

# The Enforcement Guide

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## 1. Introduction

### 1.1

This guide describes the FCA'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 FCA'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 FCA's policy concerning specific enforcement powers such as its powers to: vary a firm's Part 4A permission and impose requirements on its own initiative (chapter 8); make prohibition orders (chapter 9); prosecute criminal offences (chapter 12); and powers which the FCA has been given under legislation other than the Act (chapter 19).

### 1.2

In the areas set out below, the Act expressly requires the FCA 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) section 63C requires the FCA to publish a statement of its policy on the imposition, and amount, of financial penalties on persons that perform a controlled function without approval;

(1A) sections 69 and 210 require the FCA to publish statements of policy on the imposition of financial penalties, suspensions or restrictions on firms, approved persons and unauthorised persons to whom section 404C applies, the amount of financial penalties imposed, and the period for which suspensions or restrictions are to have effect;

(1B) section 88C requires the FCA to publish a statement of policy on the imposition of financial penalties, suspensions or restrictions on sponsors, the amount of financial penalties imposed, and the period for which suspensions or restrictions are to have effect;

(1C) section 89S requires the FCA to publish a statement of policy on the imposition of financial penalties, suspensions or restrictions on primary information providers, the amount of financial penalties imposed, the time period for any suspensions or restrictions, and the matters in relation to which, suspensions or restrictions are to have effect;

(2) section 93 requires the FCA 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 FCA to publish a statement of its policy on the imposition, and amount, of financial penalties for market abuse;

(3-A) section 131FA requires the FCA to publish a statement of its policy on the conduct of certain interviews in response to requests from EEA regulators; and

(3A) section 131J requires the FCA to publish a statement of its policy on the imposition, and amount, of financial penalties imposed under section 131G;

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

(4A) section 192N requires the FCA to publish a statement of its policy on the imposition, and amount, of financial penalties on qualifying parent undertakings under section 192K of the Act;

(4B) section 312J requires the FCA to publish a statement of its policy on the imposition, and amount, of financial penalties on recognised investment exchanges under section 312F of the Act;

(4C) section 345D requires the FCA to publish a statement of its policy on the imposition, and amount, of financial penalties on auditors and actuaries under sections 249 and 345 of the Act; and

(5) section 395 requires the FCA to issue a statement of procedures relating to:

(a) the giving of supervisory notices, warning notices and decision notices;

(b) the giving of consent to the PRA in respect of applications made to the PRA for Part 4A permission, variation of Part 4A permission and approval to hold controlled functions; and

(c) the publishing of information about matters to which certain warning notices relate.

These policies are set out in the Decision Procedure and Penalties manual (DEPP), a module of the FCA 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 FCA 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 FCA 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 FCA will have regard to the matters and objectives which apply to the competent authority function.

### 1.4

The FCA has a range of enforcement powers, and in any particular enforcement situation, the FCA 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 FCA'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 FCA 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 FCA Handbook and is not guidance on rules, but it is 'general guidance' as defined in section 139B 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 FCA's approach to enforcement**

### **2.1**

The FCA's effective and proportionate use of its enforcement powers plays an important role in the pursuit of its statutory objectives, including its operational objectives of securing an appropriate degree of protection for consumers, protecting and enhancing the integrity of the UK financial system, and promoting effective competition in the interests of consumers. For example, using enforcement helps to contribute to the protection of consumers and to deter future contraventions of FCA 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 FCA'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 FCA and those it regulates.
- (2) The FCA 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 FCA will seek to ensure fair treatment when exercising its enforcement powers.
- (4) The FCA 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 FCA. As a risk based regulator with limited resources, throughout its work the FCA prioritises its resources in the areas which pose the biggest threat to its statutory 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 FCA takes a risk based approach towards its use of the enforcement tool, and the subsequent sections comment on other aspects of the '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 FCA to decide against taking formal disciplinary action. However, in those cases, the FCA will expect the firm to act promptly in taking the necessary remedial action agreed with its supervisors to deal with the FCA's concerns. If the firm does not do this, the FCA 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 FCA'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 FCA does not have a set of enforcement priorities that are distinct from the priorities of the FCA as a whole. Rather, the FCA consciously uses the enforcement tool to deliver its overall strategic priorities. The areas and issues which the FCA 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. FCA priorities will influence the use of resources in its supervisory work and as such, make it more likely that the FCA 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 FCA focuses on priority areas is through its thematic work. This work involves the FCA looking at a particular issue or set of issues across a sample of firms. Themes are, in general, selected to enable the FCA to improve its understanding of particular industry areas or to assess the validity of concerns the FCA has about risks those areas may present to the statutory objectives. Thematic work does not start with the presumption that it will ultimately lead to enforcement outcomes. But if the FCA finds significant issues, these may become the subject of enforcement investigations as they would if the FCA had discovered them in any other circumstance. Also, by definition, the fact they are in areas that are of importance to the FCA means, following the FCA's risk-based approach through, that they are proportionately more likely to result in the FCA determining that an enforcement investigation should be carried out than issues in lower priority areas.

## 2.8

This does not mean that the FCA 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 FCA thinks are necessary to achieve effective deterrence.

## 2.9

The combination of the priority given to certain types of misconduct over others and the FCA'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 FCA's choice as to the use of the enforcement tool is therefore a question of how the FCA 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 FCA will satisfy itself that there are grounds to investigate under the statutory provisions that give the FCA 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 FCA has developed a set of assessment criteria. The current criteria (which are published on the Enforcement section of the FCA web site<sup>1</sup>) are framed as a set of questions. They take account of the FCA's statutory 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 FCA'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 FCA 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 FCA often takes a different approach to that described above where firms no longer meet the threshold conditions. The FCA 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 FCA 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 FCA will consider whether its permission to carry out regulated business should be varied and/or cancelled. However, there may be cases where the FCA considers that a formal investigation into a threshold conditions concern is appropriate.

### **Case selection: Unauthorised business**

#### **2.12**

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<sup>1</sup> <http://www.fca.org.uk/firms/being-regulated/enforcement/how-we-enforce-the-law/referral-criteria>

Where this poses a significant risk to the consumer protection objective or to the FCA's other regulatory objectives, unauthorised activity will be a matter of serious concern for the FCA. The FCA 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 FCA'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 FCA'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.

#### 2.14

The FCA 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 FCA considers that the persons concerned are willing to co-operate with it;
- (3) whether obligations of confidentiality inhibit individuals from providing information unless the FCA 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 FCA 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 FCA 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 FCA 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.

## 2.15A

A need for a joint investigation with the PRA may arise where either the FCA or the PRA identifies circumstances which suggest that a firm or individual has committed misconduct that adversely affects both regulators' statutory objectives. In such cases, the regulators will determine whether they should carry out separate but coordinated investigations, or whether it would be more appropriate for one of the regulators to carry out an investigation, keeping the other informed. (See also EG 4.34 to EG 4.35).

## **Assisting overseas regulators**

### 2.16

The FCA views co-operation with its overseas counterparts as an essential part of its regulatory functions. Section 354A of the Act imposes a duty on the FCA 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 FCA may share information which it is not prevented from disclosing, including information obtained in the course of the FCA's own investigations, or exercise certain of its powers under Part XI of the Act. Further details of the FCA's powers to assist overseas regulators are provided at EG 3.12 – 3.15 (Investigations to assist overseas authorities), EG 3.15A – D (Information requests and investigations to assist EEA regulators in relation to short selling), 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 or EEA regulator), and EG 8.18 – 8.25 (Exercising the power under section 55Q to vary or cancel a firm's Part 4A permission, or to impose requirements on a firm in support of an overseas regulator: the FCA's policy). The FCA's statement of policy in relation to interviews which

representatives of overseas regulators or EEA regulators attend and participate in is set out in DEPP 7.

### **Sources of cases**

#### **2.17**

The FCA 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 FCA's attention, as they are obliged to do under Principle 11 of the Principles for Businesses and rules in the FCA's Supervision manual.

### **Enforcement and the FCA's Principles for Business ('the Principles')**

#### **2.18**

The FCA's approach to regulation involves a combination of high-level principles and detailed rules and guidance.

#### **2.19**

The FCA will, in appropriate cases, take 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 FCA 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 FCA rules. Rather, our intention has been to acknowledge that firms may comply with the Principles in different ways; and to indicate that the FCA 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 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 FCA 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.

### **FCA guidance and supporting materials**

#### **2.22**

The FCA 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 FCA's rules apply. Nor are the variety of materials (such as case studies showing good or bad practice, FCA speeches, and generic letters written by the FCA 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 6.2.1G(4) explains that the FCA 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 FCA 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 FCA 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 FCA 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 FCA 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 FCA may take action in areas in which it has not issued guidance or supporting materials.

## **Industry guidance**

### 2.28

The FCA 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 FCA's requirements. This will be true especially where Industry Guidance has been 'confirmed' by the FCA. DEPP 6.2.1G(4) confirms that, as with FCA guidance and supporting materials, the FCA will not take action against a firm for behaviour that we consider is in line with FCA-confirmed Industry Guidance that was current when the conduct took place.

### 2.29

Equally, however, FCA-confirmed Industry Guidance is not mandatory. The FCA does not regard adherence to Industry Guidance as the only means of complying with FCA rules and Principles. Rather, it provides examples of behaviour which meets the FCA'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 FCA is aware of the concern that firms must have scope to exercise their own judgement about what FCA rules require, and that Industry Guidance should not become a new prescriptive regime in place of detailed FCA rules. This, and the specific status of FCA-confirmed Industry Guidance, will be taken into account when the FCA makes judgements about the relevance of Industry Guidance in enforcement cases.

## **Senior management responsibility**

### 2.31

The FCA is committed to ensuring that senior managers of firms fulfil their responsibilities. The FCA 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 FCA will not pursue senior managers where there is no personal culpability. However, where senior managers are themselves responsible for misconduct, the FCA will, where appropriate, bring cases against individuals as well as firms. The FCA believes that deterrence will most effectively be achieved by bringing home to such individuals the consequences of their actions. The FCA'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 FCA's policy on prohibition and withdrawal of approval is set out in chapter 9 of this guide.

### 2.32

The FCA recognises that cases against individuals are very different in their nature from cases against corporate entities and the FCA 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 FCA's statutory objectives and priorities and the FCA considers that such cases have important deterrent values. The FCA 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 FCA and whether, against that background, the use of enforcement tools is likely to further the FCA'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 FCA. 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 FCA 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 FCA 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 FCA 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 FCA'<sup>2</sup>. However, in those cases where enforcement action is not taken and/or a formal investigation is not commenced, the FCA will expect the firm to act promptly to take the necessary remedial action agreed with its supervisors to deal with the FCA's concerns. If the firm does not do this, the FCA may take disciplinary or other enforcement action in respect of the original contravention.

## **Late reporting or non-submission of reports to the FCA**

### **2.35**

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<sup>2</sup> <http://www.fca.org.uk/firms/being-regulated/enforcement/how-we-enforce-the-law/cooperating>

The FCA attaches considerable importance to the timely submission by firms of reports required under FCA rules. This is because the information contained in such reports is essential to the FCA's assessment of whether a firm is complying with the requirements and standards of the regulatory system and to the FCA'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 FCA considers that it will be appropriate to seek to cancel the firm's permission. Where the FCA 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 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 warning notices before they are submitted to the settlement decision makers.

### **Decision making in the context of regulatory enforcement action**

#### **2.37**

When the FCA is proposing to exercise its regulatory enforcement powers, the Act generally requires the FCA 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 FCA's proposed decision.

#### **2.38**

The procedures the FCA 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 FCA Board committee that is appointed by, and accountable to, the FCA Board for its decisions generally. Further details about the RDC can be found in DEPP 3 and on the pages of the FCA web site relating to the RDC.<sup>3</sup> However, decisions on settlements and statutory notices arising from them are

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<sup>3</sup> <http://www.fca.org.uk/about/structure/committees/regulatory-decisions-committee>

taken by two members of the FCA's senior management, 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 FCA 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 FCA 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 FCA web site<sup>4</sup> and on the Tribunal's own web site<sup>5</sup>.

## 3. Use of information gathering and investigation powers

### 3.1

The FCA has various powers under sections 97, 131E, 131FA, 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 FCA 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 FCA 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 FCA. Such reports can be very helpful for the FCA in circumstances where enforcement action is anticipated or underway. The FCA'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 FCA may use its section 165 power to require information and documents from firms to support both its supervisory and its enforcement functions.

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<sup>4</sup> <http://www.fca.org.uk/about/governance/who/upper-tribunal>

<sup>5</sup> <http://www.financeandtaxtribunals.gov.uk/>



### 3.3

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

### **Reports by skilled persons (section 166)**

#### 3.4

Under section 166 of the Act, the FCA has a power to require a firm and certain other persons to provide a report by a skilled person, or itself to appoint a skilled person to produce such a report. The FCA 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 FCA will consider when deciding whether to use the section 166 power include:

- (1) If the FCA'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 FCA'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 FCA'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 FCA's other available powers.

#### 3.6

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

#### 3.6A

Under section 166A of the Act, the FCA also has a power to require a firm to appoint a skilled person to collect or update information, or itself to appoint a skilled person to do so, where it considers that the firm has

failed to provide information required by the FCA or update information previously provided to the FCA.

### 3.7

Chapter 5 of the FCA's Supervision manual (Reports by skilled persons) contains rules and guidance that will apply whenever the FCA uses the section 166 and 166A powers.

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

#### 3.8

Where the FCA 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 FCA 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 FCA 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 FCA may appoint investigators under section 167.

#### 3.9

In some cases involving both general and specific concerns, the FCA 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 FCA 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 FCA 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 FCA'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 FCA 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 FCA 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 FCA may take into account when deciding whether to use its investigative powers. However, these provisions do not apply if the FCA 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 FCA 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 FCA 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.

### **Information requests and investigations to assist EEA regulators in relation to short selling**

#### 3.15A

The FCA may use its section 131E power to require information and documents from natural or legal persons to support both its monitoring and its enforcement functions.

### 3.15B

An officer with authorisation from the FCA may exercise the section 131E power to require information and documents from natural or legal persons. This includes an FCA employee or an agent of the FCA.

### 3.15C

The FCA's power to conduct investigations to assist EEA regulators in respect of the short selling regulation is contained in section 131FA of the Act. The section provides that at the request of an EEA regulator or ESMA, the FCA may either use its power under section 131E to require the production of information, or appoint a person to investigate any matter.

### 3.15D

Section 131FA states that the FCA must, in deciding whether or not to exercise its investigative power, consider whether the exercise of that power is necessary to comply with an obligation under the short selling regulation.

## **Liaison where other authorities have an interest**

### 3.16

The FCA 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 FCA is considering for investigation, is investigating or is considering prosecuting. These guidelines are set out in Annex 2 to this guide.

## **FCA approach to firms conducting their own investigations in anticipation of enforcement action.**

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

### 3.17

The FCA 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 FCA 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 FCA 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 FCA 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 FCA. But a firm's willingness to volunteer the results of its own investigation, whether protected by legal privilege or otherwise, is welcomed by the FCA and is something the FCA may take into account when deciding what action to take, if any. (The FCA'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 FCA'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 FCA decide on the appropriate action to take and may narrow the issues or obviate the need for certain work.

### 3.20

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

- (1) firms have informed the FCA of an issue of potential regulatory concern, as required by SUP 15; or
- (2) the FCA has indicated that an issue or concern has or may result in a referral to Enforcement.

### 3.21

The FCA'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 FCA 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 FCA 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 FCA 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 FCA. These include:

- (1) to what extent the FCA will be able to rely on the report in any subsequent enforcement proceedings;
- (2) to what extent the FCA 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 FCA, on what basis and for what purposes the FCA 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 FCA rules or requirements;
- (8) how the firm intends to inform the FCA of progress and communicate the results of the investigation; and
- (9) timing.

### 3.23

In certain circumstances the FCA 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 FCA investigation. This is true in particular of criminal investigations, where alerting the suspects could have adverse consequences. For example, where the FCA 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 FCA investigation, and, if in doubt, to discuss this with the FCA. The FCA 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 FCA 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 FCA's judgment about whether any further work is needed and, if so, where the FCA's efforts should be focused.

### 3.26

How the results of an investigation are presented to the FCA may differ from case to case; the FCA acknowledges that different circumstances may call for different approaches. In this sense, one size does not fit all. The FCA will take a pragmatic and flexible approach when deciding how to receive the results of an investigation. However, if the FCA 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 FCA 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 FCA 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 FCA, then the FCA 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 FCA's opinion, devalue the usefulness of the report and may require the FCA to undertake additional enquiries.

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

## 3.28

For reasons that the FCA 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 FCA understands that the concept of a limited waiver of legal privilege is not one which is recognised in all jurisdictions; the FCA 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 FCA. However, the FCA cannot accept any condition or stipulation which would purport to restrict its ability to use the information in the exercise of the FCA's statutory functions. In this sense, the FCA 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 FCA is unprotected. The FCA 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 FCA 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 FCA will consider carefully whether it would be appropriate to disclose a report provided voluntarily by a firm. The FCA 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 FCA 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 FCA's international obligations.

## 4. Conduct of investigations

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

#### 4.1

The FCA 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 FCA'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 FCA 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 FCA 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 FCA 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 FCA 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 FCA 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 FCA's view, prejudice the FCA'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 FCA 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 FCA's enquiries, the FCA will consider whether it is appropriate to notify that person that they are under investigation. The FCA will usually notify them when it exercises its statutory powers to require information from them unless doing so would prejudice the FCA's ability to conduct the investigation effectively.

## **Appointment of additional investigators**

### 4.5

In some cases, the FCA will appoint an additional investigator or additional investigators during the course of an investigation. If this

occurs and the FCA has previously told the subject it has appointed investigators, then the FCA will normally give the person written notice of the appointment(s).

#### **Notice of termination of investigations**

##### **4.6**

Except where the FCA has issued a warning notice, and the FCA has subsequently discontinued the proceedings, the Act does not require the FCA to provide notification of the termination of an investigation or subsequent enforcement action. However, where the FCA 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 FCA 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 FCA'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 FCA 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 FCA will usually seek information voluntarily.

(3) In some cases, the FCA is asked by overseas regulators or EEA regulators to obtain documents or conduct interviews on their behalf. In these cases, the FCA will not necessarily adopt its standard approach as it will consider with the overseas regulator or EEA 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 FCA (as a result of Principle 11 for Businesses and Statement of Principle 4 for Approved Persons respectively). The FCA 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 FCA 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 FCA 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 FCA 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 FCA has appointed investigators (including the nature of and reasons for the FCA'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 FCA can be about the nature of its concerns in the early stages of an investigation. The FCA team for the purposes of the scoping discussions will normally include the nominated supervisor if the subject is a fixed portfolio firm.

#### 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 FCA's concerns changes significantly from that notified to the person under investigation and the FCA, having reconsidered the case, is satisfied that it is appropriate in the circumstances to continue the investigation, the FCA will notify the person of the change in scope.

#### **Involvement of FCA supervisors during the investigation phase**

#### 4.14

A clear division between the conduct of the investigation on the one hand and the need to continue with the ongoing supervision of the firm on the other 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. Before matters are referred to the Enforcement Division for investigation, FCA staff from its Enforcement Division will often work closely together with staff from the Supervision Division in order to determine the proper course of action to take. Following a referral, the FCA 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 FCA 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 FCA to draw on that other source of expertise.

(4) In the event that a firm's supervisor becomes part of the investigation team, the 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 FCA 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 FCA 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 FCA will then confirm or amend the request. The FCA will not, however, send such a draft request where the request is straightforward and the FCA considers that it is reasonable to expect the information or documents to be made available within the FCA's specified timeframe.

#### 4.16

Once it has formally issued a requirement (whether or not this has been preceded by a draft), the FCA 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 FCA'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 FCA.

#### 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 FCA interviews a person, it will allow the person to be accompanied by a legal adviser, if they wish. The FCA 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 FCA 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 FCA 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 FCA using statutory powers, before they are re-interviewed on a voluntary basis (under caution or otherwise), the FCA will explain the difference between the two types of

interview. The FCA 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 FCA 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 FCA later wishes to conduct a compulsory interview with them, the FCA 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 FCA may make a request to the police for assistance to arrest the individual for questioning by the FCA (FCA 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 FCA 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.<sup>6</sup>

#### **Interviews in response to a request from an overseas regulator or EEA regulator**

#### 4.25

Where the FCA has appointed an investigator in response to a request from an overseas regulator or EEA regulator, it may, under sections 169(7) or 131FA of the Act respectively, 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 FCA may only use this power if it is satisfied that any information obtained by an overseas regulator or EEA regulator as a result of the interview will be

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<sup>6</sup> <http://www.fca.org.uk/your-fca/documents/association-of-chief-police-officers>



subject to safeguards equivalent to those in Part XXIII of the Act (sections 169(8) and 131FA respectively).

#### 4.26

The factors that the FCA 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 FCA'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 sections 169(9) and 131FA respectively, the FCA 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 or EEA regulators. The statement is set out in DEPP 7.

### **Search and seizure powers**

#### 4.28

Under section 176 of the Act, the FCA 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 FCA 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 FCA 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 FCA proposes to submit an investigation report to the RDC with a recommendation for regulatory action, the FCA'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 FCA 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 FCA 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 FCA 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. FCA 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 FCA has sent a preliminary findings letter and it then decides not to take any further action, the FCA will communicate this decision promptly to the person concerned.

### **Joint investigations with the PRA**

#### 4.34

In some cases, it may be appropriate for both the FCA and the PRA to pursue investigations into different aspects of the same misconduct (see EG 2.15A).

#### 4.35

In such cases, the guidance contained in this chapter will apply to the FCA's investigation and the FCA will attempt to ensure that the subject of the investigation is not prejudiced or unduly inconvenienced by the fact that there are two investigating authorities.

## **5. Settlement**

### **Settlement and the FCA – an overview**

#### 5.1

The FCA 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 FCA and industry resources, messages getting out to the market sooner and a public perception of timely and effective action. The FCA 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 FCA to secure our

statutory objectives. The FCA 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 FCA 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 FCA context are not the same as 'out of court' settlements in the commercial context. An FCA settlement is a regulatory decision, taken by the FCA, the terms of which are accepted by the firm or individual concerned. So, when agreeing the terms of a settlement, the FCA will carefully consider its statutory 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, FCA 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 FCA 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 the FCA's senior management, 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 decisions may take place**

### 5.6

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

### 5.7

The FCA 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 FCA 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 FCA 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 FCA 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 FCA will aim to organise its resources so that the preparation for the formal process continues in parallel with any settlement discussions. The FCA 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 FCA operates special decision-making arrangements under which members of FCA senior management take decisions on FCA settlements. This means that settlement discussions will take place without involving the RDC. The FCA would expect to hold any settlement discussions on the basis that neither FCA 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 FCA 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, FCA 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 FCA 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, period of suspension or period of restriction 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 FCA will send a letter at an early point in the enforcement process to the subject of the investigation. This is what the FCA 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 FCA's view on penalty, and the period within which the FCA 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 FCA to be able to satisfy itself that the settlement is the right regulatory outcome. In many cases, the FCA can send out the stage 1 letter substantially before the person concerned is provided with the FCA's preliminary investigation report (see paragraphs 4.30 to 4.33). The latest point the FCA will send a stage 1 letter is when the person is provided with the preliminary investigation report.

#### 5.19

The FCA 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.

#### 5.19A

The procedure for the settlement discount scheme where the outcome is potentially a financial penalty, described in paragraphs 5.14 to 5.19, will also apply where the outcome is potentially a suspension or restriction.

## **Mediation**

### **5.20**

The FCA is committed to mediating appropriate cases; mediation and the involvement of a neutral mediator may help the FCA 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 FCA's approach to mediation and the mediation process are set out on our web site.<sup>7</sup>

## **The relevance of settled cases to subsequent action**

### **5.22**

Decisions recorded in FCA 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 FCA when it reached its earlier decision. Not to do so would expose the FCA 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 FCA in the earlier case would not have relieved the FCA 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 FCA 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 FCA in earlier, similar, cases. This is not to say that the FCA 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 FCA is able to respond to the demands of

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<sup>7</sup> <http://www.fca.org.uk/firms/being-regulated/enforcement/how-we-enforce-the-law/settlement-mediation>



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.

## 6. Publicity

### Publicity during FCA investigations

#### 6.1

The FCA 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 FCA 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 FCA may make a public announcement that it is not investigating, and does not propose to investigate, the matter. Those circumstances are where the FCA:

- (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 FCA 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 FCA 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 FCA 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 FCA 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 FCA 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 FCA 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 FCA may publish details. Circumstances in which it may do so include those where the fact that the FCA is investigating has been made public, by the FCA or otherwise, and the FCA subsequently concludes that the concerns that prompted the investigation were unwarranted. This is particularly so if the firm under investigation wishes the FCA to clarify the matter.

#### **Publicity during, or upon the conclusion of regulatory action**

#### 6.7

For supervisory notices (as defined in section 395(13)) which have taken effect<sup>8</sup>, decision notices and final notices, section 391 of the Act requires the FCA to publish, in such manner as it considers appropriate, such information about the matter to which the notice relates as it considers appropriate. Section 391 prevents the FCA from publishing warning notices, but the FCA may publish such information about the matter to which a warning notice falling within section 391(1ZB) of the Act relates

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<sup>8</sup> Section 55Y(2) and section 391(8) of the Act define when a variation of permission under a supervisory notice takes effect

as it considers appropriate after consulting the persons to whom the notice is given or copied. However, section 391(6) provides that the FCA 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 was proposed to be taken), prejudicial to the interests of consumers, or detrimental to the stability of the UK financial system.

#### 6.7A

The FCA's approach to publishing information about warning notices is set out in paragraphs 6.7B to 6.7J below. This should be contrasted with the FCA's approach to the publication of decision notices and final notices as set out in paragraphs 6.8 to 6.9 below. In particular, the considerations that the FCA will take into account when deciding what information to publish about a warning notice, including whether publication would be unfair, recognise that the FCA has a discretion as opposed to a duty to publish and that the recipient of a warning notice has not yet had a formal opportunity to make representations about the action the FCA proposes to take.

#### **Warning notice statements**

#### 6.7B

The FCA may publish information about warning notices which fall within section 391(1ZB) of the Act. These are essentially disciplinary warning notices, for example, where the FCA is proposing to censure, fine, suspend or restrict a firm or individual. The power to publish information does not apply, for example, to warning notices which only propose to prohibit an individual, withdraw the approval of an individual or cancel the permission of a firm.

#### 6.7C

The decisions on whether to exercise the power to publish information about a warning notice, and if so what information to publish, will be taken by the RDC after it has consulted with the persons to whom the warning notice has been given or copied. The procedure the FCA will follow when making these decisions is set out in DEPP 3.

#### 6.7D

The principal purpose of this power is to promote the early transparency of enforcement proceedings. This has several benefits, including:

- consumers, firms and market users will be able to understand the types of behaviour that the FCA considers unacceptable at an earlier stage, which in turn should encourage more compliant behaviour;
- by showing at an earlier stage that the FCA is taking action, confidence in the and the regulatory system should be enhanced;
- there will be more openness in respect of the enforcement process, which will generally be in the public interest; and
- it aligns the stage at which publicity is given in regulatory cases with the stage at which publicity is given in civil and criminal cases.

#### 6.7E

The FCA will take the following initial steps in considering whether it is appropriate to exercise this power:

(1) It will consider whether it is appropriate to publish details of the warning notice in order to enable consumers, firms and market users to understand the nature of the FCA's concerns. The FCA will consider the circumstances of each case but expects normally to consider it appropriate to publish these details.

(2) Where the FCA considers it is appropriate to publish details of the warning notice, it will consider whether it is also appropriate to identify the subject of the warning notice. The FCA will consider the circumstances of each case but expects normally that it will be appropriate to identify a firm, but that it will not be appropriate to identify an individual. This is because the FCA considers that the potential harm caused to an individual from publication at this stage of the enforcement proceedings will normally exceed the benefits of early transparency, but that this will not normally be the case in respect of firms. However, there may be circumstances where the FCA considers identification of an individual is appropriate, for example, where the FCA considers:

- it is not possible to describe the nature of its concerns without making it possible to identify the individual;
- it is necessary to avoid other persons being mistakenly believed to be the individual in breach;
- it would help to protect consumers or investors;
- it is necessary to maintain public confidence in the financial system or the market; or

- it is desirable to quash rumours in the market.

(3) Where the FCA considers it is appropriate either to publish details of the warning notice without identifying its subject, or to publish details of the warning notice and identify its subject, it will consult the persons to whom the notice is given or copied. It will then consider whether any of the grounds set out in section 391(6) of the Act prohibiting publication apply. These grounds are that publication of that information, or some of that information, would, in the opinion of the FCA, be unfair to the person with respect to whom the action was proposed to be taken, prejudicial to the interests of consumers or detrimental to the stability of the UK financial system. In considering whether publication would be unfair, the FCA will have regard to, amongst other matters, whether the person with respect to whom the action was proposed to be taken is a firm or an individual, the size of a firm, and the extent to which the person has been made aware of the case against him during the course of the investigation.

#### 6.7F

A person to whom the warning notice is given or copied who seeks to demonstrate potential unfairness from publication must provide clear and convincing evidence of how that unfairness may arise and how he could suffer a disproportionate level of damage. For example, this may be the case if publication could materially affect the person's health, result in bankruptcy or insolvency, a loss of livelihood or a significant loss of income, or prejudice criminal proceedings to which he is a party. The FCA is more likely to consider that the negative impact of publication on a person's reputation amounts to unfairness if the person also provides evidence of the harm that they could suffer as a consequence of the damage to their reputation. Arguments made solely on the basis that it is unfair for the FCA to have the power to publish information at this point of the enforcement process will have no effect on the FCA's decision. Similarly, arguments about the merits of the warning notice itself will not be material to publication decisions; arguments of this nature should instead be made separately and later in the process by way of representations in response to the warning notice.

#### 6.7G

If, after consulting the persons to whom the notice is given or copied, the FCA still considers it is appropriate to publish information about a warning notice, it will publish this information in a statement (a warning notice

statement). This will ordinarily include a brief summary of the facts which gave rise to the warning notice to enable consumers, firms and market users to understand the nature of the FCA's concerns. Where the FCA considers it appropriate to identify the subject of the warning notice, it will also include details of:

- (1) the name of the firm or individual;
- (2) additional information to enable the identification of the firm or individual; and
- (3) in the case of an approved person, his or her employer at the relevant time.

#### 6.7H

As the FCA may only publish information about disciplinary warning notices and not others, it will in many cases not be able to publish details of all of the sanctions it is seeking to impose (for example, the fact that it is proposing to prohibit an individual as well as impose a fine). For this reason, the FCA will not normally publish the nature and level of the proposed disciplinary sanctions.

#### 6.7I

Any warning notice statement the FCA publishes will make clear that:

- (a) the warning notice is not the final decision of the FCA;
- (b) the recipient has the right to make representations to the RDC which, in the light of those representations, will decide on the appropriate action and whether to issue a decision notice; and
- (c) if a decision notice is issued, the subject of the notice will have the right to refer the matter to the Tribunal which will reach an independent decision on the appropriate action for the FCA to take.

#### 6.7J

Publication will generally include placing the warning notice statement on the FCA website. The FCA will also consider what information about the matter should be included on the Financial Services Register.

### Decision notices and final notices

#### 6.8

The FCA will consider the circumstances of each case, but will ordinarily publicise enforcement action where this has led to the issue of a final notice. The FCA may also publicise enforcement action where this has led to the issue of a decision notice. The FCA will decide on a case-by-case basis whether to publish information about the matter to which a decision notice relates, but expects normally to publish a decision notice if the subject of enforcement action decides to refer the matter to the Tribunal. The FCA may also publish a decision notice before a person has decided whether to refer the matter to the Tribunal if the FCA considers there is a compelling reason to do so. For example, the FCA may consider that early publication of the detail of its reasons for taking action is necessary for market confidence reasons or to allow consumers to avoid any potential harm arising from a firm's actions. If a person decides not to refer a matter to the Tribunal, the FCA will generally only publish a final notice.

#### 6.8A

If the FCA intends to publish a decision notice, it will give advance notice of its intention to the person to whom the decision notice is given and to any third party to whom a copy of the notice is given. The FCA will consider any representations made, but will normally not decide against publication solely because it is claimed that publication could have a negative impact on a person's reputation. The FCA will also not decide against publication solely because a person asks for confidentiality when they refer a matter to the Tribunal.

#### 6.8B

Publication will generally include placing the decision notice or final notice on the FCA website and this will often be accompanied by a press release. The FCA will also consider what information about the matter should be included on the Financial Services Register. Additional guidance on the FCA's approach to the publication of information on the Financial Services 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 FCA 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, or detrimental to the stability of the UK financial system. 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 notices is important to ensure the transparency of FCA decision-making; it informs the public and helps to maximise the deterrent effect of enforcement action. The FCA will upon request review warning notice statements, decision notices, final notices and related press releases that are published on the FCA's website. The FCA will determine at that time whether continued publication is appropriate, or whether notices and publicity should be removed or amended.

#### 6.10A

In carrying out its review the FCA will consider all relevant factors. In particular, the FCA will take into account:

- the seriousness of the person's misconduct;
- the nature of the action taken by the FCA and the level of any sanction imposed on the person;
- whether the FCA has continuing concerns in respect of the person and any risk they might pose to the FCA's objectives;
- whether the person is a firm or an individual;
- whether the publication sets out the FCA's expectations regarding behaviour in a particular area, and if so, whether that message still has educational value;
- public interest in the case (both at the time and subsequently);
- whether continued publication is necessary for deterrence, consumer protection or market confidence reasons;
- how much time has passed since publication; and
- any representations made by the person on the continuing impact on them of the publication.

#### 6.10B

The FCA expects usually to conclude that warning notice statements, notices and related press releases that have been published for less than six years should not be removed from the website, and that notices and



related press releases relating to prohibition orders which are still applicable should not be removed from the website regardless of the length of time they have been published.

#### 6.10C

In cases where the FCA publishes a warning notice statement and the FCA subsequently decides not to take any further action, or where it publishes a decision notice and the subject of enforcement action successfully refers the matter to the Tribunal, the FCA will

make it clear on its website that the warning notice or the decision notice no longer applies. The FCA will normally do this by publishing a notice of discontinuance with the consent of the person to whom the notice of discontinuance has been copied.

Supervisory notices varying a firm's Part 4A permission or imposing a requirement on the FCA's own initiative (see chapter 8 of this guide)

#### 6.11 [deleted]

#### 6.12

Publishing the reasons for variations of Part 4A permission the imposition of requirements, and maintaining an accurate public record, are important elements of the FCA's approach to its statutory objectives. The FCA will always aim to balance both the interests of consumers and the possibility of unfairness to the person subject to the FCA's action. The FCA will publish relevant details of both fundamental and non-fundamental variations of Part 4A permission and requirements which it imposes on firms. But it will use its discretion not to do so if it considers this to be unfair to the person on whom the variation is imposed, prejudicial to the interests of consumers, or detrimental to the stability of the UK financial system. Publication will generally include placing the notice on the FCA website and this may be accompanied by a press release. As with warning notice statements, decision notices and final notices, supervisory notices and related press releases that are published on the FCA's website will be reviewed upon request. The FCA will determine at that time whether continued publication is appropriate, or whether notices and related press releases should be removed or amended. The FCA expects usually to conclude that supervisory notices and related press releases that have been published for less than six years should not be removed from the website.

## 6.12A

The FCA will amend the Financial Services Register to reflect a firm's actual Part 4A permission following any variation.

### **Decisions 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 FCA 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 FCA 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 FCA 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 FCA 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 FCA will normally publicise the outcome of public hearings in criminal prosecutions.

#### 6.17A

When conducting a criminal investigation the FCA 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 FCA will always be very careful to ensure that any FCA 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 decision notice, final notice, civil action, or criminal action relates has occurred in the context of a takeover bid, the FCA will consult the Takeover Panel over the timing of publication if the FCA believes that publication may affect the timetable or outcome of that bid, and will give due weight to the Takeover Panel's views.

### **The Financial Services 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 FCA will consider what additional information about the circumstances of the prohibition order to include on the Financial Services Register. The FCA will balance any possible prejudice to the individual concerned against the interests of consumer protection. The FCA's normal approach to maintaining information about a prohibition order on the Financial Services Register is as follows:

- (1) The FCA will maintain an entry on the Financial Services Register while a prohibition order is in effect. If the FCA grants an application to vary the order, it will make a note of the variation on the Financial Services Register.
- (2) Where the FCA grants an application to revoke a prohibition order, it will make a note on the Financial Services Register that the order has been revoked giving reasons for the revocation. The availability to firms

and consumers of a full record of FCA action taken in relation to an individual's fitness and propriety will help it in furthering its statutory objectives. In particular, it will help with protecting consumers and the maintaining of confidence in the financial system.

(3) The FCA 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 Financial Services Register.

**The Financial Services register: publication of disciplinary measures against auditors and actuaries (see chapter 15)**

6.20

To help it fulfil its operational objective of protecting consumers, the FCA will keep on the Financial Services Register a record of firms or individual auditors or actuaries who have been the subject of disqualification orders or other disciplinary measures by the FCA.

**The Financial Services Register: publication of disapplication orders against members of the professions (see chapter 16)**

6.21

In general, the FCA 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 FCA will consider what additional information about the circumstances of the order to include on the record maintained on the Financial Services Register taking into account any prejudice to the person concerned and the interests of consumer protection.

6.22

The FCA's normal approach to maintaining information about a disapplication order on the Financial Services Register is as follows.

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

(2) The FCA'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 Financial Services Register saying that the order has been revoked giving reasons for its revocation. Having a full record of action the FCA has taken against persons granted an exemption under section 327 of the

Act available will help the FCA to fulfil its operational objectives of securing an appropriate degree of protection for consumers and protecting and enhancing the integrity of the UK financial system.

(3) This is why the FCA 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 Financial Services Register.

## **7. Financial penalties, suspensions and public censures**

### **The FCA's use of sanctions**

#### **7.1**

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

#### **7.2**

The FCA 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 88A of the Act;
  - (ca) against a primary information provider under section 89Q of the Act;

- (d) where there has been a contravention of the Part 6 rules, under section 91 of the Act;
  - (e) where there has been market abuse, against a person under section 123 of the Act;
  - (ea) if a natural or legal person has contravened any provision of the short selling regulation, or any requirement imposed on that person under section 131E or 131F, under section 131G of the Act;
  - (eb) against a qualifying parent undertaking under section 192K of the Act;
  - (ec) against an auditor under section 249 of the Act;
  - (ed) against a recognised investment exchange under section 312E of the Act;
  - (ee) against an auditor and/or an actuary under section 345 of the Act; and
  - (f) against a firm, or an unauthorised person to whom section 404C applies, under section 205 of the Act.
- (2) It may impose a financial penalty:
- (a) on a person that performs a controlled function without approval, under section 63A of the Act;
  - (aa) on an approved person, under section 66 of the Act;
  - (ab) on a sponsor under section 88A of the Act;
  - (ac) on a primary information provider under section 89Q 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;
  - (ca) on a natural or legal person who has contravened any provision of the short selling regulation, or any requirement imposed on that person under section 131E or 131F, or any natural or legal person who was knowingly concerned in the contravention, under section 131G of the Act;
  - (cb) on a qualifying parent undertaking under section 192K of the Act;

(d) on a firm, or an unauthorised person to whom section 404C applies, under section 206 of the Act;

(da) on an auditor under section 249 of the Act;

(db) on a recognised investment exchange under section 312F of the Act; and

(dc) on an auditor and/or actuary under section 345 of the Act.

(3) It may impose a suspension, limitation or other restriction:

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

(b) on a sponsor under section 88A of the Act;

(c) on a primary information provider under section 89Q of the Act; and

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

#### 7.2A

Section 415B of the Act requires the FCA to consult with the PRA before it takes certain enforcement action in relation to a PRA-authorised person or someone who has a qualifying relationship (as defined in section 415B(4) of the Act) with a PRA-authorised person. Further detail on when the FCA is required to consult the PRA, and when it has agreed to notify the PRA of certain matters, is set out in the Memorandum of Understanding between the PRA and the FCA.

### **Alternatives to financial penalties and public censures**

#### 7.3

The FCA 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 FCA 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 FCA 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 FCA 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 FCA 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.

### **FCA's statements of policy**

#### **7.4**

The FCA'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 FCA's statement of policy in relation to the amount of a financial penalty is set out in DEPP 6.5 to DEPP 6.5D. The FCA's statement of policy in relation to financial penalties for late submission of reports is set out in DEPP 6.6. The FCA's statement of policy in relation to the imposition of suspensions or restrictions is set out in DEPP 6A (The power to impose a suspension or restriction).

### **Apportionment of financial penalties**

#### **7.5**

In a case where the FCA is proposing to impose a financial penalty on a person for two or more separate and distinct areas of misconduct, the FCA will consider whether it is appropriate to identify in the decision



notice and 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 FCA's final notice. The FCA'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 FCA Handbook (GEN) 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.

#### 7.8A

Chapter 6 of the General Provisions of the FCA Handbook (GEN) also contains a rule prohibiting a firm, except a sole trader, from paying a financial penalty imposed by the FCA on a present or former employee, director or partner of the firm or of an affiliated company.

#### 7.9

Rule 1.5.33 in the FCA's Prudential Sourcebook for Insurers (INSPRU) 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 FCA 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 FCA's risk-based approach to enforcement. In such cases, the FCA 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 FCA 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 FCA identifies and explains its concerns about a person's conduct and/or procedures, and tells the subject of the warning that the FCA has seriously considered formal steps to impose a penalty or censure. They are primarily used by the FCA as an enforcement tool, but they may also be used by other parts of the FCA.

### 7.12

Typically, the FCA 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 FCA 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 FCA 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 FCA would expect to use private warnings in the context of firms and approved persons. However, the FCA 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 FCA 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 FCA will consider the likely impact of a private warning on the recipient and whether any risk that person poses to the statutory objectives requires the FCA to take more serious action. Equally, where the FCA gives a private warning to an approved person, the FCA 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 FCA's response.

#### 7.15

A private warning is not intended to be a determination by the FCA as to whether the recipient has breached the FCA'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 FCA correspondence, but the weight the FCA attaches to a private warning is likely to be greater. They may therefore influence the FCA'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 FCA'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 FCA action.

#### 7.16

Where the FCA 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 FCA 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 FCA'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 FCA 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 FCA's concerns and whether a private warning is appropriate. The FCA 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 FCA head of department or a more senior member of FCA staff.

## **8. Variation and cancellation of permission and imposition of requirements on the FCA's own initiative and intervention against incoming firms**

### 8.1

The FCA has powers under section 55J of the Act to vary or cancel an authorised person's Part 4A permission and a power under section 55L to impose requirements on an authorised person. The FCA may use these powers where:

- (1) the person is failing or is likely to fail to satisfy the threshold conditions for which the FCA is responsible;
- (2) the person has not carried on a regulated activity to which the Part 4A permission relates for a period of at least 12 months (or six months in the case of a full-scope UK AIFM);
- (3) it is desirable to exercise the power in order to advance one or more of its operational objectives; or
- (4) the person has failed to comply with a requirement in Part 5 of the AIFMD UK regulation (AIFs which acquire control of non-listed companies and issuers), or it is for some other reason desirable to exercise the power for the purposes of ensuring compliance with such a requirement.

#### 8.1A

The powers to vary and cancel a person's Part 4A permission and to impose requirements are exercisable in the same circumstances. However, the statutory procedure for the exercise of the own-initiative powers is different to the statutory procedure for the exercise of the cancellation power and this may determine how the FCA acts in a given case. Certain types of behaviour which may cause the FCA to cancel permission in one case, may lead it to impose requirements, 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 FCA will take in a given case.

### **Varying a firm's Part 4A permission or imposing requirements on the FCA's own initiative**

#### **8.1B**

When it considers how it should deal with a concern about a firm, the FCA will have regard to its statutory 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 FCA is seeking to achieve.

#### **8.2**

The FCA 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 FCA may make it clear that it expects the firm to take certain steps to meet regulatory requirements. In the vast majority of cases the FCA will seek to agree with a firm those steps the firm must take to address the FCA's concerns. However, where the FCA considers it appropriate to do so, it will exercise its formal powers under sections 55J or 55L of the Act to vary a firm's permission or to impose a requirement to ensure such requirements are met. This may include where:

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

(2) the FCA 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 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 FCA may decide to take formal action in the context of its supervision activities.

### 8.4 [deleted]

### 8.5

Examples of circumstances in which the FCA will consider varying a firm's Part 4A 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 55J(1)(a) or section 55L(2)(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 inappropriate for the scale or type of regulated activity it is carrying on, for example, where it has failed to take account of the need to manage risk 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 soundly 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;

(c) the firm's business model is not suited to its regulated activities, for example, where the firm's business model is not compatible with its affairs being conducted in a sound and prudent manner;

(d) the firm is not capable of effective supervision by the FCA, for example, where the way in which its business is organised or its membership of a group is likely to prevent effective supervision;

(2) in relation to the grounds for exercising the power under section 55J(1)(c)(i) or section 55L(2)(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 FCA'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 powers in urgent cases**

#### **8.6**

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

#### **8.7**

The FCA 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 FCA inaccurate or misleading information so that the FCA 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 FCA will consider the full circumstances of each case when it decides whether an urgent variation of Part 4A permission or an imposition of a requirement is appropriate. The following is a non-exhaustive list of factors the FCA 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 FCA'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 FCA's own-initiative power may be appropriate where the information available to the FCA 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 FCA's urgent exercise of its own-initiative powers will depend on matters such as:
  - (a) the impact of the information on the FCA'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 FCA, 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 FCA's decision about whether exercise of the FCA's own-initiative powers is appropriate to preserve the firm's assets, in the interests of the consumers. The FCA 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 FCA's intervention, and whether the exercise of the FCA's power to petition for the winding up of the firm is more appropriate than the use of its own-initiative powers (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 FCA, 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 FCA'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 FCA 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 FCA'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 FCA's own-initiative powers will have on the firm's business and on its customers. The FCA 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 FCA 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 statutory objectives.

### **Limitations and requirements that the FCA may impose when exercising its section 55J and 55L powers**

#### **8.10**

When varying Part 4A permission at its own-initiative under its section 55J power (or section 55Q power), the FCA may include in the Part 4A 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 55A of the Act.

#### **8.11**

Examples of the limitations that the FCA may impose when exercising its own-initiative variation 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).

#### **8.11A**

Under its section 55L power (or section 55Q power), the FCA may, at any time and of its own initiative, impose on an authorised person such requirements as it considers appropriate.

#### **8.12**

Examples of requirements that the FCA may consider imposing 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 FCA.

### **Cancelling a firm's Part 4A permission on its own initiative**

#### **8.13**

The FCA will consider cancelling a firm's Part 4A permission using its own-initiative powers contained in sections 55J and 55Q respectively of the Act in two main circumstances:

- (1) where the FCA 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 4A permission.

#### **8.14**

The grounds on which the FCA may exercise its power to cancel an authorised person's permission under section 55J of the Act are the same as the grounds for variation and for imposition of requirements. They are set out in section 55J(1) and section 55L(2) and described in EG 8.1. Examples of the types of circumstances in which the FCA may cancel a firm's Part 4A 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 FCA fees or repeated failure to pay FCA fees except under threat of enforcement action; and
- (6) failure to provide the FCA with valid contact details or failure to maintain the details provided, such that the FCA is unable to communicate with the firm;

- (7) repeated failures to comply with rules or requirements;
- (8) a failure to co-operate with the FCA which is of sufficient seriousness that the FCA 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 FCA to conclude or avoid disciplinary or other enforcement action; or
  - (b) provide material information or take remedial action reasonably required by the FCA.

Sections 55J(6) and 55K of the Act sets out further grounds on which the FCA may cancel the permission of authorised persons which are investment firms and section 55J(6A) of the Act set out further grounds on which the FCA may cancel the permission of authorised persons who are full-scope UK AIFMs.

#### 8.15

Depending on the circumstances, the FCA may need to consider whether it should first use its own-initiative powers to impose requirements on a firm or to vary a firm's Part 4A permission before going on to cancel it. Amongst other circumstances, the FCA 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 FCA may first vary the firm's Part 4A permission so that there is no longer any regulated activity for which the firm has a Part 4A permission. If it does this, the FCA will then have a duty to cancel the firm's Part 4A permission - once it is satisfied that it is no longer necessary to keep the Part 4A permission in force.

#### 8.17

However, where the FCA has cancelled a firm's Part 4A permission, it is required by section 33 of the Act to go on to give a direction withdrawing the firm's authorisation. Accordingly, the FCA may decide to keep a firm's Part 4A permission in force to maintain the firm's status as an authorised person and enable it (the FCA) to monitor the firm's activities. An example is where the FCA needs to supervise an orderly winding down of

the firm's regulated business (see SUP 6.4.22 (When will the relevant regulator grant an application for cancellation of permission)). Alternatively, the FCA may decide to keep a firm's Part 4A permission in force to maintain the firm's status as an authorised person to use administrative enforcement powers against the firm.

### **Exercising the power under section 55Q to vary or cancel a firm's Part 4A permission or to impose requirements on a firm in support of an overseas regulator: the FCA's policy**

#### **8.18**

The FCA has a power under section 55Q to vary, or alternatively cancel, a firm's Part 4A permission, or to impose requirements on a firm, in support of an overseas regulator. Section 55Q(4), (5) and (6) set out matters the FCA may, or must, take into account when it considers whether to exercise these powers. The circumstances in which the FCA may consider varying a firm's Part 4A permission or imposing requirements in support of an overseas regulator depend on whether the FCA is required to consider exercising the power in order to comply with a Community obligation. This reflects the fact that under section 55Q, if a relevant overseas regulator acting under prescribed provisions has made a request to the FCA for the exercise of its own-initiative power to vary or cancel a Part 4A permission or to impose requirements, the FCA must consider whether it must exercise the power in order to comply with a Community obligation.

#### **8.19**

Relevant Community obligations which the FCA may need to consider include those under the Capital Requirements 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 FCA views this cooperation and collaboration as essential to effective regulation of the international market in financial services. It will therefore exercise its own-initiative powers 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 FCA 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 55Q, which sets out matters the FCA may take into account when it decides whether to vary or cancel a firm's Part 4A permission or to impose requirements on a firm in support of the overseas regulator, applies in these circumstances.

#### 8.22

Where section 55Q(5) applies and the FCA is considering whether to vary a firm's Part 4A permission or to impose requirements on a firm, 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 55Q(5) (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 impose requirements or to vary, rather than cancel, the firm's Part 4A permission.

#### 8.23

The FCA will give careful consideration to whether the relevant authority's concerns would provide grounds for the FCA to exercise its own-initiative powers to vary, impose requirements or cancel if they related to a UK firm. It is not necessary for the FCA to be satisfied that the overseas provisions being enforced mirror precisely those which apply to UK firms. However, the FCA 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 FCA 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 FCA may decide, under section 55Q(6), not to exercise its own-initiative powers 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 FCA considers appropriate.

## 8.25

Paragraphs 8.11 and 8.12 set out some examples of limitations and requirements the FCA may impose when exercising its section 55Q powers.

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

## 8.26

The FCA 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 4A permission or impose requirements, 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 FCA is considering regulatory concerns about incoming firms.

## 8.27

When it is considering action against an incoming firm, the FCA 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 FCA'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 FCA to work towards achieving its statutory objectives. The FCA 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 FCA'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 FCA may prohibit an approved person, in addition to withdrawing their approval.

### **The FCA'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 FCA will consider all the relevant circumstances including whether other enforcement action should be taken or has been taken already against that individual by the FCA. As is noted below, in some cases the FCA may take other enforcement action against the individual in addition to seeking a prohibition order and/or withdrawing its approval. The FCA will also consider whether enforcement action has been taken against the individual by other enforcement agencies or designated professional bodies.

## 9.4

The FCA 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 FCA 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 FCA 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 FCA issues a prohibition order, it may indicate in the decision notice or 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 FCA 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 FCA 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 FCA may take into account include, but are not limited to, where appropriate, the factors at paragraphs 9.9 and at 9.17.

The FCA 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 FCA 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 FCA'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 FCA's approach to making prohibition orders against other individuals.

### **Prohibition orders and withdrawal of approval - approved persons**

## 9.8

When the FCA 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 FCA will consider in each case whether its statutory 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 FCA 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 FCA 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), the AIFMD UK regulation or any qualifying EU provision specified, or of a description specified, for the purpose of section 66(2) by the Treasury by order.
- (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 FCA, any previous regulator, designated professional body or other domestic or international regulator has previously imposed a disciplinary sanction on the individual.

#### 9.10

The FCA 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 not 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 FCA regulates, it is not possible to produce a definitive list of matters which the FCA 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 deciding to issue a prohibition order or withdraw the approval of an approved person:

- (1) Providing false or misleading information to the FCA; 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 FCA 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.

## 9.14A

The FCA will consult the PRA before withdrawing an approval given by the PRA.

### **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 FCA 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 FCA 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 FCA 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 FCA is considering making a prohibition order against an individual other than an individual referred to in paragraphs 9.8 to 9.14, the FCA 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 statutory objectives.

#### 9.18

When considering whether to exercise its power to make a prohibition order against such an individual, the FCA 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 FCA 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 FCA at the time, would have been relevant to the FCA'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 FCA'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 FCA will take into account any indication given by the FCA 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 FCA for approval of that individual's employment in that capacity. The FCA 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 FCA 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.

## 9.22A

The FCA will consult the PRA before varying or revoking a prohibition order if, as a result of the variation or revocation, an individual will either be prohibited from, or no longer be prohibited from, a function of interest to the PRA as defined at section 56(7B) of the Act.

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

## 9.23

In appropriate cases, the FCA 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 FCA's decision to make a prohibition order**

#### 9.24

The FCA 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 FCA considers that a search by a firm of the Financial Services 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 FCA expects firms to check the Financial Services Register when making applications for approval under section 59 of the Act. More generally, if a firm's search of the Financial Services Register reveals no record of a prohibition order, the FCA 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 FCA's decision to withdraw approval**

#### 9.25

When the FCA'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 appropriate regulator (as defined in section 59(4) of the Act) 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 FCA may take enforcement action against it (save where the firm concerned is a PRA-authorized person and the approval concerned falls to be given by the PRA).

## 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 appropriate regulator (as defined in section 59(4) of the Act) 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 FCA may take enforcement action against a firm that breaches this requirement (save where the firm concerned is a PRA-authorized person and the approval concerned falls to be given by the PRA).

## 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**

### 10.1A

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

### 10.1B

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

- (1) should be taken before it is possible to follow the procedure described in paragraph 10.1A; and
- (2) it is necessary to protect the interests of consumers or potential consumers.



## 10.1

The orders the court may make following an application by the FCA 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 FCA's effective use of these powers will help it work towards its operational objectives, in particular, those of securing an appropriate degree of protection for consumers, protecting and enhancing the integrity of the UK financial system and promoting effective competition in the interests of consumers in the markets.

### **Section 380 (injunctions for breaches of relevant requirement<sup>9</sup>) and section 381 (injunctions in cases of market abuse): the FCA'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 FCA may seek only one type of order, although in others it may seek several.

## 10.3

The broad test the FCA will apply when it decides whether to seek an injunction is whether the application would be the most effective way to deal with the FCA's concerns. In deciding whether an application for an injunction is appropriate in a given case, the FCA 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

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<sup>9</sup> Under sections 380(6)(a) and (7)(a), a 'relevant requirement' in relation to an application by the appropriate regulator means a requirement: which is imposed by or under the Act or by a qualifying EU provision specified, or of a description specified, for the purpose of subsection 380(6) by the Treasury by order; or which is imposed by or under any other Act and whose contravention constitutes an offence mentioned in section 402(1) of the Act; or which is imposed by the AIFMD UK regulation. The definition of "appropriate regulator" is set out in subsections 380(8) to (12) of the Act.

assets may be at risk, may be 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 FCA 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 FCA 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 FCA action, providing financial redress and repatriating funds from an overseas jurisdiction. An application by the FCA 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 FCA 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 FCA 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 FCA 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 FCA would incur in applying for and enforcing an injunction and the benefits that would result. There may be other cases which require the FCA'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 FCA 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 FCA'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 FCA (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 FCA (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 FCA, but also to action by other regulatory authorities. The FCA will examine the circumstances of each

case, and consider whether it is appropriate for the FCA to take action to address the relevant concern. In most cases the FCA 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 FCA 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 FCA 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 FCA applies to the court under section 380(3) or sections 381(3) and (4) of the Act, the FCA 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 FCA will have to show a good arguable case for the granting of the injunction. The FCA will not have to show that a contravention has already occurred or may have already occurred.

#### 10.5

The FCA 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 FCA 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 FCA 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 FCA 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 FCA has concerns about whether a firm will comply with restrictions that the FCA 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 FCA has already imposed requirements on a firm by exercising its own-initiative powers and these requirements have not been met, the FCA may seek an injunction to enforce those requirements.

## 10.8

The FCA'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 FCA may seek directly to prevent unauthorised persons from actual or threatened breaches or market abuse. The will decide whether an application against an unauthorised person is appropriate, in accordance with the approach discussed in paragraph 10.3. The FCA 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 FCA has power to prosecute under the Act. In those cases, the FCA 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 FCA 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 FCA's policy**

## 10.11

Under section 198 of the Act the FCA has power to apply to court on behalf of the Home State regulator of certain incoming EEA firms for an

injunction restraining the incoming EEA firm from disposing of, or otherwise dealing with, any of its assets. The FCA 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 FCA's policy**

#### 10.12

If the FCA decides to address issues using its powers under the Unfair Terms Regulations, and the contract is within its scope as described in the FCA's Regulatory Guide on these powers,<sup>10</sup> 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 FCA 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 FCA 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 FCA 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 FCA 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;

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<sup>10</sup> <https://www.handbook.fca.org.uk/handbook/UNFCOG/1/1.html>

- (3) whether the person has fully cooperated with the FCA in resolving the FCA'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 FCA would incur in applying for and enforcing an injunction and the benefits that would result from that action; the FCA 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 FCA 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 FCA 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 FCA 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 FCA may seek a temporary injunction without first consulting with the person.

#### 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 FCA 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 FCA will liaise with the Competition and Markets Authority or (as appropriate) a qualifying body under the Unfair Terms Regulations.

### **FCA costs**

#### 10.20

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

## **11. Restitution and redress**

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

#### 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 FCA's executive of at least director of division level.

#### 11.1B

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

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

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

#### 11.1

The FCA 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 FCA will consider whether this would be the best use of the FCA'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 FCA expects, therefore, to exercise its formal restitution powers on rare occasions only.

## 11.2

Instances in which the FCA 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 FCA will consider all the circumstances of the case. The factors which the FCA will consider may include, but are not limited to, those set out below.

### (1) Are the profits quantifiable?

The FCA 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 FCA to use its powers to obtain restitution.

### (2) Are the losses identifiable?

The FCA 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 FCA to use its powers to obtain restitution.

(3) The number of persons affected

The FCA 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 FCA to use its powers to obtain restitution on their behalf. The FCA 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 FCA to seek or require restitution from a firm. In those cases the FCA may consider combining an action seeking or requiring restitution from a firm or unauthorised person with disciplinary action or a criminal prosecution.

(4) FCA costs

The FCA will consider the cost of securing redress and whether these are justified by the benefit to persons that would result from that action. The FCA 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 FCA 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 FCA 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 FCA'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 FCA to pursue restitution.

Further details of these schemes are set out in COMP.

(6) Is redress available through another regulator?

The FCA 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 FCA will not generally exercise its own powers to do so. If the FCA does consider that action is appropriate and the matters in question have happened in the context of a takeover bid, the FCA 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 FCA 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 FCA 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 FCA 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 FCA 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 FCA will consider whether it is appropriate to seek restitution. In those cases, the FCA may consider obtaining a compulsory insolvency order against the firm or

unauthorised person rather than restitution. When considering these options, the FCA 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 FCA?

The FCA 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 FCA 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 FCA 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 FCA 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 FCA 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 FCA 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 FCA'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 FCA will consider the conduct of the persons who have suffered loss. As part of its operational objective of securing an appropriate degree of protection for consumers, the FCA 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 FCA 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 FCA will consider the context of the conduct in question. In any case where the FCA 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 FCA 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 FCA 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 FCA will take the same factors into account when considering whether the conditions have been met. DEPP 6.3 lists those factors.

### **The FCA's choice of powers**

#### 11.4

In cases where it is appropriate to exercise its powers to obtain restitution from firms, the FCA 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 FCA 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 FCA 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<sup>10A</sup>; the FCA's powers to apply for injunctions

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<sup>10A</sup> Under section 380(6)(a) and (7)(a), a 'relevant requirement' in relation to an application by the appropriate regulator means a requirement: which is imposed by or under the Act or by a qualifying EU provision specified, or of a description specified, for the purpose of section 380(6) by the Treasury by order; or which is imposed by or under any other Act and whose contravention constitutes an offence mentioned in section 402(1) of the

restraining firms from breaching one of those relevant requirements are discussed in chapter 10 of this guide;

(2) the FCA 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 FCA 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 FCA suspects that the firm may not comply with an administrative requirement to give restitution; in those cases the FCA 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 FCA 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 FCA may consider using its power under section 166 of the Act to require a firm to provide a report prepared by a skilled person or appoint a skilled person itself to prepare a report. That report may be requested to help the FCA 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

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Act; or which is imposed by the AIFMD UK regulation. The definition of “appropriate regulator” is set out in section 380(8) to (12) of the Act.

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

### **Other relevant powers**

#### **11.8**

The FCA may apply to the court for an injunction if it appears that a person, whether authorised or not, is reasonably likely to breach a relevant requirement<sup>10B</sup>, or engage in market abuse. It can also apply for an injunction if a person has breached one of those requirements or has engaged in market abuse and is likely to continue doing so.

#### **11.9**

The FCA may consider taking action for a financial penalty or public censure, as well as seeking restitution, if a person has breached a relevant requirement<sup>10C</sup>, or has engaged in, or required or encouraged others to engage in, market abuse.

#### **11.10**

The FCA 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 FCA's general approach**

#### **12.1**

The FCA has powers under sections 401 and 402 of the Act to prosecute a range of criminal offences in England, Wales and Northern Ireland. The FCA may also prosecute criminal offences where to do so would be consistent with meeting any of its statutory objectives.

#### **12.2**

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<sup>10B</sup> Under section 380(6)(a) and (7)(a), a 'relevant requirement' in relation to an application by the appropriate regulator means a requirement: which is imposed by or under the Act or by a qualifying EU provision specified, or of a description specified, for the purpose of section 380(6) by the Treasury by order; or which is imposed by or under any other Act and whose contravention constitutes an offence mentioned in section 402(1) of the Act; or which is imposed by the AIFMD UK regulation. The definition of "appropriate regulator" is set out in section 380(8) to (12) of the Act.

<sup>10C</sup> Under section 204A(2), a 'relevant requirement' in relation to an application by the appropriate regulator means a requirement: which is imposed by or under the Act or by a qualifying EU provision specified, or of a description specified, for the purpose of section 204A(2) by the Treasury by order or which is imposed by the AIFMD UK regulation. The definition of "appropriate regulator" is set out in section 204A(3) of the Act.

The FCA'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.<sup>11</sup> When considering whether to prosecute a breach of the Money Laundering Regulations, the FCA 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 FCA's approach when deciding whether to commence criminal proceedings for misleading statements and practices offences and insider dealing offences, where the FCA also has power to impose a sanction for market abuse, is discussed further in paragraphs 12.7 to 12.10.

### 12.4

In cases where criminal proceedings have commenced or will be commenced, the FCA 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 FCA 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 FCA's opinion, the taking of civil or regulatory action might unfairly prejudice the prosecution, or proposed prosecution, of criminal offences;
- (2) whether, in the FCA'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

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<sup>11</sup> [http://www.cps.gov.uk/publications/code\\_for\\_crown\\_prosecutors/](http://www.cps.gov.uk/publications/code_for_crown_prosecutors/)



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 Deputy Chairman. In an exceptionally urgent case the matter will be decided by the director of Enforcement or, in his or her absence, another member of the FCA's executive of at least director of division level.

#### 12.4B

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

- (1) should be taken before it is possible to follow the procedure described in paragraph 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 FCA will take the decision to prosecute under executive procedures.

### **FCA cautions**

#### 12.5

In some cases, the FCA may decide to issue a formal caution rather than to prosecute an offender. In these cases the FCA will follow the Home Office Guidance on the cautioning of offenders, currently contained in the Home Office Circular 16/2008.

#### 12.6

Where the FCA decides to administer a formal caution, a record of the caution will be kept by the FCA and on the Police National Computer. The FCA 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 FCA 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 FCA 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 FCA 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 FCA 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 FCA 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 FCA 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 FCA may decide that criminal proceedings are not appropriate;

(10) whether the person is being or has been voluntarily cooperative with the FCA 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 FCA's prosecution of the other(s), the FCA will take this co-operation into account when deciding whether to prosecute the individual who has assisted the FCA 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 FCA to these factors will vary from case to case and the factors are not necessarily cumulative or exhaustive.

#### 12.10

It is the FCA'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 FCA's policy not to commence a prosecution for market misconduct where the FCA 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 FCA 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 FCA is considering for investigation, investigating or considering prosecuting. These guidelines are set out in annex 2 to this guide. The FCA is also a signatory to the Prosecutors' Convention and the Investigators' Convention.

### **Prosecution of Friendly Societies**

#### 12.12

The FCA's power to prosecute friendly societies is discussed in EG 19.3 to 19.9 and in an article on the FCA web-site entitled 'Prosecuting Friendly Societies'.<sup>12</sup>

## 13. Insolvency

### 13.1

This chapter explains the FCA'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 FCA's effective use of its powers and rights in insolvency proceedings helps it pursue its regulatory objectives, including its operational objectives of securing an appropriate degree of protection for consumers, protecting and enhancing the integrity of the UK financial system, and promoting effective competition in the interests of consumers 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 FCA's general approach to use of its powers and rights in insolvency proceedings**

#### 13.2

In using its powers to seek insolvency orders the FCA 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 FCA will consider the facts of each particular case when it decides whether to use its powers and exercise its rights. The FCA 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

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<sup>12</sup> <http://www.fca.org.uk/firms/being-regulated/enforcement/how-we-enforce-the-law/courts/friendly-societies>

FCA's statutory objectives. The FCA 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 FCA's executive of at least director of division level.

### 13.3B

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

- (1) should be taken before it is possible to follow the procedure described in paragraph 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 FCA 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 FCA 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 FCA 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 FCA 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 FCA will consider the circumstances surrounding the default. In particular, the FCA 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 FCA 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 FCA 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 FCA will consider whether it is appropriate to seek an administration order or a compulsory winding up order from the court. The FCA'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 FCA 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 FCA, 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 FCA's intervention powers and by requiring restitution to consumers;
  - (b) in the case of unauthorised companies and partnerships, the FCA 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 FCA's concerns or whether it would be appropriate for the FCA 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 FCA 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 FCA 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 FCA will have regard to the purpose to be achieved by the insolvency procedure.

#### 13.13

In addition, the FCA 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 FCA 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 FCA;
- (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 FCA 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 FCA 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 FCA 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 FCA 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 FCA's other powers;
- (4) in the case of an authorised person, where the FCA 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 FCA 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 FCA 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 FCA.

### **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 FCA 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 FCA 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 FCA 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 FCA 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 FCA's decisions to seek compulsory winding up) include:

- (1) whether the FCA'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 FCA 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 FCA 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 FCA 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 FCA will also consider whether it should seek the appointment of a provisional liquidator. The FCA 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 FCA 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 FCA will also consider whether the appointment of a provisional liquidator would serve to maintain the solvency of the company or partnership.

## **The FCA'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 FCA 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 FCA's principal considerations will be its statutory objectives including the protection of consumers.

### 13.24

The FCA 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 FCA 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 FCA 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 FCA to petition for the individual's bankruptcy, or in Scotland, for the sequestration of the individual's estate. The FCA 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 FCA will serve a demand requiring the individual to establish, to the FCA's satisfaction, that there is a reasonable prospect that he will be able to pay the regulated activity debt.

### 13.26

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

### 13.27

If the FCA 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 FCA 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 FCA, including the extent of his cooperation with the FCA;
- (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 FCA'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 FCA will therefore not normally challenge an arrangement approved by a majority of creditors.

#### **13.29**

Exceptionally, the FCA 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 FCA 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 FCA, including the extent of its cooperation with the FCA and its compliance history;



(7) whether the FCA 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.

### 13.29A

Similarly, the FCA 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.:

### 13.30

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 FCA will have regard to the following matters in particular:

(1) whether the FCA 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 FCA's policy**

#### 13.31

When it decides whether to make an application for an order against debt avoidance pursuant to section 375 of the Act, the FCA 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 FCA's arrangements for notification of petitions and other documents

### 13.32

Paragraphs 13.34 to 13.36 contain information for insolvency practitioners and others about sending copies of petitions, notices and other documents to the FCA, and about making reports to the FCA. Insolvency practitioners and others have duties to give that information and those documents to the FCA 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**

#### 13.33

<b>Insolvency regime</b>	<b>Relevant sections of the Act</b>
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.

### 13.34

Unless paragraph 13.36 applies, the information and documents identified in 13.34 should be sent to the Financial Conduct 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 FCA (if known).

### 13.35

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 Conduct Authority, Quayside House, 127 Fountainbridge, Edinburgh EH3 8DJ.

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

### 13.36

The FCA 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 FCA has relevant information which it believes may not otherwise be drawn to the court's attention; especially where the FCA has been asked to attend for a particular purpose (for example to explain the operation of its rules);
- (2) where the FCA 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 FCA believes that the making of an insolvency order will affect the FCA's exercise of its other powers under the Act, and wishes to make the court aware of this.

### 13.37

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 FCA's use of its powers to seek injunctions and restitution orders from the court. The FCA will draw the court's attention to this potential effect where the FCA believes it is a relevant consideration, but it is a matter for the court to determine its relevance in a particular case.

### 13.38

The FCA 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 FCA 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 FCA 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 FCA 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) and authorised contractual schemes (ACS): sections 254 (Revocation of authorisation order otherwise than by consent), 257 (Directions), 258 (Applications to the court), 261U (Revocation of authorisation order otherwise than by consent), 261X (Directions) and 261Y (Applications to the court) of the Act**

### 14.1

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

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

non-compliance to be resolved as soon as possible. Important factors are likely to be whether existing and/or past participants have suffered loss due to the non-compliance and whether remedial steps will be taken to satisfy all the requirements of the order.

(3) Whether it is necessary to suspend the issue and redemption of units to protect the interests of existing or potential participants in the AUT or ACS. For example, this may be necessary if:

(a) information suggests the current price of units under the AUT or ACS may not accurately reflect the value of scheme property; or

(b) the scheme property cannot be valued accurately.

(4) The effect on the interests of participants within the scheme of the use of any of its powers under sections 254, 257, 261U and 261X.

However, the FCA will also consider the interests of past and potential participants.

(5) Whether the FCA's concerns can be resolved by taking enforcement action against the authorised fund manager and/or depositary of the AUT or ACS. In some instances, the FCA may consider it appropriate to deal with a breach by an authorised fund manager or depositary by taking direct enforcement action against the authorised fund manager and/or depositary without using its powers under sections 254, 257, 258, 261U, 261X or 261Y. In other instances, the FCA may combine direct enforcement action against a depositary and/or authorised fund manager with the use of one or more of the powers under sections 254, 257, 258, 261U, 261X or 261Y.

(6) Whether there is information to suggest that a depositary or authorised fund manager has knowingly or recklessly given the FCA false information. Giving false information is likely to cause very serious concerns, particularly if it shows there is a risk of loss to the scheme property or that participants' interests have been or may be affected in some other way.

(7) The conduct of the authorised fund manager or depositary in relation to, and following the identification of, the issue, for example:

(a) whether the authorised fund manager or depositary discovered the issue or problem affecting the AUT or ACS and brought it to the FCA's attention promptly;

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

(c) whether the authorised fund manager or depositary has compensated past and existing participants who have suffered loss.

(8) The compliance history of the depositary or authorised fund manager, including whether the FCA has previously taken disciplinary action against the depositary or authorised fund manager in relation to the AUT, ACS or any other collective investment scheme.

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

### **Choice of powers**

#### 14.2

The FCA may use its powers under sections 254, 257 and 258 (in the case of AUTs) and sections 261U, 261X and 261Y (in the case of ACSs) individually, together, and as well as direct enforcement action against a depositary or authorised fund manager in their capacity as firms.

14.3 Where the FCA has a concern about an AUT or ACS that must be dealt with urgently, it will generally use its power to give directions under section 257 (in the case of an AUT) or section 261X (in the case of an ACS) in the first instance.

#### 14.4

The following are examples of situations where the FCA may consider it appropriate to seek a court order under section 258 (in the case of an AUT) or section 261Y (in the case of an ACS) to remove the authorised fund manager or depositary:

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

(2) Where an authorised fund manager or depositary has breached a requirement imposed on him under the Act or has knowingly or recklessly given the FCA false information.

#### 14.5

The FCA recognises that participants in an AUT or ACS 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 (in the case of an AUT) or its section 261U power (in the case of an ACS) to revoke an authorisation order, the FCA will generally first require the authorised fund manager or depositary to wind up the AUT or ACS (or seek a court order for the appointment of a firm to wind up the AUT or ACS).

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 FCA's policy**

14.7

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

- (1) the seriousness of the breach of financial promotion rules by the operator (the matters listed at paragraph 14.1(1)(a) to (f) may be relevant in this context); and
- (2) the conduct of the operator after the breach was discovered including whether the operator has compensated past and existing participants who have suffered loss.

14.8

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

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

14.9



The FCA will consider all the relevant circumstances of each case. The general factors which the FCA may consider include, but are not limited to, those set out in paragraph 14.1(1) 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 FCA may ask the relevant regulatory body of the country or territory in which the scheme is authorised to take such action in respect of the scheme and/or its operator, trustee or depositary as will resolve the FCA'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 FCA's executive of at least director of division level.

#### 14.10B

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

- (1) should be taken before it is possible to follow the procedure described in paragraph 14.10A; 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, AUTs and ACSs. 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 FCA's power to disqualify auditors and actuaries if they breach them assist the FCA in pursuing its statutory objectives. The FCA's power to disqualify auditors in breach of duties imposed by trust scheme rules or contractual scheme rules also assists

the FCA to achieve these statutory objectives by ensuring that auditors fulfil the duties imposed on them by these rules.

#### 15.1A

The FCA also has the power under section 345 to impose a financial penalty and a public censure on an auditor or actuary in respect of a failure to comply with a duty imposed on the auditor or actuary by rules made by the FCA, or a failure to comply with a duty imposed under the Act to communicate information to the FCA. The FCA has the power under section 249 to impose a financial penalty and a public censure on an auditor in respect of a failure to comply with a duty imposed on him by trust scheme rules. The FCA's statement of policy in relation to the imposition of financial penalties is set out in DEPP 6.2 (Deciding whether to take action) and DEPP 6.4 (Financial penalty or public censure). The FCA's statement of policy in relation to determining the amount of a financial penalty is set out in DEPP 6.5 to DEPP 6.5D.

#### **Disqualification of auditors and actuaries under its powers contained in section 345, section 249 and section 261K of the Act: the FCA's general approach**

#### 15.2

The FCA 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 FCA 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 FCA's Supervision Manual are approved persons and as such will be subject to the FCA'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 FCA 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 or contractual scheme rules) is such that the FCA has concerns about the fitness and propriety of an individual auditor or actuary, the FCA 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 FCA 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 FCA 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 FCA 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 FCA promptly, the degree of cooperation with the FCA 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 FCA 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 FCA (or a previous regulator) or professional body has imposed any previous disciplinary sanctions on the firm or individual concerned.

#### **Disqualification under section 249 or section 261K**

##### **15.7**

When deciding whether or not to disqualify an auditor under section 249(1) or section 261K(1) of the Act (concerning the power to disqualify an auditor for breach of trust scheme rules or contractual scheme rules), and in setting the disqualification, the FCA 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 or contractual scheme rules: the FCA will regard as particularly serious a breach of a duty imposed by trust scheme rules or contractual 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 or contractual scheme rules: this may include any steps taken by the auditor to bring the breach to the attention of the FCA promptly, the degree of co-operation with the FCA 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 FCA 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 or contractual scheme rules;

(4) the previous compliance record of the auditor concerned: whether the FCA (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 FCA to remove the disqualification at any time after it has been imposed. The FCA 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 FCA 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 FCA's general approach to making disapplication orders**

#### **16.1**

The FCA'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 FCA in pursuing its statutory objectives.

#### **16.2**

The FCA 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 FCA 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 FCA 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 FCA 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 FCA's statutory objectives that it is appropriate to prevent the member from carrying out the exempt regulated activities. The FCA 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 FCA 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 FCA is concerned about the fitness and propriety of a specific individual, it may be more appropriate for the FCA 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 FCA will apply when determining whether to make a prohibition order against an individual who is not regulated by the FCA 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

FCA 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 FCA 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 FCA 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 FCA may consider issuing a private warning. A private warning may be appropriate where the FCA 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 FCA 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 FCA 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 FCA 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 FCA will consider making a disapplication order;

(2) The significance of the risk which the member presents to its clients: if the FCA 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 FCA 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 FCA 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 FCA is considering making a disapplication order against a member as a result of a breach of rules made by the FCA 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 FCA 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 FCA 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 FCA's statutory 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 FCA, 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 FCA 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 FCA 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 FCA 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 FCA'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 section 332(1) of the Act, the FCA 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 FCA before the revocation of the disapplication order.

## **17. [deleted]**

## **18. Cancellation of approval as sponsor or primary information provider on the FCA's own initiative**

### **18.1**

The FCA 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 FCA 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 FCA could take into account if it were considering an application for approval as a sponsor made under section 88(3)(d) of the Act.

## 18.3

The FCA may also cancel a primary information provider's approval under section 89P of the Act if it considers that a primary information provider has failed to meet the criteria for approval as a primary information provider as set out in DTR 8.3.

## 18.4

When considering whether to cancel a primary information provider's approval on its own initiative, the FCA will take into account all relevant factors, including, but not limited to, the following:

- (1) the competence of the primary information provider;
- (2) the adequacy of the primary information provider's systems and controls;
- (3) the primary information provider's history of compliance with DTR 8;

(4) the nature, seriousness and duration of the suspected failure of the primary information provider to meet (at all times) the criteria for approval as a primary information provider set out in DTR 8.3;

(5) any matter which the FCA could take into account if it were considering an application for approval as a primary information provider made under section 89P(4)(c) of the Act.

## 19. Non-FSMA powers

### Introduction

#### 19.1

This chapter describes many of the powers that the FCA 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 FCA 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 FCA 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 FCA and fulfil certain other obligations, such as the requirement to submit annual returns.

#### 19.4

IPSA65, FIPSA68, FSA74 and FSA92 provide the FCA 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 FCA'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 FCA 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 FCA is committed to using in appropriate cases.

#### 19.6

The FCA considers a variety of factors when deciding whether to prosecute a society for failing to submit its annual return. The FCA is more likely to prosecute a society which has previously failed to submit

returns, or which poses a greater risk to the FCA's statutory objectives, for example, because of the size of its financial resources or its number of members.

#### 19.7

The FCA 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 IP65, a society may appeal certain decisions of the FCA 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 circumstances 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 FCA's powers under IP65 and FSA74 can be found on the FCA's website.<sup>13</sup>

### **Credit Unions Act 1979**

#### 19.10

The Credit Unions Act enables certain societies in Great Britain to be registered under IP65 and makes provisions in respect of these societies. It gives the FCA certain powers in addition to the powers that it has under the Act in respect of those credit unions which are authorised persons. The FCA'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);

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<sup>13</sup> <http://www.fca.org.uk/firms/being-regulated/enforcement/how-we-enforce-the-law/courts/friendly-societies>

- 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 FCA will use these powers in a manner consistent with its approach to using the same powers under the Act. Where the FCA 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 FCA will act in accordance with EG 12 when prosecuting these offences.

#### 19.13 [deleted]

#### 19.14 [deleted]

### **Unfair Terms in Consumer Contracts Regulations 1999**

#### 19.15

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

#### 19.19

The FCA 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 FCA 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 FCA 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 FCA of its statutory powers or statutory duties. In order to serve a notice under Part III RIPA, the FCA must obtain written permission from an appropriate judicial authority. The FCA 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 FCA 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/](http://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 FCA 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 FCA to maintain a register of all those people who are not authorised by the FCA but who carry on insurance mediation activities. Under article 95 RAO, the FCA 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 FCA 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 FCA 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 FCA 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 or ACSs. 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 FCA 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 FCA will adopt an approach which is broadly similar to that described in EG 14.2 to 14.5.

#### 19.26

The FCA 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 FCA may also use its disqualification powers against auditors who fail to comply with a duty imposed on them under FCA rules. The procedure which the FCA 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 FCA 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 FCA's policy**

19.29

The FCA 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 FCA 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 FCA will contact the relevant EEA regulator of the incoming ECA provider. The FCA would expect the relevant EEA regulator to consider the matter, investigate it where appropriate and keep the FCA informed about what action, if any, was being taken. The FCA may not need to be involved further if the action by the relevant EEA regulator addresses the FCA's concerns.

19.31

However, there are likely to be circumstances in which the FCA 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 FCA 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 FCA to be adequate; or
  - (b) the relevant EEA regulator and the FCA agree that, having regard to the circumstances of the particular case, action against the wrong-doing would be taken more effectively by the FCA.

### 19.32

The question of whether the FCA 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 FCA 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 FCA 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 FCA 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 FCA, 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 FCA 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 FCA 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 FCA may consider include those listed in paragraph 19.32 of this guide. There may be other relevant factors.

## Decision making

### 19.35

The FCA'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 FCA'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 FCA, 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 decides to issue a direction or vary it at its own initiative, or if the FCA 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 FCA 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 FCA may not publish information relating to a direction if publication would, in the FCA'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 FCA will consider the full circumstances of each case. The FCA 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 FCA, 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 FCA will liaise with other authorities, particularly the Competition and Markets Authority (the CMA), to determine which authority is best placed to take enforcement action. The FCA 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 FCA's scope under the Enterprise Act is:

- the Unfair Terms in Consumer Contracts Directive;<sup>14</sup>
- the Comparative and Misleading Advertising Directive;<sup>15</sup>
- the E-Commerce Directive;<sup>16</sup>
- the Distance Marketing Directive;<sup>17</sup>
- the Unfair Commercial Practices Directive<sup>18</sup>; and
- the Consumer Credit Directive<sup>19</sup>

### 19.42

The FCA has powers under Part 8 of the Enterprise Act both as a “designated enforcer” in relation to domestic and Community

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<sup>14</sup> Directive 93/13/EEC.

<sup>15</sup> Directive 97/55/EC.

<sup>16</sup> Directive 2000/31/EC.

<sup>17</sup> Directive 2002/65/EC.

<sup>18</sup> Directive 2005/29/EC.

<sup>19</sup> Directive 2008/48/EC.

infringements and as a “CPC enforcer” which gives the FCA and other CPC enforcers additional powers in relation to Community infringements so that they can meet their obligations as “competent authorities” under Regulation (EC) No.2006/2004 on co-operation between national authorities responsible for enforcement of consumer protection laws (the CPC Regulation).

#### **The FCA’s powers as a designated enforcer**

##### 19.43

As a designated enforcer, the FCA 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 FCA may also apply for orders where it thinks that a person is likely to commit a Community infringement.

##### 19.44

The FCA 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 FCA 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 FCA may apply for an enforcement order, it must:

- give notice to the CMA of its intention to apply for an enforcement order; and
- consult the person against whom the enforcement order would be made. The period for notification and consultation is 14 days before an application for an enforcement order is 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 FCA 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 FCA's powers as a CPC enforcer**

19.48

In addition to its powers as a designated enforcer under the Enterprise Act, the FCA also has powers, in its capacity as a "CPC enforcer", to enter premises with or without a warrant. The FCA 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 FCA 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 FCA 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 FCA does use its powers under the Enterprise Act, it will have regard to the enforcement guidelines which are published on the CMA's website.<sup>20</sup>

19.50

Further information about the FCA'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 FCA 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 FCA 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 FCA may request that the court make ancillary orders requiring the person to disclose his assets and/or to repatriate assets held overseas.

#### 19.56

POCA also contains various powers of investigation which the FCA may use in specified circumstances. However, where these powers overlap with powers under the Act, the FCA will in most cases consider it more appropriate to rely on its investigation powers under the Act.

19.57 [deleted]

19.58 [deleted]

19.59 [deleted]

### **Financial Services (Distance Marketing) Regulations 2004**

19.60

These Regulations give effect to the Distance Marketing Directive.<sup>20</sup> Under the Regulations, the FCA 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 FCA 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 FCA may also accept undertakings from the person who committed the breach that he will comply with the Regulations. The FCA 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.

19.62

The FCA may also prosecute offences under the Regulations which relate to specified contracts. It will generally be appropriate for the FCA 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 FCA's rules, the FCA 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.

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<sup>20</sup> Directive 2002/65/EC

## Financial Conglomerates and Other Financial Groups Regulations 2004

### 19.63

These Regulations implement in part the Financial Conglomerates Directive<sup>21</sup>, which imposes certain procedural requirements on the FCA 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 FCA's powers to vary a firm's Part 4A permission or to impose requirements under sections 55J and 55L of the Act have been extended under these Regulations. The FCA is able to use these powers 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 Capital Requirements Directive; and
- acting in accordance with specified provisions of the Insurance Groups Directive.

### 19.65

The duty imposed by section 55B(3) (The threshold conditions) of the Act does not prevent the FCA from exercising its own-initiative power for these purposes. But subject to that, when exercising this power under the Regulations, the FCA will do so in a manner consistent with its approach generally to variation under the Act.

## The Consumer Protection Co-operation Regulation<sup>22</sup>

### 19.66

The FCA 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 FCA is a competent authority for the purposes of specified EU consumer protection laws<sup>23</sup> in

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<sup>21</sup> Directive 2002/87/EC

<sup>22</sup> Regulation (EC) No.2006/2004 on co-operation between national authorities responsible for enforcement of consumer protection laws.

<sup>23</sup> These are the Unfair Terms in Consumer Contracts Directive; the Comparative and Misleading Advertising Directive; the E-Commerce Directive; the Distance Marketing Directive; the Unfair Commercial Practices Directive; and the Consumer Credit Directive.

the context of the regulated activities of authorised firms and of breaches by UK firms concerning “specified contracts” as 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 FCA 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 FCA 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 FCA 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 FCA 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 FCA 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 FCA is responsible for monitoring and enforcing compliance with the Regulations not only by authorised firms who are within the Money Laundering Regulations' 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, now Annex I of the CRD<sup>24</sup>. 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 FCA.

#### 19.73

The Money Laundering Regulations add to the range of options available to the FCA for dealing with anti-money laundering failures. These options are:

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<sup>24</sup> Consumer 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).

- to prosecute both authorised firms and Annex I financial institutions;
- to take regulatory action against authorised firms for failures which breach the FCA's rules and requirements (for example, under Principle 3 or SYSC 3.2.6R or SYSC 6.1.1R); 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 FCA has powers to investigate and take action under both the Act and the Money Laundering Regulations. The FCA 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 FCA 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 FCA rules apply and regulatory action, as opposed to criminal proceedings, is appropriate, the FCA generally expects to continue to discipline authorised firms under the Act.

#### 19.75

The Money Laundering Regulations also provide investigation powers that the FCA 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 FCA expects to take action under the Regulations.

#### 19.76

The FCA 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 FCA has decided to adopt enforcement and decision making procedures which are broadly akin to those under the Act. Key features of the FCA's approach are described below.

### **The conduct of investigations under the Money Laundering Regulations**

19.78

The FCA 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 FCA expects to carry out a scoping visit early on in the enforcement process in most cases. The FCA'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 FCA 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 FCA's decision maker for contested cases in which the FCA 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 FCA 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 FCA 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 FCA'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 FCA's policy includes having regard, where relevant, to relevant factors in DEPP 6.2.1G and DEPP 6.5 to DEPP 6.5D. The FCA 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 FCA 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 FCA 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 FCA will apply the approach to publicity that it has outlined in EG 6. However, as the Money Laundering Regulations do not require the FCA to issue final notices, the FCA 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 FCA's website, with or without an accompanying press release, and updating the Public Register.

### **Transfer of Funds (Information on the Payer) Regulations 2007 (The Transfer of Funds Regulations)**

19.85

The FCA 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 FCA'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 FCA'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 FCA 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 FCA. The RCB Regulations give the 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 FCA 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 FCA may also remove an issuer from the register if it fails to comply with the Regulations. In addition, the FCA 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 FCA the power to impose a financial penalty on a person for a breach of the Regulations.

19.87

The FCA 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 FCA'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 FCA's penalty policy includes having regard, where relevant, 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 FCA'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 FCA 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.

### **Counter-Terrorism Act 2008**

#### 19.89A

The FCA has investigation and sanctioning powers in relation to both criminal and civil breaches of the Counter Terrorism Act 2008 ("the Counter Terrorism Act"). The Counter Terrorism Act allows the Treasury to issue directions imposing requirements on relevant persons in relation to transactions or business relationships with designated persons of a particular country. Relevant persons may be required to take the following action:

- apply enhanced customer due diligence measures;
- apply enhanced ongoing monitoring of any business relationship with a designated person;

- systematically report details of transactions and business relationships with designated persons; or
- limit or cease business with a designated person.

#### 19.89B

The FCA is responsible for monitoring and enforcing compliance with requirements imposed by the Treasury under the Counter Terrorism Act by 'credit institutions' that are authorised persons and by 'financial institutions' (except money service businesses that are not authorised persons and consumer credit financial institutions). 'Credit institutions' and 'financial institutions' are defined in Part 2 of Schedule 7 to the Counter Terrorism Act.

#### 19.89C

The investigation and sanctioning powers given to the FCA by the Counter Terrorism Act are similar to those given to the FCA by the Money Laundering Regulations. The FCA's approach to using its powers under the Counter Terrorism Act will be consistent with its approach to using its powers under the Money Laundering Regulations, described in paragraphs 19.78 to 19.84 above.

### **Insurance Accounts Directive (Lloyd's Syndicate and Aggregate Accounts) Regulations 2008**

#### 19.89D

The Lloyd's Accounting Regulations implement the Audit and Accounts Directives in relation to the Lloyd's insurance market. They aim to increase the transparency of the accounts published by Lloyd's syndicates by imposing requirements in relation to the preparation and disclosure of the accounts. The Regulations give the FCA the power to institute criminal proceedings for an offence committed under the Regulations.

#### 19.89E

Our policy in relation to the prosecution of criminal offences and the circumstances in which we would expect to commence criminal proceedings is set out in EG 12.

### **Payment Services Regulations 2009**

#### 19.90

The FCA 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 FCA'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 FCA 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.

#### 19.92A

The FCA also has the power to prohibit or restrict the carrying out of certain regulated activities by EEA authorised payment institutions.

#### 19.93

The Payment Services Regulations, for the most part, mirror the FCA's investigative, sanctioning and regulatory powers under the Act. The FCA 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 FCA'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 FCA 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 FCA expects to carry out a scoping visit early on in the enforcement process in most cases. The FCA'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 FCA'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 FCA to have published procedures to launch criminal prosecutions. However, in these situations the FCA 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 FCA 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 FCA 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 FCA's policy includes having regard to the relevant factors in DEPP 6.2 and DEPP 6.4. The FCA'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 FCA 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 FCA 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 FCA will follow the procedures described in DEPP 7.

#### **Electronic Money Regulations 2011**

##### 19.104

The FCA has investigation and sanctioning powers in relation to both criminal and civil breaches of the Electronic Money Regulations. The Electronic Money Regulations impose requirements including, amongst other things, various provisions regulating the rights and obligations of electronic money institutions.

## 19.104A

In addition to its powers that apply to authorised electronic money institutions, generally the FCA has the power to prohibit or restrict the carrying out of certain regulated activities by EEA authorised electronic money institutions.

## 19.105

The FCA's approach to enforcing the Electronic Money 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 electronic money issuer or relevant 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.

## 19.106

The Electronic Money Regulations, for the most part, mirror the FCA's investigative, sanctioning and regulatory powers under the Act. The FCA 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 FCA's approach are described below.

**The conduct of investigations under the Electronic Money Regulations**

## 19.107

The Electronic Money 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 Electronic Money Regulations.

19.108 The FCA will notify the subject of the investigation that it has appointed investigators to carry out an investigation under the Electronic Money Regulations and the reasons for the appointment, unless notification is likely to prejudice the investigation or otherwise result in it being frustrated. The FCA's policy in civil investigations under the Electronic Money 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 Electronic Money Regulations**

### 19.109

The RDC is the FCA's decision maker for some of the decisions under the Electronic Money Regulations as set out in DEPP 2 Annex 1G. 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 15).

### 19.110

For decisions made by executive procedures the procedures to be followed will be those described in DEPP 4.

### 19.111

The Electronic Money Regulations do not require the FCA to have published procedures to commence criminal prosecutions. However, in these situations the FCA expects that it will normally follow its decision-making procedures for the equivalent decisions under the Act.

### 19.112

The Electronic Money Regulations require the FCA to give third party rights as set out in section 393 of the Act and to give access to material as set out in section 394 of the Act in certain cases.

### 19.113

Certain FCA 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 Electronic Money Regulations**

### 19.114

When determining whether to take action to impose a penalty the FCA's policy includes having regard to the relevant factors in DEPP 6.2 and DEPP 6.4. When determining the level of a financial penalty the FCA's policy includes having regard to relevant principles and factors in DEPP 6.5 to 6.5D.

### 19.115

When determining whether to suspend the authorisation or, as the case may be, the registration of an electronic money institution or limit or otherwise restrict the carrying on of electronic money issuance or



payments services business by an electronic money issuer the FCA's policy will have regard to the relevant factors in DEPP 6A.

#### 19.116

As with cases under the Act, the FCA may settle or mediate appropriate cases involving civil breaches of the Electronic Money 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 Electronic Money Regulations)**

#### 19.117

The Electronic Money Regulations apply section 169 of the Act which requires the FCA to publish a statement of policy on the conduct of certain interviews in response to requests from overseas regulators. For the purposes of the Electronic Money Regulations the FCA will follow the procedures described in DEPP 7.

**Cross-Border Payments in Euro Regulations 2010**

#### 19.118

The Cross-Border Payments in Euro Regulations lay down rules on cross-border payments in euros, to ensure that compliance with the EU Cross-Border Regulation is guaranteed by effective, proportionate and dissuasive sanctions. The main aim of the EU Cross-Border Regulation is to ensure that the charges for cross-border payments in euro are equal to the charges for identical national payments in euro within a Member State. The Cross-Border Payments in Euro Regulations give the FCA investigation and sanctioning powers in relation to breaches of the EU Cross-Border Regulation, including:

- the power to require information
- the power of public censure; and
- the power to impose financial penalties.

#### 19.119

The FCA's policy for using the powers given to it by the Cross-Border Payments in Euro Regulations is the same as its policy for using the equivalent powers given to it by the Payment Services Regulations, set

out in EG 19.90 to 19.103, as, for the most part, these powers are very similar. As the Payment Services Regulations, for the most part, mirror the FCA's investigative, sanctioning and regulatory powers under the Act, the FCA will therefore adopt enforcement procedures akin to those used under the Act.

### **Recognised Auction Platforms Regulations 2011**

19.120

The FCA's policy for using the powers given to it by the RAP Regulations is set out in REC. This includes, for example, its policy in relation to the power to impose a financial penalty on or censure an RAP (REC 2A.4) and its policy in relation to the power to give directions to an RAP (REC 4.6).

### **OTC Derivatives, Central Counterparties and Trade Repositories Regulations 2013**

19.121

The FCA has information gathering and sanctioning powers under the Act which are applicable to breaches of EMIR requirements by authorised persons or recognised bodies. The OTC derivatives, CCPs and trade repositories regulation adds to the powers available to the FCA for dealing with breaches of EMIR requirements and sets out information gathering and sanctioning powers enabling the FCA to investigate and take action for breaches of the EMIR requirements by non- authorised counterparties and for certain breaches of the OTC derivatives, CCPs and trade repositories regulation by authorised persons. Such powers under the OTC derivatives, CCPs and trade repositories regulation or the Act do not extend to breaches of article 11(3) and (4) of EMIR by PRA-authorised financial counterparties.

### **Information gathering powers**

19.122

The FCA may require a non-authorized counterparty that is subject to obligations under EMIR to provide specified information or specified documents so that it can verify whether the non-authorized counterparty has complied with EMIR. The FCA also has the power to require a person to provide specified information or specified documents so that it can verify whether the person is subject to EMIR. The FCA may require the above information to be provided in such form, or to be verified or authenticated in such

manner, as is reasonably required in connection with the exercise of the FCA's functions under EMIR.

#### Sanctioning powers

##### 19.123

(1) The FCA has the power to publish a statement or impose a financial penalty of such amount as it considers appropriate on:

(a) a financial counterparty who is not an authorised person, a non-financial counterparty or any other person who has breached an EMIR requirement or regulation 7 or 8 of the OTC derivatives, CCPs and trade repositories regulation;

(b) a financial counterparty who is an authorised person who has breached regulation 8 of the OTC derivatives, CCPs and trade repositories regulation.

(2) Where the FCA exercises its power to impose a financial penalty under the OTC derivatives, CCPs and trade repositories regulation or the Act for breaches in relation to EMIR a penalty, it must publish a statement to that effect unless such disclosure would seriously jeopardise the financial markets or cause disproportionate damage to the parties involved.

[**Note:** article 12(2) of EMIR and regulation 9(3) of the OTC derivatives, CCPs and trade repositories regulation]

##### 19.124

As the power to impose penalties for contravention of an EMIR requirement or regulations 7 or 8 of the OTC derivatives, CCPs and trade repositories regulation mirrors similar powers to that the FCA has under the Act, the FCA will adopt procedures and policies in relation to the use of those powers akin to those it has adopted under the Act, subject to EG 19.123G(2).

##### 19.125

The FCA will use the sanctioning powers where it is appropriate to do so and with regard to the relevant factors listed in DEPP 6.2.1G and DEPP 6.4. In determining the appropriate level of financial penalty, the FCA will have regard to the principles set out in DEPP 6.5, DEPP 6.5A, DEPP 6.5B, DEPP 6.5D and DEPP 6.7.

##### 19.126

Where the FCA proposes or decides to take action to publish a statement or impose a financial penalty referred to in EG 19.123G, it will give the person concerned a warning notice or a decision notice respectively. In the case of a public statement, the warning notice or decision notice will also set out the terms of the statement. In the case of a financial penalty, the warning notice or decision notice will also state the amount of the penalty. On receiving a warning notice, the person concerned has a right to make representations regarding the FCA's proposed decision. A person that receives a decision notice may refer the matter to the Tribunal.

#### 19.127

If it is proposing to publish a statement or impose a penalty under the OTC derivatives, CCPs and trade repositories regulation, the FCA's decision maker will be the RDC. The RDC will make its decisions following the procedure set out in DEPP 3.2 or where appropriate, DEPP 3.3.

#### 19.128

Sections 393 and 394 of the Act apply to notices referred to in this section. See DEPP 2.4 (Third party rights and access to FCA material).

#### 19.129

In relation to the notices in this section, the FCA will, subject to EG 19.123G(2), apply the approach to publicity that is outlined in EG 6.

#### 19.130

In relation to authorised persons and recognised bodies which are subject to obligations under EMIR, other information gathering powers and sanctions may also be applicable under the Act.

### **Alternative Investment Fund Managers Regulations 2013**

#### 19.131

The AIFMD UK regulation transposes AIFMD, EuSEF and EuVECA regulations and provides new and updated powers to both existing and new managers of AIFs, whether authorised or registered.

#### 19.132

The AIFMD UK regulation includes information gathering and sanctioning powers that enable the FCA to investigate and take action for breaches of the regulations and directly applicable EU regulations. Specific standalone powers are in the AIFMD UK regulation for unauthorised AIFMs, by

applying relevant sections of the Act. Amendments to the Act, including those made under the Financial Services and Markets Act (Qualifying EU Provisions) Order 2013, extend certain FCA powers (e.g. disciplinary powers, injunctions and restitution) so that they apply to contraventions of requirements of the AIFMD UK regulation and to contraventions of directly applicable EU regulations.

#### **Information gathering and investigation powers**

##### **19.133**

The FCA has decided that its approach to enforcing the AIFMD UK regulation requirements will mirror its general approach to enforcing the Act in EG 2. Therefore, the FCA will apply the same procedures and policies under the Act for appointing investigators and requiring information for breaches of the AIFMD UK regulation.

##### **19.134**

##### **19.135**

The new powers under the AIFMD UK regulation include powers of direction and the power to revoke the registration of small registered UK AIFMs, including a EuSEF manager or a EuVECA manager and, in some circumstances, EEA managers of a qualifying social entrepreneurship fund or a qualifying venture capital fund, respectively.

The FCA will respect the principle of proportionality when taking action against EuSEF or EuVECA managers for breaches identified in articles 22 and 21 of the directly applicable EuSEF regulation and EuVECA regulation, respectively. The FCA may take action to ensure compliance with the regulations or prohibit the use of the designation of EuSEF manager or EuVECA manager and revoke registration of such managers. The prohibition route is more likely to apply to serious breaches of the EU regulations such as in situations where:

- registration has been obtained through false statements or any other irregular means; or
- there are grounds for concern over the behaviour of a EuSEF manager or a EuVECA manager in the management of a qualifying social entrepreneurship fund or a qualifying venture capital fund, respectively.

#### **Decision making under the AIFMD UK regulation**

##### **19.136**

The RDC is the FCA's decision maker for some decisions under the AIFMD UK regulation, as set out in DEPP 2 Annex 1G. The RDC will make its decisions following the procedure in DEPP 3.2 or, where appropriate, DEPP 3.3 and 3.4. For decisions made by executive procedures, the procedures to be followed are in DEPP 4.

19.137

The AIFMD UK regulation does not require the FCA to publish procedures to commence criminal prosecutions. However, the FCA will normally follow its equivalent decision-making procedures for similar decisions under the Act.

19.138

The AIFMD UK regulation applies the procedural provisions of Part 9 and Part 26 of the Act for matters that can be referred to the Tribunal and to warning and decision notices under the regulations as it applies to referrals and notices under the Act. The AIFMD UK regulation also applies sections 205 and 206 of the Act to unauthorised AIFMs and, accordingly, the FCA will give third party rights (section 393 of the Act) and access to material (section 394 of the Act).

#### **Imposition of penalties under the AIFMD UK regulation**

19.139

When determining whether to take action to impose a penalty under the AIFMD UK regulation, the FCA's policy includes having regard to the relevant factors in DEPP 6.2 and DEPP 6.4. When determining the level of financial penalty, the FCA's policy includes having regard to relevant principles and factors in DEPP 6.5 to 6.5A, DEPP 6.5B, DEPP 6.5D and DEPP 6.7.

19.140

As with cases under the Act, the FCA may settle or mediate appropriate cases involving civil breaches of the AIFMD UK regulation to assist it to exercise its functions. DEPP 5, DEPP 6.7 and EG 5 set out information on the FCA's settlement process and the settlement discount scheme.

19.141

The FCA will apply the approach to publicity that is outlined in EG 6.

#### **Statement of Policy in section 169(7) interviews (as applied by the AIFMD UK regulation)**

19.142

Regulation 71(2) of the AIFMD UK regulation applies section 169 of the Act in respect of unauthorised AIFMs, which requires the FCA to have a statement of policy on the conduct of certain interviews in response to requests from overseas regulators. The FCA will follow the procedures described in DEPP 7.

### **Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Referral Fees) Regulations 2013**

19.143

The Referral Fees Regulations give the FCA investigation and sanctioning powers in relation to the contravention of the rules against referral fees contained in sections 56 to 60 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (the LASPO Act), as well as the contravention of requirements imposed by, or under, the Referral Fees Regulations.

19.144

The FCA's approach to taking enforcement action under the Referral Fees 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 and 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.

19.145

The Referral Fees Regulations, for the most part, mirror the FCA's investigative and sanctioning powers under the Act. The FCA has adopted procedures and policies for the use of those powers that are akin to those it has under the Act. Key features of the FCA's approach are described below.

#### **Information gathering and investigation powers**

19.146

The Referral Fees 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 contraventions

of the relevant provisions of the LASPO Act or the Referral Fees Regulations.

19.147

The FCA will notify the subject of the investigation that it has appointed investigators to carry out an investigation under the Referral Fees Regulations and the reasons for the appointment, unless notification is likely to result in the investigation being frustrated. In most cases, the FCA expects to carry out a scoping visit early on in the enforcement process. The FCA's policy in civil investigations under the Referral Fees 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 Referral Fees Regulations**

19.148

The RDC is the FCA's decision maker for decisions which require warning notices or decision notices to be given under the Referral Fees Regulations, as set out in DEPP 2 Annex 1G. The RDC will make its decisions following the procedure set out in DEPP 3.2 or, where appropriate, DEPP 3.3.

19.149

The Referral Fees Regulations do not require the FCA to publish procedures to commence criminal prosecutions. However, the FCA will normally follow its equivalent decision-making procedures for similar decisions under the Act, as set out in EG 12.

19.150

The Referral Fees Regulations do not require the FCA to publish procedures to apply to the court for an injunction or restitution order. However, the FCA will normally follow its equivalent decision-making procedures for similar decisions under the Act, as set out in EG 10 and EG 11.

19.151

The Referral Fees Regulations apply sections 393 and 394 of the Act to warning notices and decision notices given under the Referral Fees Regulations and so require the FCA to give third party rights and to give access to material.

19.152



The Referral Fees Regulations apply the procedural provisions of Part 9 of the Act, as modified by the Referral Fees Regulations, in respect of matters that can be referred to the Tribunal. Referral to the Tribunal in respect of decision notices given under regulation 26(1) of the Referral Fees Regulations are treated as disciplinary referrals for the purpose of section 133 of the Act.

#### **Public censures, imposition of penalties and the impositions of suspensions or restrictions under the Referral Fees Regulations**

##### **19.153**

When determining whether to take action to impose a penalty or to issue a public censure under the Referral Fees Regulations, the FCA's policy includes having regard to the relevant factors in DEPP 6.2 and DEPP 6.4. When determining the level of financial penalty, the FCA's policy includes having regard to the relevant principles and factors in DEPP 6.5 to DEPP 6.5B, DEPP 6.5D and DEPP 6.7.

##### **19.154**

As with cases under the Act, the FCA may settle or mediate appropriate cases involving civil breaches of the Referral Fees Regulations to assist it to exercise its functions. DEPP 5, DEPP 6.7 and EG 5 set out information on the FCA's settlement process and the settlement discount scheme.

##### **19.155**

When determining whether to take action to impose a suspension or restriction under the Referral Fees Regulations, the FCA's policy includes having regard to the relevant factors in DEPP 6A.2 and 6A.4. When determining the length of the period of suspension or restriction, the FCA's policy includes having regard to the relevant principles and factors in DEPP 6A.3. However, the FCA does not have the power to suspend an authorised person's permission under the Referral Fees Regulations.

##### **19.156**

The FCA will apply the approach to publicity that is outlined in EG 6.

## **20. Enforcement of the Consumer Credit Act 1974**

### **20.1**

The CCA Order gives the FCA the power to enforce the CCA through the application of its investigation and sanctioning powers in the Act by reference to the contravention of CCA Requirements and criminal offences

under the CCA. The FCA's investigation and sanctioning powers include the following:

- power to censure or fine an approved person, or impose a suspension or a restriction on their approval under section 66 of the Act, for being knowingly concerned in a contravention by the relevant authorised person of a CCA Requirement;
- power to require information and documents, under section 165 of the Act, it reasonably requires in connection with the exercise of the functions conferred on it by the CCA Order;
- power to appoint an investigator under section 167 of the Act for reasons related to its functions under the CCA Order;
- power to appoint an investigator under section 168 of the Act where there are circumstances suggesting that an offence under the CCA may have been committed or that a person may have failed to comply with a CCA Requirement;
- power to impose a requirement under section 196 of the Act on an incoming firm by reference to the contravention or likely contravention of a CCA Requirement;
- power to censure (under section 205 of the Act) or fine (under section 206 of the Act) an authorised person, or impose a suspension or restriction on their permission (under section 206A of the Act) for the contravention of a CCA Requirement;
- power to apply to the court for an injunction under section 380 of the Act by reference to the contravention or likely contravention of a CCA Requirement;
- power to apply to the court for a restitution order under section 382 of the Act by reference to the contravention of a CCA Requirement;
- power to impose a restitution requirement under section 384 of the Act by reference to the contravention of a CCA Requirement; and
- power to prosecute under section 401 of the Act an offence committed under the CCA.

## 20.2

The FCA's approach to taking enforcement action under the CCA Order 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.

### 20.3

The FCA has decided to adopt procedures and policies that it currently has in place for the enforcement of the Act in exercising its powers to enforce the CCA. Key features of the FCA's approach are described below.

#### **Information gathering and investigation powers**

### 20.4

The CCA Order applies 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 contraventions of the CCA Requirements and offences committed under the CCA.

### 20.5

The FCA will notify the subject of the investigation that it has appointed investigators to carry out an investigation under the CCA Order and the reasons for the appointment, unless notification is likely to result in the investigation being frustrated. The FCA expects to carry out a scoping visit early on in the enforcement process in most cases. The FCA's policy in civil investigations under the CCA Order 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 CCA Order**

### 20.6

The RDC is the FCA's decision maker for decisions which require the giving of warning or decision notices under the CCA Order, as set out in DEPP 2 Annex 1G. The RDC will make its decisions following the procedure set out in DEPP 3.2 or, where appropriate, DEPP 3.3.

### 20.7

The CCA Order does not require the FCA to publish procedures about its approach towards the commencement of criminal prosecutions. However, the FCA will normally follow its equivalent decision-making procedures for similar decisions under the Act as set out in EG 12.

20.8 The CCA Order does not require the FCA to publish procedures about its approach towards applications to the court for an injunction or restitution order. However, the FCA will normally follow its equivalent decision-making procedures for similar decisions under the Act as set out in EG 10 and EG 11.

20.9

The CCA Order requires the FCA to give third party rights as set out in section 393 of the Act and to give access to material, as set out in section 394 of the Act, in relation to warning notices and decision notices given under the CCA Order.

20.10

The CCA Order applies the procedural provisions of Part 9 of the Act, as modified by the CCA Order, in respect of matters that can be referred to the Tribunal. Referrals to the Tribunal in respect of decision notices given under sections 67 (pursuant to article 3(3) of the CCA Order) and 208 (pursuant to article 3(7) of the CCA Order) of the Act are treated as disciplinary referrals for the purpose of section 133 of the Act.

#### **Public censures, imposition of penalties and the impositions of suspensions or restrictions in relation to contraventions of the Consumer Credit Act 1974**

20.11

When determining whether to take action to impose a penalty or to issue a public censure in relation to the contraventions of a CCA Requirement, the FCA's policy includes having regard to the relevant factors in DEPP 6.2 and DEPP 6.4. When determining the level of financial penalty, the FCA's policy includes having regard to relevant principles and factors in DEPP 6.5 to DEPP 6.5B, DEPP 6.5D and DEPP 6.7.

20.12

As with cases under the Act, the FCA may settle or mediate appropriate cases involving civil contraventions of CCA Requirements to assist it to exercise its functions. DEPP 5, DEPP 6.7 and EG 5 set out information on the FCA's settlement process and the settlement discount scheme.

## 20.13

When determining whether to take action to impose a suspension or restriction in relation to the contraventions of CCA Requirements, the FCA's policy includes having regard to the relevant factors in DEPP 6A.2 and 6A.4. When determining the length of the period of suspension or restriction, the FCA's policy includes having regard to relevant principles and factors in DEPP 6A.3.

## 20.14

The FCA will apply the approach to publicity that is outlined in EG 6.

### **Prosecution of criminal offences under the Consumer Credit Act 1974**

## 20.15

The FCA's policy with respect to the prosecution of criminal offences is set out in EG 12 and applies to the prosecution of CCA offences under section 401 of the Act. The FCA will not prosecute a person for an offence under the CCA in respect of an act or omission where the FCA has already disciplined the person under section 66, 205, 206 or 206A of the Act in respect of that act or omission.

## **Annex 1 - [deleted]**

## **Annex 2 - Guidelines on investigation of cases of interest or concern to the Financial Conduct Authority and other prosecuting and investigating agencies**

### **Purpose, status and application of the guidelines**

#### **1**

These guidelines concern the following bodies (the agencies):

- the Financial Conduct Authority (the FCA);
- the Serious Fraud Office (the SFO);
- the Department for Business, Innovation and Skills (BIS);
- 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 (ACPO).

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 FCA 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) the seriousness of the breach of duty that resulted in the disqualification;
- (b) the amount of time since the original disqualification; and
- (c) 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.
- (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 FCA and the other agencies. They are not intended to apply to the relationships between those other agencies themselves where there is no FCA 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 ACPO(S) 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 FCA 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 FCA

- Where the suspected conduct in question gives rise to concerns regarding market confidence or protection of consumers of services regulated by the FCA.
- Where the suspected conduct in question would be best dealt with by:
  - o criminal prosecution of offences which the FCA 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;

- o civil proceedings under the 2000 Act (including applications for injunctions, restitution and to wind up firms carrying on regulated activities);
  - o regulatory action which can be referred to the Tribunal (including proceedings for market abuse); and
  - o 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 authorised persons 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 FCA 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 FCA.
  - 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:
    - o criminal proceedings for which the FCA is not the statutory prosecutor;



- o proceedings for disqualification of directors under the Company Directors Disqualification Act 1986 (normally appropriate for BIS action);
- o winding up proceedings which the FCA does not have statutory powers to bring (normally appropriate for BIS action); or
- o 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 FCA is likely to prejudice the public interest in the prosecution of offences for which the FCA is not a statutory prosecutor.
- Where the case falls only partly within the regulated area (or criminal offences for which FCA 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 FCA and the Crown Office for the prosecution of offences in Scotland arising out of FCA 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 FCA, these are set out in paragraph 6.2 of the FCA Decision and 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 CONDUCT AUTHORITY AND OTHER PROSECUTING AND INVESTIGATING AGENCIES**

### **1. The FCA**

#### **1.1**

The FCA is the single statutory regulator for all financial business in the UK. Its strategic objective under the Financial Services and Markets Act 2000 (the 2000 Act) is to ensure that the relevant markets function well. The FCA's operational objectives are:

- securing an appropriate degree of protection for consumers;
  - protecting and enhancing the integrity of the UK financial system;
- and
- promoting effective competition in the interests of consumers in the markets.

**(Note:** The 2000 Act repealed and replaced various enactments which conferred powers and functions on the FCA and other regulators whose functions are now carried out by the FCA. Most notable in this context are the Financial Services Act 1986 and the Banking Act 1987. Transitional provisions under the 2000 Act permit the FCA 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 FCA'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 FCA 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 and Part 7 of the Financial Services Act 2012;
- 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 rules or a provision otherwise made in accordance with the Prospectus Directive.

The FCA'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 FCA has the 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 penalties on persons that perform controlled functions without approval under s.63A 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), Part 7 of the Financial Services Act 2012 and various offences under the 2000 Act including (Note: The FCA may also prosecute any other offences where to do so would be consistent with meeting any of its statutory objectives):
  - o carrying on regulated activity without authorisation or exemption, under s.23;
  - o making false claims to be authorised or exempt, under s.24;
  - o promoting investment activity without authorisation, under s.25;
  - o breaching a prohibition order, under s.56;
  - o failing to co-operate with or giving false information to FCA appointed investigators, under s.177;

- o failing to comply with provisions about influence over authorised persons, under s.191;
- o making misleading statements and engaging in misleading practices, under s.397;
- o misleading the FCA, under s.398;
- o various offences in relation to the FCA'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 BIS**

### **2.1**

The Secretary of State for Business, Innovation and Skills exercises concurrently with the FCA 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 BIS 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 FCA 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. ACPO 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 Deputies, 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 FCA'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 FCA before 28 August in relation to the same matter.	From 28 August 2007	28 August 2007