of an *injunction* application will also be an offence which the FSA has power to prosecute under the *Act*. In those cases, the FSA will consider whether it is appropriate to prosecute the offence in question, as well as applying for *injunctions* under section 380, section 381, or both.

10.10 Where the FSA exercises its powers under section 380, section 381 and/or invokes the court's inherent jurisdiction to obtain an order restraining the disposal of assets, it may also apply to the court for a restitution order for the distribution of those assets.

Section 198: the FSA's policy

10.11 Under section 198 of the *Act* the FSA has power to apply to court on behalf of the *Home State regulator* of certain i*ncoming EEA firms* for an *injunction* restraining the *incoming EEA firm* from disposing of, or otherwise dealing with, any of its assets. The FSA will consider exercising this power only where a request from a *Home State regulator* satisfies the requirements of section 198(1).

Applications for injunctions under regulation 12 of the Unfair Terms Regulations: the FSA's policy

10.12 If the FSA decides to address issues using its powers under the *Unfair Terms Regulations*, and the contract is within its scope as described in the FSA's Regulatory Guide on these powers,[10] it will, unless the case is urgent, generally first write to the *person* expressing its concerns about the potential unfairness within the meaning of the *Unfair Terms Regulations* of a term or terms in the *person's* contract and inviting the *person's* comments on those concerns. If the FSA remains of the view that the term is unfair within the meaning of the *Unfair Terms Regulations*, it will normally ask the *person* to undertake to stop including the term in new contracts and stop relying on it in contracts which have been concluded.

10.13 If the *person* either declines to give an undertaking, or gives such an undertaking and fails to follow it, the FSA will consider the need to apply to court for an *injunction* under regulation 12 of the *Unfair Terms Regulations*.

10.14 In determining whether to seek an *injunction* against a *person*, the FSA will consider the full circumstances of each case. A number of factors may be relevant for this purpose. The following list is not exhaustive; not all of the factors may be relevant in a particular case, and there may be other factors that are relevant.

(1) whether the FSA is satisfied that the contract term which is the subject of the complaint may properly be regarded as unfair within the meaning of the *Unfair Terms Regulations*;

(2) the extent and nature of the detriment to *consumers* resulting from the term or the potential detriment which could result from the term;

(3) whether the *person* has fully cooperated with the FSA in resolving the FSA's concerns about the fairness of the particular contract term;

(4) the likelihood of success of an application for an *injunction*;

(5) the costs the FSA would incur in applying for and enforcing an *injunction* and the benefits that would result from that action; the FSA is more likely to be satisfied that an application is appropriate where an *injunction* would not only prevent the continued use of the particular contract term, but would also be likely to prevent the use or continued use of similar terms, or terms having the same effect, used or recommended by other *firms* concluding contracts with *consumers*.

10.15 In an urgent case, the FSA may seek a temporary *injunction*, to prevent the continued use of the term until the fairness of the term could be fully considered by the court. An urgent case is one in which the FSA considers that the actual or potential detriment is so serious that urgent action is necessary. In deciding whether to apply for a temporary *injunction*, the FSA may take into account a number of factors, including one or more of the factors set out in paragraph 10.14. In such an urgent case, the FSA may seek a temporary injunction without first consulting with the *person*.

[10] [**link to UNFCOG**]

10.16 In deciding whether to grant an *injunction*, the court will decide whether the term in question is unfair within the meaning of the *Unfair Terms Regulations* (see *UNFCOG* 1.3.2G). The court may grant an *injunction* on such terms as it sees fit. For example, it may require the *person* to stop including the unfair term in contracts with *consumers* from the date of the *injunction* and to stop relying on the unfair term in contracts which have been concluded. If the *person* fails to comply with the *injunction,* it will be in contempt of court.

10.17 Regulation 8 of the *Unfair Terms Regulations* provides that an unfair term is not binding on the *consumer*. This means that if the court finds that the term in question is unfair, the *person* would be unable to rely on the unfair term in existing contracts governed by the *Unfair Terms Regulations*. To the extent that it is possible, the existing contract would continue in effect without the unfair term.

10.18 When the FSA considers that a case requires enforcement action under the *Unfair Terms Regulations*, it will take the enforcement action itself if the *person* is a *firm* or an *appointed representative*.

10.19 Where the *person* is not a *firm* or an *appointed representative*, the FSA will generally pass the case to the Office of Fair Trading, with a recommendation that it take the enforcement action. The Office of Fair Trading may then decide whether or not to take enforcement action.

FSA costs

10.20 When it seeks an *injunction* under a power discussed in this chapter, the FSA may ask the court to order that the *person* who is the subject of the application should pay the FSA's costs.

11 Restitution and redress

Restitution orders under sections 382, 383 and 384 of the Act: the FSA's general approach

11.1 The FSA has power to apply to the court for a restitution order under section 382 of the *Act* and (in the case of *market abuse*) under section 383 of the *Act*. It also has an administrative power to require restitution under section 384 of the *Act*. When deciding whether to exercise these powers, the FSA will consider whether this would be the best use of the FSA's limited resources taking into account, for example, the likely amount of any recovery and the costs of achieving and distributing any sums. It will also consider, before exercising its powers: other ways that *persons* might obtain redress, and whether it would be more efficient or cost-effective for them to use these means instead; and any proposals by the *person* concerned to offer redress to any *consumers* or other *persons* who have suffered loss, and the adequacy of those proposals. The FSA expects, therefore, to exercise its formal restitution powers on rare occasions only.

11.1A Decisions about whether to apply to the civil courts for restitution 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 FSA's executive of at least director of division level.

11.1B An exceptionally urgent case in these circumstances is one where the FSA staff believe that a decision to begin proceedings

(1) should be taken before it is possible to follow the procedure described in paragraph 11.1A; and

(2) it is necessary to protect the interests of consumers or potential consumers.

11.2 Instances in which the FSA might consider using its powers to obtain restitution for *market counterparties* are likely to be very limited.

Criteria for determining whether to exercise powers to obtain restitution

11.3 In deciding whether to exercise its powers to seek or require restitution under sections 382, 383 or 384 of the *Act*, the FSA will consider all the circumstances of the case. The factors which the FSA will consider may include, but are not limited to, those set out below.

(1) Are the profits quantifiable?

The FSA will consider whether quantifiable profits have been made which are owed to identifiable *persons*. In certain circumstances it may be difficult to prove that the conduct in question has resulted in the *person* concerned making a profit. It may also be difficult to find out how much profit and to whom the profits are owed. In these cases it may not be appropriate for the FSA to use its powers to obtain restitution.

(2) Are the losses identifiable?

The FSA will consider whether there are identifiable *persons* who can be shown to have suffered quantifiable losses or other adverse effects. In certain circumstances it may be difficult to establish the number and identity of those who have suffered loss as a result of the conduct in question. It may also prove difficult in those cases to establish the amount of that loss and whether the losses have arisen as a result of the conduct in question. In these cases it may not be appropriate for the FSA to use its powers to obtain restitution.

(3) The number of persons affected

The FSA will consider the number of *persons* who have suffered loss or other adverse effects and the extent of those losses or adverse effects. Where the breach of a relevant requirement by a *person*, whether *authorised* or not, results in significant losses, or losses to a large number of *persons* which collectively are significant, it may be appropriate for the FSA to use its powers to obtain restitution on their behalf. The FSA anticipates that many individual losses resulting from breaches by *firms* may be more efficiently and effectively redressed by *consumers* pursuing their claims directly with the firm concerned or through the *Financial Ombudsman Service* or the *compensation scheme* where the *firm* has ceased trading. However, where a large number of *persons* have been affected or the losses are substantial it may be more appropriate for the FSA to seek or require restitution from a *firm*. In those cases the FSA may consider combining an action seeking or requiring restitution from a *firm* or *unauthorised person* with disciplinary action or a criminal prosecution.

(4) FSA costs

The FSA will consider the cost of securing redress and whether these are justified by the benefit to *persons* that would result from that action. The FSA will consider the costs of exercising its powers to obtain restitution and, in particular, the costs of any application to the court for an order for restitution, together with the size of any sums that might be recovered as a result. The costs of the action will, to a certain extent, depend on the nature and location of assets from which restitution may be made. In certain circumstances it may be possible for the FSA to recover its costs of applying to the court for an order for restitution, or a proportion of those costs, from the party against whom a restitution order is obtained, though this would have the disadvantage of reducing the amount available to pay redress.

(5) Is redress available elsewhere?

The FSA will consider the availability of redress through the *Financial Ombudsman Service* or the *compensation scheme*. This will be relevant where the loss has resulted from the conduct of a *firm*. It will not be relevant where losses have resulted from the conduct of *unauthorised persons* operating in breach of the *general prohibition*. The *Financial Ombudsman Service* and the *compensation scheme* (where the *firm* has ceased trading) may be a more efficient and effective method of redress in many cases. The *Financial Ombudsman Service* provides a way for some *consumers* to obtain redress. The *compensation scheme* may provide redress for some *consumers* and businesses. The FSA's power to obtain restitution is not intended to duplicate the functions of the *Ombudsman* or *compensation schemes* in those cases. However, in certain cases it will be more appropriate for the FSA to pursue restitution. Further details of these schemes are set out in *COMP*.

(6) Is redress available through another regulator?

The FSA will consider the availability of redress through another regulatory authority. Where another regulatory authority, such as *the Takeover Panel*, is in a position to require appropriate redress, the FSA will not generally exercise its own powers to do so. If the FSA does consider that action is appropriate and the matters in question have happened in the context of a *takeover bid*, the FSA will only take action during the bid in the circumstances set out in *DEPP* 6.2.25G if the *person* concerned has responsibilities under the *Takeover Code*. If another *regulatory body* has required redress and a *person* has not met that requirement, the FSA will take this into account and (subject to all other relevant factors and circumstances) may consider it appropriate to take action to ensure that such redress is provided.

(7) Can persons bring their own proceedings?

The FSA will consider whether *persons* who have suffered losses are able to bring their own civil proceedings. In certain circumstances it may be appropriate for *persons* to bring their own civil proceedings to recover losses. This might be the case where the *person* who has suffered loss is a *market counterparty* and so may be expected to have a high degree of financial experience and knowledge. When considering whether this might be a more appropriate method of obtaining redress, the FSA will consider the costs to the *person* of bringing that action and the likelihood of success in relation to the size of any sums that may be recovered.

(8) Is the firm solvent?

The FSA will consider the solvency of the *firm* or *unauthorised person* concerned. Where the solvency of the *firm* or *unauthorised person* would be placed at risk by the payment of restitution, the FSA will consider whether it is appropriate to seek restitution. In those cases, the FSA may consider obtaining a compulsory *insolvency order* against the *firm* or *unauthorised person* rather than restitution. When considering these options, the FSA may also take account of the position of other creditors who may be prejudiced if the assets of the *firm* or *unauthorised person* are used to pay restitution payments prior to insolvency.

(9) What other powers are available to the FSA?

The FSA will consider the availability of its power to obtain a compulsory *insolvency order* against the *firm* or *unauthorised person* concerned or to apply to the court for the appointment of a receiver. In certain circumstances it may be appropriate for the FSA to obtain an administration order, winding up order or bankruptcy order against a *firm* or *unauthorised person* carrying out *regulated activities* in breach of the *general prohibition*.

The FSA may decide to exercise its power to obtain a compulsory *insolvency order* or to apply for the appointment of a receiver rather than to exercise its powers to obtain restitution. This could happen if the FSA has particular concerns about a *person's* conduct, or financial position and, in particular, whether it is solvent (though the appointment by the court of a receiver is not conditional on the insolvency of the *person* concerned). The FSA may also consider the cost of seeking compulsory *insolvency orders* which will be paid out of the assets of the *firm*, or of the *unauthorised person* concerned, compared to the cost of seeking restitution. In the case of *unauthorised persons* operating in breach of the *general prohibition*, a decision to apply for a compulsory *insolvency order* rather than restitution will depend on all the circumstances of the case. In particular, the FSA may consider the significance of the *unauthorised* activities compared to the whole of the business; the nature and conduct of the activities carried on in breach of the *general prohibition*; and the number and nature of the claims against the *person* or *firm* concerned. The FSA's powers to apply for compulsory *insolvency orders* are discussed in chapter 13 of this guide.

(10) The behaviour of the persons suffering loss

The FSA will consider the conduct of the *persons* who have suffered loss. As part of its *regulatory objectives* of increasing consumer awareness of the *financial system* and protecting *consumers*, the FSA is required to publicise information about the *authorised* status of *persons* and is empowered to give information and guidance about the regulation of financial services. This information should help *consumers* avoid suffering losses. When the FSA considers whether to obtain restitution on behalf of *persons*, it will consider the extent to which those *persons* may have contributed to their own loss or failed to take reasonable steps to protect their own interests.

(11) Other factors which may be relevant

The FSA will consider the context of the conduct in question. In any case where the FSA believes that the exercise of its powers under section 383 or 384 of the *Act* may affect the timetable or outcome of a *takeover bid*, it will consult the *Takeover Panel* before taking any steps to exercise such powers, and will give due weight to its views.

Where the FSA is considering applying to court for a restitution order in relation to *market abuse* under section 383 of the *Act*, it will also consider whether the court would be prevented from making that order by section 383(3) of the *Act*. A similar provision to section 383(3) applies where the FSA proposes to exercise its powers to require restitution in relation to market abuse under section 384(2). The conditions set out in section 383(3)(a) and section 384(a) and (b) are the same as those that apply to penalties for *market* *abuse* and the FSA will take the same factors into account when considering whether the conditions have been met. *DEPP* 6.3 lists those factors.

The FSA's choice of powers

11.4 In cases where it is appropriate to exercise its powers to obtain restitution from *firms*, the FSA will first consider using its own administrative powers under section 384 of the *Act* before considering taking court action.

11.5 However, there may be circumstances in which the FSA will choose to use the powers under section 382 or section 383 of the *Act* to apply to the court for an order for restitution against a *firm*. Those circumstances may include, for example, where:

(1) the FSA wishes to combine an application for an order for restitution with other court action against the *firm*, for example, where it wishes to apply to the court for an *injunction* to prevent the *firm* breaching a relevant requirement of the *Act* or any directly applicable Community regulation made under *MiFID*; the FSA's powers to apply for *injunctions* restraining *firms* from breaching relevant requirements of the *Act* or any directly applicable Community regulation under *MiFID* are discussed in chapter 10 of this guide;

(2) the FSA wishes to bring related court proceedings against an *unauthorised person* where the factual basis of those proceedings is likely to be the same as the claim for restitution against the *firm*;

(3) there is a danger that the assets of the *firm* may be dissipated; in those cases, the FSA may wish to combine an application to the court for an order for restitution with an application for an asset-freezing *injunction* to prevent assets from being dissipated; or

(4) the FSA suspects that the *firm* may not comply with an administrative requirement to give restitution; in those cases the FSA may consider that the sanction for breach of a court order may be needed to ensure compliance; a *person* who fails to comply with a court order may be in contempt of court and is liable to imprisonment, to a fine and/or to have his assets seized.

Determining the amount of restitution

11.6 The FSA may obtain information relating to the amount of profits made and/or losses or other adverse effects resulting from the conduct of *firms* or *unauthorised persons* as a result of the exercise of its powers to appoint investigators under sections 167 or 168 of the *Act*.

11.7 As well as obtaining information through the appointment of investigators, the FSA may consider using its power under section 166 of the *Act* to require a *firm* to provide a report prepared by a *skilled person*. That report may be requested to help the FSA to:

(1) determine the amount of profits which have been made by the *firm*; or

(2) establish whether the conduct of the *firm* has caused any losses or other adverse effects to qualifying persons and/or the extent of such losses; or

(3) determine how any amounts to be paid by the *firm* are to be distributed between qualifying persons.

Other relevant powers

11.8 The FSA may apply to the court for an *injunction* if it appears that a *person*, whether *authorised* or not, is reasonably likely to breach a requirement of the *Act* or any directly applicable Community regulation made under *MiFID* or engage in *market abuse*. It can also apply for an *injunction* if a *person* has breached a requirement of the *Act* or any directly applicable Community regulation made under *MiFID* or has engaged in *market abuse* and is likely to continue doing so.

11.9 The FSA may consider taking action for a financial penalty or *public censure*, as well as seeking restitution, if a *person* has breached a relevant requirement of the *Act* or any directly applicable Community regulation under *MiFID* or has engaged in, or *required or encouraged* others to engage in, *market abuse*.

11.10 The FSA may consider exercising its power to prosecute offences under the *Act*, as well as applying to seek restitution if a *person* has breached certain requirements of the *Act*.

12 Prosecution of Criminal Offences

The FSA's general approach

12.1 The FSA has powers under sections 401 and 402 of the *Act* to prosecute a range of criminal offences in England, Wales and Northern Ireland. The FSA may also prosecute criminal offences for which it is not the statutory prosecutor, but where the offences form part of the same criminality as the offences it is prosecuting under the *Act*.

12.2 The FSA's general policy is to pursue through the criminal justice system all those cases where criminal prosecution is appropriate. When it decides whether to bring criminal proceedings in England, Wales or Northern Ireland, or to refer the matter to another prosecuting authority in England, Wales or Northern Ireland (see paragraph 12.11), it will apply the basic principles set out in the Code for Crown Prosecutors.[11] When considering whether to prosecute a breach of the *Money Laundering Regulations*, the FSA will also have regard to whether the person concerned has followed the Guidance for the UK financial sector issued by the Joint Money Laundering Steering Group.

12.3 The FSA's approach when deciding whether to commence criminal proceedings for *misleading statements and practices offences* and *insider dealing offences*, where the FSA also has power to impose a sanction for *market abuse*, is discussed further in paragraphs 12.7 to 12.10.

Commencing criminal proceedings

12.4 In cases where criminal proceedings have commenced or will be commenced, the FSA may consider whether also to take civil or regulatory action (for example where this is appropriate for the protection of *consumers*) and how such action should be pursued. That action might include: applying to court for an *injunction*; applying to court for a restitution order; variation and/or cancellation of *permission*; and prohibition of individuals. The factors the FSA may take into account when deciding whether to take such action, where criminal proceedings are in contemplation, include, but are not limited to the following:

(1) whether, in the FSA's opinion, the taking of civil or regulatory action might unfairly prejudice the prosecution, or proposed prosecution, of criminal offences;

(2) whether, in the FSA's opinion, the taking of civil or regulatory action might unfairly prejudice the defendants in the criminal proceedings in the conduct of their defence; and

(3) whether it is appropriate to take civil or regulatory action, having regard to the scope of the criminal proceedings and the powers available to the criminal courts.

12.4A Subject to 12.4C, a decision to commence criminal proceedings will be made by the *RDC* Chairman or, in an urgent case and if the Chairman is not available, by an *RDC*

[11] http://www.cps.gov.uk/publications/docs/code2004english.pdf

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 FSA's executive of at least director of division level.

12.4B An exceptionally urgent case in these circumstances is one where the FSA staff believe that a decision to begin proceedings

(1) should be taken before it is possible to follow the procedure described in paragraph 12.4A; and

(2) it is necessary to protect the interests of consumers or potential consumers.

12.4C Decisions about whether to initiate criminal proceedings under the Building Societies Act 1986, the Friendly Societies Acts 1974 and 1992, the Credit Unions Act 1979, the Industrial and Provident Societies Act 1965 and the Friendly and Industrial and Provident Societies Act 1968 may either be taken by the procedure described in paragraph 12.4A above or under *executive procedures*. The less serious the offence or its impact and the less complex the issues raised, the more likely that the FSA will take the decision to prosecute under *executive procedures*.

FSA cautions

12.5 In some cases, the FSA may decide to issue a formal caution rather than to prosecute an offender. In these cases the FSA will follow the Home Office Guidance on the cautioning of offenders, currently contained in the Home Office Circular 18/1994.

12.6 Where the FSA decides to administer a formal caution, a record of the caution will be kept by the FSA and on the Police National Computer. The FSA will not publish the caution, but it will be available to parties with access to the Police National Computer. The issue of a caution may influence the FSA and other prosecutors in their decision whether or not to prosecute the offender if he offends again. If the offender is a *firm* or an *approved person*, a caution given by the FSA will form part of the *firm's* or *approved person's* regulatory record for the purposes of *DEPP* 6.2.1 G (3). If relevant, the FSA will take the caution into account in deciding whether to take disciplinary action for subsequent regulatory misconduct by the *firm* or the *approved person*. The FSA may also take a caution into account when considering a *person's* honesty, integrity and reputation and his fitness or propriety to perform controlled or other functions in relation to *regulated activities* (see *FIT* 2.1.3G).

Criminal prosecutions in cases of market abuse

12.7 In some cases there will be instances of market misconduct that may arguably involve a breach of the criminal law as well as *market abuse* as defined in section 118 of the *Act*. When the FSA decides whether to commence criminal proceedings rather than impose a sanction for *market abuse* in relation to that misconduct, it will apply the basic principles set out in the Code for Crown Prosecutors. When deciding whether to prosecute market misconduct which also falls within the definition of *market abuse*, application of these basic principles may involve consideration of some of the factors set out in paragraph 12.8.

12.8 The factors which the FSA may consider when deciding whether to commence a criminal prosecution for market misconduct rather than impose a sanction for *market abuse* include, but are not limited to, the following:

(1) the seriousness of the misconduct: if the misconduct is serious and prosecution is likely to result in a significant sentence, criminal prosecution may be more likely to be appropriate;

(2) whether there are victims who have suffered loss as a result of the misconduct: where there are no victims a criminal prosecution is less likely to be appropriate;

(3) the extent and nature of the loss suffered: where the misconduct has resulted in substantial loss and/or loss has been suffered by a substantial number of victims, criminal prosecution may be more likely to be appropriate;

(4) the effect of the misconduct on the market: where the misconduct has resulted in significant distortion or disruption to the market and/or has significantly damaged market confidence, a criminal prosecution may be more likely to be appropriate;

(5) the extent of any profits accrued or loss avoided as a result of the misconduct: where substantial profits have accrued or loss avoided as a result of the misconduct, criminal prosecution may be more likely to be appropriate;

(6) whether there are grounds for believing that the misconduct is likely to be continued or repeated: if it appears that the misconduct may be continued or repeated and the imposition of a financial penalty is unlikely to deter further misconduct, a criminal prosecution may be more appropriate than a financial penalty;

(7) whether the person has previously been cautioned or convicted in relation to market misconduct or has been subject to civil or regulatory action in respect of market misconduct;

(8) the extent to which redress has been provided to those who have suffered loss as a result of the misconduct and/or whether steps have been taken to remedy any failures in systems or controls which gave rise to the misconduct: where such steps are taken promptly and voluntarily, criminal prosecution may not be appropriate; however, potential defendants will not avoid prosecution simply because they are able to pay compensation;

(9) the effect that a criminal prosecution may have on the prospects of securing redress for those who have suffered loss: where a criminal prosecution will have adverse effects on the solvency of a *firm* or individual in circumstances where loss has been suffered by *consumers*, the FSA may decide that criminal proceedings are not appropriate;

(10) whether the *person* is being or has been voluntarily cooperative with the FSA in taking corrective measures; however, potential defendants will not avoid

prosecution merely by fulfilling a statutory duty to take those measures;

(11) whether an individual's misconduct involves dishonesty or an abuse of a position of authority or trust;

(12) where the misconduct in question was carried out by a group, and a particular individual has played a leading role in the commission of the misconduct: in these circumstances, criminal prosecution may be appropriate in relation to that individual;

(12A) where the misconduct in question was carried out by two or more individuals acting together and one of the individuals provides information and gives full assistance in the FSA's prosecution of the other(s), the FSA will take this co-operation into account when deciding whether to prosecute the individual who has assisted the FSA or bring market abuse proceedings against him;

(13) the personal circumstances of an individual may be relevant to a decision whether to commence a criminal prosecution.

12.9 The importance attached by the FSA to these factors will vary from case to case and the factors are not necessarily cumulative or exhaustive.

12.10 It is the FSA's policy not to impose a sanction for *market abuse* where a *person* is being prosecuted for market misconduct or has been finally convicted or acquitted of market misconduct (following the exhaustion of all appeal processes) in a criminal prosecution arising from substantially the same allegations. Similarly, it is the FSA's policy not to commence a prosecution for market misconduct where the FSA has brought or is seeking to bring disciplinary proceedings for *market abuse* arising from substantially the same allegations.

Liaison with other prosecuting authorities

12.11 The FSA has agreed guidelines that establish a framework for liaison and cooperation in cases where one or more other authority (such as the Crown Prosecution Service or Serious Fraud Office) has an interest in prosecuting any aspect of a matter that the FSA is considering for investigation, investigating or considering prosecuting. These guidelines are set out in annex 2 to this guide.

Prosecution of Friendly Societies

12.12 The FSA's power to prosecute friendly societies is discussed in *EG* 19.3 to 19.9 and in an article on the FSA web-site entitled 'Prosecuting Friendly Societies'.[12]

[12] http://www.fsa.gov.uk/Pages/doing/regulated/law/focus/friendly.shtml

13 Insolvency

13.1 This chapter explains the FSA's policies on how it uses its powers under the *Act* to apply to the court for orders under existing insolvency legislation and exercise its rights under the *Act* to be involved in proceedings under that legislation. The FSA's effective use of its powers and rights in insolvency proceedings helps it pursue its *regulatory objectives* of maintaining market confidence, protecting *consumers* and reducing *financial crime* by, amongst other matters, enabling it to apply to court for action to:

(1) stop *firms* and *unauthorised persons* carrying on insolvent or unlawful business; and

(2) ensure the orderly realisation and distribution of their assets.

The FSA's general approach to use of its powers and rights in insolvency proceedings

13.2 In using its powers to seek *insolvency orders* the FSA takes full account of: the principle adopted by the courts that recourse to insolvency regimes is a step to be taken for the benefit of creditors as a whole; and the fact that the court will have regard to the public interest when considering whether to wind up a body on the grounds that it is just and equitable to do so.

13.3 The FSA will consider the facts of each particular case when it decides whether to use its powers and exercise its rights. The FSA will also consider the other powers available to it under the *Act* and to *consumers* under the *Act* and other legislation, and the extent to which the use of those other powers meets the needs of *consumers* as a whole and the FSA's *regulatory objectives*. The FSA may use its powers to seek *insolvency orders* in conjunction with its other powers, including its powers to seek *injunctions*.

13.3A Decisions about whether to apply to the civil courts for insolvency 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 FSA’s executive of at least director of division level.

13.3B An exceptionally urgent case in these circumstances is one where the FSA staff believe that a decision to begin proceedings

(1) should be taken before it is possible to follow the procedure described in paragraph 13.3A; and

(2) it is necessary to protect the interests of consumers or potential consumers.

Petitions for administration orders or compulsory winding up orders: determining whether a company or partnership is unable to pay its debts

13.4 The FSA can petition for an administration order or compulsory winding up order on the grounds that the *company* or *partnership* is unable (or, in the case of administration orders, is likely to become unable) to pay its debts. The FSA does not have to be a creditor to petition on these grounds.

13.5 Under sections 359 (Petitions) and 367 (Winding up Petitions) of the *Act*, a *company* or *partnership* is deemed to be unable to pay its debts if it is in default on an obligation to pay a sum due and payable under an agreement where the making or performance of the agreement constitutes or is part of a *regulated activity* which the *company* or *partnership* is carrying on.

13.6 The FSA would not ordinarily petition for an administration order unless it believes that the *company* or *partnership* is, or is likely to become, insolvent. Similarly, the FSA would not ordinarily petition for a compulsory winding up order solely on the ground of inability to pay debts (as provided in the *Act*), unless it believes that the *company* or *partnership* is or is likely to be insolvent.

13.7 While a default on a single agreement of the type mentioned in paragraph 13.5 is, under the *Act*, a presumption of an inability to pay debts, the FSA will consider the circumstances surrounding the default. In particular, the FSA will consider whether:

(1) the default is the subject of continuing discussion between the *company* or *partnership* and the creditor, under the relevant agreement, which is likely to lead to a resolution;

(2) the default is an isolated incident;

(3) in other respects the *company* or *partnership* is meeting its obligations under agreements of this kind; and

(4) the FSA has information to indicate that the *company* or *partnership* is able to pay its debts or, alternatively, that in addition to the specific default the *company* or *partnership* is in fact unable to pay its debts.

Petitions for administration orders or compulsory winding up orders: determining whether to seek any insolvency order

13.8 Where the FSA believes that a *company* or *partnership* to which sections 359(1) and 367(1) of the *Act* applies is, or is likely to become, unable to pay its debts, the FSA will consider whether it is appropriate to seek an administration order or a compulsory winding up order from the court. The FSA's approach will be in two stages: the first is to consider whether it is appropriate to seek any *insolvency order*; the second is to consider which *insolvency order* will meet, or is likely to meet, the needs of *consumers*.

13.9 In determining whether it is appropriate to seek an *insolvency order* on this basis, the FSA will consider the facts of each case including, where relevant:

(1) whether the *company* or *partnership* has taken or is taking steps to deal with its insolvency, including petitioning for its own administration, placing itself

in voluntary winding up or proposing to enter into a company voluntary arrangement, and the effectiveness of those steps;

(2) whether any consumer or other creditor of the *company* or *partnership* has taken steps to seek an *insolvency order* from the court;

(3) the effect on the *company* or partnership and on the creditors of the company or partnership if an *insolvency order* is made;

(4) whether the use of other powers, rights or remedies available to the FSA, *consumers* and creditors under the *Act* and other legislation will achieve the same or a more advantageous result in terms of the protection of *consumers*, and of market confidence and the restraint and remedy of unlawful activity, for example:

   (a) in the case of *authorised persons* and *appointed representatives*, the interests of *consumers* may, in certain circumstances, be met by the use of the FSA's intervention powers and by requiring restitution to *consumers*;

   (b) in the case of *unauthorised companies* and *partnerships*, the FSA will consider whether the interests of *consumers* can be achieved by seeking an *injunction* to restrain continuation of the carrying on of the *regulated activity* and/or an order for restitution to consumers.

(5) whether other regulatory authorities or law enforcement agencies propose to take action in respect of the same or a similar issue which would be adequate to address the FSA's concerns or whether it would be appropriate for the FSA to take its own action;

(6) the nature and extent of the *company* or *partnership* assets and liabilities, and in particular whether the *company* or *partnership* holds *client* assets and whether its secured and preferred liabilities are likely to exceed available assets;

(7) whether there is a significant cross border or international element to the business which the *company* or *partnership* is carrying on and the effect on foreign assets or on the continuation of the business abroad of making an *insolvency order*;

(8) whether an *insolvency order* is likely to achieve a fair and orderly realisation and distribution of assets; and

(9) whether there is a risk of creditors being preferred and any advantage in securing a moratorium in relation to proceedings against the *company* or *partnership*.

13.10 After the FSA has determined that it is appropriate to seek an *insolvency order*, and there is no moratorium in place under Schedule A1 to the Insolvency Act 1986 (as amended by the Insolvency Act 2000) (hereafter referred to in this chapter as 'the

1986 Act'), it will consider whether this order should be an administration order or a compulsory winding up order.

Petitions for administration orders or compulsory winding up orders: determining which insolvency order to seek

13.11 An administration order can be made only in relation to *companies* and *partnerships* and only where the court believes that making such an order will achieve one or more of the four purposes set out in section 8 of the 1986 Act. The FSA will apply for an administration order only where it considers that doing so will meet or is likely to meet one or more of these purposes.

13.12 Where it has the option of applying for either an administration order or a compulsory winding up order, the FSA will have regard to the purpose to be achieved by the insolvency procedure.

13.13 In addition, the FSA will consider, where relevant, factors including:

(1) the extent to which the financial difficulties are, or are likely to be attributable to the management of the *company* or *partnership*, or to external factors, for example, market forces;

(2) the extent to which it appears to the FSA that the *company* or *partnership* may, through an administrator, be able to trade its way out of its financial difficulties;

(3) the extent to which the *company* or *partnership* can lawfully and viably continue to carry on *regulated activities* through an administrator;

(4) the extent to which the sale of the business in whole or in part as a going concern is likely to be achievable;

(5) the complexity of the business of the *company* or *partnership*;

(6) whether recourse to one regime or another is likely to result in delays in redress to *consumers* or an additional cost;

(7) whether recourse to one regime or another is likely to result in better redress to *consumers*;

(8) the adequacy and reliability of the *company* or *partnership*'s accounting or administrative records;

(9) the extent to which the management of the *company* or *partnership* has co-operated with the FSA;

(10) in the case of an *unauthorised company* or *partnership* carrying on a *regulated activity* as part of a larger enterprise, the scale and importance of the unauthorised activity in relation to the whole of the *company's* or *partnership's* business;

(11) the extent to which the management of the *company* or *partnership* is likely to cooperate in determining whether one or more of the purposes of an administration order can be met;

(12) in the case of an *unauthorised company* or *partnership* carrying on a *regulated activity* as part of a larger enterprise, the extent to which the *company*'s or *partnership*'s survival can be anticipated without the continuance of the unauthorised regulated activity;

(13) where an administrative receiver is in place, whether the *debenture* holder is likely to agree to an application for an administration order;

(14) where an administrative receiver is in place, whether the FSA has reason to believe that the *debenture* under which the administrative receiver has been appointed is likely to be released, discharged, avoided or challenged.

Petitioning for compulsory winding up on just and equitable grounds

13.14 The FSA has power under section 367(3)(b) of the *Act* to petition the court for the compulsory winding up of a *company* or *partnership*, on the ground that it is just and equitable for the body to be wound up, regardless of whether or not the body is able to pay its debts. In some instances the FSA may need to consider whether to petition on this ground alone or in addition to the ground of insolvency.

13.15 When deciding whether to petition on this ground the FSA will consider all relevant facts including:

(1) whether the needs of *consumers* and the public interest require the *company* or *partnership* to cease to operate;

(2) the need to protect *consumers'* claims and *client* assets;

(3) whether the needs of *consumers* and the public interest can be met by using the FSA's other powers;

(4) in the case of an *authorised person*, where the FSA considers that the *authorisation* should be withdrawn or where it has been withdrawn, the extent to which there is other business that the *person* can carry on without *authorisation*;

(5) in the case of an *unauthorised company* or *partnership* carrying on a *regulated activity* as part of a larger enterprise, the scale and importance of the *unauthorised regulated activity* and the extent to which the enterprise is likely to survive the restraint and remedying of that activity by the use of other powers available to the FSA having regard to any continuing risk to *consumers*;

(6) whether there is reason to believe that an *injunction* to restrain the carrying on of an *unauthorised regulated activity* would be ineffective;

(7) whether the *company* or *partnership* appears to be or to have been involved in *financial crime* or appears to be or to have been used as a vehicle for *financial crime*.

13.16 Where appropriate the FSA will also take the following factors into account:

(1) the complexity of the *company* or *partnership* (as this may have a bearing on the effectiveness of winding up or any alternative action);

(2) whether there is a significant cross border or international element to the business being carried on by the *company* or *partnership* and the impact on the business in other jurisdictions;

(3) the adequacy and reliability of the *company* or *partnership*'s accounting or administrative records;

(4) the extent to which the *company* or *partnership*'s management has co-operated with the FSA.

Petitioning for compulsory winding up of a company already in voluntary winding up

13.17 Section 365(6) of the *Act* makes it clear that the FSA may petition for the compulsory winding up of a *company* even if it is already in voluntary winding up. This power is already available to creditors and contributories of *companies* in voluntary winding up. For example, the court can be asked to direct the liquidator to investigate a transaction which the *company* undertook before the winding up. In some circumstances, this power may be used in respect of partnerships (section 367 of the *Act*).

13.18 Given the powers available to creditors (or contributories), the FSA anticipates that there will only be a limited number of cases where it will exercise the right under section 365(6) to petition for the compulsory winding up of a company already in voluntary winding up. The FSA will only be able to exercise this right where one or both of the grounds on which it can seek compulsory winding up are met.

13.19 Factors which the FSA will consider when it decides whether to use this power (in addition to the factors identified in paragraphs 13.11 to 13.16 in relation to the FSA's decisions to seek compulsory winding up) include:

(1) whether the FSA's concerns can properly and effectively be met by seeking a specific direction under section 365(2) of the Act;

(2) whether the affairs of the *company* require independent investigation of the kind which follows a compulsory winding up order and whether there are or are likely to be funds available for that investigation;

(3) the composition of the creditors of the company including the ratio of *consumer* and non-*consumer* creditors and the nature of their claims;

(4) the extent to which there are creditors who are or are likely to be connected to the *company* or its directors and management;

(5) the extent to which the directors and management are cooperating with the liquidator in voluntary winding up;

(6) the need to protect and distribute *consumers'* claims and *assets*;

(7) whether a petition by the FSA for compulsory winding up is likely to have the support of the majority or a large proportion of the creditors; and

(8) the extent of any resulting delay and additional costs in seeking a compulsory winding up order.

13.20 Where the FSA is requested by a *Home State regulator* of an *EEA firm* or a *Treaty firm* to present a petition for the compulsory winding up of that firm, the FSA will first need to consider whether the presentation of the petition is necessary in order to comply with a Community obligation.

Power to apply to court for a provisional liquidator

13.21 Where a petition has been presented for the winding up of a body, the court may appoint a provisional liquidator in the interim period pending the hearing of the petition. An appointment may be sought and made to:

(1) permit the continuation of the business for the protection of *consumers*; or

(2) secure, protect, or realise assets or property in the possession or under the control of the *company* or *partnership* (in particular where there is a risk that the assets will be dissipated) for the benefit of creditors or *consumers*.

13.22 In cases where it decides to petition for the compulsory winding up of a body under section 367 of the *Act*, the FSA will also consider whether it should seek the appointment of a provisional liquidator. The FSA will have regard, in particular, to the extent to which there may be a need to protect *consumers*' claims and *consumers*' funds or other assets. Where the FSA decides to petition for the compulsory winding up of a *company* or *partnership* on the just and equitable ground and where the *company* or *partnership* is solvent but may become insolvent, the FSA will also consider whether the appointment of a provisional liquidator would serve to maintain the solvency of the *company* or *partnership*.

The FSA's use of its power to petition for a bankruptcy order or a sequestration award in relation to an individual (section 372 of the Act)

13.23 The FSA recognises that the bankruptcy of an individual or the sequestration of an individual's estate are significant measures which may have significant personal and professional implications for the individual involved. In considering whether to present a petition the FSA's principal considerations will be its *regulatory objectives* including the protection of *consumers*.

13.24 The FSA is also mindful that whilst the winding up of an *unauthorised company* or *partnership* should bring an end to any unlawful activity, this is not necessarily the effect of bankruptcy or sequestration. The FSA may, in certain cases, consider the use of powers to petition for bankruptcy or sequestration in conjunction with the use of other powers to seek *injunctions* and other relief from the court. In particular, where the individual controls assets belonging to consumers and holds, or appears to hold, those assets on trust for consumers, those assets will not vest in the insolvency practitioner appointed in the bankruptcy or sequestration. The FSA will in those circumstances consider whether separate action is necessary to protect the assets and interests of *consumers*.

13.25 If an individual appears to be unable to pay a *regulated activity debt*, or to have no reasonable prospect of doing so, then section 372 of the *Act* permits the FSA to petition for the individual's bankruptcy, or in Scotland, for the sequestration of the individual's estate. The FSA will petition for bankruptcy or sequestration only if it believes that the individual is, in fact, insolvent. In determining this, as a general rule, the FSA will serve a demand requiring the individual to establish, to the FSA's satisfaction, that there is a reasonable prospect that he will be able to pay the *regulated activity debt*.

13.26 The FSA will consider the response of the individual to that demand on its own facts and in the light of information, if any, available to the FSA. Exceptionally, the FSA may not first proceed to serve a demand if:

(1) the individual is already in default of a *regulated activity debt* which has fallen due and payable; and

(2) the FSA is satisfied, either because the individual has confirmed it or on the information already available to the FSA, that the individual is insolvent and has no reasonable prospect of paying another *regulated activity debt* when it falls due.

13.27 If the FSA believes that the individual is insolvent, the factors it will consider when it decides whether to seek a bankruptcy order or sequestration award include:

(1) whether others have taken steps to deal with the individual's insolvency, including a proposal by the individual of a voluntary arrangement, a petition by the individual for his own bankruptcy or sequestration, or a petition by a third party for the individual's bankruptcy or the sequestration of the individual's estate;

(2) whether the FSA can adequately deal with the individual using other powers available to it under the *Act*, without the need to seek a bankruptcy order or sequestration award;

(3) the extent of the individual’s insolvency or apparent insolvency;

(4) the number of *consumers* affected and the extent of their claims against the individual;

(5) whether the individual has control over assets belonging to *consumers*;

(6) the individual's conduct in his dealings with the FSA, including the extent of his cooperation with the FSA;

(7) whether the individual appears to be, or to have been, involved in *financial crime*;

(8) the adequacy of the individual's accounts and administration records;

(9) in the case of an *unauthorised individual* who is carrying on or who has carried on a *regulated activity*, the nature, scale and importance of that activity and the individual's conduct in carrying on that activity;

(10) whether there would be an advantage in securing a moratorium in respect of proceedings against the individual; and

(11) whether there are any special personal or professional implications for that individual if a bankruptcy order or sequestration award is made.

Applications in relation to voluntary arrangements: the FSA's policy

13.28 In general terms, the approval of a voluntary arrangement (in relation to *companies*, *partnerships* and *individuals*) requires more than 75% of the creditors to whom notice of a meeting has been sent and who are present in person or by proxy. The arrangement must also not be opposed by more than 50% of creditors given notice of the meeting and who have notified their claim, but excluding secured creditors and creditors who are, in the case of companies or partnerships, connected persons and, in the case of individuals, associates. The FSA will therefore not normally challenge an arrangement approved by a majority of creditors.

13.29 Exceptionally, the FSA will consider making such a challenge using its powers in sections 356 and 357 of the *Act* after considering, in particular, the following matters:

(1) The composition of the creditors of the company including the ratio of *consumer* to non-*consumer* creditors or the nature of their claims;

(2) whether the FSA has concerns, or is aware of concerns of creditors, about the regularity of the meeting or the identification of connected or associated creditors and the extent to which creditors with those concerns could themselves make an application to court;

(3) whether the *company*, *partnership* or individual has control of consumer assets which might be affected by the voluntary arrangement;

(4) the complexity of the arrangement;

(5) the nature and complexity of the regulated activity;

(6) the *company's*, *partnership's* or individual's previous dealings with the FSA, including the extent of its cooperation with the FSA and its compliance history;

(7) whether the FSA is aware of any matters which would materially affect the rights and expectations of creditors under the voluntary arrangement as approved; and

(8) the extent to which the debtor has made full and accurate disclosure of assets and liabilities in the proposal to creditors.

13.30 Similarly, the FSA will not normally use its powers under section 358 of the *Act* to petition for sequestration of a debtor's estate following the grant of a trust deed, if the trust deed has been, or appears likely to be, acceded to by a majority of creditors.

13.31 In considering whether to exercise its powers under Schedule A1 to the 1986 Act to make a challenge in relation to acts, omissions or decisions of a nominee during a moratorium, the FSA will have regard to the following matters in particular:

(1) whether the FSA is aware of matters indicating that the proposed voluntary arrangement does not have a reasonable prospect of being approved and implemented or that the company is likely to have insufficient funds available to it to carry on its business during the moratorium;

(2) whether consumer assets held by the company are or may be placed at risk; and

(3) in the case of an *unauthorised company* whether that *company* is able to carry on its business lawfully during the moratorium without undertaking any *regulated activity* in contravention of the *general prohibition*.

Applications for orders against debt avoidance: the FSA's policy

13.32 When it decides whether to make an application for an order against debt avoidance pursuant to section 375 of the *Act*, the FSA will consider all relevant factors, including the following:

(1) the extent to which the relevant transactions involved dealings in *consumers*' funds;

(2) whether it would be appropriate to petition for a winding up order, bankruptcy order, or sequestration award, in relation to the debtor and the extent to which the transaction could properly be dealt with in that winding up, bankruptcy or sequestration;

(3) the number of *consumers* or other creditors likely to be affected and their ability to make an application of this nature; and

(4) the size of the transaction.

The FSA's arrangements for notification of petitions and other documents

13.33 Paragraphs 13.34 to 13.36 contain information for insolvency practitioners and others about sending copies of petitions, notices and other documents to the FSA, and about making reports to the FSA. Insolvency practitioners and others have duties to give that information and those documents to the FSA under various sections in Part XXIV of the *Act* (Insolvency). Paragraph 13.34 identifies the relevant sections of the Act that explain some of the duties.

Insolvency regime and relevant sections of the *Act*.

13.34

Insolvency regime	**Relevant sections of the Act**
Administration	Sections 361 and 362(3)
Compulsory winding up	Sections 369, 370, and 371(3)
Voluntary liquidation	Section 365(4)
Receivership	Sections 363(4) and 364
Bankruptcy and sequestration	Sections 373 and 374(3)
Company moratoria Individual voluntary arrangements	Paragraph 44 of schedule A1 to the 1986 Act Section 357(3) - relates to notices of the result of the creditors' meetings.
Trust deeds for creditors	Section 358(2)(a) and (b) - relates to copies of trust deeds and copies of certain other documents of information sent to creditors. Section 358(4) - relates to notices of any meeting of creditors held in relation to the trust deed.

13.35 Unless paragraph 13.36 applies, the information and documents identified in 13.34 should be sent to the Financial Services Authority, 25 The North Colonnade, Canary Wharf, London E14 5HS marked 'Insolvency Information'. If the *person* who is subject to the insolvency regime ('the insolvent person') is an *authorised person*, the information and documents should, in the first instance, be addressed to the insolvent person's supervisory contact at the FSA (if known).

13.36 If the insolvent person is an *authorised person* and the sender of the information or documents knows that the insolvent person's supervisory contact operates from Edinburgh, information or documents should, in the first instance, be sent to the Financial Services Authority, Quayside House, 127 Fountainbridge, Edinburgh EH3 8DJ.

Rights on petitions by third parties and involvement in creditors meetings: the FSA's policy

13.37 The FSA will exercise its rights under sections 362, 371 and 374 of the *Act* to be heard on a third party's petition or in subsequent hearings only where it believes it has information that it considers relevant to the court's consideration of the petition or application. These circumstances may include:

(1) where the FSA has relevant information which it believes may not otherwise be drawn to the court's attention; especially where the FSA has been asked to attend for a particular purpose (for example to explain the operation of its rules);

(2) where the FSA believes that the *insolvency order* being sought by a third party is inappropriate to meet the needs of *consumers* and the public interest; and

(3) where the FSA believes that the making of an *insolvency order* will affect the FSA's exercise of its other powers under the *Act*, and wishes to make the court aware of this.

13.38 The making of an *insolvency order* operates to stay any proceedings already in place against the company, partnership or individual, and prevents proceedings being commenced while the *insolvency order* is in place. Proceedings can continue or be commenced against those *persons* only with the court's permission. This may impact on the effectiveness of the FSA's use of its powers to seek *injunctions* and restitution orders from the court. The FSA will draw the court's attention to this potential effect where the FSA believes it is a relevant consideration, but it is a matter for the court to determine its relevance in a particular case.

13.39 The FSA is given power to receive the same information as creditors are entitled to receive in the winding up, administration, receivership or voluntary arrangement of an *authorised person*, of *appointed representatives* and of *persons* who have carried out a *regulated activity* while *unauthorised*. The FSA is also entitled to attend and make representation at any creditors' meeting or (where relevant) creditors' committee meeting taking place in those regimes. When it decides whether to exercise its power to attend and make representations at meetings the factors which the FSA will take into account include:

(1) the extent of claims by *consumers* upon the body or individual;

(2) the extent to which *consumer* assets are held by the body or individual;

(3) the extent to which the FSA is aware of concerns of *consumers* (or other creditors or contributories) about the way in which the insolvency regime is proceeding;

(4) whether the circumstances which gave rise to the insolvency regime might have general implications for others carrying on regulated business;

(5) whether the creditors include *shareholders*, directors, or other *persons* who have a connection with the management or ownership of the body or are associated with the individual;

(6) the complexity or specialisation of the business of the body or individual; and

(7) where there is a significant cross border or international element to the business which the *company*, *partnership* or individual is carrying out.

14 Collective Investment Schemes.

Exercise of the powers in respect of Authorised Unit Trust Schemes (*AUT*): sections 254 (revocation of authorisation), 257 (directions) and 258 (power to apply to court) of the Act

14.1 The FSA 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 a *manager* or *trustee* 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* as a result of the *breach*;

(c) whether the *breach* highlights serious or systemic weaknesses in the management or control of either the *AUT* 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* 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*. The FSA 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*. For example, this may be necessary if:

(a) information suggests the current price of units under the *AUT* may not accurately reflect the value *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 either or both of its powers under sections 254 and 257. However, the FSA will also consider the interests of past and potential *participants*.

(5) Whether the FSA's concerns can be resolved by taking enforcement action against the *manager* and/or *trustee* of the *AUT*. In some instances, the FSA may consider it appropriate to deal with a *breach* by a manager or *trustee* by taking direct enforcement action against the *manager* and/or *trustee* without using its powers under sections 254, 257, or 258. In other instances, the FSA may combine direct enforcement action against a *trustee* and/or *manager* with the use of one or more of the powers under sections 254, 257 and 258.

(6) Whether there is information to suggest that a *trustee* or *manager* has knowingly or recklessly given the FSA 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 *manager* or *trustee* in relation to, and following the identification of, the issue, for example:

(a) whether the *manager* or *trustee* discovered the issue or problem affecting the *AUT* and brought it to the FSA's attention promptly;

(b) the degree to which the *manager* or *trustee* is willing to cooperate with the FSA's investigation and to take protective steps, for example by suspending the issue and redemption of units in the *AUT*;

(c) whether the *manager* or *trustee* has compensated past and existing *participants* who have suffered loss.

(8) The compliance history of the *trustee* or *manager*, including whether the FSA has previously taken disciplinary action against the *trustee* or *manager* in relation to the *AUT* or any other *collective investment scheme*.

(9) Whether there is information to suggest that the *AUT* is being used for criminal purposes and/or that the *manager* or *trustee* is itself involved in *financial crime*.

Choice of powers

14.2 The FSA may use its powers under sections 254, 257 and 258 individually, together, and as well as direct enforcement action against a *trustee* or *manager* in their capacity as *firms*.

14.3 Where the FSA has a concern about an *AUT* that must be dealt with urgently, it will generally use its power to give directions under section 257 in the first instance.

14.4 The following are examples of situations where the FSA may consider it appropriate to seek a court order under section 258 to remove the *manager* or *trustee*:

(1) Where there are grounds for concern over the behaviour of the *manager* or *trustee* in respect of the management of the *scheme* or of its assets.

(2) Where a *manager* or *trustee* has breached a requirement imposed on him under the *Act* or has knowingly or recklessly given the FSA false information.

14.5 The FSA recognises that participants in an *AUT* have a direct financial interest in the *scheme property*. It follows that in cases where it considers it appropriate to use its section 254 power to revoke an authorisation order, the FSA will generally first require the *manager* or *trustee* to wind up the *AUT* (or seek a court order for the appointment of a firm to wind up the *AUT*).

14.6 [deleted]

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 FSA's policy

14.7 When it decides whether a suspension order under section 267 is appropriate, the FSA will consider all the relevant circumstances. General factors that the FSA 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.

14.8 In addition to or instead of suspending the promotion of a *scheme* recognised under section 264, the FSA 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 FSA's concerns. Also, Schedule 5 to the *Act* states that a *person* who for the time being is an *operator*, *trustee* or *depositary* of a *scheme* recognised under section 264 of the *Act* is an *authorised person*. So, it will also be open to the FSA to take direct enforcement action against those *persons*.

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 270 or section 272: the FSA's policy

14.9 The FSA will consider all the relevant circumstances of each case. The general factors which the FSA may consider include, but are not limited to, those set out in paragraph 14.1(1) to (9) (the conduct of the *operator* of the *scheme* and of the *trustee* or *depositary* will also, of course, be taken into account in relation to each of these factors).

14.10 As well as or instead of using these powers, the FSA 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 *depositary* as will resolve the FSA's concerns.

14.10A 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 FSA's executive of at least director of division level.

14.10B An exceptionally urgent case in these circumstances is one where the FSA staff believe that a decision to begin proceedings

(1) should be taken before it is possible to follow the procedure described in paragraph 14.10A; and

(2) it is necessary to protect the interests of consumers or potential consumers.

15 Disqualification of auditors and actuaries

15.1 Auditors and *actuaries* fulfil a vital role in the management and conduct of *firms* and *AUTs*. Provisions of the *Act*, *rules* made under the *Act* and the *OEIC Regulations 2000* impose various duties on auditors and *actuaries*. These duties and the FSA's power to disqualify auditors and *actuaries* if they breach them assist the FSA in pursuing its *regulatory objectives*. The FSA's power to disqualify auditors in breach of duties imposed by *trust scheme rules* also assist the FSA to achieve these *regulatory objectives* by ensuring that auditors fulfil the duties imposed on them by these rules.

Disqualification of auditors and actuaries under its powers contained in section 345 and section 249 of the Act: the FSA's general approach

15.2 The FSA recognises that the use of its powers to disqualify auditors and *actuaries* will have serious consequences for the auditors or *actuaries* concerned and their clients; it will therefore exercise its power to impose a disqualification in a way that is proportionate to the particular breach of duty concerned. The FSA will consider the seriousness of the breach of duty when deciding whether to exercise its power to disqualify and the scope of any disqualification.

15.3 *Actuaries* appointed by *firms* under rule 4.3.1 of the FSA's Supervision Manual are *approved persons* and as such will be subject to the FSA's *Statements of Principle* and *Code of Practice for Approved Persons*. When deciding whether to exercise its power to disqualify an *actuary* who is an *approved person*, the FSA will consider whether the particular breach of duty can be adequately addressed by the exercise of its disciplinary powers in relation to *approved persons*.

15.4 In cases where the nature of the breach of duties imposed on the auditors and *actuaries* under the *Act* (and/or in the case of actuaries imposed by *trust scheme rules*) is such that the FSA has concerns about the fitness and propriety of an individual auditor or *actuary*, the FSA will consider whether it is appropriate to make a *prohibition order* instead of, or in addition to, disqualifying the individual.

15.5 A disqualification order will be made against the *person* appointed as auditor or *actuary* of the *firm*. In the case of *actuaries*, the disqualification order will be made against the individual appointed by the *firm*. In the case of auditors, the disqualification order will depend on the terms of the appointment. Where the *firm* has appointed a named individual as auditor the disqualification will be made against that individual and this will be the case where the individual concerned is a member of a *firm* of auditors. Where the *firm* has appointed a firm as auditor the disqualification order will be against that firm. Where the *person* appointed is a *limited liability partnership* the disqualification order will be against the *limited liability partnership* rather than its members.

Disqualification under section 345

15.6 When it decides whether to exercise its power to disqualify an auditor or *actuary* under section 345(1), and what the scope of any disqualification will be, the FSA will take into account all the circumstances of the case. These may include, but are not limited to, the following factors:

(1) the nature and seriousness of any breach of rules and the effect of that breach: the rules are set out in *SUP* 3 (Auditors) and *SUP* 4 (*Actuaries*), and in the case of *firms* which are *ICVCs*, in *COLL* 4 (Investor relations) and *COLL* 7 (Suspension of dealings and termination of authorised funds). The FSA will regard as particularly serious any breach of *rules* which has resulted in, or is likely to result in, loss to *consumers* or damage to confidence in the *financial system* or an increased risk that a *firm* may be used for the purposes of *financial crime*;

(2) the nature and seriousness of any breach of the duties imposed under the *Act*: the FSA will regard as particularly serious any failure to disclose to it information which has resulted in, or is likely to result in, loss to *consumers* or damage to confidence in the *financial system* or an increased risk that a *firm* may be used for the purposes of *financial crime*;

(3) action taken by the auditor or *actuary* to remedy the *breach*: this may include whether the auditor or *actuary* brought the *breach* to the attention of the FSA promptly, the degree of cooperation with the FSA in relation to any subsequent investigation, and whether remedial steps have been taken to rectify the breach and whether reasonable steps have been taken to prevent a similar breach from occurring;

(4) action taken by professional bodies: the FSA will consider whether any disciplinary action has been or will be taken against the auditor or *actuary* by a relevant professional body and whether that action adequately addresses the particular breach of duty;

(5) The previous compliance record of the auditor or *actuary* concerned: whether the FSA (or a *previous regulator*) or professional body has imposed any previous disciplinary sanctions on the *firm* or individual concerned.

Disqualification under section 249

15.7 When deciding whether or not to disqualify an auditor under section 249(1) of the *Act* (concerning the power to disqualify an auditor for breach of *trust scheme rules*), and in setting the disqualification, the FSA will take into account all the circumstances of the case. These may include, but are not limited to, the following circumstances:

(1) the effect of the auditor's breach of a duty imposed by *trust scheme rules*: the FSA will regard as particularly serious a breach of a duty imposed by *trust scheme rules* (set out in *COLL* 4 (Investor relations) and *COLL* 7 (Suspension of dealings and termination of authorised funds)) which has resulted in, or is likely to result in, loss to *consumers* or damage to confidence in the *financial system* or an increased risk that a *firm* may be used for the purposes of *financial crime*;

(2) action taken by the auditor to remedy its breach of a duty imposed by *trust scheme rules*: this may include any steps taken by the auditor to bring the

breach to the attention of the FSA promptly, the degree of co-operation with the FSA in relation to any subsequent investigation, and whether any steps have been taken to rectify the breach or prevent a similar breach;

(3) action taken by a relevant professional body: The FSA will consider whether any disciplinary action has or will be taken against the auditor by a relevant professional body and whether such action adequately addresses the particular breach of a duty imposed by *trust scheme rules*;

(4) the previous compliance record of the auditor concerned: whether the FSA (or a *previous regulator*) or professional body has imposed any previous disciplinary sanctions on the *firm* or individual concerned.

Removal of a disqualification

15.8 An auditor or *actuary* may ask the FSA to remove the disqualification at any time after it has been imposed. The FSA will remove a disqualification if it is satisfied that the disqualified *person* will in future comply with the duty in question (and other duties under the *Act*). When it considers whether to grant or refuse a request that a disqualification be removed on these grounds, the FSA will take into account all the circumstances of a particular case. These circumstances may include, but are not limited to:

(1) the seriousness of the breach of duty that resulted in the disqualification;

(2) the amount of time since the original disqualification; and

(3) any steps taken by the auditor or *actuary* after the disqualification to remedy the factors which led to the disqualification and any steps taken to prevent a similar breach of duty from happening again.

16 Disapplication orders against members of the professions

The FSA's general approach to making disapplication orders

16.1 The FSA's power under section 329 of the *Act* to make an order disapplying an exemption from the *general prohibition* in relation to a *person* who is a *member* of the professions on the grounds that the *member* is not a fit and proper person to conduct *exempt regulated activities*, and to maintain a public record of disapplication orders, will assist the FSA in pursuing its *regulatory objectives*.

16.2 The FSA may make a range of disapplication orders depending on the particular circumstances of each case, including the range of *exempt regulated activities* undertaken and the particular *exempt regulated activities* to which the *person's* lack of fitness and propriety in that context is relevant.

16.3 The FSA recognises that a decision to make a disapplication order may have serious consequences for a *member* in relation not only to the conduct by the member of *exempt regulated activities*, but also in relation to the other business carried on by the *member*. When it decides whether to exercise its power to make a disapplication order, the FSA will consider all relevant circumstances including whether other action, in particular the making of a *prohibition order* (see chapter 9 of this guide), would be more appropriate. In general, the FSA is likely to exercise its powers to make an order disapplying an exemption where it considers that a *member* of a profession presents such a risk to the FSA's *regulatory objectives* that it is appropriate to prevent the *member* from carrying out the *exempt regulated activities*. The FSA will also have regard to any disciplinary action taken, or to be taken, against the *person* by the relevant *designated professional body*.

Disapplication orders

16.4 When the FSA has concerns about the fitness and propriety of a *member* to carry out *exempt regulated activities*, it will consider all the relevant circumstances of the case, including whether those concerns arise from the fitness and propriety of specific individuals engaged to perform the *exempt regulated activities* carried out by the *member* or whether its concerns arise from wider concerns about the *member* itself.

16.5 In most cases, where the FSA is concerned about the fitness and propriety of a specific individual, it may be more appropriate for the FSA to consider whether to make an order prohibiting the individual from performing functions in relation to *exempt regulated activities* rather than a disapplication order in relation to the *member* concerned. The criteria which the FSA will apply when determining whether to make a prohibition order against an individual who is not regulated by the FSA are set out in paragraphs 9.17 to 9.18 of this guide (*prohibition orders* against other individuals). In addition to the factors referred to in these paragraphs, the FSA may also take into consideration any disciplinary action that has been, or will be taken against the individual concerned by the relevant *designated professional body*, where that disciplinary action reflects on the fitness and propriety of the individual concerned to perform *exempt regulated activities*.

16.6 The FSA will also take into account the potentially more serious consequences that a disapplication of an exemption will have for the *member* concerned compared with the consequences of a prohibition of a particular individual engaged in *exempt regulated activities*. However, the FSA may consider it appropriate in some cases to disapply an exemption where it decides that the *member* concerned is not fit and proper to carry out *exempt regulated activities* in accordance with section 327 of the *Act* (Exemption from the general prohibition).

16.7 As an alternative to making an order to disapply an exemption, the FSA may consider issuing a private warning. A private warning may be appropriate where the FSA has concerns in relation to a *member's* fitness and propriety but feels that its concerns in relation to the conduct of *exempt regulated activities* can be more appropriately addressed by a private warning than by a disapplication of the *member's* exemption.

16.8 When it decides whether to exercise its power to disapply an exemption from the *general prohibition* in relation to a *member*, the FSA will take into account all relevant circumstances which may include, but are not limited to, the following factors:

(1) Disciplinary or other action taken by the relevant *designated professional body*, where that action relates to the fitness and propriety of the *member* concerned: where the FSA considers that its concerns in relation to the fitness and propriety of the *member* concerned may be, or have been adequately addressed by disciplinary or other action taken by the relevant *designated professional body* it may consider not making a disapplication order in addition to such action; however, where the FSA considers that its concerns, and in particular, any risks presented to the *member's clients* in respect of its *exempt regulated activities*, are not adequately addressed by that action, the FSA will consider making a disapplication order;

(2) The significance of the risk which the *member* presents to its *clients*: if the FSA is satisfied that there is a significant risk to *clients* and *consumers* it may consider making a disapplication order;

(3) The extent of the *member's* compliance with rules made by the FSA under section 332(1) of the *Act* (Rules in relation to whom the general prohibition does not apply) or by the relevant *designated professional body* under section 332(3) of the *Act*;

16.9 Where the FSA is considering whether to exercise its power to make a disapplication order in relation to a *member*, it will liaise closely with the relevant *designated professional body*.

16.10 Where the FSA is considering making a disapplication order against a *member* as a result of a breach of *rules* made by the FSA under section 323(1) of the *Act*, it will take into account any proposed application by the *member* concerned for *authorisation* under the *Act*. The FSA may refrain from making a disapplication order pending its consideration of the application for *authorisation*.

Applications under section 329(3) for variation or revocation of disapplication orders

16.11 When considering whether to grant or refuse an application under section 329(3) of the *Act* to vary or revoke a disapplication order, the FSA will take into account all the relevant circumstances. These may include, but are not limited to:

(1) any steps taken by the *person* to rectify the circumstances which gave rise to the original order;

(2) whether the *person* has ceased to present the risk to *clients* and *consumers* or to the FSA's *regulatory objectives* which gave rise to the original order;

(3) the circumstances giving rise to the original order and any additional information which, had it been known by the FSA, would have been relevant to the decision to make the order;

(4) the amount of time which has elapsed since the order was made.

16.12 The FSA will not generally grant an application to vary a disapplication order unless it is satisfied that the proposed variation will not result in the *person* presenting the same degree of risk to *clients* or *consumers* that originally gave rise to the order to disapply the exemption. Similarly, the FSA will not revoke a disapplication order unless and until it is satisfied that the *person* concerned is fit and proper to carry out *exempt regulated activities* generally or those specific *exempt regulated activities* in relation to which the exemption has been disapplied.

The effect of a disapplication order

16.13 When the FSA has made a disapplication order, the *member* against which it has been made may not perform the *exempt regulated activities* to which the order relates. If the member contravenes the order, there will be a breach of the *general prohibition* that may be prosecuted under section 23 of the *Act* (see chapter 12).

16.14 A disapplication order in relation to *exempt regulated activities* made against a *member* will be relevant should that *member* subsequently apply for *authorisation* under the *Act*. Whether or not such an application for *authorisation* is successful will depend on many factors, including the FSA's grounds for making the disapplication order. For example, if the order for disapplication of the exemption was made on the grounds of a breach of *rules* made under 332(1) the FSA may accept an application for *authorisation* notwithstanding the disapplication order. If, however, the order was made on grounds of a breach of the rules of a *designated professional body* resulting in a significant risk to *clients* in relation to the provision of *exempt regulated activities*, it is unlikely that an application for approval made by the *member* would be accepted by the FSA before the revocation of the disapplication order.

17 [deleted]

18 Cancellation of approval as sponsor on the FSA's own initiative

18.1 The FSA may cancel a *sponsor's* approval under section 88 of the *Act* if it considers that a *sponsor* has failed to meet the criteria for approval as a *sponsor* as set out in *LR* 8.6.5R.

18.2 When considering whether to cancel a *sponsor's* approval on its own initiative, the FSA will take into account all relevant factors, including, but not limited to, the following:

(1) the competence of the *sponsor*;

(2) the adequacy of the *sponsor's* systems and controls;

(3) the *sponsor's* history of compliance with the *listing rules*;

(4) the nature, seriousness and duration of the suspected failure of the *sponsor* to meet (at all times) the criteria for approval as a *sponsor* set out in *LR* 8.6.5R;

(5) any matter which the FSA could take into account if it were considering an application for approval as a *sponsor* made under section 88(3)(d) of the *Act*.

19 Non-FSMA powers

Introduction

19.1 This chapter describes many of the powers that the FSA has to enforce requirements imposed under legislation other than the *Act*. The chapter is ordered chronologically, ending with the most recent legislation. Where powers under different pieces of legislation are broadly the same, or apply to the same class of person, we have set out the relevant statements of policy in one section to avoid duplication.

19.2 Where conduct may amount to a breach of more than one enactment, the FSA may need to consider which enforcement powers to use and whether to use powers from one or more of the Acts. Which power or powers are appropriate will vary according to the circumstances of the case. However, where appropriate, we have tried to adopt procedures in respect of our use of powers under legislation other than the *Act* which are akin to those used under the *Act*. We expect, for example, to provide the subject of an investigation with confirmation of the reasons for the investigation and the legislative provisions under which it is conducted unless notification would be likely to prejudice the investigation or otherwise result in it being frustrated.

Industrial and Provident Societies Act 1965 (IPSA65)

Friendly and Industrial and Provident Societies Act 1968 (FIPSA68)

Friendly Societies Act 1974 (FSA74)

Friendly Societies Act 1992 (FSA92)

19.3 The FSA has certain functions in relation to what are described as “registrant-only” mutual societies. These societies are not regulated or supervised under the *Act*. Instead, they are subject to the provisions of IPSA65, FIPSA68, FSA74 and FSA92, which require them to register with the FSA and fulfil certain other obligations, such as the requirement to submit annual returns.

19.4 IPSA65, FIPSA68, FSA74 and FSA92 provide the FSA with certain powers to ensure that registrant-only societies meet the requirements imposed on them. These include the power to:

- cancel or suspend the society’s registration (ss.16 and 17 IPSA65, s.91 FSA74);
- dissolve the society (ss.95 and 95A FSA74);
- appoint an accountant or actuary to inspect the society’s books (s.47 IPSA65);
- require the production of documents and provision of information for certain purposes (s.48 IPSA65, s.90 FSA74);
- appoint inspectors and call special meetings (s.49 IPSA65, s.90 FSA74);
- present petitions for winding up (s.56 IPSA65; ss.22 and 52 FSA92); and

- prosecute failures to comply with requirements (s.61 IPSA65, s.18 FIPSA68 s.98 FSA74).

19.5 The FSA's enforcement activities in respect of registrant-only societies focus on prosecuting societies that fail to submit annual returns. As registrant-only societies are not subject to the rules imposed by the *Act* and by the FSA Handbook, the requirement that they submit annual returns provides an important check that the interests and investments of members, potential members, creditors and other interested parties are being safeguarded. The power to prosecute registrant-only societies who fail to meet this requirement is therefore an important tool and one which the FSA is committed to using in appropriate cases.

19.6 The FSA considers a variety of factors when deciding whether to prosecute a society for failing to submit its annual return. The FSA is more likely to prosecute a society which has previously failed to submit returns, or which poses a greater risk to the FSA's statutory objectives, for example, because of the size of its financial resources or its number of members.

19.7 The FSA may also use its power to petition for the society's winding up where it has prosecuted a society but the society continues to fail to submit the outstanding annual returns or defaults on submitting further returns.

19.8 The decision whether to initiate criminal and other proceedings under these Acts will be taken in accordance with the procedure described in *EG* 12.4C. Under section 18 IPSA65, a society may appeal certain decisions of the FSA relating to the refusal, cancellation or suspension of a society's registration to the High Court or, in Scotland, the Court of Session. Refusals to register a branch or to register the amendment of a society's rules and cancellations or suspensions of a society's listing under the Friendly Societies Act 1974 are also appealable in certain circumstance to the High Court or the Court in Sessions. Distinguishing features of the procedure for giving statutory notices under the FSA92, including available rights of reference to the *Tribunal*, are set out in *DEPP* 2.5.18G.

19.9 Further information about the FSA's powers under IPSA65 and FSA74 can be found on the FSA's website.[13]

Credit Unions Act 1979

19.10 The Credit Unions Act enables certain societies in Great Britain to be registered under IPSA65 and makes provisions in respect of these societies. It gives the FSA certain powers in addition to the powers that it has under the *Act* in respect of those credit unions which are *authorised persons*. The FSA's powers under the Credit Unions Act include the power to:

- require the production of books, accounts and other documents in the exercise of certain functions (section 17);

[13] http://www.fsa.gov.uk/Pages/doing/regulated/law/focus/friendly.shtml

- appoint an investigator or to call a special meeting of the credit union (section 18);

- cancel the registration of the credit union (section 20); and

- petition the High Court to wind up the credit union in particular circumstances (section 20).

19.11 The FSA will use these powers in a manner consistent with its approach to using the same powers under the *Act*. Where the FSA decides to cancel or suspend a credit union's registration under section 20(1) of the Credit Unions Act, the credit union may appeal that decision to the High Court or, in Scotland, the Court of Session.

19.12 The Credit Unions Act also extends to credit unions some criminal offences under IPSA65. The FSA will act in accordance with *EG* 12 when prosecuting these offences.

Buildings Societies Act 1986

19.13 The Building Societies Act sets out provisions on matters relating, amongst other things, to the constitution and management of building societies. It extends certain of the FSA's enforcement powers under the *Act* so that the FSA may, for example:

- make a prohibition order against the society (section 36A);

- petition the High Court for a winding up order where a society breaches certain requirements, for example, if it contravenes a prohibition order or where it fails to comply with certain directions given to it by the FSA (section 37); and

- exercise the FSA's powers under section 45 of the *Act* to cancel or vary a *Part IV permission* where a society fails to comply with a direction from the FSA to transfer all its engagements or to transfer its business (section 42B).

19.14 The FSA will use these powers in a manner consistent with its approach to using them under the *Act*. Distinguishing features of the procedure for giving statutory notices under the Building Societies Act are set out in *DEPP* 2.5.18G. Decisions of the FSA made under the Building Societies Act may not be referred to the *Tribunal*.

Unfair Terms in Consumer Contracts Regulations 1999

19.15 The FSA has published a separate regulatory guide, *UNFCOG*, which describes how it will use the general powers under the *Unfair Terms Regulations*, including its powers to obtain undertakings and seek information from firms. In addition, *EG* 10 describes how the FSA will use its injunctive powers under these Regulations.

Regulation of Investigatory Powers Act 2000 (RIPA)

19.16 RIPA provides methods of surveillance and information gathering to help the FSA in the prevention and detection of crime. RIPA ensures that, where these methods are used, an individual's rights to privacy under Article 8 of the European Convention of Human Rights are considered and protected.

19.17 Under RIPA the FSA is able to:

- acquire data relating to communications;
- carry out covert surveillance;
- make use of covert human intelligence sources (CHIS); and
- access electronic data protected by encryption or passwords.

19.18 The FSA is not able to obtain warrants to intercept communications during the course of transmission.

19.19 The FSA is only able to exercise powers available to it under Parts I and II of RIPA where it is necessary for the purpose of preventing or detecting crime. All RIPA authorisations for the acquisition of communications data, the carrying out of directed surveillance and the use of CHIS must be approved by a Head of Department in the Enforcement Division. Authorisation will only be given where the authorising officer believes that the proposed action is necessary and proportionate in the specific circumstances set out in the application. Consideration will be given to any actual or potential infringement of the privacy of individuals who are not the subjects of the investigation or operation (collateral intrusion) and to the steps taken to avoid or minimise any such intrusion. When considering whether the proposed action is necessary and proportionate the following non-exhaustive list of factors is likely to be relevant:

- the seriousness of the offence;
- the amount of material that might be gathered;
- the nature of the material that might be gathered;
- whether there are other less intrusive ways of obtaining the same result;
- whether the proposed activity is likely to satisfy the objective; and
- where surveillance is proposed, the location of the surveillance operation.

Encryption

19.20 Under Part III RIPA the FSA is able to require a person who holds “protected” electronic information (that is, information which is encrypted) to put that information into an intelligible form and, where the person has a key to the encrypted information, to require the person to disclose the key so that the data may be put into an intelligible form. The FSA may impose such a requirement where it is necessary for the purpose of preventing or detecting crime or where it is necessary for the purpose of securing the effective exercise or proper performance by the FSA of its statutory powers or statutory duties. In order to serve a notice under Part III RIPA, the FSA must obtain written permission from an appropriate judicial authority. The FSA does not anticipate using powers under Part III very often as it expects firms and individuals to provide information in intelligible format pursuant to requirements to provide information under the *Act*.

Home Office Codes of Practice

19.21 In exercising powers under RIPA the FSA has regard to the relevant RIPA codes of practice. The Codes are available on the Home Office website: security.homeoffice.gov.uk/ripa/publication-search/ripa-cop/.

Complaints and Oversight

19.22 RIPA provides for the appointment of Commissioners to oversee the compliance of designated authorities with RIPA requirements, and the establishment of a tribunal with jurisdiction to consider and determine, amongst other things, complaints and referrals about the way in which the FSA and other public bodies use their RIPA powers.

Regulated Activities Order 2001 (RAO)

19.23 The RAO sets out those activities which are regulated for the purposes of the *Act*. Part V of the RAO also requires the FSA to maintain a register of all those people who are not authorised by the FSA but who carry on insurance mediation activities. Under article 95 RAO, the FSA has the power to remove from the register an appointed representative who carries on insurance mediation activities if it considers that he is not fit and proper. The FSA will give the person a *warning notice* informing him that it proposes to remove his registration and a *decision notice* if the decision to remove his registration is taken. The decisions to give a *warning notice* or a *decision notice* will be taken by the *RDC* following the procedures set out in *DEPP* 3.2 or, where appropriate, *DEPP* 3.3. A person who receives a decision notice under article 95 RAO may refer the matter to the *Tribunal*.

The Open-Ended Investment Companies Regulations 2001

19.24 The *OEIC Regulations* set out requirements relating to the way in which collective investment may be carried on by open-ended investment companies. Under the *OEIC Regulations*, the FSA has the power, amongst other things, to:

- revoke an open-ended investment company's authorisation in several situations, including where the firm breaches relevant requirements or provides us with false or misleading information (regulation 23);

- give, vary and revoke certain directions, including that the affairs of the company be wound up (regulations 25 and 28);

- apply to court for an order that a depositary or director of a company be removed and replaced (regulation 26);

- appoint one or more competent persons to investigate and report on the affairs of the company and specified others (regulation 30).

19.25 Factors that the FSA may take into account when it decides whether to use one or more of these powers include, but are not limited to, factors which are broadly similar to those in *EG* 14.1 in the context of *AUTs*. However, the relevant conduct will be that of the *ICVC*, the *director* or *directors* of the *ICVC* and its *depositary*. Another difference is that the FSA is also able to take disciplinary action against the *ICVC* itself since the *ICVC* will be an *authorised person*. When choosing which powers to use, the FSA will adopt an approach which is broadly similar to that described in *EG* 14.2 to 14.5.

19.26 The FSA will give a company a *warning notice* if it proposes to revoke the company's authorisation and a *decision notice* if the decision to revoke the company's authorisation is subsequently taken. The decisions to give a *warning notice* or a *decision notice* will be taken by the *RDC* following the procedures set out in *DEPP* 3.2 or, where appropriate, *DEPP* 3.3. A person who receives a decision notice under the *OEIC Regulations* may refer the matter to the *Tribunal*.

19.27 Under the *OEIC Regulations*, the FSA may also use its disqualification powers against auditors who fail to comply with a duty imposed on them under FSA rules. The procedure which the FSA will follow when exercising its disqualification powers is set out in *EG* 15.

Electronic Commerce Directive (Financial Services and Markets) Regulations 2002

19.28 The FSA has powers under regulation 6 of the *ECD Regulations*, provided certain policy and procedural conditions are met, to direct that an *incoming ECA provider* may no longer carry on a specified *incoming electronic commerce activity*, or may only carry it on subject to specified requirements.

Electronic commerce activity directions: the FSA's policy

19.29 The FSA will exercise the power to make an *electronic commerce activity direction* on a case-by-case basis. When deciding whether to make a direction, the FSA will undertake an assessment of whether the circumstances of the particular case meet the policy conditions set out in regulation 6.

19.30 On obtaining information concerning possible *financial crime* facilitated through or involving an *incoming ECA provider*, or detriment to UK markets or UK *ECA recipients* caused by the activities of an *incoming ECA provider*, the FSA will contact the relevant *EEA regulator* of the *incoming ECA provider*. The FSA would expect the relevant *EEA regulator* to consider the matter, investigate it where appropriate and keep the FSA informed about what action, if any, was being taken. The FSA may not need to be involved further if the action by the relevant *EEA regulator* addresses the FSA’s concerns.

19.31 However, there are likely to be circumstances in which the FSA will need to use the *electronic commerce activity direction* power. Examples could include where it was necessary to stop the behaviour complained of, or to make the continued provision of services by the *incoming ECA provider* conditional upon compliance with specified requirements. Overall, the FSA may use the direction power:

(1) where:

(a) the behaviour complained of was causing, or had the potential to cause, major detriment to *consumers* in the United Kingdom; or

(b) the *incoming ECA provider's* activities have been used, or have the potential to be used, to facilitate serious *financial crime* or to launder the proceeds of a crime; or

(c) the making of the direction is considered to be necessary for other reasons of public policy relevant to the *regulatory objectives*; and

(2) either:

(a) the relevant *EEA regulator* is unable to take action, or has not within a reasonable time taken action which appears to the FSA to be adequate; or

(b) the relevant *EEA regulator* and the FSA agree that, having regard to the circumstances of the particular case, action against the wrong-doing would be taken more effectively by the FSA.

19.32 The question of whether the FSA decides to prevent or prohibit the *incoming electronic commerce activity*, or to make it subject to certain requirements (for example, compliance with specified rules), will depend on the overall circumstance of the case. A relevant consideration will be whether the FSA is satisfied that its concerns over the *incoming electronic commerce activity* can be adequately addressed through the imposition of a requirement, rather than a complete prohibition on the activity. Set out below is a list of factors the FSA may consider. The list is not exhaustive.

(1) The extent of any loss, or risk of loss, or other adverse effect on UK *ECA recipients*: The more serious the loss or potential loss or other adverse effect on them, the more likely it is to be appropriate for the FSA to use its powers to prohibit the activity altogether, to protect the interests of UK *ECA recipients*.

(2) The extent to which customer assets appear to be at risk.

(3) The risk that the *incoming ECA provider's* activities may be used or have been used to facilitate *financial crime* or to launder the proceeds of a crime: Information available to the FSA, including information supplied by other law enforcement agencies, may suggest that the *incoming ECA provider* is being used for, or is itself involved in, *financial crime*. Where this appears to be the

case, a direction that the *incoming electronic commerce activity* should cease may be appropriate.

(4) The risk that the *incoming ECA provider's* activities present to the *financial system* and to confidence in the *financial system*.

(5) The impact that a complete prohibition on the activity would have on UK *ECA recipients*.

19.33 The FSA may consider that a case is urgent, in particular, where:

(1) the information available to it indicates serious concerns about the *incoming electronic commerce activity* that need to be addressed immediately; and

(2) circumstances indicate that it is appropriate to use the direction power immediately to prohibit the *incoming electronic commerce activity*, or to make the carrying on of the activity subject to specified requirements.

19.34 The FSA will consider the full circumstances of the case when deciding whether exercising the direction power, without first taking the procedural steps set out in regulation 6, is an appropriate response to such concerns. The factors the FSA may consider include those listed in paragraph 19.32 of this guide. There may be other relevant factors.

Decision making

19.35 The FSA's decision to make, revoke or vary an *electronic commerce activity direction* will generally be taken by the *RDC* Chairman. However, this is subject to two exceptions.

(1) In an urgent case and if the Chairman is not available, the decision will be taken by an *RDC* Deputy Chairman and where possible, but subject to the need to act swiftly, one other *RDC* member.

(2) If a provider who has been notified of the FSA's intention to make a direction or to vary a direction on its own initiative makes representations within the period and in the manner required by the FSA, then those representations will be considered by the *RDC*, rather than by the *RDC* Chairman alone. Having taken into account the provider's representations, the *RDC* will then decide whether to make the direction, or to vary the existing direction.

19.36 Where a provider must be given the opportunity to make representations in relation to a proposed direction or variation of a direction, the *RDC* Chairman will determine in each case the manner and the period within which those representations should be made. If the FSA decides to issue a direction or vary it at its own initiative, or if the FSA refuses an application to vary or revoke a direction, the person to whom the direction applies may refer the matter to the *Tribunal*.

Publicity

19.37 Regulation 10(8) of the *ECD Regulations* provides that if the FSA makes a direction, it may publish, in such manner as it considers appropriate, such information about the matter to which the direction relates as it considers appropriate in furtherance of any of the objectives referred to in paragraph 19.31(1) of this guide. However, under regulation 10(9), the FSA may not publish information relating to a direction if publication would, in the FSA's opinion, be unfair to the provider to whom the direction applies or prejudicial to the interests of *consumers*.

19.38 When deciding what information, if any, to publish and the appropriate manner of publication, the FSA will consider the full circumstances of each case. The FSA anticipates that it will generally be appropriate to publish relevant details of a direction, in order to protect and inform *consumers*. However, in accordance with the regulation 10(9) prohibition, it will not publish information if it considers that publication would be unfair to the provider or prejudicial to the interests of *consumers*.

Enterprise Act 2002

19.39 The FSA, together with several other UK authorities, has powers under Part 8 of the Enterprise Act to enforce breaches of consumer protection law. Where a breach has been committed, the FSA will liaise with other authorities, particularly the Office of Fair Trading (the OFT), to determine which authority is best placed to take enforcement action. The FSA would generally expect to be the most appropriate authority to deal with breaches by authorised firms in relation to regulated activities.

19.40 The Enterprise Act identifies two main types of breach which trigger the Part 8 enforcement powers. These are referred to as "domestic infringements", which are breaches of UK law, and "Community infringements" which are breaches of the EU legislation listed in Schedule 13 of the Enterprise Act. In both cases the breach must be regarded as harming the collective interests of consumers.

19.41 The Community legislation falling within the FSA's scope under the Enterprise Act is:

- the Unfair Terms in Consumer Contracts Directive;[14]
- the Comparative and Misleading Advertising Directive;[15]
- the E-Commerce Directive;[16]
- the Distance Marketing Directive;[17] and
- the Unfair Commercial Practices Directive.[18]

19.42 The FSA has powers under Part 8 of the Enterprise Act both as a "designated enforcer" in relation to domestic and Community infringements and as a "CPC enforcer" which gives the FSA and other CPC enforcers additional powers in relation to Community infringements so that they can meet their obligations as "competent

[14] Directive 93/13/EEC
[15] Directive 97/55/EC
[16] Directive 2000/31/EC
[17] Directive 2002/65/EC
[18] Directive 2005/29/EC

authorities" under Regulation (EC) No.2006/2004 on co-operation between national authorities responsible for enforcement of consumer protection laws (the CPC Regulation).

The FSA's powers as a designated enforcer

19.43 As a designated enforcer, the FSA has the power to apply to the courts for an enforcement order or an interim enforcement order which requires a person who has committed a breach of applicable legislation not to engage in the conduct which constituted the breach. The FSA may also apply for orders where it thinks that a person is likely to commit a Community infringement.

19.44 The FSA has the power under the Enterprise Act to require any person to provide it with information which will enable it to (i) exercise or consider exercising its functions as an enforcer; or (ii) determine whether a person is complying with an enforcement order or an interim enforcement order. If the FSA requires a person to provide it with information, it must give him a notice setting out the information that it requires and confirming for which of purposes (i) and (ii) above the information is required.

19.45 Before the FSA may apply for an enforcement order, it must consult with:

- the OFT; and
- the person against whom the enforcement order would be made.

The period for consultation is 14 days before an application for an enforcement order can be made, or 7 days in the case of an application for an interim enforcement award. The aim of consultation is to ensure that any action taken is necessary and proportionate, and to ensure that businesses are given a reasonable opportunity to put things right before the courts become involved.

19.46 The Enterprise Act also makes provision for enforcers to accept undertakings from a person who has committed a breach. The undertaking confirms that the person will not, amongst other things, commence, continue or repeat the conduct which constituted or would constitute the breach. There is a general expectation that, if a breach of applicable legislation is committed, or if a Community infringement is likely to be committed, enforcers will seek an undertaking from the person in question before applying to court for an enforcement order against him.

19.47 The FSA may take steps to publish the undertakings it receives, and may apply to the court for an enforcement order if a person fails to comply with an undertaking that he has given.

The FSA's powers as a CPC enforcer

19.48 In addition to its powers as a designated enforcer under the Enterprise Act, the FSA also has powers, in its capacity as a "CPC enforcer", to enter premises with or without a warrant. The FSA must give at least two working days' notice of its intention to enter premises without a warrant unless it has not been possible to serve such notice despite all reasonably practicable steps having been taken. If the FSA cannot give a notice in advance, it must produce the notice on the day the premises are entered.

Use of enforcement powers under Enterprise Act

19.49 The FSA anticipates that its powers under the *Act* will be adequate to address the majority of breaches which it would also be able to enforce under the Enterprise Act and that there will therefore be limited cases in which it would seek to use its powers as an Enterprise Act enforcer. Where the FSA does use its powers under the Enterprise Act, it will have regard to the enforcement guidelines which are published on the OFT's website.[19]

19.50 Further information about the FSA's powers under the CPC Regulations is provided at paragraphs 19.66 to 19.70 below.

Proceeds of Crime Act 2002 (POCA)

19.51 POCA provides the legislative framework for the confiscation from criminals of the proceeds of their crime. Under POCA, the FSA can apply to the Crown Court for a restraint order when it is investigating or prosecuting criminal cases. A restraint order prevents the person(s) named in the order from dealing with the assets it covers for the duration of the order.

19.52 The FSA may apply for such an order where a criminal investigation has been started or where proceedings have started but not concluded; in either case there must be reasonable cause to believe that the defendant has benefited from criminal conduct. In this context, a person benefits from criminal conduct if he obtains property or a pecuniary advantage as a result of or in connection with conduct that would be an offence if it took place in England or Wales, regardless of whether he also obtains it in some other connection. The court is required to exercise its powers with a view to securing that the value of realisable assets is not diminished.

19.53 Once an order is made, the applicant or anyone affected by the order can apply to the court for it to be varied or discharged. The court must discharge the order if the condition for granting it is no longer satisfied, that is, if the criminal investigation has not led to criminal proceedings being started within a reasonable time or the criminal proceedings have concluded.

19.54 A restraint order may apply to any realisable property held by the specified person whether or not described in the order, or to any such property transferred to him after the order is made. The order may contain exceptions for reasonable living and business expenses, but not for legal expenses relating to the offences from which he is suspected to have benefited for the order to be made.

19.55 The order can apply to assets wherever they are held, and anyone breaching the order would be guilty of contempt of court in this country. The FSA may request that the court make ancillary orders requiring the person to disclose his assets and/or to repatriate assets held overseas.

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[19] www.oft.gov.uk/advice_and_resources/resource_base/legal/enterprise-act/part8/

19.56 POCA also contains various powers of investigation which the FSA may use in specified circumstances. However, where these powers overlap with powers under the *Act*, the FSA will in most cases consider it more appropriate to rely on its investigation powers under the *Act*.

Credit Institutions (Reorganisation and Winding Up) Regulations 2004

19.57 These Regulations implement Directive 2001/24/EC on the reorganisation and winding up of credit institutions. The Regulations only allow winding-up proceedings or reorganisation measures in respect of EEA credit institutions in certain circumstances.

19.58 Under these Regulations, the FSA is required to exercise its powers under section 45 of the *Act* to vary or cancel the UK credit institution's permission to accept deposits or to issue electronic money as soon as reasonably practicable after it is notified of any of the following:

- a decision which approves a voluntary arrangement where it includes a realisation of some or all of the assets of the credit institution with a view to terminating the whole or any part of the business of that credit institution;
- a winding-up order or an administration order in the prescribed circumstances; or
- the appointment of a provisional liquidator or the appointment of a liquidator.

19.59 This power is mandatory rather than discretionary. The FSA will follow its procedure for varying and cancelling *Part IV permission* under the *Act* when exercising its powers under these Regulations.

Financial Services (Distance Marketing) Regulations 2004

19.60 These Regulations give effect to the Distance Marketing Directive.[20] Under the Regulations, the FSA can enforce breaches of the Regulations concerning "specified contracts". Specified contracts are certain contracts for the provision of financial services which are made at a distance and do not require the simultaneous physical presence of the parties to the contract.

19.61 The FSA may apply to the courts for an injunction or interim injunction against a person who appears to it to be responsible for a breach of the Regulations. The FSA must consult with the OFT before exercising this power. The FSA may also accept undertakings from the person who committed the breach that he will comply with the Regulations. The FSA must publish details of any applications it makes for injunctions; the terms of any orders that the court subsequently makes; and the terms of any undertakings given to it or to the court.

[20] Directive 2002/65/EC

19.62 The FSA may also prosecute offences under the Regulations which relate to specified contracts. It will generally be appropriate for the FSA to seek to resolve the breach by obtaining an undertaking before it applies for an injunction or initiates a prosecution. Where a failure by a firm to meet the requirements of the Regulations also amounts to a breach of the FSA's rules, the FSA will consider all the circumstances of the case when deciding whether to take action for a breach of its rules or under the Regulations. This will include, amongst other things, having regard to appropriate factors set out in *DEPP* 6 and the considerations in *EG* 12.

Financial Conglomerates and Other Financial Groups Regulations 2004

19.63 These Regulations implement in part the Financial Conglomerates Directive,[21] which imposes certain procedural requirements on the FSA as a competent authority under the Directive. These Regulations also make specific provision about the exercise of certain supervisory powers in relation to financial conglomerates.

19.64 The FSA's power to vary a firm's *Part IV permission* under section 45 of the *Act* has been extended under these Regulations. The FSA is able to use this power where it is desirable to do so for the purpose of:

- supervision in accordance with the Financial Conglomerates Directive;
- acting in accordance with specified provisions of the Banking Consolidation Directive; and
- acting in accordance with specified provisions of the Insurance Groups Directive.

19.65 The duty imposed by section 41(2) (The threshold conditions) of the *Act* does not prevent the FSA from exercising its own-initiative power for these purposes. But subject to that, when exercising this power under the Regulations, the FSA will do so in a manner consistent with its approach generally to variation under the *Act*.

The Consumer Protection Co-operation Regulation[22]

19.66 The FSA is a competent authority under the CPC Regulation, which aims to encourage and facilitate co-operation between competent authorities across the EU in consumer protection matters. The FSA is a competent authority for the purposes of specified EU consumer protection laws[23] in the context of the regulated activities of authorised firms and of breaches by UK firms concerning "specified contracts" as

[21] Directive 2002/87/EC

[22] Regulation (EC) No.2006/2004 on co-operation between national authorities responsible for enforcement of consumer protection laws.

[23] These are the Unfair Terms in Consumer Contracts Directive; the Comparative and Misleading Advertising Directive; the E-Commerce Directive; the Distance Marketing Directive; and the Unfair Commercial Practices Directive.

defined in the Financial Services (Distance Marketing) Regulations 2004 (for which see paragraphs 19.60 to 19.62).

19.67 All CPC competent authorities have a minimum set of enforcement and investigatory powers available to them to ensure that across the EU there is a robust toolkit to protect consumers. These are powers to:

- access any relevant document related to the breach;
- require the supply by any person of relevant information related to the breach;
- carry out necessary on-site inspections;
- request in writing that a person cease the breach;
- obtain from the person responsible for the breach an undertaking to cease the breach; and, where appropriate, to publish the resulting undertaking;
- require the cessation or prohibition of any breach and where appropriate, to publish resulting decisions; and
- require the losing defendant to make payments in the event of failure to comply with the decision.

19.68 The powers are engaged when a person breaches one of the EU consumer protection laws which are scheduled to the CPC Regulation and the breach is one which harms, or is likely to harm, the collective interests of consumers who live in a member state other than the member state in which the breach was committed; where the person who committed the breach is established; or where evidence or assets relating to the breach are located.

19.69 Under the CPC Regulation the FSA can request information from competent authorities in other member states to help it determine whether a relevant breach has taken, or may take, place. The FSA can also request that competent authorities in the relevant member states take action without delay to stop or prohibit the breach. All competent authorities are required to notify their counterparts in relevant member states when they become aware of actual or possible breaches of European consumer protection law.

19.70 The FSA may use its powers under the *Act* or under Part 8 of the Enterprise Act (for which, see paragraphs 19.39 to 19.50 above) in order to fulfil its obligations under the CPC Regulation. The FSA will decide on a case-by-case basis which powers will enable it to obtain its desired outcomes in the most effective and efficient way. In the majority of cases this is more likely to be by using its powers under the *Act*.

Money Laundering Regulations 2007

19.71 The FSA has investigation and sanctioning powers in relation to both criminal and civil breaches of the *Money Laundering Regulations*. The *Money Laundering Regulations* impose requirements including, amongst other things, obligations to apply customer due diligence measures and conduct ongoing monitoring of business relationships on designated types of business.

19.72 The FSA is responsible for monitoring and enforcing compliance with the Regulations not only by authorised firms who are within the *Money Laundering Regulation*s' scope, but also by what the Regulations describe as "Annex I financial institutions". These are businesses which are not otherwise authorised by us but which carry out certain of the activities listed in Annex I of the Banking Consolidation Directive.[24] The activities include lending (e.g. forfaiters and trade financiers), financial leasing, and safe custody services. Annex I financial institutions are required to register with the FSA.

19.73 The *Money Laundering Regulations* add to the range of options available to the FSA for dealing with anti-money laundering failures. These options are:

- to prosecute both authorised firms and Annex I financial institutions;
- to take regulatory action against authorised firms for failures which breach the FSA's rules and requirements (for example, under Principle 3 or *SYSC* 3.2.6R); and
- to impose civil penalties on both authorised firms and Annex I financial institutions under regulation 42 of the *Money Laundering Regulations*.

19.74 This means that there will be situations in which the FSA has powers to investigate and take action under both the *Act* and the *Money Laundering Regulations*. The FSA will consider all the circumstances of the case when deciding what action to take and, if it is appropriate to notify the subject about the investigation, will in doing so inform them about the basis upon which the investigation is being conducted and what powers it is using. The FSA will adopt the approach outlined in *EG* 12 when prosecuting *Money Laundering Regulations* offences. In the majority of cases where both the Regulations and the FSA rules apply and regulatory action, as opposed to criminal proceedings, is appropriate, the FSA generally expects to continue to discipline authorised firms under the *Act*.

19.75 The *Money Laundering Regulations* also provide investigation powers that the FSA can use when investigating whether breaches of the Regulations have taken place. These powers include:

- the power to require information from, and attendance of, relevant and connected persons (regulation 37); and
- powers of entry and inspection without or under warrant (regulations 38 and 39).

The use of these powers will be limited to those cases in which the FSA expects to take action under the Regulations.

[24] Credit financial institutions and money service businesses are also outside the definition of "Annex I financial institution", which is set out in Regulation 22(1).

19.76 The FSA will adopt a risk-based approach to its enforcement of the *Money Laundering Regulations*. Failures in anti-money laundering controls will not automatically result in disciplinary sanctions, although enforcement action is more likely where a firm has not taken adequate steps to identify its money laundering risks or put in place appropriate controls to mitigate those risks, and failed to take steps to ensure that controls are being effectively implemented.

19.77 However, the *Money Laundering Regulations* say little about the way in which investigation and sanctioning powers should be used, so the FSA has decided to adopt enforcement and decision making procedures which are broadly akin to those under the *Act*. Key features of the FSA's approach are described below.

The conduct of investigations under the Money Laundering Regulations

19.78 The FSA will notify the subject of the investigation that it has appointed officers to carry out an investigation under the *Money Laundering Regulations* and the reasons for the appointment, unless notification is likely to prejudice the investigation or otherwise result in it being frustrated. The FSA expects to carry out a scoping visit early on in the enforcement process in most cases. The FSA's policy in civil investigations is to use powers to compel information in the same way as it would in the course of an investigation under the *Act*.

19.79 When the FSA proposes or decides to impose a penalty under the *Money Laundering Regulations*, it must give the person on whom the penalty is to be imposed a notice. These notices are akin to *warning notices* and *decision notices* given under the *Act*, although Part XXVI (Notices) of the *Act* does not apply to notices given under the Regulations.

19.80 The *RDC* is the FSA's decision maker for contested cases in which the FSA decides to impose a penalty under the *Money Laundering Regulations*. This builds a layer of separation into the process to help ensure not only that decisions are fair but that they are seen to be fair. The *RDC* will make its decisions following the procedure set out in *DEPP* 3.2 or, where appropriate, *DEPP* 3.3. Where the FSA imposes a penalty on a person under the *Money Laundering Regulations*, that person may appeal the decision to the *Tribunal*.

19.81 Although the *Money Laundering Regulations* do not require it, the FSA will involve third parties and provide access to Authority material when it gives notices under the Regulations, in a manner consistent with the provisions of sections 393 and 394 of the *Act*. However, there is no formal mechanism under the *Money Laundering Regulations* for third parties to make representations in respect of proposed money laundering actions. If a third party asks to make representations, it will be a matter for the FSA's decision makers to decide whether this is appropriate and, if so, how best to ensure that these representations are taken into consideration. In general it is expected that decision makers would agree to consider any representations made. Third parties may not refer cases to the *Tribunal* as the *Money Laundering Regulations* give the *Tribunal* no power to hear such referrals.

19.82 When imposing or determining the level of a financial penalty under the Regulations, the FSA's policy includes having regard, where relevant, to relevant factors in *DEPP* 6.2.1G and *DEPP* 6.5 to *DEPP* 6.5D. The FSA may not impose a penalty where there are reasonable grounds for it to be satisfied that the subject of the proposed action took all reasonable steps and exercised all due diligence to ensure that the relevant requirement of the *Money Laundering Regulations* would be met. In deciding whether a person has failed to comply with a requirement of the *Money Laundering Regulations*, the FSA must consider whether he followed any relevant guidance which was issued by a supervisory authority or other appropriate body; approved by the Treasury; and published in a manner approved by the Treasury. The Joint Money Laundering Steering Group Guidance satisfies this requirement.

19.83 As with cases under the *Act*, the FSA may settle or mediate appropriate cases involving civil breaches of the *Money Laundering Regulations* to assist it to exercise its functions under the Regulations in the most efficient and economic way. The settlement discount scheme set out in *DEPP* 6.7 applies to penalties imposed under the *Money Laundering Regulations.*

19.84 The FSA will apply the approach to publicity that it has outlined in *EG* 6. However, as the *Money Laundering Regulations* do not require the FSA to issue final notices, the FSA will publish such information about the matter to which the decision notice relates as it considers appropriate. This will generally involve publishing the decision notice on the FSA's website, with or without an accompanying press release, and updating the Public Register. The timing of publicity will be consistent with the FSA's approach in comparable cases under the *Act*.

Transfer of Funds (Information on the Payer) Regulations 2007 (The Transfer of Funds Regulations)

19.85 The FSA is required, under EU Regulation 1781/2006 (on information on the payer accompanying transfers of funds), to monitor the compliance of payment services providers which are *authorised firms* with the requirements imposed by the Regulation. The Transfer of Funds Regulations set out the FSA's powers to investigate and impose sanctions for breaches of Regulation 1781/2006. The powers are identical to those given under the *Money Laundering Regulations*. The FSA's policy in respect of the use of its powers under the Regulations is the same as the policy it has adopted for the use of *Money Laundering Regulations* powers; the FSA will adopt enforcement procedures broadly akin to those used under the *Act*, with the modifications described in paragraphs 19.78 to 19.84 above.

Regulated Covered Bonds Regulations 2008

19.86 The *RCB Regulations* provide a framework for issuing covered bonds in the UK. Covered bonds issued under the *RCB Regulations* are subject to strict quality controls and both bonds and issuers must be registered with the FSA. The *RCB Regulations* give the FSA powers to enforce these Regulations. Where a person has failed, or is likely to fail, to comply with any obligation under the *RCB Regulations*, the FSA may make a direction that the person take steps to ensure compliance with the Regulations or it may make a direction for the winding up of the owner of the asset pool. The FSA may also remove an *issuer* from the register if it fails to comply with the

Regulations. In addition, the FSA may apply to court for an order restraining a person from committing a breach of the Regulations or requiring the person to take steps to remedy the breach. The *RCB Regulations* also give the FSA the power to impose a financial penalty on a person for a breach of the Regulations.

19.87 The FSA may use the information gathering powers set out in section 165 of the *Act* when monitoring and enforcing compliance with the *RCB Regulations*, and may appoint skilled persons as provided in section 166 of the *Act*.

19.88 The FSA's approach to the use of its enforcement powers, and its statement of policy in relation to imposing and determining financial penalties under the *RCB Regulations*, are set out in *RCB* 4.2. The FSA's penalty policy includes having regard, where relevant, to *DEPP* 6.5 to *DEPP* 6.5D and such other specific matters as the likely impact of the penalty on the interests of investors in the relevant bonds. The FSA's statement of procedure in relation to giving *warning notices* or *decision notices* under the *RCB Regulations* is set out in *RCB* 6. It confirms that the *RDC* will be the decision maker in relation to the imposition of financial penalties under the *RCB Regulations*, following the procedure outlined in *DEPP* 3.2 or, where appropriate, *DEPP* 3.3 and that decision notices given under the Regulations may be referred to the *Tribunal*.

19.89 The FSA may agree to settle cases in which it proposes to impose a financial penalty under the *RCB Regulations* if the right regulatory outcome can be achieved. The settlement discount scheme set out in *DEPP* 6.7 applies to penalties imposed under the *RCB Regulations*. See *DEPP* 5 and *EG* 5 for further information about the settlement process.

Payment Services Regulations 2009

19.90 The FSA has investigation and sanctioning powers in relation to both criminal and civil breaches of the *Payment Services Regulations*. The *Payment Services Regulations* impose requirements including, amongst other things, obligations on *payment service providers* to provide users with a range of information and various provisions regulating the rights and obligations of payment service users and providers.

19.91 The FSA's approach to enforcing the *Payment Services Regulations* will mirror its general approach to enforcing the *Act*, as set out in *EG* 2. It will seek to exercise its enforcement powers in a manner that is transparent, proportionate, responsive to the issue, and consistent with its publicly stated policies. It will also seek to ensure fair treatment when exercising its enforcement powers. Finally, it will aim to change the behaviour of the *person* who is the subject of its action, to deter future non-compliance by others, to eliminate any financial gain or benefit from non-compliance, and where appropriate, to remedy the harm caused by the non-compliance.

19.92 The regulatory powers which the *Payment Services Regulations* provide to the FSA include:

- the power to require information;
- powers of entry and inspection;
- power of public censure;

- the power to impose financial penalties;
- the power to prosecute or fine unauthorised providers; and
- the power to vary an authorisation on its own initiative.

19.93 The *Payment Services Regulations*, for the most part, mirror the FSA's investigative, sanctioning and regulatory powers under the *Act*. The FSA has decided to adopt procedures and policies in relation to the use of those powers akin to those it has under the *Act*. Key features of the FSA's approach are described below.

The conduct of investigations under the Payment Services Regulations

19.94 The *Payment Services Regulations* apply much of Part 11 of the *Act*. The effect of this is to apply the same procedures under the *Act* for appointing investigators and requiring information when investigating breaches of the *Payment Services Regulations*.

19.95 The FSA will notify the subject of the investigation that it has appointed investigators to carry out an investigation under the *Payment Services Regulations* and the reasons for the appointment, unless notification is likely to prejudice the investigation or otherwise result in it being frustrated. The FSA expects to carry out a scoping visit early on in the enforcement process in most cases. The FSA's policy in civil investigations under the *Payment Services Regulations* is to use powers to compel information in the same way as it would in the course of an investigation under the *Act*.

Decision making under the Payment Services Regulations

19.96 The *RDC* is the FSA's decision maker for some of the decisions under the *Payment Services Regulations* as set out in *DEPP* 2 Annex 1G. This builds a layer of separation into the process to help ensure not only that decisions are fair but that they are seen to be fair. The *RDC* will make its decisions following the procedure set out in *DEPP* 3.2 or, where appropriate, *DEPP* 3.3 and 3.4. *DEPP* 3.4 applies for urgent notices under Regulations 11(6), (9), and (10)(b) (including as applied by Regulation 14).

19.97 For decisions made by *executive procedures* the procedures to be followed will be those described in *DEPP* 4.

19.98 The *Payment Service Regulations* do not require the FSA to have published procedures to launch criminal prosecutions. However, in these situations the FSA expects that it will normally follow its decision-making procedures for the equivalent decisions under the *Act*.

19.99 The *Payment Service Regulations* require the FSA to give third party rights as set out in section 393 of the *Act* and to give access to certain material as set out in section 394 of the *Act*.

19.100 Certain FSA decisions (for example the cancellation of an authorisation or the imposition of a financial penalty) may be referred to the *Tribunal* by an aggrieved party.

Imposition of penalties under the Payment Services Regulations

19.101 When imposing a financial penalty the FSA's policy includes having regard to the relevant factors in *DEPP* 6.2, *DEPP* 6.3 and *DEPP* 6.4. The FSA's policy in relation to determining the level of a financial penalty includes having regard, where relevant, to *DEPP* 6.5 to *DEPP* 6.5D.

19.102 As with cases under the *Act*, the FSA may settle or mediate appropriate cases involving civil breaches of the *Payment Services Regulations* to assist it to exercise its functions under the Regulations in the most efficient and economic way. See *DEPP* 5, *DEPP 6.7* and *EG* 5 for further information on the settlement process and the settlement discount scheme.

Statement of policy in section 169(7) interviews (as implemented by the Payment Services Regulations)

19.103 The *Payment Services Regulations* apply section 169 of the *Act* which requires the *FSA* to publish a statement of policy on the conduct of certain interviews in response to requests from overseas regulators. For the purposes of the *Payment Services Regulations* the *FSA* will follow the procedures described in *DEPP* 7.

Annex 1 – [deleted]

Annex 2 - Guidelines on investigation of cases of interest or concern to the Financial Services Authority and other prosecuting and investigating agencies

Purpose, status and application of the guidelines

1. These guidelines have been agreed by the following bodies (the agencies):
   - the Financial Services Authority (the FSA);
   - the Serious Fraud Office (the SFO);
   - the Department for Business, Enterprise and Regulatory Reform (BERR);
   - the Crown Prosecution Service (the CPS);
   - the Association of Chief Police Officers in England, Wales and Northern Ireland (ACPO);
   - the Crown Office and Procurator Fiscal Service (COPFS);
   - the Public Prosecution Service for Northern Ireland (the PPS);
   - the Association of Chief Police Officers in Scotland (ACPOS).

2. The guidelines are intended to assist the agencies when considering cases concerning financial crime and/or regulatory misconduct that are, or may be, of mutual interest to the FSA and one or more of the other agencies. Their implementation and wider points arising from them will be kept under review by the agencies who will liaise regularly.

3. The purpose of the guidelines is to set out some broad principles which the agencies agree should be applied by them in order to assist them to:

   (a) decide which of them should investigate such cases;

   (b) co-operate with each other, particularly in cases where more than one agency is investigating;

   (c) prevent undue duplication of effort by reason of the involvement of more than one agency;

   (d) prevent the subjects of proceedings being treated unfairly by reason of the unwarranted involvement of more than one agency.

4. The guidelines are intended to apply to the relationships between the FSA and the other agencies. They are not intended to apply to the relationships between

those other agencies themselves where there is no FSA interest. They are not legally binding.

5. The guidelines are subject to the restrictions on disclosure of information held by the agencies. They are not intended to override them.

6. The guidelines are relevant to ACPO and ACPOS only in so far as they relate to investigations. Similarly, they are relevant to the CPS, COPFS and the PPS only in so far as they relate to prosecutions.

Commencing Investigations

7. The agencies recognise that there are areas in which they have an overlapping remit in terms of their functions and powers (the powers and functions of the agencies are set out in the Appendix to this document). The agencies will therefore endeavour to ensure that only the agency or agencies with the most appropriate functions and powers will commence investigations.

8. The agencies further recognise that in certain cases concurrent investigations may be the most quick, effective and efficient way for some cases to be dealt with. However, if an agency is considering commencing an investigation and another agency is already carrying on a related investigation or proceedings or is otherwise likely to have an interest in that investigation, best practice is for the agencies concerned to liaise and discuss which agency or agencies should take action, i.e. investigate, bring proceedings or otherwise deal with the matter.

Indicators for deciding which agency should take action

9. The following are indicators of whether action by the FSA or one of the other agencies is more appropriate. They are not listed in any particular order or ranked according to priority. No single feature of the case should be considered in isolation, but rather the whole case should be considered in the round.

(a) Tending towards action by the FSA

- Where the suspected conduct in question gives rise to concerns regarding market confidence or protection of consumers of services regulated by the FSA.

- Where the suspected conduct in question would be best dealt with by:

    - criminal prosecution of offences which the FSA has powers to prosecute by virtue of the Financial Services and Markets Act 2000 ("the 2000 Act") (See Appendix paragraph 1.4) and other incidental offences;

    - civil proceedings under the 2000 Act (including applications for injunctions, restitution and to wind up firms carrying on regulated activities);

  - regulatory action which can be referred to the Financial Services and Markets Tribunal (including proceedings for market abuse); and

  - proceedings for breaches of Part VI of the *Act*, of *Part 6 rules* or the *Prospectus Rules* or a provision otherwise made in accordance with the *Prospectus Directive* .

- Where the likely defendants are FSA authorised or approved persons.

- Where the likely defendants are issuers or sponsors of a security admitted to the official list or in relation to which an application for listing has been made.

- Where there is likely to be a case for the use of FSA powers which may take immediate effect (e.g. powers to vary the permission of an authorised firm or to suspend listing of securities).

- Where it is likely that the investigator will be seeking assistance from overseas regulatory authorities with functions equivalent to those of the FSA.

- Where any possible criminal offences are technical or in a grey area whereas regulatory contraventions are clearly indicated.

- Where the balance of public interest is in achieving reparation for victims and prosecution is likely to damage the prospects of this.

- Where there are distinct parts of the case which are best investigated with regulatory expertise.

(b) Tending towards action by one of the other agencies

- Where serious or complex fraud is the predominant issue in the conduct in question (normally appropriate for the SFO).

- Where the suspected conduct in question would be best dealt with by:

  - criminal proceedings for which the FSA is not the statutory prosecutor;

  - proceedings for disqualification of directors under the Company Directors Disqualification

Act 1986 (normally appropriate for BERR action);

    - winding up proceedings which FSA does not have statutory powers to bring (normally appropriate for BERR action); or

    - criminal proceedings in Scotland.

- Where the conduct in question concerns the abuse of limited liability status under the Companies Acts (normally appropriate for BERR action).

- Where powers of arrest are likely to be necessary.

- Where it is likely that the investigator will rely on overseas organisations (such as law enforcement agencies) with which the other agencies have liaison.

- Where action by the FSA is likely to prejudice the public interest in the prosecution of offences for which the FSA is not a statutory prosecutor.

- Where the case falls only partly within the regulated area (or criminal offences for which FSA is a statutory prosecutor) and the prospects of splitting the investigation are not good.

10. It is also best practice for the agencies involved or interested in an investigation to continue to liaise as appropriate throughout in order to keep under review the decisions as to who should investigate or bring proceedings. This is particularly so where there are material developments in the investigation that might cause the agencies to reconsider its general purpose or scope and whether additional investigation by others is called for.

Conduct of concurrent investigations

11. The agencies recognise that where concurrent investigations are taking place, action taken by one agency can prejudice the investigation or subsequent proceedings brought by another agency. Consequently, it is best practice for the agencies involved in concurrent investigations to notify each other of significant developments in their investigations and of any significant steps they propose to take in the case, such as:

    - interviewing a key witness;

    - requiring provision of significant volumes of documents;

    - executing a search warrant; or

- instituting proceedings or otherwise disposing of a matter.

12. If the agencies identify that particular action by one party might prejudice an investigation or future proceedings by another, it is desirable for the parties concerned to discuss and decide what action should be taken and by whom. In reaching these decisions, they will bear in mind how the public interest is best served overall. The examples provided in paragraph 9 above may also be used as indicators of where the overall balance of interest lies.

Deciding to bring proceedings

13. The agencies will consider, as necessary, and keep under review whether an investigation has reached the point where it is appropriate to commence proceedings. Where agencies are deciding whether to institute criminal proceedings, they will have regard to the usual codes or guidance relevant to that decision. For example, agencies other than the PPS or COPFS will have regard to the Code for Crown Prosecutors (Note: Different guidance applies to the PPS and COPFS. All criminal proceedings in Scotland are the responsibility of the Lord Advocate. Separate arrangements have been agreed between the FSA and the Crown Office for the prosecution of offences in Scotland arising out of FSA investigations). Where they are considering whether to bring non-criminal proceedings, they will take into account whatever factors they consider relevant (for example, in the case of market abuse proceedings brought by the FSA, these are set out in paragraph 6.2 of the FSA Decision Procedure and Penalties manual).

14. The agencies recognise that in taking a decision whether to commence proceedings, relevant factors will include:

    - whether commencement of proceedings might prejudice ongoing or potential investigations or proceedings brought by other agencies; and

    - whether, in the light of any proceedings being brought by another party, it is appropriate to commence separate proceedings against the person under investigation.

15. Best practice in these circumstances, therefore, is for the parties concerned to liaise before a decision is taken.

Closing Cases

16. It is best practice for the agencies, at the conclusion of any investigation where it is decided that no further action need be taken, or at the conclusion of proceedings, to notify any other agencies concerned of the outcome of the investigation and/or proceedings and to provide any other helpful feedback.

APPENDIX TO THE GUIDELINES ON INVESTIGATION OF CASES OF INTEREST OR CONCERN TO THE FINANCIAL SERVICES AUTHORITY AND OTHER PROSECUTING AND INVESTIGATING AGENCIES

1. The FSA

1.1 The FSA is the single statutory regulator for all financial business in the UK. Its regulatory objectives under the Financial Services and Markets Act 2000 (the 2000 Act) are:

- market confidence;
- public awareness;
- the protection of consumers; and
- the reduction of financial crime.

(**Note**: The 2000 Act repealed and replaced various enactments which conferred powers and functions on the FSA and other regulators whose functions are now carried out by the FSA. Most notable in this context are the Financial Services Act 1986 and the Banking Act 1987. Transitional provisions under the 2000 Act permit the FSA to continue to investigate and bring proceedings for offences under the old legislation. Details of these transitional provisions are not set out in these guidelines)

1.2 The *FSA's regulatory objectives* as the competent authority under Part VI of the *Act* are:

- the protection of investors;
- access to capital; and
- investor confidence.

1.3 Under the 2000 Act the FSA has powers to investigate concerns including:

- regulatory concerns about authorised *firms* and individuals employed by them;
- suspected *market abuse* under s.118 of the 2000 Act;
- suspected misleading statements and practices under s.397 of the 2000 Act;
- suspected *insider dealing* under of Part V of the Criminal Justice Act 1993;
- suspected contraventions of the general prohibition under s.19 of the 2000 Act and related offences;

- suspected offences under various other provisions of the 2000 Act (see below);

- suspected breaches of Part VI of the *Act*, of *Part 6 rules* or the *prospectus rule* s or a provision otherwise made in accordance with the *Prospectus Directive*.

The FSA's powers of information gathering and investigation are set out in Part XI of the 2000 Act and in s.97 in relation to its Part VI functions.

1.4 The FSA has power to take the following enforcement action:

- discipline authorised firms under Part XIV of the 2000 Act and approved persons under s.66 of the 2000 Act;

- impose civil penalties in cases of market abuse under s.123 of the 2000 Act;

- prohibit an individual from being employed in connection with a regulated activity, under s.56 of the 2000 Act;

- apply to Court for *injunctions* (or interdicts) and other orders against persons contravening relevant requirements (under s.380 of the 2000 Act) or engaging in *market abuse* (under s.381 of the 2000 Act);

- petition the court for the winding up or administration of companies, and the bankruptcy of individuals, carrying on *regulated activities*;

- apply to the court under ss.382 and 383 of the 2000 Act for restitution orders against persons contravening relevant requirements or persons engaged in *market abuse*;

- require restitution under s.384 of the 2000 Act of profits which have accrued to authorised persons contravening relevant requirements or persons engaged in *market abuse*, or of losses which have been suffered by others as a result of those *breaches*;

- (except in Scotland) prosecute certain offences, including under the Money Laundering Regulations 2007, the Transfer of Funds (Information on the Payer) Regulations 2007, Part V Criminal Justice Act 1993 (insider dealing) and various offences under the 2000 Act including (**Note:** The FSA may also prosecute any other offences which are incidental to those which it has express statutory power to prosecute):

    - carrying on *regulated activity* without authorisation or exemption, under s.23;

    - making false claims to be authorised or exempt, under s.24;

    - promoting investment activity without authorisation, under s.25;

    - breaching a prohibition order, under s.56;

    - failing to co-operate with or giving false information to FSA appointed investigators, under s.177;

    - failing to comply with provisions about influence over authorised persons, under s.191;

    - making misleading statements and engaging in misleading practices, under s.397;

    - misleading the FSA, under s.398;

    - various offences in relation to the *FSA's* Part VI function;

- Fine, issue public censures, suspend or cancel listing for breaches of the Listing Rules by an issuer; and

- Issue public censures or cancel a sponsor's approval.

2. BERR

2.1 The Secretary of State for Business, Enterprise and Regulatory Reform exercises concurrently with the FSA those powers and functions marked with an asterisk in paragraphs 1.3 above. The investigation functions are undertaken by Companies Investigation Branch (CIB) and the prosecution functions by the Legal Services Directorate.

2.2 The principal activities of CIB are, however, the investigations into the conduct of companies under the Companies Acts. These are fact-finding investigations but may lead to follow-up action by CIB such as petitioning for the winding up of a company, disqualification of directors of the company or referring the matter to the Solicitors Office for prosecution. CIB may also disclose information to other prosecution or regulatory authorities to enable them to take appropriate action under their own powers and functions. Such disclosure is, however, strictly controlled under a gateway disclosure regime.

2.3 The Solicitors Office advises on investigation work carried out by CIB and undertakes criminal investigations and prosecutions in respect of matters referred to it by CIB, the Insolvency Service or other directorates of BERR or its agencies.

3. SFO

3.1 The aim of the SFO is to contribute to:

- reducing fraud and the cost of fraud;
- the delivery of justice and the rule of law;
- maintaining confidence in the UK's business and financial institutions.

3.2 Under the Criminal Justice Act 1987 the Director of the SFO may investigate any suspected offence which appears on reasonable grounds to involve serious or complex fraud and may also conduct, or take over the conduct of, the prosecution of any such offence. The SFO may investigate in conjunction with any other person with whom the Director thinks it is proper to do so; that includes a police force (or the FSA or any other regulator). The criteria used by the SFO for deciding whether a case is suitable for it to deal with are set out in paragraph 3.3.

3.3 The key criterion should be that the suspected fraud is such that the direction of the investigation should be in the hands of those who would be responsible for any prosecution.

The factors that are taken into account include:

- whether the amount involved is at least £1 million (this is simply an objective and recognisable signpost of seriousness and likely public concern rather than the main indicator of suitability);
- whether the case is likely to give rise to national publicity and widespread public concern. That includes those involving government bodies, public bodies, the governments of other countries and commercial cases of public interest;
- whether the case requires highly specialist knowledge of, for example, stock exchange practices or regulated markets;
- whether there is a significant international dimension;
- whether legal, accountancy and investigative skills need to be brought together; and
- whether the case appears to be complex and one in which the use of Section 2 powers might be appropriate.

4. CPS

4.1 The CPS has responsibility for taking over the conduct of all criminal proceedings instituted by the police in England and Wales. The CPS may advise the police in respect of criminal offences. The CPS prosecutes all kinds of criminal offences, including fraud. Fraud cases may be prosecuted by local CPS offices but the most serious and complex fraud cases will be prosecuted centrally.

5. ACPO and ACPOS

5.1 ACPO represents the police forces of England, Wales, and Northern Ireland. ACPOS represents the police forces of Scotland.

6. COPFS

6.1 The investigation and prosecution of crime in Scotland is the responsibility of the Lord Advocate, who is the head of the COPFS, which comprises Procurators Fiscal and their Deputes, who are answerable to the Lord Advocate. The Procurator Fiscal is the sole public prosecutor in Scotland, prosecuting cases reported not only by the police but all regulatory departments and agencies. All prosecutions before a jury, both in the High Court of Justiciary and in the Sheriff Court, run in the name of the Lord Advocate; all other prosecutions run in the name of the local Procurator Fiscal. The Head Office of the Procurator Fiscal Service is the Crown Office and the Unit within the Crown Office which deals with serious and complex fraud cases and with the investigation of cases of interest or concern to the Financial Services Authority is the National Casework Division: the remit of this Unit is directly comparable to that of the Serious Fraud Office.

7. The PPS

7.1 The PPS is responsible for the prosecution of all offences on indictment in Northern Ireland, other than offences prosecuted by the Serious Fraud Office. The PPS is also responsible for the prosecution of certain summary offences, including offences reported to it by any government department.

Transitional provisions applying to the Enforcement Guide

(1)	(2) Material to which the transitional provision applies	(3)	(4) Transitional provision	(5) Transitional provision dates in force:	(6) Regulatory Guide provision coming into force
1	*EG*		*EG* takes effect on 28 August 2007, save to the extent described below. The *FSA's* enforcement policy will continue to be as described in the Enforcement manual (ENF) in relation to any *statutory notice* or related notice given on or after 28 August where a *warning notice*, first *supervisory notice* or *decision notice* was given by the *FSA* before 28 August in relation to the same matter.	From 28 August 2007	28 August 2007