

CP12/6[★]

Financial Services Authority

Regulating bidding for Emissions Allowances under Phase Three of the EU Emissions Trading Scheme

March 2012

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The Financial Services Authority invites comments on this Consultation Paper. Comments should reach us by 19 April 2012.

Comments may be sent by electronic submission using the form on the FSA's website at: www.fsa.gov.uk/Pages/Library/Policy/CP/2012/cp12-06-response.shtml.

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Copies of this Consultation Paper are available to download from our website – www.fsa.gov.uk. Alternatively, paper copies can be obtained by calling the FSA order line: 0845 608 2372.

Abbreviations used in this paper

CAR	EU Commission Auction Regulation 1031/2010 of 12 November 2010 as amended by EU Commission Regulation 1210/2011 of 23 November 2011
EU	European Union
EUA	EU Allowance – a right to emit one tonne of carbon, or the equivalent in another greenhouse gas
EUAA	EU Aviation Allowance – a right to emit one tonne of carbon, or the equivalent in another greenhouse gas for the aviation sector
EU ETS	EU Emissions Trading Scheme
FSMA	Financial Services and Markets Act 2000
RAP	Recognised Auction Platform
RAP Regulations	Recognised Auction Platforms Regulations 2011 (SI 2011/2699)
RAO	Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544)

1

Overview

Introduction

- 1.1 In this paper, we propose how we will authorise and supervise certain firms intending to bid on auction platforms, as this practice becomes a regulated activity in certain circumstances.

Background

- 1.2 The European Union (EU) is committed to a 20% reduction in carbon emissions from 1990 levels by 2020. One of the European Commission's key policies for achieving this is a market-based requirement for the industry to account for their emissions by surrendering a matching number of allowances throughout each trading period. These allowances are issued under a 'cap and trade' system, whereby the available number will diminish over time.
- 1.3 This system is known as the EU Emissions Trading Scheme (EU ETS). A right to emit one tonne of carbon (or the equivalent in another greenhouse gas) is known as an EU Allowance (EUA). From 2012, aviation has been included within the scope of the EU ETS. In this sector, an allowance is known as an EU Aviation Allowance (EUAA). Throughout this document, the term 'emissions allowance' is used to mean EUA and/or EUAA.
- 1.4 Member States can currently auction up to 10% of allowances, with the balance being issued at no cost, although the average amount auctioned has been less than 4%. Under Phase III of the EU ETS (2013-2020) at least 50% of allowances will be auctioned across the EU.¹
- 1.5 To accommodate this auctioning, there will be a common European auction platform through which allowances are auctioned; but the UK (in common with Germany and Poland) has exercised a right under the EU Commission Auction Regulation 1031/2010 (CAR) to host a national platform instead. To achieve this, the Treasury's Recognised

¹ The proportion varies by sector but, for example, this includes 100% auctioning in the power generation sector in the UK and most Member States from 2013.

Auction Platforms Regulations 2011² (RAP Regulations) created a new type of body which the FSA may recognise and supervise, a Recognised Auction Platform (RAP), applying a regime similar to that applicable to Recognised Investment Exchanges. We consulted on our approach to recognising and supervising RAPs last summer (CP11/14).

- 1.6 The Treasury is currently consulting on amendments to legislation that would make bidding on auction platforms a regulated activity, in certain circumstances, in its consultation entitled, *Regulating certain bidders in auctions of EU emissions allowances* dated 14 February 2012.³ So we will be required to specifically authorise certain firms intending to bid; namely investment firms, credit institutions and a category of firms that are exempt from the Markets in Financial Instruments Directive (MiFID).
- 1.7 Given the anticipated timing of the first auctions, we have assumed for the purposes of this Consultation Paper (CP) that the amendments to legislation the Treasury has proposed will be enacted in their current form. If those amendments change following consultation, our approach may also need to change to reflect that.
- 1.8 This CP also encompasses our consultation on the Market Abuse Regime to be applied to trading on a RAP.⁴
- 1.9 The redress related part of the Business Standards section in chapter three (Para 3.19 – 3.21) constitutes a joint consultation by the FSA and the Financial Ombudsman Service (the ombudsman service).

Who should read this paper?

- 1.10 This CP will be of interest to all firms involved in bidding for emissions allowances.

What are the next steps?

- 1.11 For the most part, auctions are not anticipated until autumn 2012, but the EU Commission may begin auctions on the central platform as soon as July 2012. To allow as much time as possible for UK firms to apply to us for authorisation to participate in any such auctions, we are asking for comments on this paper by **19 April 2012**.
- 1.12 In light of consultation responses, and subject to FSA Board approval, we intend to finalise the proposals in this CP through made rules in late May 2012. We plan to publish a Policy Statement, including feedback on the responses to the consultation in the same month that the final rules are approved by the FSA Board or shortly after.

2 (SI 2011/2699)

3 www.hm-treasury.gov.uk/consult_regulating_certain_bidders_auctions_euemissions_allowances.htm

4 It should be noted that while recognised auction platforms are the only type of UK business *entitled* to run an emissions auction platform they must still compete to run specific platforms. National procurements for auction platforms are taking place during the early part of 2012.

- 1.13** Subject to FSA Board approval, and assuming the proposals in HMT's CP are adopted, we will be able to consider firms' early applications for permission to undertake the new regulated activity with a mind to facilitating participation in the early auctions over the summer. We will endeavour to consider any applications received in the first half of June before any auctions in July 2012, should they be scheduled to occur.
- 1.14** Firms are advised however that each application is decided on its own merits and in some cases, for example where an application is incomplete, where certain matters require further information, or where we have concerns that the applicant does not meet the requirements for the new permission it may still be necessary to use the full statutory timeframe for reaching a decision.⁵ It is also worth noting that all firms seeking to bid, even those that do not require authorisation to do so, must be admitted to bid by the auction platform on which the auctions will be conducted. Admission to bid is granted by the auction platform and not the FSA.
- 1.15** Firms seeking to bid in these early auctions can assist us by following our subsequent publications on this topic and ensuring that any applications are complete and accompanied with all necessary supporting information.

⁵ Six months beginning on the day that the completed application is received.

2

Regulatory framework

2.1 This chapter sets out our proposed approach to regulating the activity of bidding in emissions auctions. An important factor in our considerations is that under CAR, there are two types of emissions auction product which may be auctioned on the platforms: a two day spot and a five day future.⁶ Depending on the type of product and the nature of firm wishing to bid, CAR defines some bidding to be business that is subject to the provisions of the Markets in Financial Instruments Directive (MiFID), some to be non-MiFID business (referred to as ‘auction regulation business’ in the rest of this document) and some to be exempt from FSA regulation altogether.

Bidding in emissions auctions: a new regulated activity

- 2.2** Bidders will only participate in the new primary markets in emissions allowances. Only the firms listed in article 18 of CAR are able to bid in emissions auctions. Of these, CAR provides that only three categories must be authorised in order to bid:
- a) an investment firm authorised under MiFID where it is bidding on behalf of its clients;
 - b) a credit institution authorised under the Banking Consolidation Directive (2006/48/EC) where it is bidding on behalf of its clients; and
 - c) a firm that is exempt from MiFID under article 2(1)(i)⁷ where it is either bidding on behalf of the clients of its main business or on its own account.
- 2.3** The Treasury’s proposed amendments to the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544) (RAO) will cause bidding in emissions auctions to be a new regulated activity which will not form part of any other activity under the RAO. Therefore, for each of the three categories above, where a UK firm

⁶ Article 4(2) CAR

⁷ Article 2(1)(i) MiFID exempts persons dealing on own account in financial instruments, or providing investment services in commodity derivatives or derivative contracts included in Annex I, Section C 10 of MiFID to the clients of their main business, provided this is an ancillary activity to their main business, when considered on a group basis, and that main business is not the provision of investment services within the meaning of MiFID or banking services under Directive 2000/12/EC.

intends to bid in emissions auctions, it must apply to us for permission to carry on this new regulated activity.

- 2.4 We take the view that the new bidding activity is comparable to the existing regulated activities of ‘dealing in investments as principal’, ‘dealing in investments as agent’ and ‘arranging deals in investments’. Consequently, for a firm with existing permission to carry on these activities, unless its bidding activities would materially alter the risks posed to its business, we envisage the variation of permission process to be relatively straightforward.
- 2.5 In these circumstances, we would therefore propose to charge a Variation of Permission (VOP) fee. It is not envisaged that ongoing costs will alter, unless taking on this new business fundamentally alters the nature or size of the firm in question. If it does, then ongoing supervision fees will change accordingly.

MiFID business

- 2.6 CAR defines bidding to be MiFID business where the firm carrying out the bidding is an investment firm authorised under MiFID or a credit institution authorised under the Banking Consolidation Directive (2006/48/EC) *and* the emissions auction products are financial instruments within the meaning of MiFID.⁸ Under CAR, this means five day futures.⁹
- 2.7 While we have made consequential changes to our Handbook to ensure that the activity of bidding on an auction platform is captured, we have sought to treat MiFID business bidding in emissions allowances in the same way as a firm’s existing MiFID business.

Q1: Do you agree that where bidding on an auction platform is MiFID business, we should treat it on equivalent terms as other MiFID business?

Auction regulation business

- 2.8 There are two circumstances in which a UK firm must be authorised by us to bid for emissions allowances, and in so doing will not be conducting MiFID business:

⁸ Article 6(5) CAR

⁹ Recital 14 CAR

- a) where a firm qualifies for an exemption under article 2(1)(i) of MiFID¹⁰ and bids in relation to either type of auction product (a two day spot or a five day future) on its own account or on behalf of clients of its main business; and
 - b) where a an investment firm authorised by us under MiFID or a credit institution authorised by us under the Banking Consolidation Directive (2006/48/EC) bids in relation to a 2 day spot auction product on behalf of its clients.
- 2.9** Article 59 of CAR (reproduced at Annex four) lays out authorisation and conduct of business requirements for bidders not undertaking MiFID business. These requirements are directly effective and do not require implementation by the FSA to have effect in relation to bidders.
- 2.10** However, under CAR, competent national authorities may require as a condition of authorisation: ‘any other measures deemed necessary having regard to the nature of the bidding services being offered and the level of sophistication of the clients in question in terms of their investor or trading profile as well as any risk-based assessment of the likelihood of money laundering, terrorist financing or criminal activity¹¹’.
- 2.11** CAR also requires competent national authorities to have at their disposal the ‘necessary investigative powers and sanctions that are effective, proportionate and dissuasive’.¹²
- 2.12** We have taken into account the fact that the very smallest operators of facilities or airlines are exempt from the EU ETS under a ‘de minimis’ cut-off and that those who remain within the system just above that threshold are likely to bid via the firms we authorise but will require allowances as a fundamental part of their business. So we consider that the market’s end-users will usually be relatively sophisticated clients¹³. Also given the nature of the auctions, which will be conducted using sealed bids on a regulated market, there is limited risk to the clients’ money outside of the limited time window in which each auction will occur.
- 2.13** Taking these factors into account, we have chosen to use the power in article 59(5) and to implement 59(6) so that we apply the same anti money laundering measures to bidders as apply to other firms. We have also chosen to approve key individuals of a bidder both to ensure the firm’s overall suitability and to provide for effective, proportionate and dissuasive enforcement powers.
- 2.14** Our specific approach to authorising this auction regulation business and an overview of the resultant Handbook changes is at Chapter 3.

Q2: Do you agree that we should seek to authorise auction

10 Article 2(1)(i) MiFID exempts persons dealing on own account in financial instruments, or providing investment services in commodity derivatives or derivative contracts included in Annex I, Section C 10 of MiFID to the clients of their main business, provided this is an ancillary activity to their main business, when considered on a group basis, and that main business is not the provision of investment services within the meaning of MiFID or banking services under Directive 2000/12/EC. Further information on the article 2(1)(i) exemption from MiFID is in PERG 13.5, Q44.

11 Article 59(5)(d) CAR

12 Article 59(6)(a) CAR

13 The clients will understand the market and the EU requirements surrounding emissions allowances.

regulation business against only those requirements stated in CAR with the addition of anti-money laundering measures and certain approved persons?

Excluded business

- 2.15** The amendments to CAR made by Commission Regulation 1210/2011 of 23 November 2011 removed the requirement for authorisation under CAR for a MiFID investment firm or a credit institution bidding in relation to two day spot products on its own account. Accordingly, this does *not* form part of the Treasury's proposed new regulated activity.
- 2.16** Additionally, the persons listed in Article 18 CAR – other than investment firms, credit institutions and firms exempt under article 2(1)i) of MiFID – are *not* undertaking a regulated activity under HM Treasury's proposed statutory framework and we *do not need to authorise or supervise them*. Article 18 CAR sets out an exhaustive list of persons eligible to apply for admission to bid directly in auctions which includes, for example, operators that are subject to the EU ETS.

Passported activities

- 2.17** In respect of MiFID business bidding, our Handbook will apply to incoming EEA firms, and to UK firms seeking to provide services in another Member State, in the same way as other MiFID business.
- 2.18** Authorisation under CAR is the responsibility of the Member State in which a firm is established. However, some Handbook requirements will apply to incoming EEA firms in relation to auction regulation business. The anti money laundering and financial crime requirements (discussed further below) apply because they are host state matters. The money laundering reporting function will also apply to an incoming EEA firm with a branch in the UK.
- 2.19** In general, the Treasury has proposed that incoming EEA firms that are authorised by their Home Member States will qualify for authorisation and be granted with permission on terms equivalent to the permissions granted by their Home Member States under Schedule 3 FSMA. Since this operates slightly differently than the existing passporting mechanism (e.g. the service conditions do not apply to this activity), some of the guidance in the Supervision Manual (SUP) on passported activities has been amended to clarify which activities it relates to.
- 2.20** A UK firm seeking to carry on bidding services in another Member State will be subject to CAR and our requirements (as set out in this CP), except for SYSC 6.3 (Financial crime).

Reporting

- 2.21** A firm carrying on MiFID business bidding will be subject to the usual reporting requirements that apply to it as a MiFID investment firm and, as explained above, we do not propose to change these existing requirements, other than where it also carries out auction regulation bidding.
- 2.22** Reporting requirements for firms carrying out auction regulation bidding will be contained in the Supervision manual (SUP). SUP includes a general notification requirement in SUP 15.3.1R where a firm must, for example, notify the FSA immediately if it becomes aware of any matter that may cause it to fail to satisfy a threshold condition. We also propose to include a specific notification requirement for a firm to notify the FSA of a breach of a directly applicable provision in CAR (SUP 15.3.11R(1)(ea)).
- 2.23** Additionally, a firm carrying on auction regulation bidding will be subject to a number of more specific reporting requirements in SUP 16. These firms will need to comply with SUP 16.3 (General provisions on reporting), 16.4 (Annual controllers report), 16.5 (Annual Close Links Report) and 16.10 (Verification of standing data). These reports will assist us in monitoring a firm's ongoing compliance with the threshold conditions under the Financial Services and Markets Act 2000 (FSMA) and keep the information that we hold on firms up to date (e.g. firm name and address).
- 2.24** In addition, we propose to require a firm that carries out auction regulation bidding to declare compliance with CAR, and those specific FSA standards which apply to them as described in this CP (for example the £50,000 capital requirements), on an annual basis within 30 business days of the firm's accounting reference date. The reporting will be done in Excel and submitted to a central FSA mailbox. The address will be confirmed in the policy statement in May.
- 2.25** Firms will also be supervised as a matter of routine and their conduct in the auctions monitored by the platform concerned.

3

Authorising auction regulation business

- 3.1** This chapter explains the Handbook changes we propose to make in order to regulate auction regulation business in emissions allowances and the standards against which we will judge any application for authorisation.
- 3.2** As stated in Chapter 2, we will only authorise a bidder if it is able to satisfy the conditions of its authorisation set out in article 59(5) of CAR.
- 3.3** Having regard to the nature of the bidding services being offered and the level of sophistication of the clients in question – as well as a risk-based assessment of the likelihood of money laundering, terrorist financing and criminal activity – we consider that it is necessary to apply Chapter 6.3 (Financial crime) of our Senior Management Arrangements, Systems and Controls (SYSC) sourcebook to auction regulation bidding.
- 3.4** In general, the UK has taken the view that all regulated activities under FSMA should have the protection of the same anti-money laundering requirements to ensure protection in all sectors, and by applying those elements of the Handbook we achieve that objective.
- 3.5** We also propose to apply the Statements of Principle and Code of Practice for Approved Persons (APER), Fit and Proper Test for Approved Persons (FIT) and elements of SUP to describe a limited Approved Persons Regime for auction regulation business. To ensure a proportionate approach, we have proposed applying only the Governing functions, the Money Laundering Reporting Function and a modified form of the Customer Function (a person acting as a ‘bidder’s representative’ in an auction will require approval for this function). Also to be proportionate, we propose to include within a governing function this new part of the Customer Function. Additionally, if a firm opts into the Client Assets sourcebook for its auction regulation business, the CASS operational oversight function will apply if it is a firm of a type to which that function relates.
- 3.6** The assessment of key individuals connected with a firm is an integral part of our judgement whether a firm is suitable to be authorised to conduct a regulated activity and

the approved persons regime provides the regulatory architecture to help that assessment, as well as providing specific sanctioning powers against those key individuals if they breach regulatory requirements.

- 3.7 The other controlled functions, if not specifically amended, do not apply as a result of their being based in the Senior Management Arrangements, Systems and Controls sourcebook (SYSC) which these firms are not subject to (other than as discussed above) in relation to their auction regulation bidding.

Q3: Do you agree with our specific approach to financial crime and the approved persons regime?

- 3.8 We have amended other parts of the Handbook only where it was necessary to specifically 'carve out' their application to auction regulation business as in those areas, CAR imposes specific requirements. Our Handbook amendments and policy can be summarised as follows:

High-level standards

- 3.9 Article 59 of CAR lays out the conduct rules for bidding in emissions auctions, where this constitutes auction regulation business. The standards established by this regime largely concern the relationship between firms and their clients, but they also describe high-level standards against which the FSA is required to make its assessment with respect to authorisation.¹⁴ In our view, these requirements are broadly comparable to our Principles for Businesses (PRIN) but we recognise that in some respects CAR has a narrower application.
- 3.10 At this stage, we do not propose to apply PRIN in respect of auction regulation bidding. Similarly, for the most part we have chosen *not* to apply SYSC¹⁵ and we have not mandated standards under our Training and Competence Rules (TC). This is because CAR specifically did not apply the same requirements that apply to MiFID business, which most of these provisions implement. Given that firms are subject to different but broadly analogous requirements directly under EU legislation, we propose that we will monitor the operation of this market under those requirements and keep the need for the application of these provisions under review.
- 3.11 However, the Threshold Conditions set out in FSMA are a prerequisite for authorisation to carry on a regulated activity and they will form the basis of the authorisation process for auction regulation business. Accordingly, the guidance in COND is relevant though note that in assessing these conditions, our judgement to authorise a firm (or not) will also be informed by the ability of that firm to satisfy the requirements set out in CAR.

¹⁴ CAR article 59(5)

¹⁵ Although as noted in Chapter 2 we have applied anti money laundering and financial crime requirements in order to give effect to the UK's approach to financial crime. We have also applied section 18 of SYSC as it exists to remind firms of their obligations under the Public Interest Disclosure Act.

Prudential standards

- 3.12** We have used our Interim Prudential Sourcebook for Investment Businesses (IPRU-INV) to impose limited prudential requirements on firms that wish to undertake auction regulation business. They will be required to hold £50,000 in capital. We do not think this will entail raising new capital for a significant proportion of firms. We have made this assumption based on the fact that this is wholesale business and the minimum bid size is likely to be relatively large- the prudential requirement is therefore relatively small when viewed in this context. We believe this figure to be proportionate to market risks¹⁶ while also engendering market confidence.

Business standards

- 3.13** Article 59 of CAR defines high-level conduct standards required of those undertaking the bidding activity, and so for the same reasons as set out in relation to PRIN and SYSC before, we do not intend to apply our own Conduct of Business Standards (COBS), although we will also keep this under review.
- 3.14** Firms should note, however, that COBS 5 (Distance communications) will apply as this has more general application to distance communications made by firms and reflects our implementation of the Distance Marketing Directive¹⁷ and the E-Commerce Directive.¹⁸
- 3.15** Additionally, we are proposing an ‘opt-in’ regime under our Client Assets sourcebook (CASS) rules. We are doing this because although such standards are not required under CAR, in the absence of an ‘opt-in’ it would be administratively difficult for firms to apply the same standard of protection to both their auction regulation business and other MiFID business (for example, they would not be able to mix their client money with money received in relation to auction regulation business) and harmonise their treatment of client assets. In our judgement, it may be administratively useful for larger firms conducting both types of business to provide consistent protection of money and assets relating to this business should firms choose to exercise the option. To achieve this, certain Glossary terms used in CASS and other parts of the Handbook are modified. For example, a modification includes two-day emissions spots within the definition of ‘safe custody assets’ for use in CASS.
- 3.16** One exception to this is under CASS 6.2 which sets out requirements on the holding of client assets. This is to provide for an exception to the requirements on the registration and recording of legal title in CASS 6.2.3R. The exception applies where it is not practicable for a firm to register the legal title to emissions auction products that are financial instruments in the ways described in that rule and, in those circumstances, permits the firm to hold them in its own name. Where a firm has opted in for auction regulation bidding, this exception also

¹⁶ See Para 2.8

¹⁷ The Directive of the Council and Parliament of 23 September 2002 on distance marketing of consumer financial services (No 2002/65/EC)

¹⁸ The Council Directive of 8 June 2002 on legal aspects of information society services, in particular electronic commerce, in the Internal Market (No 2000/31/EC).

extends to two-day emissions spots. The reason for this exception is to cater to the mechanics of the auction process on an auction platform which may, in some circumstances, require that allowances are registered in the name of the firm.

- 3.17** Firms should note that their opt in to CASS has an effect on other parts of the Handbook (e.g. COBS and SUP).
- 3.18** We propose that they make and retain a written record of their opt-in, including the date from which the election is to be effective. If a firm decides to cease its use of the opt in, it must discharge any outstanding fiduciary obligations that arose under CASS and make and retain a record of that decision, including the date on which it is to be effective. Both these records must be retained for five years.

Redress and compensation

- 3.19** CAR does not require that clients of bidders should have access to a dispute resolution service or compensation scheme. So, in the interests of clarity, we propose to amend our definition of participant firm (insofar as it relates to membership of the Financial Services Compensation Scheme) to exclude auction regulation bidding. We also propose to exclude firms from the complaints handling requirements in DISP 1 in relation to auction regulation bidding.
- 3.20** There are three separate jurisdictions under the ombudsman service.¹⁹ We propose to amend DISP 2 to make clear that firms conducting bidding that is non-MiFID business will be excluded from the Compulsory Jurisdiction. The ombudsman service (with the approval of the FSA) makes rules about the scope of its Voluntary Jurisdiction (VJ). It is proposed to update DISP 2 to make clear that the VJ does not extend to auction regulation bidding.
- 3.21** However, in accordance with CAR 59(7), the FSA will accept complaints about bidders' non-compliance with the conduct rules and conditions of authorisation within CAR. To give effect to this requirement, we propose to make complaints forms available on our website. All complaints will be acknowledged, considered and used to inform our regulatory priorities. We will take reasonable action where appropriate.

Q4: Are you content with our proposed approach to the high-level standards, prudential standards, business standards and redress sections of our Handbook, as well as our proposal to provide for a complaints-handling procedure?

¹⁹ These are the Compulsory Jurisdiction (which covers firms authorised by the FSA as well as payment service providers and electronic money issuers); the Consumer Credit Jurisdiction (which relates to activities of consumer credit licensees); and the Voluntary Jurisdiction. The Voluntary Jurisdiction covers financial services businesses that are not covered by the other two jurisdictions, for example, overseas firms.

Fees

- 3.22** We propose to charge an initial authorisation fee of £1,500 for firms that have not previously been authorised by the FSA. This is our standard charge for a straightforward application. We will charge firms we have previously authorised £750, or £250 if they already have permission to deal as principal.
- 3.23** For the purposes of ongoing supervision we recover our costs from firms by allocating them to a series of fee-blocks which represent groupings of related regulated business activities that they have permission to undertake. Rather than creating a new fee-block for firms bidding for emissions allowances, we propose to place all firms conducting auction regulation business into fee block A10, along with firms dealing as principal. These seem to us, for fees purposes, the closest equivalent to an emissions bidder.
- 3.24** We calculate fees in each fee-block from a metric known as a tariff base, which firms are required to report to us. The tariff base for dealers as principal is the number of traders who commit the firm in market dealings. Firms with one or no traders pay the FSA minimum fee of £1,000. This represents the cost of our baseline regulatory services to firms (e.g. regulatory reporting, the customer contact centre, policing the perimeter). If they have two or more, the charge per trader in 2012/13 will be £5,355.89. Emissions bidders will therefore need to identify and report to us the number of individuals whose duties include bidding on behalf of the firm during auctions. Because we are imposing a limited regulatory regime on emissions bidding, we propose to apply a discount of 20 %, bringing the rate per individual to £4,284.71. Firms with fewer than 2 bidders will pay the standard minimum fee.
- 3.25** Since the new regime comes into force via auctions in summer 2012, we will start to levy periodic fees on a pro-rata basis in the 2012/13 financial year for those firms who achieve authorisation during that year. Once we have assessed the level of supervisory effort required for this market we may change the tariff level for the period from April 2013.

Q5: Do you agree with our proposed fees framework for emissions bidders?

4

Market abuse

- 4.1 In this chapter, we consult on consequential amendments to our Handbook reflecting those sections of the Treasury's RAP Regulations which set up a market abuse regime that applies in relation to emissions allowances auctioned on a RAP. Those sections of the RAP Regulations come into effect in June 2012.
- 4.2 Specifically, they set out a modified version of the market abuse provisions under Part 8 of FSMA. This is set out in Schedule 1²⁰ of the RAP Regulations including the requirement for the FSA to prepare and issue a code with appropriate guidelines under section 119. These Handbook amendments constitute that code.
- 4.3 The Treasury has previously set out background information and its initial thinking as regards this market abuse regime.²¹
- 4.4 The extended market abuse regime under MAR 1 will apply in relation to 5 day futures as these are included within the definition of financial instruments under MiFID²² (and the FSA Handbook Glossary for the purposes of MAR 1). The current regime already applies to these instruments insofar as they are traded on the secondary market of a prescribed market. CAR articles 37-43 apply directly to 2 day spots. MAR 1 will refer to those provisions but provide no additional guidance.
- 4.5 In light of the Government's approach in developing a market abuse regime in relation to allowances, we propose to make:
- a) technical amendments to the Code of Market Conduct (MAR 1) in order to clarify that it also applies in relation to abusive behaviour on a prescribed auction platform; and
 - b) amendments to ensure our current guidance is appropriate for auctioned products, including subjecting five-day futures to equivalent market abuse provisions to those set out in CAR.

20 SI 2011/2699, Regulation 6.

21 HM Treasury, Regulating auctions of EU emissions allowances, July 2011, paragraphs 2.16 – 2.32 at www.hm-treasury.gov.uk/d/condoc_regulating_auctions_eu_emissions_allowances.pdf.

22 Article 1(3).

- 4.6 MAR 1.3 to MAR 1.9 provide guidance in relation to the seven types of market abusive behaviour under Part 8 of FSMA (section 118(2) to (8)). Schedule 1 of the RAP Regulations sets out a modified version of the seven types of behaviour that apply in relation to five-days futures auctioned on an auctions platform.²³ So we propose to make amendments to MAR 1.3 to MAR 1.9 to clarify it also applies in relation to auctioned five-days futures.
- 4.7 The RAP Regulations include an eighth type of market abusive behaviour which applies in relation to two-day spots (i.e. FSMA, section 118(8A)).²⁴ This captures behaviour that contravenes any of the provisions within articles 38-41 of the CAR. We propose to create a new MAR 1.9A to specifically cover this type of behaviour and refer to CAR Articles 38-41.
- 4.8 To ensure the market abuse regime for 5 day futures auctioned products is subject to the same provisions that apply to 2 day spot auctioned products under CAR and appropriately implements the market abuse under the RAP Regulations; we propose to make additional modifications to MAR 1.3 to MAR 1.9 to also capture the type behaviour described in CAR Articles 38-41.
- 4.9 We propose to amend the inside information provision set out in the Glossary of the FSA Handbook to reflect FSMA, section 118C as modified by the RAP Regulations.

The future market abuse regime

- 4.10 The UK super-equivalent market abuse regime currently operates under a sunset clause until the end of 2014.²⁵ It is expected to be replaced by the Market Abuse Regulation once it takes effect following agreement and adoption at EU level. As a Regulation it will be directly applicable to Member States. Depending on the direction of negotiations, emissions allowances may be classified as financial instruments under a recast MiFID that will emerge from the ongoing MiFID Review, and by virtue of this will qualify as financial instruments for the purposes of MAR. Further provisions on market abuse in relation to auctioned products may be set out in delegated acts. So we do not propose to amend MAR 1 beyond our proposals set out above.

Q6: Do you agree with our proposals on market abuse?

23 Regulation 10 of the RAP Regulations amends the *Prescribed Markets and Qualifying Investments Order* (the Order) clarifying that auctioned products which are financial instruments under MiFID (i.e. five-days futures) are prescribed as qualifying investments in relation to the seven types of market abusive behaviour.

24 RAP Regulations, Schedule 1, Clause 1(g). Regulation 10 of the RAP Regulations amends the *Prescribed Markets and Qualifying Investments Order* (the Order) clarifying that auctioned products which are not financial instruments under MiFID (i.e. two-day spots) are prescribed as qualifying investments in relation to the eighth type of market abusive behaviour.

25 The Financial Services and Markets Act 2000 (Market Abuse) Regulations 2011 (SI 2011/2928).

Annex 1

Cost benefit analysis

1. CAR applies directly in the UK. Where it requires actions or legal changes these *must* therefore occur as surely as if they were required by UK Legislation. The Treasury has responded to a number of these requirements through two Statutory Instruments (the Recognised Auction Platforms Regulations 2011 and the amendments to legislation proposed in its most recent CP²⁶).
2. Where the FSA is required to do something under CAR or Treasury legislation, we have neither estimated additional costs for MiFID business where the ordinary requirements of MiFID will apply, nor have we estimated the cost of complying with CAR. We have only assessed the economic impact where there is a degree of policy discretion in our implementation of CAR or the amendments proposed in HMT's CP. There is a scale of policy options, which broadly fall into three categories:
 - a) **Do nothing.** We are required by CAR and by the proposed RAO amendments to authorise firms against those requirements stated in CAR but we are not *required* to impose additional requirements in the case of auction regulation business. Were we to do this, we would still have to authorise against the framework of the FSMA threshold conditions but no other part of the Handbook would be 'active'. This would have left emissions trading as the only regulated activity against which the UK did not apply its approach to financial crime or specified controlled functions. **So we discarded this option as incompatible with policy choices previously made by the UK.**
 - b) **Make limited changes.** The option described throughout this paper, where auction regulation business is authorised by reference to CAR with the addition of limited requirements on financial crime and approved persons with a description of the prudential standards expected. **This option forms the basis of our proposals in this CP.**
 - c) **Maximum changes.** We could take the view that the auction regulation business is sufficiently similar to the MiFID Business (and to other investment business) that we should require the relevant firms to apply equivalent MiFID requirements, as implemented in relevant provisions of the Handbook. However, we do not think that this is the case and therefore, such an approach would introduce

26 www.hm-treasury.gov.uk/consult_regulating_certain_bidders_auctions_euemissions_allowances.htm

disproportionate compliance costs and CAR specifically did not apply MiFID standards to auction regulation business. **So we discarded this option.**

Cost of recommended option

3. There are around 2,500 investment firms and 100 credit institutions currently authorised by the FSA. Of these, we do not have full certainty as to how many will be seeking to carry out the activity of bidding on an auction platform. Certain MiFID exempt firms may also be seeking to carry out that activity. Estimating the number of these MiFID exempt firms is more difficult.
4. However, we assume that in total no more than 100 firms will be looking to bid in auctions of emissions allowances. This is because:
 - a) Only around 90 regulated firms are significantly involved in commodities trading, of which, 50 are specialised in non-carbon commodities.
 - b) All bidders in the current UK EU ETS auctions are authorised by the FSA or an overseas equivalent. While we would expect some new entrants to this business from currently MiFID exempt firms, initial contact with these firms suggests there will be relatively few and it seems reasonable to assume that there would be no more than 60.
5. There will probably be significantly fewer than 100 firms ultimately applying and the planning estimate is 50, ten of which will be new to the market.
6. We *have not* considered the economic impact of the fee we charge for authorisations (which broadly reflects the cost borne by the FSA) as these fees would be incurred as a consequence of CAR whatever policy choice the FSA made but for information this fee would be £250/£750 in the case of a VOP or £1,500 in the case of a fresh authorisation.
7. In practice, we anticipate all 40 of the relevant firms currently conducting MiFID business to be authorised to 'Deal as Principal' and therefore to pay £250 (or £10,000 for all 40 firms). This is consistent with our conversations with the industry. We have assumed that five of the MiFID-exempt firms currently hold no authorisation and will pay the £1500 fee (£7,500 in total), with the other five holding a form of authorisation and therefore paying the £750 VOP fee (£3,750 in total).
8. This would indicate an overall authorisation cost of £21,250.
9. More generally, we have not considered additional costs borne by those conducting MiFID business (including the reporting requirements at 2.18) as, again, these are a consequence of provisions in CAR and the Treasury's Statutory instrument (SI) and are not affected by our policy choices. We have also not considered the cost to non-MiFID firms of demonstrating compliance with CAR alone for the same reason.

10. We have considered the extra costs implied by the approved person, prudential and money laundering requirements we have chosen to apply to non-MiFID Business. We consider that demonstrating compliance with requirements would likely consume two full-days' work at an assumed total cost of around £1,200.²⁷
11. This figure incorporates the accepted average £200 cost of applying to approve a person under our approved person's regime. We have assumed that on average, two persons might need to be approved – the rest of the cost would be made up in demonstrating compliance with our other requirements.²⁸ We do not think that professional advice would be needed, as the requirements are relatively simple.
12. Therefore the total one-off costs to all 50 businesses (including 10 new entrants) of applying to conduct non-MiFID business would be £60,000 initially.
13. For context, the figure would be £81,250 if we also included the £21,250 fees we note for authorisation at paragraph 8, above.
14. We anticipate the ongoing compliance costs of the money-laundering requirements to equate to around two days' work annually as the firm must be able to 'identify, assess, monitor and manage money laundering risk [in a manner that is] comprehensive and proportionate to the nature, scale and complexity of its activities'. This requirement does not seem to be overly burdensome beyond normal prudent business management. Indeed, after the first year, the burden is likely to fall.
15. Allowing for another two days to ensure compliance against the prudential requirements (the approved persons submission only needs to be made once per person) this gives a total ongoing cost of no more than £120,000 annually across the 50 firms or £2,400 per firm.
16. **Benefits of recommended option.** The benefits will accrue in better protection for consumers and our ability to detect market abuse, money laundering and fraud risks. It will also improve our ability to ensure that the new primary market of the auction platform has the confidence of all its participants and can fulfil its function.
17. **Conclusion.** Our recommended option represents the practical minimum, as it is the only option that can ensure market confidence whilst not imposing disproportionate costs.

Q7: Do you agree with our estimation of the compliance costs?

²⁷ This figure is based on the accepted costs of one day's labour that we used in Phase One of this work, moderated by having had some contact with the likely applicant firms. It is based on a figure of £600 per day's work.

²⁸ Primarily records checking and internal clearance related to the money laundering requirements.

Annex 2

Compatibility statement

1. Sections 155 and 157 of the FSMA require us to explain our reasons for believing that making proposed rules or guidance is compatible with our general duties under section 2 of the FSMA.
2. This statement explains why we believe that the proposed rules and guidance:
 - are compatible with our statutory objectives;
 - are the most appropriate for meeting these objectives and;
 - take account of the principles of good regulation to which we must have regard.
3. Our proposals provide for limited prudential, financial crime and approved persons measures beyond those required by CAR – in order to bring our approach to regulating this market into line with our existing minimum standards in those areas. In so doing, these measures ensure our consumer protection, market confidence and financial crime regulatory objectives.
4. We have taken a proportionate approach as a reflection of the principles of good regulation. We have given particular regard to the need to use resources in the most efficient and economic way; and that the principle that a burden or restriction which is imposed on a person, or on the carrying on of an activity, should be proportionate to the benefits, considered in general terms, which are expected to result from the imposition of that burden or restriction.
5. Furthermore, we have considered the international character of financial services and markets and the desirability of maintaining the competitive position of the UK; and decided to primarily regulate bidding in emissions auctions against the standards in the relevant EU regulation.

Annex 3

List of questions

- Q1:** Do you agree that where bidding on an auction platform is MiFID Business, we should treat it on equivalent terms as other MiFID business?
- Q2:** Do you agree that we should seek to authorise auction regulation business against only those requirements stated in CAR with the addition of anti money laundering measures and certain approved persons?
- Q3:** Do you agree with our specific approach to financial crime and the approved persons regime?
- Q4:** Are you content with our proposed approach to the high-level standards, prudential standards, business standards and redress sections of our Handbook, as well as our proposal to provide for a complaints handling procedure?
- Q5:** Do you agree with our proposed fees framework for emissions bidders?
- Q6:** Do you agree with our proposals on market abuse?
- Q7:** Do you agree with our estimation of the compliance costs?

Annex 4

CAR Article 59

Article 59

Conduct rules for other persons authorised to bid on behalf of others pursuant to Article 18(1)(b) and (c) and Article 18(2)

1. This Article shall apply to:
 - a. persons authorised to bid pursuant to Article 18(2);
 - b. investment firms and credit institutions referred to Article 18(1)(b) and (c) authorised to bid pursuant to Article 18(3).
2. Persons referred to in paragraph 1 shall apply the following conduct rules in their relationship with their clients:
 - a. they shall accept instructions from their clients on comparable terms;
 - b. they may refuse to bid on behalf of a client if they have reasonable grounds to suspect money laundering, terrorist financing, criminal activity or market abuse, subject to national legislation transposing Articles 24 and 28 of Directive 2005/60/EC;
 - c. they may refuse to bid on behalf of a client if they have reasonable grounds to suspect that the client is unable to pay for the allowances for which it is seeking to bid;
 - d. they shall enter into a written agreement with their clients. Agreements entered into shall not impose any unfair conditions or restrictions on the client concerned. They shall provide for all the terms and conditions relating to the services offered including in particular payment and delivery of the allowances;
 - e. they may require their clients to make a deposit by way of advance payment for allowances;
 - f. they may not unduly limit the number of bids that a client might submit;

- g. they may not prevent or restrict their clients from engaging the services of other entities eligible pursuant to Article 18(1)(b) to (e) and Article 18(2) to bid on their behalf in the auctions;
- h. they shall pay due regard to the interests of their clients who request them to submit bids on their behalf in the auctions;
- i. they shall treat clients fairly and without discrimination;
- j. they shall maintain adequate internal systems and procedures to process requests from clients to act as agent in an auction and to be able to participate effectively in an auction in particular with regard to the submission of bids on behalf of their clients, collect payment and collateral from and transfer allowances to clients for whom they act;
- k. they shall prevent the disclosure of confidential information from that part of their business responsible for receiving, preparing and submitting bids on behalf of their clients to that part of their business responsible for preparing and submitting bids on their own account or to that part of their business responsible for dealing on their own account on the secondary market;
- l. they shall keep records of information obtained or created in their role as intermediaries handling bids on behalf of their clients in the auctions, for five years from the date of obtaining or creating the information concerned.

The amount of the deposit referred to in point (e) shall be calculated on a just and reasonable basis.

The method of calculating the deposit referred to in point (e) shall be set out in the agreements entered into pursuant to point (d).

Any part of the deposit referred to in point (e) not used to satisfy payment for allowances shall be refunded to the payee within a reasonable period after the auction as stated in the agreements entered into pursuant to point (d).

3. Persons referred to in paragraph 1 shall apply the following conduct rules when bidding on their own account or on behalf of their clients:
 - a. they shall provide any information requested by any auction platform where they are admitted to bid or by the auction monitor to fulfil their respective functions under this Regulation;
 - b. they shall act with integrity, reasonable skill, care and diligence.
4. The competent national authorities designated by the Member States where the persons referred to in paragraph 1 are established shall be responsible for authorising such persons to carry out the activities referred to in that paragraph and for monitoring and enforcing

compliance with the conduct rules provided for in paragraphs 2 and 3 including the handling of any complaints made for non-compliance with such conduct rules.

5. The competent national authorities referred to in paragraph 4 shall only grant an authorisation to the persons referred to in paragraph 1 where the persons fulfil all of the following conditions:
 - a. they are of sufficiently good repute and sufficiently experienced as to ensure proper respect of the conduct rules provided for in paragraphs 2 and 3;
 - b. they have put in place the necessary processes and checks to manage conflicts of interest and serve the best interests of their clients;
 - c. they comply with the requirements of national legislation transposing Directive 2005/60/EC;
 - d. they comply with any other measures deemed necessary having regard to the nature of the bidding services being offered and the level of sophistication of the clients in question in terms of their investor or trading profile as well as any risk-based assessment of the likelihood of money laundering, terrorist financing or criminal activity.
6. The competent national authorities of the Member State where the persons referred to in paragraph 1 are authorised shall monitor and enforce the conditions listed in paragraph 5. The Member State shall ensure that:
 - a. its competent national authorities have at their disposal the necessary investigative powers and sanctions that are effective, proportionate and dissuasive;
 - b. a mechanism is established for the handling of complaints and the withdrawal of authorisations where the authorised persons are in breach of their obligations pursuant to such authorisation;
 - c. its competent national authorities may withdraw the authorisation granted under paragraph 5 where a person referred to in paragraph 1 has seriously and systematically infringed the provisions of paragraphs 2 and 3.
7. Clients of bidders referred to in paragraph 1 may direct any complaints that they may have with regard to compliance with the conduct rules provided for in paragraph 2 to the competent authorities mentioned in paragraph 3 in accordance with the procedural rules laid down for the handling of such complaints in the Member State where the persons referred to in paragraph 1 are supervised.
8. Persons referred to in paragraph 1 that are admitted to bid at an auction platform pursuant to Articles 18, 19 and 20 shall be allowed, without further legal or administrative requirements of the Member States, to provide bidding services to clients referred to in point (a) of Article 19(3).

Appendix 1:

Draft Handbook text

EMISSIONS ALLOWANCE AUCTION BIDDERS INSTRUMENT 2012

Powers exercised by the Financial Ombudsman Service Limited

- A. The Financial Ombudsman Service Limited amends the rule and guidance in Part 2 of Annex L (DISP) to this instrument for Voluntary Jurisdiction participants relating to the Voluntary Jurisdiction in the exercise of the following powers and related provisions in the Act:
- (1) section 227 (Voluntary Jurisdiction); and
 - (2) paragraph 8 (Guidance) of Schedule 17 (The Ombudsman Scheme).
- B. The making of this rule and guidance by the Financial Ombudsman Service Limited is subject to the approval of the Financial Services Authority.

Powers exercised

- C. The Financial Services Authority makes this instrument in the exercise of the following powers and related provisions in the Financial Services and Markets Act 2000 (“the Act”):
- (1) section 59 (Approval for particular arrangements);
 - (2) section 60 (Applications for approval);
 - (3) section 64 (Conduct: statements and codes);
 - (4) section 119 (The code);
 - (5) section 121 (Codes: procedure);
 - (6) section 138 (General rule-making power);
 - (7) section 139 (Miscellaneous ancillary matters);
 - (8) section 156 (General supplementary powers);
 - (9) section 157(1) (Guidance);
 - (10) section 213 (The compensation scheme);
 - (11) section 214 (General);
 - (12) section 223 (Management expenses);
 - (13) section 226 (Compulsory jurisdiction);
 - (14) section 227 (Voluntary jurisdiction);
 - (15) section 340 (Appointment);
 - (16) section 293(1) (Notification requirements); and
 - (17) paragraph 17(1) (Fees) of Schedule 1 (The Financial Services Authority).
- D. The rule-making powers listed above are specified for the purpose of section 153(2) (Rule-making instruments) of the Act.
- E. The Financial Services Authority approves the rules and guidance made by the Financial Ombudsman Service Limited.

Commencement

- F. This instrument comes into force on *[date]*.

Amendments to the Handbook

- G. The modules of the FSA’s Handbook of rules and guidance listed in column (1) below are amended in accordance with the Annexes to this instrument listed in column (2).

(1)	(2)
Glossary of definitions	Annex A
Principles for Businesses (PRIN)	Annex B
Senior Management Arrangements, Systems and Controls sourcebook (SYSC)	Annex C
Statements of Principle and Code of Practice for Approved Persons (APER)	Annex D
Training and Competence sourcebook (TC)	Annex E
Fees manual (FEES)	Annex F
Interim Prudential sourcebook for Investment Businesses (IPRU(INV))	Annex G
Conduct of Business sourcebook (COBS)	Annex H
Client Assets sourcebook (CASS)	Annex I
Market Conduct sourcebook (MAR)	Annex J
Supervision manual (SUP)	Annex K
Dispute Resolution: Complaints sourcebook (DISP)	Annex L
Recognised Investment Exchanges and Recognised Clearing Houses sourcebook (REC)	Annex M
Listing Rules sourcebook (LR)	Annex N

Amendments to material outside the Handbook

- H. The Perimeter Guidance manual (PERG) is amended in accordance with Annex O to this instrument.
- I. The Enforcement Guide (EG) is amended in accordance with Annex P to this instrument.

Notes

- J. In Annex A and Annex J to this instrument, the “notes” (indicated by “**Note:**”) are included for the convenience of readers but do not form part of the legislative text.

Citation

- K. This instrument may be cited as the Emissions Allowance Auction Bidders Instrument 2012.

By order of the Board of the Financial Ombudsman Service Limited
[date]

By order of the Board
[date]

Annex A

Amendments to the Glossary of definitions

In this Annex, underlining indicates new text and striking through indicates deleted text, unless otherwise stated.

Insert the following new definitions in the appropriate alphabetical position. The text is not underlined.

auction regulation bidding the *regulated activity* of *bidding in emissions auctions* where it is carried on by:

- (a) a *firm* that is exempt from *MiFID* under article 2(1)(i); or
- (b) a *MiFID investment firm* (other than a *UCITS investment firm*) on behalf of its *clients* in relation to a *two-day emissions spot*.

bidding in emissions auctions the *regulated activity*, specified in article 24A of the *Regulated Activities Order* (Bidding in emissions auctions), which is in summary the reception, transmission or submission of a bid at an auction of an *emissions auction product* conducted on an *auction platform*.

MiFID business bidding the *regulated activity* of *bidding in emissions auctions* where it is carried on by a *MiFID investment firm* (other than a *UCITS investment firm*) in relation to a *financial instrument*.

prescribed auction platform an auction platform which has been prescribed by the Treasury in the *Prescribed Markets and Qualifying Investments Order*.

two-day emissions spot an *emissions allowance* where delivery is to be made at an agreed date no later than the second trading day from the day of an auction on an *auction platform* (within the meaning of article 3(3) of the *auction regulation*).

Amend the following definitions as shown.

auction platform a platform on which auctions of ~~*greenhouse gas emission allowances*~~ *emissions allowances* are held in accordance with the *auction regulation*.

competent authority ...

- (2) (in relation to the exercise of an *EEA right* and the exercise of the *overseas financial stability information power*) a competent authority for the purposes of the relevant *Single Market Directive* or

the auction regulation.

...

designated investment

a *security* or a contractually-based investment (other than a *funeral plan contract* and a right to or interest in a funeral plan contract), that is, any of the following *investments*, specified in Part III of the *Regulated Activities Order* (Specified Investments), and a *long-term care insurance contract* which is a *pure protection contract*:

...

(ha) ...

(hb) *emissions auction product (article 82A) where it is a financial instrument.*

...

designated investment business

any of the following activities, specified in Part II of the *Regulated Activities Order* (Specified Activities), which is carried on by way of business:

(b) ...

(ba) *MiFID business bidding (part of bidding in emissions auctions) (article 24A);*

...

EEA authorisation

(in accordance with paragraph 6 of Schedule 3 to the *Act* (EEA Passport Rights));

...

(b) in relation to any other *EEA firm*, authorisation granted to an *EEA firm* by its *Home State regulator* for the purpose of the relevant *Single Market Directive* or the auction regulation.

EEA firm

(in accordance with paragraph 5 of Schedule 3 to the *Act* (EEA Passport Rights)) any of the following, if it does not have its relevant office in the *United Kingdom*:

...

(g) an *undertaking* pursuing the activity of reinsurance (within the meaning of article 1 of the *Reinsurance Directive*) which has received authorisation under article 3 of the *Reinsurance Directive* from its *Home State Regulator*;

(h) *a person who has received authorisation under article 18 of the auction regulation;*

...

<i>EEA regulator</i>	<i>a competent authority</i> for the purposes of any of the <i>Single Market Directives</i> or the <i>auction regulation</i> .
<i>EEA right</i>	(in accordance with paragraph 7 of Schedule 3 to the <i>Act</i> (EEA Passport Rights)) the entitlement of a <i>person</i> to establish a <i>branch</i> or provide services in an <i>EEA State</i> other than that in which he has his relevant office: ... (b) subject to the conditions of the relevant <i>Single Market Directive</i> or <u><i>the auction regulation</i></u> .
<i>emissions auction products</i>	<u><i>the investment</i> specified in article 82A of the <i>Regulated Activities Order</i> (Greenhouse gas emissions allowances), which is in summary an <i>greenhouse gas emission allowances</i> <i>emissions allowance</i> which are offered for sale as a <i>financial instrument</i> or a <i>two-day emissions spot</i> on an <i>auction platform</i>.</u>
<i>greenhouse gas emission allowances</i>	an 'allowance', licence, permit, right, note, unit, credit, asset, certificate or instrument (the "allowance") where: (a) the allowance confers or may result in a benefit or advantage to its holder or another person; and (b) the allowance, or the benefit or advantage in (a), is linked to the emission or non-emission of quantities of carbon dioxide or other greenhouse gases into the environment by the holder of the allowance or another person <u>within the meaning of article 3(a) of Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC.</u>
<i>energy collective investment scheme</i>	<i>a collective investment scheme</i> , the property of which consists only of <i>energy</i> , <i>energy investments</i> , <i>greenhouse gas emissions allowances</i> <i>emissions allowances</i> , <i>tradable renewable energy credits</i> or cash awaiting investment.
<i>energy investment</i>	any of the following: (a) a <i>unit</i> in an <i>energy collective investment scheme</i> ; (b) an <i>option</i> to acquire or dispose of an <i>energy investment</i> ; (c) a <i>future</i> or a <i>contract for differences</i> where the commodity or property of any other description in question is: (i) <i>energy</i> ; or (ii) an <i>energy investment</i> ; or

- (iii) ~~a greenhouse gas emissions allowance~~ an emissions allowance; or
- (iv) a tradable renewable energy credit;
- (d) a contract for differences where the index or other factor in question is linked to or otherwise dependent upon fluctuations in the value or price of any of (c)(i) to (iv) (including any prices or charges in respect of imbalances under the *Network Code* or the *Balancing and Settlement Code*);
- (e) a weather derivative;
- (f) ~~a greenhouse gas emissions allowance~~ an emissions allowance, if it is a specified investment;
- (g) a tradable renewable energy credit, if it is a specified investment;
- (h) rights to or interests in investments in (a)-(g).

Home State

...

- (12) (in relation to a person who has received authorisation under article 18 of the auction regulation) the EEA state in which the person is established and authorised under the auction regulation.

Home State
regulator

- (1) (in relation to an EEA firm) (as defined in paragraph 9 of Schedule 3 to the Act (EEA Passport Rights)) the competent authority (under the relevant *Single Market Directive* or the *auction regulation*) of an EEA State (other than the *United Kingdom*) in relation to the EEA firm concerned.

...

Host State
regulator

...

- (2) (in relation to a UK firm) (as defined in paragraph 11 of Schedule 3 to the Act (EEA Passport Rights)) the competent authority (under the relevant *Single Market Directive* or the *auction regulation*) of an EEA State (other than the *United Kingdom*) in relation to a ~~UK firm's~~ UK firm's exercise of EEA rights there.

...

investment service

any of the following involving the provision of a service in relation to a financial instrument, that is:

...

Note: article 4(1)(2) of, and section A of Annex 1 to, *MiFID* and article 6(5) of the auction regulation

investment

any of the services and activities listed in Section A of Annex I to *MiFID*

services and activities

relating to any *financial instrument*, that is:

...

Note: article 4(1)(2) of, and section A of Annex 1 to, *MiFID* and article 6(5) of the *auction regulation*

investment services and/or activities

any of the services and activities listed in Section A of Annex I to *MiFID* relating to any *financial instrument*, that is:

...

Note: article 4(1)(2) of, and section A of Annex 1 to, *MiFID* and article 6(5) of the *auction regulation*

investment services or activities

any of the services and activities listed in Section A of Annex I to *MiFID* relating to any *financial instrument*, that is:

...

Note: article 4(1)(2) of, and section A of Annex 1 to, *MiFID* and article 6(5) of the *auction regulation*

market abuse

(1) (in accordance with section 118 of the *Act* (Market abuse)) *behaviour* (whether by one *person* alone or by two or more *persons* jointly or in concert) which:

- (a) occurs in relation to *qualifying investments* traded or admitted to trading on a *prescribed market* or in respect of which a request for admission to trading on such a market has been made; and
- (b) falls within any one or more of the types of *behaviour* set out in section 118(2) to (8) of the *Act*.

(2) (in accordance with section 118 of the *Act* (Market abuse) as modified by the *RAP Regulations*) *behaviour* (whether by one *person* alone or by two or more *persons* jointly or in concert) which:

- (a) occurs in relation to *qualifying investments* which are offered for sale on a *prescribed auction platform*; and
- (b) falls within any one or more of the types of *behaviour* set out in subsections 118(2) to (8A) of the *Act*.

market abuse (distortion)

(1) (in accordance with section 118(8) of the *Act* (Market abuse)) the *behaviour* described in section 118(8) of the *Act* which satisfies the condition in section 118(8)(b) and is *behaviour* (not falling within

sections 118(5), (6) or (7)) which:

- (a) would be, or would be likely to be, regarded by a *regular user* of the market as behaviour that would distort, or would be likely to distort, the market in a *qualifying investment*; and
- (b) is likely to be regarded by a *regular user* of the market as a failure on the part of the *person* concerned to observe the standard of *behaviour* reasonably expected of a *person* in his position in relation to the market.

(2) (in accordance with section 118(8) of the Act (Market abuse) as modified by the RAP Regulations) the behaviour described in section 118(4) of the Act as modified by the RAP Regulations, the behaviour described in section 118(8) of the Act which satisfies the condition in section 118(8)(b) and is behaviour (not falling within sections 118(5), (6) or (7)) which:

- (a) would be, or would be likely to be, regarded by a regular user of the auction platform as behaviour that would distort, or would be likely to distort, the auction of such an investment,
- (b) and is likely to be regarded by a regular user of the auction platform as a failure on the part of the person concerned to observe the standard of behaviour reasonably expected of a person in his position in relation to the market.

*market abuse
(manipulating
devices)*

(1) (in accordance with section 118(6) of the Act (Market abuse)) the behaviour described in section 118(6) of the Act, which is effecting transactions or orders to trade which employ fictitious devices or any other form of deception or contrivance.

(2) (in accordance with section 118(6) of the Act (Market abuse) as modified by the RAP Regulations)) the behaviour described in section 118(6) of the Act, which is effecting transactions, bids or orders to trade which employ fictitious devices or any other form of deception or contrivance.

*market abuse
(manipulating
transactions)*

(1) (in accordance with section 118(5) of the Act (Market abuse)) the behaviour described in section 118(5) of the Act, which is behaviour effecting transactions or orders to trade (otherwise than for legitimate reasons and in conformity with accepted market practices on the relevant market) which:

- (a) give, or are likely to give a false or misleading impression as to the supply of, or demand for, or as to the price of, one or more *qualifying investments*; or
- (b) secure the price of one or more such investments at an abnormal or artificial level.

(2) (in accordance with section 118(5) of the Act (Market abuse) as modified by the RAP Regulations) the behaviour described in section 118(5) of the Act as modified by the RAP Regulations, which is behaviour effecting transactions, bids or orders to trade (otherwise than for legitimate reasons and in conformity with accepted market practices on the relevant auction platform) which:

(a) give, or are likely to give a false or misleading impression as to the supply of, or demand for, or as to the price of, one or more qualifying investments; or

(b) secure the price of one or more such investments at an abnormal or artificial level.

*market abuse
(misleading
behaviour)*

(1) (in accordance with section 118(8) of the Act (Market abuse)) the behaviour described in section 118(8) of the Act which satisfies the condition in section 118(8)(a) and is behaviour (not falling within sections 118(5), (6) or (7)) which:

(a) is likely to give a regular user of the market a false or misleading impression as to the supply of, demand for or price or value of, qualifying investments, and

(b) is likely to be regarded by a regular user of the market as a failure on the part of the person concerned to observe the standard of behaviour reasonably expected of a person in his position in relation to the market.

(2) (in accordance with section 118(8) of the Act (Market abuse) as modified by the RAP Regulations) the behaviour described in section 118(8) of the Act which satisfies the condition in section 118(8)(a) and is behaviour (not falling within sections 118(5), (6) or (7)) which:

(a) is likely to give a regular user of the auction platform a false or misleading impression as to the supply of, demand for or price or value of, qualifying investments, or

(b) and is likely to be regarded by a regular user of the auction platform as a failure on the part of the person concerned to observe the standard of behaviour reasonably expected of a person in his position in relation to the market.

*market abuse
(misuse of
information)*

(1) (in accordance with section 118(4) of the Act (Market abuse)) the behaviour described in section 118(4) of the Act, which is behaviour (not falling within sections 118 (2) or (3) of the Act):

(a) based on information which is not generally available to those using the market but which, if available to a regular user of the market, would be, or would be likely to be, regarded by him as relevant when deciding the terms on

which transactions in *qualifying investments* should be effected; and

- (b) likely to be regarded by a *regular user* of the market as a failure on the part of the *person* concerned to observe the standard of *behaviour* reasonably expected of a *person* in his position in relation to the market

(2) (in accordance with section 118(4) of the Act (Market abuse) as modified by the RAP Regulations) the behaviour described in section 118(4) of the Act as modified by the RAP Regulations, which is behaviour (not falling within sections 118 (2) or (3) of the Act):

- (a) based on information which is not generally available to those using the auction platform but which, if available to a regular user of the auction platform, would be, or would be likely to be, regarded by him as relevant when deciding the terms on which transactions in qualifying investments should be effected, and
- (b) is likely to be regarded by a regular user of the auction platform as a failure on the part of the person concerned to observe the standard of behaviour reasonably expected of a person in his position in relation to the auction platform.

participant firm (1) (except in FEES 1 and FEES 6) a firm or a member other than:

...

- (j) a firm that is exempt from MiFID under article 2(1)(i) in respect of its carrying on of bidding in emissions auctions.

...

permission permission to carry on regulated activities; that is, any of the following:

...

- (b) the permission that an *incoming EEA firm* has, under paragraph 15(1) or paragraph 15Z(1), (3) or (4) of Schedule 3 to the Act (EEA Passport Rights), on qualifying for *authorisation* under paragraph 12 of that Schedule;

...

regular user (1) (as defined in section 130A(3) of the Act (Market abuse)) a *person* who is, in relation to a particular market, a reasonable *person* who regularly deals on that market in *investments* of the kind in question.

(2) (in accordance with section 130A(3) of the Act (Market abuse) as modified by the RAP Regulations) a person who is, in relation to a

particular auction platform, a reasonable *person* who regularly makes bids on that market for *investments* of the kind in question.

- regulated activity* (in accordance with section 22 of the *Act* (The classes of activity and categories of investment)) any of the following activities specified in Part II of the *Regulated Activities Order* (Specified Activities):
- ...
- (e) ...
- (ea) *bidding in emissions auctions* (article 24A);
- ...
- relevant information*
- (1) (except in *REC*) (in relation to an *investment*) information which would be likely to be regarded by a *regular user* of the market or auction platform in question as relevant when deciding the terms on which transactions in that *investment* should be effected.
- (2) (in *REC*) (in relation to an *investment*) information which is relevant to determining the current value of that *investment* or (in relation to *RAPs*) information on the terms of *emissions auction products* and the terms on which they will be auctioned on an *RAP*.
- securities and futures firm* (subject to *BIPRU* TP 1 (Revised definition of securities and futures firm for certain transitional purposes)) a *firm* whose *permitted activities* include *designated investment business* or *bidding in emissions auctions*, which is not an *authorised professional firm*, *bank*, *BIPRU investment firm* (unless it is an *exempt BIPRU commodities firm*), *building society*, *credit union*, *friendly society*, *ICVC*, *insurer*, *media firm*, *service company*, *incoming EEA firm* (without a *top-up permission*), *incoming Treaty firm* (without a *top-up permission*), *UCITS management company* or *UCITS qualifier* (without a *top-up permission*), whose *permission* does not include a *requirement* that it comply with *IPRU(INV)* 5 (Investment management firms) or 13 (Personal investment firms), and which is within (a), (b), (c), (d), (e), (f), ~~(g)~~ or (h):
- ...
- (g) an *exempt BIPRU commodities firm*;
- (h) a *firm* that is exempt from *MiFID* under article 2(1)(i) whose *permitted activities* include *bidding in emissions auctions*.
- specified investment* any of the following *investments* specified in Part III of the *Regulated Activities Order* (Specified Investments):
- ...
- (oe) *emissions auction products* (article 82A);
- ...

Annex B

Amendments to the Principles for Businesses (PRIN)

In this Annex, underlining indicates new text and striking through indicates deleted text.

3.1. Who?

3.1.1 R *PRIN* applies to every *firm*, except that:

...

(5) *PRIN* does not apply to an *incoming ECA provider* acting as such; and

(6) *PRIN* does not apply to a *firm* in relation to its carrying on of *auction regulation bidding*.

3.1.2 G ~~SYSC App 1~~, COBS 1 Annex 1 and the territorial *guidance* in PERG 13.6 all contain *guidance* that is relevant to the reservation of responsibility to a *Home State regulator* referred to in *PRIN* 3.1.1R(1).

Annex C

Amendments to the Senior Management Arrangements, Systems and Controls sourcebook (SYSC)

In this Annex, underlining indicates new text and striking through indicates deleted text.

1.4 Application of SYSC 11 to SYSC 21

1.4.1 G The application of each of chapters SYSC 11 to SYSC 21 is set out in those chapters and below.

1.4.1A R SYSC 12, SYSC 19A, SYSC 20 and SYSC 21 do not apply to a firm in relation to its carrying on of auction regulation bidding.

1.4.1B G A firm is not subject to SYSC 11 to SYSC 21 in relation to its carrying on of auction regulation bidding, except for SYSC 18 which provides guidance on the Public Interest Disclosure Act. This is because those chapters either only apply to an insurer or are disapplied as a result of SYSC 1.4.1AR.

...

1 Annex 1 Detailed application of SYSC

...		
Part 2	Application of the common platform requirements (SYSC 4 to 10)	
...		
2.6	...	
<u>2.6A</u>	R	<u>The common platform requirements do not apply to a firm (including an incoming EEA firm) in relation to its carrying on of auction regulation bidding, except for:</u>
	(1)	<u>SYSC 6.1.1R which only applies to the extent that it relates to the obligation to establish, implement and maintain adequate policies and procedures for countering the risk that the firm (including its managers, employees and appointed representatives) might be used to further financial crime; and</u>
	(2)	<u>SYSC 6.3 (Financial crime).</u>
...		

Annex D

Amendments to the Statements of Principle and Code of Practice for Approved Persons (APER)

In this Annex, underlining indicates new text and striking through indicates deleted text.

2.1 The Statements of Principle

...

- 2.1.1A P An ~~approved person~~ approved person will not be subject to a *Statement of Principle* to the extent that it would be contrary to the *UK's* obligations under a *Single Market Directive* or the auction regulation.

...

Annex E

Amendments to the Training and Competence sourcebook (TC)

In this Annex, underlining indicates new text and striking through indicates deleted text.

Appendix 1.1 Activities and Products/Sectors to which TC applies subject to TC Appendices 2 and 3

Activity	Products/Sectors		Is there an appropriate qualification requirement?
<i>Designated investment business carried on for a retail client</i>			
...			
Dealing	13A ₂	<i>Securities which are not stakeholder pension schemes, personal pension schemes or broker funds</i>	No
	13B ₂	<i>Derivatives</i>	No
<u>MiFID business bidding</u>	<u>13C.</u>	<u>Emissions auction products</u>	<u>No</u>
...			

Annex F

Amendments to the Fees manual (FEES)

In this Annex, underlining indicates new text and striking through indicates deleted text.

Application

1.1.2 R This manual applies in the following way:

...

(3) FEES 1, 2 and 5 apply to:

- (a) every firm (except to the extent it is bidding in emissions auctions), fee-paying payment service provider and fee-paying electronic money issuer which is subject to the Compulsory Jurisdiction of the Financial Ombudsman Service; and

...

...

...

3 Annex 1R Authorisation fees payable

...

Part 2 – Complexity Grouping Straightforward Cases

Straightforward cases	
Activity grouping	Description
...	
A.4	...
<u>A.10</u>	<u>A firm to the extent it is bidding in emissions auctions</u>
...	

...

Moderately complex cases	
Activity Grouping	Description

...	
A.10	<i>Firms dealing as principal, except to the extent the firm is bidding in <u>emissions auctions</u></i>
...	

...

4 Annex 1R Activity groups, tariff bases and valuation dates applicable

...

Activity group	Fee payer falls in the activity group if
...	
A.10 Firms dealing as principal	<p>its <i>permission</i> includes:</p> <p><u>(a) dealing in investments as principal; and/or</u></p> <p><u>(b) bidding in emissions auctions;</u></p> <p>BUT NOT if one or more of the following apply:</p> <p>...</p> <ul style="list-style-type: none"> the <i>firm</i> is an <i>oil market participant, energy market participant</i> or a <i>local</i> <u>(except where the firm is bidding in emissions auctions);</u> <p>...</p>
...	

...

6 Annex 3R Financial Services Compensation Scheme - classes and sub-classes

...

Class D	Investment
...	
Legal basis for activity in sub-class D2	Any of the following activities in relation to <i>designated investment business</i>
	<i>dealing in investments as principal;</i>
	<i>dealing in investments as agent;</i>

	<u><i>MiFID business bidding;</i></u>
	...
...	

Annex G

Amendments to the Interim Prudential sourcebook for Investment Businesses (IPRU(INV))

In this Annex, underlining indicates new text and striking through indicates deleted text.

3.60 FIRMS TO WHICH RULES 3-61 to 3-182 APPLY

Broad scope firms

3.60(1) R Rules 3-61 to 3-182 apply to a *broad scope firm* except that rules 3-80 to 3-178 do not apply to a *venture capital firm* or in respect of *bidding in emissions auctions* carried on by a *firm* that is exempt from *MiFID* under article 2(1)(i).

...

3.72 R A *firm's* absolute minimum requirement is:

...

(ea) for a *firm* that is exempt from *MiFID* under article 2(1)(i) and whose *permitted activities* include *bidding in emissions auctions*: £50,000;

(f) for a *broad scope firm* other than one within (b) to (e ea) above: £100,000; or

...

...

APPENDIX 1 GLOSSARY OF TERMS FOR IPRU(INV) 3

...

investment business means any of the following regulated activities specified in Part II of the Regulated Activities Order and which is carried on by way of business:

...

(b) ...

(ba) *auction regulation bidding* (part of *bidding in emissions auctions*) (article 24A);

...

...

Annex H

Amendments to the Conduct of Business sourcebook (COBS)

In this Annex, underlining indicates new text and striking through indicates deleted text.

1.1 The general application rule

...

1.1.1C R The following rules in COBS apply to a firm in relation to its carrying on of auction regulation bidding:

- (1) COBS 5 (Distance communications);
- (2) (for a firm that has exercised an opt-in to CASS in accordance with CASS 1.4.9R in relation only to those clients for which it holds client money or safe custody assets in accordance with CASS) COBS 3 (Client categorisation), COBS 6.1.7R (Information concerning safeguarding of designated investments belonging to client and client money), COBS 6.1.11R (Timing of disclosure) and COBS 16.4 (Statements of client designated investments or client money).

Annex I

Amendments to the Client Assets sourcebook (CASS)

In this Annex, underlining indicates new text and striking through indicates deleted text.

1.4 Application: particular activities

...

Auction regulation bidding

- 1.4.9 R Where a firm carries on auction regulation bidding it may elect to comply with CASS (but not CASS 5) in respect of this activity, subject to the general modifications in CASS 1.4.10R.
- 1.4.10 R Where a firm has made an election in accordance with CASS 1.4.9R, CASS is modified so that:
- (1) each reference to:
 - (a) designated investments;
 - (b) safe custody assets; and
 - (c) contingent liability investments;includes a reference to a two-day emissions spot;
 - (2) each reference to designated investment business includes auction regulation bidding;
 - (3) each reference to safeguarding and administering investments, including safeguarding and administration of assets (without arranging) and arranging safeguarding and administration of assets, includes those activities where they are carried on in relation to a two-day emissions spot; and
 - (4) the reference in CASS 6.2.3AR to an 'emissions auction product that is a financial instrument' includes a two-day emissions spot;
- 1.4.11 G When a firm makes an election in accordance with CASS 1.4.9R:
- (1) a two-day emissions spot falls within the scope of each chapter in CASS (save for CASS 5), for example:
 - (a) the reference in CASS 6.1.1R(1B) to safeguarding and administering investments is modified to include the activity of safeguarding and administering a two-day emissions spot;

and

(b) any money that the firm receives or holds for or on behalf of a client in the course of or in connection with its auction regulation bidding activities will be treated as client money and so will need to be dealt with in accordance with the client money rules; and

(2) that election also has effect in relation to rules and guidance elsewhere in the Handbook, including:

(a) COBS 3 (Client categorisation);

(b) COBS 6.1.7R (Information concerning safeguarding of designated investments belonging to clients and client money);

(c) COBS 6.1.11R (Timing of disclosure);

(d) COBS 16.4 (Statements of client designated investments or client money);

(e) SUP 3 (Auditors);

(f) SUP 10.4.5R (Table Controlled functions) and SUP 10.7.9R (CASS operational oversight function (CF10a)); and

(g) SUP 16.14 (Client money and asset return).

1.4.13 R Where a firm makes an election in accordance with CASS 1.4.9R it must:

(1) make a written record of the election, including the date from which the election is to be effective, on the date it makes the election;

(2) keep a record of that election for a period of five years after ceasing to use the opt in.

1.4.14 R Where a firm that has opted in to CASS under CASS 1.4.9R subsequently decides to cease its use of that opt in it must:

(1) make a written record of this decision, including the date from which the decision is to be effective, on the date it takes the decision;

(2) keep a record of that decision for a period of five years after the date it is to be effective; and

(3) discharge any outstanding fiduciary obligations that had arisen because the firm had elected to comply with CASS.

...

6.2.3 ...

6.2.3A R If:

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

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

...

Schedule 1 Record keeping requirements

...

Sch 1.3G

Handbook reference	Subject of record	Contents of record	When record must be made	Retention period
CASS 1A.3.3R	...			
<u>CASS 1.4.12R</u> and, where applicable, <u>CASS 1.4.13R</u>	<u>For a firm which carries on auction regulation bidding, election (under CASS 1.4.9R) to comply with CASS in respect of this activity and, where applicable, decision to discontinue use of that opt in</u>	<u>Record of this election or, where applicable, the decision to discontinue use of the opt in, including the date on which either is to be effective</u>	<u>Upon making the election or, where applicable, upon taking the decision to discontinue use of the opt in</u>	<u>5 years from the date on which the opt in ceases to be used</u>
...				

Annex J

Amendments to the Market Conduct sourcebook (MAR)

In this Annex, underlining indicates new text and striking through indicates deleted text.

1.1 Application and interpretation

Application and purpose

1.1.1 ...

1.1.1A G References in MAR 1 to the Act should be read to mean the Act as modified by the RAP regulations where the relevant behaviour occurs in relation to qualifying investments which are offered for sale on a prescribed auction platform.

1.1.2 G This chapter provides assistance in determining whether or not *behaviour* amounts to *market abuse*. It also forms part of the UK's implementation of the *Market Abuse Directive* (including its EU implementing legislation, that is Directive 2003/124/EC, Directive 2003/125/EC, Regulation 2273/2003 and Directive 2004/72/EC) and the auction regulation. It is therefore likely to be helpful to *persons* who:

- (1) want to avoid engaging in *market abuse* or to avoid requiring or encouraging another to do so; or
- (2) want to determine whether they are required by SUP 15.10 (Reporting suspicious transactions (market abuse)) to report a transaction to the FSA as a suspicious one.

...

Using MAR 1

...

1.1.5 G Part VIII of the *Act*, and in particular section 118, specifies ~~seven~~ types of *behaviour* which can amount to *market abuse*. This chapter considers the general concepts relevant to *market abuse*, then each type of behaviour in turn and then describes exceptions to *market abuse* which are of general application. In doing so, it sets out the relevant provisions of the *Code of Market Conduct*, that is:

...

1.2 Market Abuse: general

...

1.2.2A UK Table: section 118(1) of the Act as modified by the RAP Regulations

<p><u>“For the purposes of this Act, [market abuse] is [behaviour] (whether by one person alone or by two or more persons jointly or in concert) which -</u></p>	
<p><u>(a)</u></p>	<p><u>occurs in relation to:</u></p>
<p><u>(i)</u></p>	<p><u>[qualifying investments] which are offered for sale on a [prescribed auction platform], or</u></p>
<p><u>(ii)</u></p>	<p><u>in the case of subsection (2) or (3), investments which are [related investments] in relation to such [qualifying investments], and</u></p>
<p><u>(b)</u></p>	<p><u>falls within any one or more of the types of [behaviour] set out in subsections (2) to (8A).”</u></p>

...

Prescribed markets and qualifying investments: “in relation to”: factors to be taken into account

1.2.5 E In the opinion of the FSA, the following factors are to be taken into account in determining whether or not *behaviour* prior to a request for admission to trading, ~~or~~ the admission to or the commencement of trading, or the offer for sale on a prescribed auction platform satisfies section 118(1)(a) of the Act, and are indications that it does:

- (1) if it is in relation to *qualifying investments*:
 - (i) in respect of which a request for admission to trading on a *prescribed market* is subsequently made; and
 - ~~(2)~~ (ii) if it continues to have an effect once an application has been made for the *qualifying investment* to be admitted for trading, or it has been admitted to trading on a *prescribed market*, respectively, or
- (2) if it is in relation to *qualifying investments*:
 - (i) which are subsequently offered for sale on a prescribed auction platform; and
 - (ii) if it continues to have an effect once the qualifying investments are offered for sale on a prescribed auction platform.

...

Insiders: factors to be taken into account

...

1.2.7A UK Table: section 118B of the Act as modified by the RAP Regulations

<p><u>“For the purposes of [market abuse] an [insider] is any person who has [inside information]:</u></p>	
(a)	<p><u>as a result of his membership of an administrative, management or supervisory body of an [auction platform] or its operator, an auctioneer or auction monitor,</u></p>
(b)	<p><u>as a result of his holding in the capital of an [auction platform] or its operator, an auctioneer or auction monitor,</u></p>
(c)	<p><u>as a result of having access to the information through the exercise of his employment, profession or duties,</u></p>
(d)	<p><u>as a result of his criminal activities, or</u></p>
(e)	<p><u>which he has obtained by other means and which he knows, or could reasonably be expected to know, is [inside information].”</u></p>

...

Inside information: factors to be taken into account

...

1.2.12 E In the opinion of the *FSA*, the following factors are to be taken into account in determining whether or not information is generally available, and are indications that it is (and therefore not *inside information*)

- (1) whether the information has been disclosed to a *prescribed market* or a prescribed auction platform through a *regulatory information service* or *RIS* or otherwise in accordance with the rules of that market;

...

1.2.15A UK Table: section 118C(4) of the Act as modified by the RAP Regulations

<p><u>“In relation to a person charged with the execution of bids ... [inside information] includes information conveyed by a client and related to the client's pending bids ...”</u></p>
--

1.2.16 E In the opinion of the *FSA*, a factor which indicates that there is a pending order or bid for a client is, if a *person* is approached by another in relation to a transaction, and:

- (1) the transaction is not immediately executed on an arm's length basis in response to a price quoted by that *person*; and
- (2) the *person* concerned has taken on a legal or regulatory obligation relating to the manner or timing of the execution of the transaction.

...

The regular user

1.2.20 G In section 118 of the *Act*, the *regular user* decides:

- (1) ...
- (2) whether *behaviour*:
 - (a) based on information meeting the criteria in section 118(4)(a) is below the expected standard (section 118(4)(b)); or
 - (b) creates or is likely to create a false or misleading impression or distorts the market or the auction of investments of the kind in question (section 118(8)); or
 - (c) which creates or is likely to create a false or misleading impression or distorts the market or the auction of investments of the kind in question is below the expected standard (section 118(8)).

1.2.21 G The *regular user* is a hypothetical reasonable *person* who regularly deals on the market and in the investments of the kind in question or bids on the auction platform in relation to investments of the kind in question. The presence of the *regular user* imports an objective element into the elements listed in *MAR* 1.2.15UK while retaining some subjective features of the markets for, or the auction of, the investments in question.

...

1.3 Market abuse (insider dealing)

...

1.3.2 E The following *behaviours* are, in the opinion of the *FSA*, *market abuse (insider dealing)*:

- (1) ...
- (2) front running/pre-positioning - that is, a transaction for a *person's* own benefit, on the basis of and ahead of an order (including an order relating to a bid) which he is to carry out with or for another (in respect of which information concerning the order is *insider information*), which takes advantage of the anticipated impact of the

order on the market or auction clearing price;

...

...

- 1.3.6 C A *person* will form an intention to *buy or sell, or submit or withdraw a bid for, a qualifying investment or a related investment* before doing so. His carrying out of his own intention is not in itself *market abuse (insider dealing)*. [**Note:** Recital 30 *Market Abuse Directive* and article 36(1) of the auction regulation]

...

Descriptions of behaviour that do not amount to market abuse (insider dealing) and relevant factors: execution of client orders

- 1.3.12 C The dutiful carrying out of, or arranging for the dutiful carrying out of, an order (including an order relating to a bid) on behalf of another (including as portfolio manager) will not in itself amount to *market abuse (insider dealing)* by the *person* carrying out that order. [**Note:** Recital 18 *Market Abuse Directive* and article 36(1) of the auction regulation]

- 1.3.13 G *MAR* 1.3.12C applies whether or not the *person* carrying out the order (including an order relating to a bid) or the *person* for whom he is acting, in fact possesses *inside information*. Also, a *person* that carries out an order on behalf of another will not, merely as a result of that action, be considered to have any *inside information* held by that other *person*.

...

- 1.3.15 E In the opinion of the *FSA*, the following factors are to be taken into account in determining whether or not a *person's behaviour* is dutiful execution of an order (including an order relating to a bid) on behalf of another, and are indications that it is:

...

- (4) the extent to which the *person's behaviour* was reasonable by the proper standards of conduct of the market or auction platform concerned and (if relevant) proportional to the risk undertaken by him; or
- (5) whether, if the relevant trading or bidding (including the withdrawal of a bid) by that *person* is connected with a transaction entered into or to be entered into with a client (including a potential client), the trading or bidding either has no impact on the price or there has been adequate disclosure to that client that trading or bidding will take place and he has not objected to it.

...

1.4 Market abuse (improper disclosure)

...

Factors to be taken into account in determining whether or not behaviour amounts to market abuse (improper disclosure)

1.4.5 E In the opinion of the *FSA*, the following factors are to be taken into account in determining whether or not the disclosure was made by a *person* in the proper course of the exercise of his employment, profession or duties, and are indications that it was:

- (1) whether the disclosure is permitted by the rules of a *prescribed market*, a *prescribed auction platform*, of the *FSA* or the *Takeover Code*; or

...

...

1.5 Market abuse (misuse of information)

...

1.5.1A UK Table: section 118(4) of the Act as modified by the RAP Regulations

<u>“The third [type of <i>behaviour</i>] is where the [<i>behaviour</i>] (not [amounting to <i>market abuse (insider dealing)</i>] or <i>market abuse (improper disclosure)</i>):</u>	
<u>(a)</u>	<u>is based on information</u>
	<u>which is not generally available to those using the auction platform</u>
	<u>but which, if available to a [<i>regular user</i>] of the auction platform, would be, or would be likely to be, regarded by him as relevant when deciding the terms on which transactions in [<i>qualifying investments</i>] should be effected, and</u>
<u>(b)</u>	<u>is likely to be regarded by a [<i>regular user</i>] of the auction platform as a failure on the part of the person concerned to observe the standard of [<i>behaviour</i>] reasonably expected of a person in his position in relation to the auction platform.”</u>

1.5.2 E The following *behaviours* are, in the opinion of the *FSA*, *market abuse (misuse of information)*:

- (1) *dealing* or *arranging deals* in *qualifying investments* based on *relevant information*, which is not generally available and relates to matters which a *regular user* would reasonably expect to be disclosed to users of the particular *prescribed market* or *prescribed auction platform*, but which does not amount to *market abuse*

(*insider dealing*) (whether because the *dealing* relates to a *qualifying investment* to which section 118(2) does not apply or because the *relevant information* is not *inside information*); and

...

...

Factors to be taken into account: standards of behaviour

- 1.5.7 E In the opinion of the *FSA*, the following factors are to be taken into account when considering whether a *regular user* would reasonably expect the *relevant information* to be disclosed to users of the particular *prescribed market* or *prescribed auction platform*, or to be announced, and accordingly whether *behaviour* is likely to be regarded by a *regular user* as failing to meet the expected standard and are indications that he would:

...

...

1.6 Market abuse (manipulating transactions)

...

1.6.1A UK Table: section 118(5) of the Act as modified by the RAP Regulations

<u>“The fourth [type of <i>behaviour</i>] ...consists of effecting transactions, bids or orders to trade</u>	
<u>(otherwise than for legitimate reasons and in conformity with accepted market practices on the relevant auction platform)</u>	
<u>which:</u>	
<u>(a)</u>	<u>give, or are likely to give, a false or misleading impression as to the supply of, or demand for, or as to the price of, one or more qualifying investments, or</u>
<u>(b)</u>	<u>secure the price of one or more such investments at an abnormal or artificial level.”</u>

Description of behaviour that amount to market abuse (manipulating transactions): false or misleading impressions

- 1.6.2 E The following *behaviours* are, in the opinion of the *FSA*, *market abuse (manipulating transactions)* of a type involving false or misleading impressions:

...

- (3) painting the tape - that is, entering into a series of transactions that

are shown on a public display for the purpose of giving the impression of activity or price movement in a *qualifying investment* ~~and~~;

- (4) entering orders into an electronic trading system, at prices which are higher than the previous bid or lower than the previous offer, and withdrawing them before they are executed, in order to give a misleading impression that there is demand for or supply of the *qualifying investment* at that price, and
- (5) buying or selling on the secondary market of *qualifying investments* or related derivatives prior to the auction with the effect of fixing the auction clearing price for the auctioned products at an abnormal or artificial level or misleading bidders in the auctions, other than for legitimate reasons. [Note: Article 1.2(c) *Market Abuse Directive* and Article 36(1) and Article 37(b) *auction regulation*]

...

Descriptions of behaviour that amount to market abuse (manipulating transactions): price positioning

1.6.4 E The following *behaviours* are, in the opinion of the *FSA*, *market abuse (manipulating transactions)* involving securing the price of a *qualifying investment*:

...

- (6) transactions or orders to trade employed so as to create obstacles to the price falling below a certain level, in order to avoid negative consequences for the *issuer*, for example a downgrading of its credit rating; ~~and~~
- (7) trading on one market or trading platform with a view to improperly influencing the price of the same or a related *qualifying investment* that is traded on another *prescribed market*, and
- (8) conduct by a *person*, or *persons* acting in collusion, that secure a dominant position over the demand for a *qualifying investment* which has the effect of fixing, directly or indirectly, auction clearing prices or creating other unfair trading conditions, other than for legitimate reasons. [Note: Article 1.2(c) *Market Abuse Directive* and Article 36(1) and Article 37(b) *auction regulation*]

Factors to be taken into account: “legitimate reasons”

1.6.5 E In the opinion of the *FSA* the following factors are to be taken into account when considering whether *behaviour* is for “legitimate reasons”, and are indications that it is:

- (1) if the *person* has an actuating purpose behind the transaction to induce others to trade in, bid for or to position or move the price of, a

qualifying investment;

- (2) if the *person* has another, illegitimate, reason behind the transactions, bid or order to trade; [**Note:** Recital 20 *Market Abuse Directive* and Article 36(1) *auction regulation*]

...

1.6.6 E In the opinion of the *FSA* the following factors are to be taken into account when considering whether *behaviour* is for “legitimate reasons”, and are indications that it is:

...

- (2) if the transaction is executed in a way which takes into account the need for the market or auction platform as a whole to operate fairly and efficiently;
- (3) ...
- (4) if the transaction complied with the rules of the relevant *prescribed markets or prescribed auction platform* about how transactions are to be executed in a proper way (for example, rules on reporting and executing cross-transactions).

1.6.7 G It is unlikely that the *behaviour* of market or auction platform users when ~~trading~~ dealing at times and in sizes most beneficial to them (whether for the purpose of long term investment objectives, risk management or short term speculation) and seeking the maximum profit from their dealings will of itself amount to distortion. Such *behaviour*, generally speaking, improves the liquidity and efficiency of markets or auction platforms.

...

Factors to be taken into account: behaviour giving a false or misleading impression

1.6.9 E In the opinion of the *FSA*, the following factors are to be taken into account in determining whether or not a *person's behaviour* amounts to *market abuse (manipulating transactions)*: [**Note:** Article 4 2003/124/EC and Article 36(1) auction regulation]

- (1) the extent to which orders to trade given, bids submitted or transactions undertaken represent a significant proportion of the daily volume of transactions in the relevant *qualifying investment* on the *regulated market or prescribed auction platform* concerned, in particular when these activities lead to a significant change in the price of the *qualifying investment*;
- (2) the extent to which orders to trade given, bids submitted or transactions undertaken by *persons* with a significant buying or selling position in a *qualifying investment* lead to significant changes

in the price of the *qualifying investment* or related derivative or underlying asset admitted to trading on a regulated market;

...

...

1.7 Market abuse (manipulation devices)

...

1.7.1A UK Table: section 118(6) of the Act as modified by the RAP Regulations

<p><u>“The fifth [type of behaviour] ... consists of effecting transactions, bids or orders to trade which employ fictitious devices or any other form of deception or contrivance.”</u></p>
--

Descriptions of behaviour that amount to market abuse (manipulating devices)

1.7.2 E The following *behaviours* are, in the opinion of the *FSA*, *market abuse (manipulating devices)*:

- (1) taking advantage of occasional or regular access to the traditional or electronic media by voicing an opinion about a *qualifying investment* (or indirectly about its *issuer, if applicable*) while having previously taken positions on, or submitted bids in relation to, that *qualifying investment* and profiting subsequently from the impact of the opinions voiced on the price of that instrument, without having simultaneously disclosed that conflict of interest to the public in a proper and effective way; [**Note:** Article 1.2 *Market Abuse Directive* and Article 36(1) and Article 37(b)(iii) *auction regulation*]

...

Factors to be taken into account when determining whether or not behaviour amounts to market abuse (manipulating devices)

1.7.3 E In the opinion of the *FSA*, the following factors are to be taken into account in determining whether or not a fictitious device or other form of deception or contrivance has been used, and are indications that it has:

- (1) if orders to trade given, bids submitted or transactions undertaken in *qualifying investments* by *persons* are preceded or followed by dissemination of false or misleading information by the same *persons* or *persons* linked to them;
- (2) if orders to trade are given, bids submitted or transactions are undertaken in *qualifying investments* by *persons* before or after the same *persons* or *persons* linked to them produce or disseminate research or investment recommendations which are erroneous or biased or demonstrably influenced by material interest. [**Note:**

Article 5 2003/124/EC and Article 36(1) *auction regulation*]

...

1.9 Market abuse (misleading behaviour) & market abuse (distortion)

...

1.9.1A UK Table: section 118(8) of the Act as modified by the RAP Regulations

<p><u>“The seventh [type of <i>behaviour</i>] is where the [<i>behaviour</i>] (not [amounting to <i>market abuse (manipulating transactions)</i>], <i>market abuse (manipulating devices)</i> or <i>market abuse (dissemination)</i>]</u></p>	
<p>(a)</p>	<p><u>is likely to give a [<i>regular user</i>] of the auction platform a false or misleading impression as to the supply of, demand for or price or value of, [<i>qualifying investments</i>] [<i>market abuse (misleading behaviour)</i>], or</u></p>
<p>(b)</p>	<p><u>would be, or would be likely to be, regarded by a [<i>regular user</i>] of the auction platform as [<i>behaviour</i>] that would distort, or would be likely to distort, the auction of such an investment [<i>market abuse (distortion)</i>]</u></p>
<p><u>and the behaviour is likely to be regarded by a [<i>regular user</i>] of the auction platform as a failure on the part of the [<i>person</i>] concerned to observe the standard of [<i>behaviour</i>] reasonably expected of a [<i>person</i>] in his position in relation to the market.”</u></p>	

...

Factors to be taken into account: false or misleading impressions

1.9.4 E In the opinion of the *FSA*, the following factors are to be taken into account in determining whether or not *behaviour* is likely to give a *regular user* a false or misleading impression as to the supply of or the demand for or as to the price or value of one or more *qualifying investments* or *related investments*:

- (1) the experience and knowledge of the users of the market or auction platform in question;
- (2) the structure of the market or auction platform, including its reporting, notification and transparency requirements;
- (3) the legal and regulatory requirements of the market or auction platform concerned

...

Factors to be taken into account: standards of behaviour

1.9.5 E In the opinion of the *FSA*, the following factors are to be taken into account in determining whether or not *behaviour* that creates a false or misleading impression as to, or distorts the market or auction platform for, a *qualifying investment* , has also failed to meet the standard expected by a *regular user*:

...

(2) if the transaction is executed in a way which takes into account the need for the market or auction platform as a whole to operate fairly and efficiently; or

(3) the characteristics of the market or auction platform in question, including the users and applicable rules and codes of conduct (including, if relevant, any statutory or regulatory obligation to disclose a holding or position, such as under *DTR 5*);

(4) ...

(5) if the transaction complied with the rules of the relevant *prescribed markets* or prescribed auction platform about how transactions are to be executed in a proper way (for example, rules on reporting and executing cross-transactions); and

...

Annex K

Amendments to the Supervision manual (SUP)

In this Annex, underlining indicates new text and striking through indicates deleted text.

1 The FSA’s approach to supervision

1.1 Application and purpose

...

- 1.1.2 G The *Act* requires the *FSA* to “maintain arrangements designed to enable it to determine whether persons on whom requirements are imposed by or under this Act, or by any directly applicable Community regulation or decision made under *MiFID* or the UCITS Directive or the auction regulation, are complying with them” (paragraph 6(1) of Schedule 1 to the *Act*).

...

2 Information gathering by the FSA on its own initiative

2.1 Application and purpose

...

- 2.1.3 G Achieving the *regulatory objectives* involves the *FSA* informing itself of developments in *firms* and in markets. The *Act* requires the *FSA* to monitor a *firm’s* compliance with requirements imposed by or under the *Act*, or by any directly applicable Community regulation or decision made under *MiFID* or the *UCITS Directive* or the *auction regulation* (paragraph 6(1) of Schedule 1). The *Act* also requires the *FSA* to take certain steps to cooperate with other relevant bodies and regulators (section 354). For these purposes, the *FSA* needs to have access to a broad range of information about a *firm’s* business.

...

3 Auditors

3.1 Application

...

3.1.2R Applicable sections (see SUP 3.1.1R)

(1) Category of firm	(2) Sections applicable to the firm	(3) Sections applicable to its auditor
...		

<u>(7AA) A firm that has exercised an opt in to CASS in accordance with CASS 1.4.9R</u>	<u>SUP 3.1 to SUP 3.7, SUP 3.11</u>	<u>SUP 3.1, SUP 3.2, SUP 3.8, SUP 3.10.</u>
...		

...

10 Approved persons

10.1 Application

...

10.1.13 R Only the following *controlled functions* apply to an *incoming EEA firm* with respect to its *passport activities* carried on from a *branch* in the *United Kingdom*:

...

(6) the *customer function* other than where this relates to the function in SUP 10.10.7A R-(4) and SUP 10.10.7AR(7).

...

Bidders in emissions auctions

10.1.27 G For a firm that is exempt from MiFID under article 2(1)(i) and whose only permission is bidding in emissions auctions, the only controlled functions that apply to it are the governing functions, the money laundering reporting function, the customer function and (where it has exercised an opt-in to CASS in accordance with CASS 1.4.9R and is a CASS medium firm or a CASS large firm) the CASS operational oversight function. This is because the approved persons regime specifies a number of functions by incorporation of requirements in SYSC; however, a firm carrying on auction regulation bidding is only subject to SYSC to a limited extent in relation to that activity. This means that the required functions do not apply to auction regulation bidding, except for the money laundering reporting function. Similarly, the significant management function does not apply in relation to auction regulation bidding because in carrying on that activity, a firm is not subject to SYSC 2.1.1R or SYSC 4.1.1R and is not undertaking proprietary trading (a two-day emissions spot is not a designated investment).

...

10.6 Governing functions

...

What the governing functions include

...

10.6.2A R In respect of *bidding in emissions auctions*, each of the *governing functions* (other than the *non-executive function* and the function described in *SUP 10.6.4R(2)*) includes that part of the *customer function* specified in *SUP 10.10.7AR(7)* (bidder's representative).

10.6.3 G The effect of *SUP 10.6.2R* and *SUP 10.6.2AR* is that a *person* who is *approved* to perform a *governing function* (other than the *non-executive function* and the function described in *SUP 10.6.4R(2)*) will not have to be specifically approved to perform the *systems and controls function*, ~~or~~ the *significant management function* or the part of the *customer function* specified in *SUP 10.10.7AR(7)*. However, a ~~A~~ *person* who is *approved* to perform a *governing function* will have to be additionally approved before he can perform any of the *required functions* or the *customer function* (except the part specified in *SUP 10.10.7AR(7)*).

...

10.8 Systems and control functions

Application

10.8.1-A R The *systems and control function* applies to every *firm* subject to this chapter, except in relation to *bidding in emissions auctions* carried on by a *firm* that is exempt from *MiFID* under article 2(1)(i).

Systems and control ~~functions~~ function (CF28)

10.8.1 R ...

...

10.10 Customer functions

...

10.10.7A R The *customer function* is the function of:

...

(6) acting in the capacity of an *investment manager* and carrying on functions connected to this;

(7) in relation to *bidding in emissions auctions*, acting as a 'bidder's representative' within the meaning of subparagraph 3 of article 6(3) of the *auction regulation*.

10.10.7B R The *customer function* does not extend to an individual who is performing the functions in *SUP 10.10.7AR(1)* to (2) or *SUP 10.10.7AR(5)* to ~~(6)~~ (7) and who is based overseas and who, in a 12 *month* period, spends no more than 30 *days* in the *United Kingdom* to the extent that he is appropriately

supervised by a *person* approved for this function.

...

13 Exercise of passport rights by UK firms

13.1 Application and purpose

...

13.1.3 G This chapter does not apply to:

...

- (3) any insurance activity by way of provision of services which is provided by an *EEA firm* participating in a *community co-insurance operation* otherwise than as *leading insurer*; article 26.2 of the *Second Non-Life Directive* provides that only the *leading insurer* in such an operation is required to complete any passporting formalities (see also article 11 of the *Regulated Activities Order*); ~~or~~
- (4) the marketing of the *units* of a *UCITS scheme* by its *management company* in another *EEA State* under the *UCITS Directive* (see paragraph 20B of Part III of Schedule 3 to the *Act* and *COLL 12.4* (UCITS product passport)); or
- (5) a UK firm in relation to its exercising an EEA right under the auction regulation.

...

13.1.7 G A UK firm is not subject to the requirements in Schedule 3 to the Act in respect of its exercise of an EEA right under the auction regulation to provide services into another EEA state. Accordingly, this chapter does not provide further guidance in relation to the exercise of that EEA right under the auction regulation.

13A Qualifying for authorisation under the Act

13A.1 Application and purpose

...

13A.1.2 G This chapter does not apply to:

...

- (4) a *market operator* that operates a *regulated market* or an *MTF* in an *EEA State* other than the *UK* and wishes to make appropriate arrangements so as to facilitate access to and use of its system by

remote users or participants in the *UK*. See *SUP* App 3.6.25G for guidance; or

- (5) an EEA firm in relation to its exercising an EEA right under the auction regulation.

...

- 13A.1.6 G (1) EEA firms should also note that this chapter does not address the exercise of an EEA right under the auction regulation, other than in (2) below and in Note 1 of the table in SUP 13A Annex 1 (Application of the Handbook to incoming EEA firms).
- (2) An EEA firm which has received authorisation under the auction regulation by its home state regulator under either article 18(2) or (3) qualifies for authorisation under Schedule 3 to the Act and its grant of permission is treated on terms equivalent to those appearing in the authorisation granted by that regulator under article 18 of the auction regulation.

13A Annex 1 Application of the Handbook to Incoming EEA Firms

1. The table below summarises the application of the *Handbook* to an *incoming EEA firm*. Where the table indicates that a particular module of the *Handbook* may apply, its application in relation to any particular activity is dependent on the detailed application provisions in that module. The table does not apply to *incoming ECA providers*. These should refer to *COBS* 1 Annex 1 Part 3 section 7 for guidance on how *COBS* applies to them. The table does not apply to *EEA pure reinsurers* as these *firms* have automatic passport rights on the basis of their *Home State authorisation*. This table also does not apply to an incoming EEA firm in relation to its exercise of an EEA right under the auction regulation, although these firms should be aware that a limited set of requirements in the Handbook apply to them in relation to that EEA right – such as the rules listed in paragraph 2.6A of SYSC 1 Annex 1 and the rules in GEN 4 and SUP – and where these firms are also carrying on MiFID business, the ordinary requirements relating to MiFID business apply.

...

15.3 General notification requirements

...

- 15.3.7A G Although PRIN does not apply to a firm in relation to its carrying on of auction regulation bidding, the FSA expects to be given notice of events that are material to the FSA's supervision of that business and so firms carrying on that business should have regard to the guidance in SUP 15.3.8G to SUP 15.3.10G.

...

- 15.3.11 R (1) A firm must notify the FSA of:

...

- (e) a breach of any requirement in regulation 4C(3) (or any successor provision) of the Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulations 2007; or

- (ea) a breach of a directly applicable provision in the *auction regulation*; or

...

...

...

16 Reporting requirements

...

16.12 Integrated regulatory reporting

16.12.1 G The effect of SUP 16.1.1 R is that this section applies to every *firm* carrying on business set out in column (1) of SUP 16.12.4 R except:

- (1) an *incoming EEA firm* with *permission* for *cross border services* only;

- (1A) an *incoming EEA firm* in relation to its carrying on of *bidding in emissions auctions*;

...

...

16.12.4 R Table of applicable rules containing *data items*, frequency and submission periods

	(1)	(2)	(3)	(4)
RAG number	Regulated Activities	Provisions containing:		
		applicable <i>data items</i>	reporting frequency / period	Due <u>due</u> date
...
<u>RAG 11</u>	<u><i>bidding in emissions auctions</i></u>	<u>SUP 16.12.29AR</u>	<u>SUP 16.12.29AR</u>	<u>SUP 16.12.29AR</u>

...

Regulated Activity Group 11

16.12.29A R A firm must submit the form contained in SUP 16 Annex 31 (Bidding in emissions auctions return) annually within 30 business days from its accounting reference date unless the firm did not carry on any auction regulation bidding during the year to which that form relates.

...

16 R This annex consists only of one or more forms. Forms are to be found
Annex through the following address:

31

Bidding in emissions auctions return – SUP 16 Annex 31

...

Appendix 3 Guidance on passporting issues

3.1 Application

3.1.1 G This appendix applies to all firms when ~~passporting~~ passporting, except for a firm which is only passporting under the auction regulation.

FSA059

Bidding in emissions auctions return

- | | | A |
|---|---|----------|
| 1 | Are you meeting your minimum capital requirement? | yes - no |
| 2 | In carrying on <i>bidding in emissions auctions</i> , have you complied throughout the reporting period, and are you currently compliant, with directly applicable requirements under the <i>auction regulation</i> and related <i>rules</i> in the <i>Handbook</i> ? | yes - no |

Annex L

Amendments to the Dispute Resolution: Complaints sourcebook (DISP)

In this Annex, underlining indicates new text and striking through indicates deleted text.

Part 1: Provisions made by the FSA

1.1 Purpose and application

...

Application to firms

1.1.3 R (1) Subject to DISP 1.1.5R, this ~~This~~ chapter applies to a *firm* in respect of *complaints* from *eligible complainants* concerning activities carried on from an establishment maintained by it or its *appointed representative* in the *United Kingdom*.

...

...

1.1.5 R This chapter does not apply to:

...

(3) an *authorised professional firm* in respect of expressions of dissatisfaction about its *non-mainstream regulated activities*; and

(4) *complaints* in respect of *auction regulation bidding*.

...

1 Annex 2G Application of DISP 1 to type of respondent / complaint

...

Type of respondent / <u>complaint</u>	DISP 1.2 Consumer awareness rules	DISP 1.3 Complaints handling rules	DISP 1.4 - 1.8 Complaints resolution rules etc.	DISP 1.9 Complaints record rule	DISP 1.10 Complaints reporting rules	DISP 1.10A Complaints data publication rules
...						
<i>VJ participant</i>	...					
<u><i>complaints relating to auction</i></u>	<u>Does not apply</u>	<u>Does not apply</u>	<u>Does not apply</u>	<u>Does not apply</u>	<u>Does not apply</u>	<u>Does not apply</u>

<u>regulation bidding</u>						
---------------------------	--	--	--	--	--	--

...

2.3 To which activities does the Compulsory Jurisdiction apply?

Activities by firms

2.3.1 R The *Ombudsman* can consider a *complaint* under the *Compulsory Jurisdiction* if it relates to an act or omission by a *firm* in carrying on one or more of the following activities:

(1) *regulated activities* (other than *auction regulation bidding*);

...

...

Schedule 6 Rules that can be waived

Sch 6.1 G As a result of regulation 10 of the Regulatory Reform (Financial Services and Markets Act 2000) Order 2007 (SI 2007/1973) the *FSA* has power to waive all its *rules*, other than *rules* made under section 247 (Trust scheme rules) or section 248 (Scheme particulars rules) of the *Act*. However, if the *rules* incorporate requirements laid down in European directives or European Regulations, it will not be possible for the *FSA* to grant a waiver that would be incompatible with the *United Kingdom's* responsibilities under those directives or Regulations.

Part 2: Provisions made by the FOS

2.5 To which activities does the Voluntary Jurisdiction apply?

2.5.1 R The *Ombudsman* can consider a *complaint* under the *Voluntary Jurisdiction* if:

...

(2) it relates to an act or omission by a *VJ participant* in carrying on one or more of the following activities:

...

(c activities (apart from *auction regulation bidding*) which (at 30 April 2011 [~~date of coming into force of the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2012]~~) were *regulated activities* or would be *regulated activities* if they were carried on from an establishment in the *United Kingdom* (these activities are listed in *DISP 2 Annex 1G*);

...

2 Annex 1G **Regulated activities for the Voluntary Jurisdiction at ~~30 April 2011~~ [date of coming into force of the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2012]**

G The activities which (at ~~30 April 2011~~ [date of coming into force of the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2012]) were *regulated activities* for the *Voluntary Jurisdiction* were, in accordance with section 22 of the *Act* (The classes of activity and categories of investment), any of the following activities specified in Part II of the *Regulated Activities Order*:

...

(6) *dealing in investments as agent* (article 21);

(6A) *bidding in emissions auctions* (article 24A) (apart from *auction regulation bidding*);

...

...

Annex M

Amendments to the Recognised Investment Exchanges and Recognised Clearing Houses sourcebook (REC)

In this Annex, underlining indicates new text and striking through indicates deleted text.

2A.3 Guidance on RAP recognition requirements

...

2A.3.2 G ...

Table: Guidance on RAP recognition requirements

Column A <i>REC 2 guidance which applies to an RAP</i>	Column B Modification to <i>REC 2</i> guidance for an <i>RAP</i>	Column C Relevant <i>RAP</i> recognition requirement
...		
<i>REC 2.12.11G to REC 2.12.12G</i> (Availability of relevant information)	<p><i>REC 2.12.11G to REC 2.12.12G</i> are replaced with the following for an <i>RAP</i>:</p> <p><i>REC 2.12.11G</i></p> <p>In determining whether appropriate arrangements have been made to make <i>relevant information</i> available to <i>persons</i> engaged in dealing in <i>emissions auction products</i>, the <i>FSA</i> may have regard to:</p> <p>(1) the extent to which auction bidders are able to obtain information in a timely fashion about the terms of those <i>emissions auction products</i> and the terms on which they will be auctioned, either through accepted channels for dissemination of information or through other regularly and widely accessible communication media;</p> <p>(2) what restrictions, if any, there are on the dissemination of <i>relevant information</i> to auction bidders; and</p> <p>(3) whether <i>relevant information</i> is, or can be, kept to restricted groups of persons in such a way as to facilitate or encourage</p>	Reg 17(2)(c)

	<p><i>market abuse.</i></p> <p><i>REC 2.12.12G</i></p> <p>An <i>RAP</i> does not need to maintain its own arrangements for providing information on the terms of <i>emissions auction products</i> to auction bidders where it has made adequate arrangements for other persons to do so on its behalf or there are other effective and reliable arrangements for this purpose.</p>	
...		

3 Notification rules for UK recognised bodies

...

3.18 Membership

...

3.18.3 R Where a *UK recognised body* admits for the first time a *member* whose head or registered office is in a jurisdiction from which that *UK recognised body* has not previously admitted *members*, it must immediately give the *FSA* notice of that event, and:

...

- (2) the name of any regulatory authority in that jurisdiction which regulates that *member* in respect of activities relating to *specified investments* or (for an *RAP*) relating to *emissions auction products*; and

...

...

5 Applications for Recognition (UK recognised bodies)

...

5.2 Application process

...

5.2.14 G Information and supporting documentation (see *REC 5.2.4G*).

...	
-----	--

(3)	Details of the <i>facilities</i> which the applicant plans to operate, including details of the trading platform or (for an <i>RAP</i>) <i>auction platform</i> , settlement arrangements, clearing services and <i>custody</i> services which it plans to supply. An applicant for <i>RAP</i> status must provide details on the relationship between the <i>auction platform</i> and any secondary market in <i>emissions auction products</i> which it operates or plans to operate.
...	

...

Annex N

Amendments to the Listing Rules sourcebook (LR)

In this Annex, underlining indicates new text and striking through indicates deleted text.

Appendix 1.1 Relevant definitions

...

specified investment any of the following *investments* specified in Part III of the *Regulated Activities Order* (Specified Investments):

... ..

(i) *stakeholder pension scheme* (article 82)

(ia) *emissions auction product* (article 82A):

...

...

Annex O

Amendments to the Perimeter Guidance manual (PERG)

In this Annex, underlining indicates new text and striking through indicates deleted text.

2.4 Link between activities and the United Kingdom

...

2.4.3 G Section 418 of the *Act* (Carrying on regulated activities in the United Kingdom) takes this one step further. It extends the meaning that ‘in the *United Kingdom*’ would ordinarily have by setting out five additional cases. The *Act* states that, in these five cases, a *person* who is carrying on a *regulated activity* but who would not otherwise be regarded as carrying on the activity in the *United Kingdom* is, for the purposes of the *Act*, to be regarded as carrying on the activity in the *United Kingdom*.

- (1) The first case is where a *UK-based person* carries on a *regulated activity* in another *EEA State* in exercise of rights under a *Single Market Directive* or the *auction regulation*.

...

...

2.6 Specified investments: a broad outline

...

Greenhouse gas emissions allowances

2.6.19D G This *specified investment* comprises *emissions allowances* that are auctioned as *financial instruments* or *two-day emissions spots* (together, *emissions auction products*).

2.6.19E G It relates only to the *regulated activity* of *bidding in emissions auctions* (whereby a bid is received, transmitted and submitted on an *auction platform*) and captures the two forms of allowance products that may be auctioned under article 4(2) of the *auction regulation*: a ‘two-day spot’ or a ‘five-day future’. Recital 14 of the *auction regulation* explains that a ‘two-day spot’ is not a *financial instrument* whereas a ‘five-day future’ is (see *PERG* 13.4, Q34).

2.6.19F G For the purposes of the *RAO*, this *specified investment* is not a *security*, *contractually-based investment* or a *relevant investment*.

2.6.19G G The terms used in this *specified investment* incorporate definitions from other *EU* directives or regulations which can be summarised as follows:

- (1) “Emissions allowance” means an ‘allowance’ as defined in article 3(a) of Directive 2003/87/EC which established the scheme for greenhouse gas emissions allowance trading within the EU. That article provides that an ‘allowance’ is an allowance to emit one tonne of carbon dioxide equivalent during a specified period, only valid for the purpose of meeting the requirements of that directive and only transferable in accordance with the provisions of that directive (emissions allowance).
- (2) A ‘two-day spot’ is defined by reference to article 3(3) of the auction regulation. That article provides that a ‘two-day spot’ is an allowance auctioned for delivery at an agreed date no later than the second trading day from the day of the auction (two-day emissions spot).
- (3) A financial instrument is defined in the RAO as any instrument listed in Section C of Annex I to MiFID. As explained in PERG 2.6.19EG, if an auction product is not a ‘two-day spot’, it must instead be a ‘five-day future’ which is defined in article 3(4) of the auction regulation as an allowance auctioned as a financial instrument for delivery at an agreed date no later than the fifth trading day from the day of the auction.

...

2.7 Activities: a broad outline

...

Bidding in emissions auctions

- 2.7.6B G The regulated activity of bidding in emissions auctions can only be undertaken by three types of firm: an investment firm to which MiFID applies, a BCD credit institution and a firm that is exempt from MiFID under article 2(1)(i) (further information on the article 2(1)(i) exemption from MiFID is in PERG 13.5, Q44) . Other types of person are either ineligible to apply to an auction platform for admission to bid under article 18 of the auction regulation (which sets out an exhaustive list of those able to bid in auctions) or are able to apply for admission to bid without a requirement for authorisation.
- 2.7.7C G Article 24A(2) of the RAO provides that bidding in emissions auctions does not form part of any other regulated activity and so, although in the FSA’s view this activity broadly equates to the regulated activities of dealing in investments as principal, dealing in investments as agent, arranging (bringing about) deals in investments or making arrangements with a view to transactions in investments, a firm seeking to carry on this activity will require specific permission to do so.

2.7.7D G None of the exclusions set out in the RAO apply to the activity of *bidding in emissions auctions*. However the activity does not include where an *investment firm to which MiFID applies* or a *BCD credit institution bids in emissions auctions for its own account*.

...

2.8 Regulated activities: exclusions applicable in certain circumstances

...

Dealing in investments as principal

2.8.4 G The *regulated activity of dealing in investments as principal* applies to specified transactions relating to any security or to any *contractually based investment* (apart from rights under *funeral plan contracts* or rights to or interests in such contracts). The activity is cut back by exclusions as follows.

...

(7) An activity that might otherwise be both *dealing in investments as principal* and *bidding in emissions auctions* is specifically excluded from *dealing in investments as principal* as a result of article 24A(2) of the RAO which provides that the activity of *bidding in emissions auctions* does not form part of any other *regulated activity* (see PERG 2.7.7CG).

...

Dealing in investments as agent

2.8.5 G The *regulated activity of dealing in investments as agent* applies to specified transactions relating to any *security* or to any *relevant investment* (apart from rights under *funeral plan contracts* or rights to or interests in such rights). In addition, the activity is cut back by exclusions as follows.

...

(4) An activity that might otherwise be both *dealing in investments as agent* and *bidding in emissions auctions* is specifically excluded from *dealing in investments as agent* as a result of article 24A(2) of the RAO which provides that the activity of *bidding in emissions auctions* does not form part of any other *regulated activity* (see PERG 2.7.7CG).

...

...

Arranging deals in investments and arranging a home finance transaction

...

2.8.6A G The exclusions in the *Regulated Activities Order* that relate to the various *arranging* activities are as follows.

(-1) Under Article 24A(2), an activity that would otherwise be both *arranging* and *bidding in emissions auctions* is specifically excluded from *arranging* because the activity of *bidding in emissions auctions* does not form part of any other regulated activity (see PERG 2.7.7CG).

(1) ...

...

...

2.9 Exclusions applicable to particular regulated activities

2.9.1 G The various exclusions outlined below deal with a range of different circumstances.

(1) Each set of circumstances described in PERG 2.9.3G to PERG 2.9.17G has some application to several *regulated activities* relating to *securities*, *relevant investments* or *home finance transactions*. They have no effect in relation to the separate *regulated activities* of *accepting deposits*, *issuing electronic money*, *effecting or carrying out contracts of insurance*, *bidding in emissions auctions*, *advising on syndicate participation at Lloyd's*, *managing the underwriting capacity of a Lloyd's syndicate as a managing agent at Lloyd's* or *entering as provider into a funeral plan contract*. Within each set of circumstances, the *Regulated Activities Order*, in Chapter XVII of Part II of the Order, makes separate provision for each *regulated activity* affected. This is necessary because each exclusion has to be tailored to reflect the different nature of the *regulated activity* involved and the different language required (for example, some activities involve entering directly into transactions while others relate to the provision of services).

...

...

2.10 Persons carrying on regulated activities who do not need authorisation

...

Members of the professions

...

2.10.14 G The *regulated activities* that may be carried on in this way are restricted by an Order made by the Treasury under section 327(6) of the *Act* (Exemption from the general prohibition) (the *Non-Exempt Activities Order*). Accordingly, under that section, a *person* may not by way of business carry on any of the following activities without *authorisation*:

...

(3) ...

(3A) *bidding in emissions auctions*;

...

...

2 Annex 2G Regulated activities and the permission regime

...

2 Table

Table 1: Regulated Activities [See note 1 to Table 1]

Regulated activity	Specified investment in relation to which the regulated activity (in the corresponding section of column one) may be carried on
--------------------	---

...

...

Bidding in emissions auctions

(ac) bidding in emissions auctions

emissions auction products

...

...

Designated investment business [see notes 1A, ~~and 1B~~ and 1C to Table 1]

...

...

...

Note 1C:

Although *MiFID business bidding* (part of *bidding in emissions auctions*) is *designated investment business*, it is not separately listed in this table under *designated investment business* because *bidding in emissions auctions* is already referred to above.

...

13 Guidance on the scope of the Markets in Financial Instruments Directive and the recast Capital Adequacy Directive

...

13.3 Investment services and activities

...

Q12A. We carry out the activity of bidding in emissions auctions. Is this a MiFID service or activity?

Article 6(5) of the *auction regulation* deems an *investment service or activity* the reception, transmission and submission of a bid for a *financial instrument* (the ‘five-day future’ auction product – see *PERG 2.6.19GG(3)*) on an *auction platform* by an *investment firm* to which *MiFID* applies or a *BCD credit institution*. It does not specify which *investment service or activity*. In the *FSA*’s view, it is likely to be the reception and transmission of orders in relation to one or more *financial instruments*, *execution of orders on behalf of clients* or *dealing on own account*.

As a result of some of *bidding in emissions auctions* being *MiFID business*, the *regulated activity* is divided for the purposes of the *Handbook*, and the different requirements that apply, into two parts: *MiFID business bidding* and *auction regulation bidding*.

Q13. When might we be receiving and transmitting orders in relation to one or more financial instruments? (A1 and recital 20)

...

If you are party to a transaction as agent for your client or commit your client to it, you may be doing more than receiving and transmitting orders and will need to consider whether you are providing the investment service of executing orders on behalf of clients.

Where you are receiving, transmitting and submitting bids on an *auction platform* in relation to *financial instruments* on behalf of your clients, you may be receiving and transmitting orders in relation to one or more *financial instruments*.

...

Q15. When might we be executing orders on behalf of clients? (A2, article 4.1(5) and recital 21)

When you are acting to conclude agreements to buy or sell one or more MiFID financial instruments on behalf of clients. You will be providing this investment service if you participate in the execution of an order on behalf of a client, as opposed simply to arranging the relevant deal. In our view, you can execute orders on behalf of clients either when dealing in investments as agent (by entering into an agreement in the name of your client or in your own name, but on behalf of your client) or, in some cases, by dealing in investments as principal (for example by back-to-back or riskless principal trading).

Where you bid on behalf of your *client* on an *auction platform* for a *financial instrument*, you may be executing orders on behalf of clients.

Q16. What is dealing on own account? (A3 and article 4.1(6))

...

Where you bid for your own account on an *auction platform* for a *financial instrument*, you may be dealing on own account.

...

13.4 Financial instruments

...

Q34. Are there any other derivatives subject to MiFID regulation?

There is a miscellaneous category of derivatives in C10, which is supplemented by articles 38 and 39 of the *MiFID Regulation*. These relate to:

...

- ~~emission~~ emissions allowances;

...

C10 derivative must also meet at least one of the following criteria:

...

In relation to *emissions auction products*, recital 14 together with the definitions of ‘two-day spot’ and ‘five-day future’ in article 3(3) and 3(4) of the *auction regulation*, indicate that a ‘five-day future’ (one of two forms of auction product permitted under the *auction regulation*) falls within this category of derivative.

...

13 Annex 2

Table 1 - MiFID Investment services and activities and the Part IV permission regime

MiFID Investment Services and Activities	Part IV permission	Comments
<p>A1- Reception and transmission of orders in relation to one or more financial instruments</p>	<p>Arranging (bringing about) deals in investments (article 25(1) <i>RAO</i>):</p> <p><u>Bidding in emissions auctions (article 24A <i>RAO</i>)</u></p>	<p>This was an ISD service.</p> <p>Generally speaking, only firms with permission to carry on the activity of arranging (bringing about) deals in investments in relation to securities and contractually based investments which are financial instruments can provide the service of reception and transmission. This is because a service must bring about the transaction if it is to amount to reception and transmission of orders.</p> <p>The activity of arranging (bringing about) deals in investments is wider than A1, so a firm carrying on this regulated activity will not always be receiving and transmitting orders.</p> <p>See <u>Q12A</u>, Q13 and Q14 for further guidance.</p>

<p>A2- Execution of orders on behalf of clients</p>	<p>Dealing in investments as agent (article 21 <i>RAO</i>)</p> <p>Dealing in investments as principal (article 14 <i>RAO</i>)</p> <p><u>Bidding in emissions auctions (article 24A <i>RAO</i>)</u></p>	<p>This was an ISD service.</p> <p>Usually, where a firm executes orders on behalf of clients it will need permission to carry on the activity of dealing in investments as agent. Where a firm executes client orders on a true back-to-back basis or by dealing on own account, it also needs permission to carry on the activity of dealing in investments as principal.</p> <p>See <u>Q12A</u> and <u>Q15</u> for further guidance.</p>
<p>A3- Dealing on own account</p>	<p>Dealing in investments as principal (article 14 <i>RAO</i>)</p>	<p>Dealing on own account falls within the ISD, but only where a service is provided. Under MiFID, dealing on own account is caught even if no service is provided. Where a firm is dealing on own account, it needs permission to carry on the activity of dealing in investments as principal.</p> <p>See <u>Q12A</u> and <u>Q16</u> for further guidance.</p>
<p>...</p>	<p>...</p>	<p>...</p>
<p>Note: <u>The activity of <i>bidding in emissions auctions</i> can form part of A1, A2 or A3. In terms of the permission regime, <i>bidding in emissions auctions</i> does not form part of any other <i>regulated activity</i> (see <i>PERG 2.7.7CG</i>) and so a firm must have a separate permission to undertake that activity.</u></p>		

Table 2: MiFID financial instruments and the Part IV permission regime

<p>MiFID financial instrument</p>	<p>Part IV permission category</p>	<p>Commentary</p>
<p>...</p>	<p>...</p>	<p>...</p>

<p>C10- Options, futures, swaps, forward rate agreements and any other derivative contracts relating to climatic variables, freight rates, emission allowances or inflation rates or other official economic statistics that must be settled in cash or may be settled in cash at the option of one of the parties (otherwise than by reason of a default or other termination event), as well as any other derivative contracts relating to assets, rights, obligations, indices and measures not otherwise mentioned in this Section, which have the characteristics of other derivative financial instruments, having regard to whether, inter alia, they are traded on a regulated market or an MTF, are cleared and settled through recognised clearing houses or are subject to regular margin calls.</p>	<p>option (excluding commodity option and option on a commodity future)</p> <p>future (excluding a commodity future and a rolling spot forex contract)</p> <p>contract for differences (excluding spread bet and rolling spot forex contract)</p> <p>spread bet</p> <p><u>emissions auction product</u></p>	<p>C10 is supplemented by Level 2 measures (see articles 38 and 39 of the <i>MiFID Regulation</i>) and comprises miscellaneous derivatives.</p> <p>For further guidance see Q34.</p>
<p>...</p>		

...

13 Annex 4 Principal Statutory Instruments relating to MiFID scope issues

1. The Financial Services and Markets Act 2000 (Regulated Activities) (Amendment No. 3) Order 2006 [SI 2006 No. 3384]
2. The Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulations 2007 [SI 2007 No 126]
3. The Financial Services and Markets Act 2000 (Markets in Financial Instruments) (Modification of Powers) Regulations 2006 [SI 2006 No 2975]
4. The Financial Services and Markets Act 2000 (Appointed Representatives) (Amendment) Regulations 2006 [SI 2006 No 3414]

5. The Financial Services and Markets Act 2000 (Exemption) (Amendment) Order 2007 [SI 2007 No 125]

6. The Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2012 [SI 2012 No []]

Annex P

Amendments to the Enforcement Guide (EG)

In this Annex, underlining indicates new text and striking through indicates deleted text.

Prohibition orders and withdrawal of approval – approved persons

...

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

...

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

(a) ...

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

...

...

10 Injunctions

...

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

...

The FSA's choice of powers

...

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

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

...

...

Other relevant powers

- 11.8 The FSA may apply to the court for an *injunction* if it appears that a *person*, whether *authorised* or not, is reasonably likely to breach a requirement of the *Act* or any directly applicable Community regulation or decision under *MiFID* or the *UCITS Directive* or the *auction regulation*, or engage in *market abuse*. It can also apply for an *injunction* if a *person* has breached a requirement of the *Act* or any directly applicable Community regulation under *MiFID* one of those requirements or has engaged in *market abuse* and is likely to continue doing so.
- 11.9 The FSA may consider taking action for a financial penalty or *public censure*, as well as seeking restitution, if a *person* has breached a relevant requirement of the *Act* or any directly applicable Community regulation or decision under *MiFID* or the *UCITS Directive* or the *auction regulation*, or has engaged in, or *required or encouraged* others to engage in, *market abuse*.

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