

CP13/6^{★★}

Financial Services Authority

Regulatory reform:

FCA Handbook amendments relating to the
Enforcement Guide

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The Financial Services Authority invites comments on this Consultation Paper. Comments should reach us by 1 March 2013.

Comments may be sent by electronic submission using the form on the FSA's website at: www.fsa.gov.uk/Pages/Library/Policy/CP/2013/cp13-06-response.shtml.

Alternatively, please send comments in writing to:

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It is the FSA's policy to make all responses to formal consultation available for public inspection unless the respondent requests otherwise. A standard confidentiality statement in an email message will not be regarded as a request for non-disclosure.

Despite this, we may be asked to disclose a confidential response under the Freedom of Information Act 2000. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by the Information Commissioner and the Information Rights Tribunal.

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

CP	Consultation Paper
DEPP	The Decision Procedure and Penalties Manual
EG	The Enforcement Guide
FCA	Financial Conduct Authority
FSA	Financial Services Authority
FSMA	Financial Services and Markets Act 2000
LCO	Legal Cutover (1 April 2013)
PRA	Prudential Regulation Authority
The 2012 Act	Financial Services Act 2012

1

Overview

- 1.1** This Consultation Paper (CP) is part of a series of papers setting out proposed changes to the regulatory requirements needed to create the new rulebooks and policies for the Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA). We intend these changes to be in place when the new regulators acquire their legal powers on 1 April 2013.

Regulatory reform and changes to existing requirements

- 1.2** The background to the proposed changes has been set out in a series of CPs and a number of other papers published over recent months by the government, the FSA and the Bank of England.¹
- 1.3** The Financial Services Act 2012 (the 2012 Act), and the necessary secondary legislation that will support it, establishes the new UK regulatory architecture. This includes creating the PRA and the FCA.
- 1.4** The PRA, a subsidiary of the Bank of England, will prudentially supervise deposit takers, insurers and a small number of significant investment firms. The FCA will regulate conduct in retail and wholesale markets; supervise the trading infrastructure that supports those markets; and prudentially regulate firms not regulated by the PRA.
- 1.5** The 2012 Act proposes changes to a number of existing Acts of Parliament, most notably the Financial Services and Market Act 2000 (FSMA), the Bank of England Act 1998 and the Banking Act 2009.
- 1.6** The FSA is helping the FCA and PRA create their new rulebooks, which will come into effect when the new regulators acquire their legal powers on 1 April 2013 – a point we refer to as ‘legal cutover’ (LCO). The overall approach to amending the rulebook ready for LCO is based on only making the changes that are required properly to implement

¹ Please see the FSA's webpages on regulatory reform at www.fsa.gov.uk/about/what/reg_reform.

the 2012 Act and support the creation of the new regulatory structure. This approach aims to control the degree of change for the regulators and firms at LCO.

- 1.7 As we have explained in the previous regulatory reform CPs, a key element of this approach is that when the FCA and PRA acquire their new powers, provisions in the existing FSA Handbook will be adopted, or ‘designated’ by the FCA, the PRA or by both regulators, to form the basis of the new FCA and PRA rulebooks. There is more information in our ‘One Minute Guide’ to designation.²
- 1.8 In addition to designation, some more substantive changes to the existing FSA Handbook are needed to align the new rulebooks with the future objectives and functions of the FCA and PRA, as set out in the 2012 Act, and the resulting adjustments to the regulatory procedures of the new regulators. It is mainly this category of substantive changes that we are consulting on here.

Structure of this Consultation Paper

- 1.9 Chapter 2 explains our proposed amendments to the existing FSA Enforcement Guide (EG) to create the new FCA Enforcement Guide, to reflect new powers being introduced by the 2012 Act and support the creation of a new regulatory structure. The changes we propose in this CP will supplement the provisions in the existing EG that will be carried forward by the FCA by means of ‘designation’ (see above), updated as necessary.
- 1.10 We will publish a further CP before LCO covering our policy proposals for the FCA’s use of the power under amended FSMA s391(1) to publish such information about the matter to which a warning notice relates as it considers appropriate.
- 1.11 The proposed amended FCA EG text in the Appendix to this paper does not reproduce all the relevant EG chapters in full, but only those provisions that are wholly new or substantively changed from the existing FSA EG. In addition, for clarity, we have set out the intended designation of the provisions in the Appendix and also indicated this against each provision in the draft EG text. We are not formally consulting on the proposed designation of the individual provisions, only on the content of the changes.

Minor amendments

- 1.12 As with the previous regulatory reform policy proposals, we need to make some associated minor amendments to the existing EG. These include (but are not limited to):
- replacing references to the ‘FSA’ with references to the FCA or the appropriate regulator as relevant;

² www.fsa.gov.uk/smallfirms/resources/one_minute_guides/about_fsa/handbook-pra-fca.shtml

- updating references to the FSA's website, address, departments, teams or contact details to give the website, address or contact details of the FCA, as appropriate; and
- updating cross-references to other parts of the FCA's Handbook, to FSMA or to other legislation, where changes to numbering or headings have occurred.

1.13 For the EG provisions included in this CP, we have already applied as many of these minor changes as we can, so readers can understand all the proposed changes to each section. We have not updated all cross references to the new provisions included in this CP. We will do this when the instruments are made, without consultation.

Timetable and next steps

1.14 Comments on this CP should reach us by 1 March 2013. We will review all responses, and the FCA will issue final rule instruments and Policy Statements once it acquires its legal powers.³ Feedback on previous consultations will also be published.

1.15 Our rules and guidance may be affected by the finalisation of the secondary legislation that has not yet been agreed. If any aspects have a significant policy effect on proposed FCA EG text on which we have already consulted, we may need to re-consult on some points.

1.16 We intend to publish a designated version of the existing Handbook before LCO, to show how we are moving the Handbook contents to the PRA and FCA.

Equality and diversity

1.17 We have considered whether equality and diversity issues arise from the proposals in this CP. We have concluded that the proposals do not give rise to discrimination and are of low relevance to the equality agenda.

1.18 We would welcome your comments on any equality and diversity issues you believe arise from our proposals.

Competition duty

1.19 Without compromising its consumer protection or integrity objective, the FCA must discharge its general functions (including rule-making guidance and general policies) in a way which promotes effective competition in the interests of consumers (section 1B(4) of FSMA). In proposing the amendments to the Enforcement Guide set out in this paper, we have had regard to this competition duty.

³ Where other FSA consultations also cover changes to these Handbook provisions or sections, unrelated to regulatory reform, we will reconcile the various changes when appropriate.

Who should read this Consultation Paper?

- 1.20 This paper should be read by all financial services firms.

2

Amendments to the Enforcement Guide

Introduction

- 2.1 The Enforcement Guide (EG) describes the FSA's approach to exercising the main enforcement powers given to it by FSMA and by other legislation and will be adopted by the FCA at LCO, subject to the changes explained in this Chapter. The text of the proposed amendments is set out at Appendix 1.
- 2.2 We will publish a further consultation paper before LCO covering our policy proposals for the FCA's use of the power under amended FSMA s391(1) to publish such information about the matter to which a warning notice relates.

Overview of Bill changes

- 2.3 As EG sets out the FSA's approach to exercising its enforcement powers, we will need to make some changes to reflect the new powers the 2012 Act introduces and to support the creation of a new regulatory structure, eg:
- a) the disciplinary powers described in Chapter 6 of CP12/37;
 - b) the powers to appoint skilled persons; and
 - c) the changes to the FCA's own-initiative powers.
- 2.4 We are making the minimum amendments necessary to reflect these and other changes.

Summary of key Handbook changes

Disciplinary powers

- 2.5 We propose to add references to the new statements of policy that the FCA will be required to prepare and publish to the existing list of statements in EG 1.2. We also propose to add references to the FCA's new disciplinary powers to the list in EG 7.2. We have taken the opportunity to update the list by adding references to the existing suspension and restriction powers regarding firms and approved persons, as well as adding a cross-reference to DEPP 6A in EG 7.4.
- 2.6 We propose to add references to the new statements of procedures that the FCA will be required to prepare and publish under amended FSMA s. 395 to EG 1.2(5).
- 2.7 We also propose to add an additional paragraph in Chapter 15 (Disqualification of auditors and actuaries) and to amend EG 6.20 to reflect the FCA's disciplinary powers regarding auditors and actuaries.

Skilled persons reports

- 2.8 Chapter 3 explains how the FCA will use the information-gathering powers it will have under FSMA. We propose several changes to Chapter 3 to reflect that the FCA will have a power under:
- amended FSMA s. 166 to appoint a skilled person directly; and
 - a power under amended FSMA s. 166A to appoint a skilled person where it considers that an authorised person has breached a requirement to collect information, or keep it up-to-date.
- 2.9 In both cases, additional guidance on using these new powers will appear in SUP 5.

Own-initiative powers

- 2.10 Chapter 8 explains how the FCA will exercise its own-initiative powers. Part 4A is the new part of FSMA detailing requirements for permissions to carry on regulated activities. Part 4A replicates the current Part IV section of FSMA but with modifications to reflect the new regulatory structure – notably the creation of the FCA and the PRA. We propose to amend Chapter 8 to take account of these changes. We also propose to amend EG 1.1, EG 2.16, and EG 6.12 to reflect them.

Cancelling approval of primary information providers

- 2.11** Chapter 18 currently refers to the power to cancel the approval of sponsors. We propose to add similar provisions to refer to the corresponding power to cancel the approval of PIPs.

Other changes

- 2.12** We propose some amendments to reflect that there will, from LCO, be two separate regulators, and that the PRA and FCA will cooperate and share information in the course of their business, including, in appropriate cases, conducting joint investigations into the same misconduct. We have introduced new paragraphs at EG 2.15A, EG 4.34-4.35, EG 9.14A and EG 9.22A.
- 2.13** We propose changes to reflect that staff from the Enforcement Division shall work more closely with staff from FCA Supervision before and after a matter is formally referred for investigation (EG 4.12 and 4.14).
- 2.14** We propose to update the section on the use of the Principles for Businesses enforcement cases (EG 2.18-2.19).
- 2.15** We propose to update EG to reflect any changes to the underlying statutory language (e.g. changes to section 391(6) and the definition of ‘relevant requirement’).
- 2.16** We also propose removing references in EG 19 (Non-FSMA powers) to powers that will no longer be exercised by the FCA.

Q1: Do you have any comments on these proposed changes to EG?

Annex 1

List of questions

Q1: Do you have any comments on these proposed changes to EG?

Appendix 1

Draft Handbook text

LEGAL CUTOVER ENFORCEMENT GUIDE INSTRUMENT 2013

Powers exercised by the Financial Conduct Authority

- A. The Financial Conduct Authority makes this instrument in the exercise of its power under section 139A (Power of the FCA to give guidance) and related provisions of the Financial Services and Markets Act 2000.

Commencement

- B. This instrument comes into force on 1 April 2013.

Amendments to the Enforcement Guide

- D. The Enforcement Guide (EG) is amended in accordance with the Annex to this instrument.

Citation

- E. This instrument may be cited as the Legal Cutover Enforcement Guide Instrument 2013.

Made by order of the Board of the Financial Conduct Authority
[*date*]

Annex

Amendments to the Enforcement Guide (EG)

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

1. Introduction

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

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

...

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

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

...

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

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

- (4B) section 312J requires the *FCA* to publish a statement of its policy on the imposition, and amount, of financial penalties on *recognised investment exchanges* under section 312F of the *Act*;
- (4C) section 345D requires the *FCA* to publish a statement of its policy on the imposition, and amount, of financial penalties on auditors and *actuaries* under sections 249 and 345 of the *Act*; and
- (5) section 395 requires the ~~FSA~~ *FCA* to issue a statement of procedures relating to:
 - (a) the giving of *supervisory notices*, *warning notices* and *decision notices*;
 - (b) the giving of consent to the *PRA* in respect of applications made to the *PRA* for *Part 4A permission*, variation of *Part 4A permission* and approval to hold *controlled functions*; and
 - (c) the publishing of information about matters to which certain *warning notices* relate.

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

...

2. ~~The FSA~~ *FCA*'s approach to enforcement

2.1 The ~~FSA~~ *FCA*'s effective and proportionate use of its enforcement powers plays an important role in the pursuit of its ~~regulatory~~ *statutory objectives*, ~~including its operational objectives of securing an appropriate degree of~~ protecting protection for consumers, maintaining confidence in protecting and enhancing the integrity of the *UK financial system*, financial stability and reducing *financial crime* and promoting effective competition in the interests of consumers. For example, using enforcement helps to contribute to the protection of *consumers* and to deter future contraventions of ~~FSA~~ *FCA* and other applicable requirements and *financial crime*. It can also be a particularly effective way, through publication of enforcement outcomes, of raising awareness of regulatory standards.

...

2.15 ...

Investigations into *PRA*-authorised persons

2.15A A need for a joint investigation with the *PRA* may arise where either the *FCA* or the *PRA* identifies circumstances which suggest that a *firm* or individual has committed misconduct that adversely affects both regulators' *statutory objectives*. In such

cases, the regulators will determine whether they should carry out separate but coordinated investigations, or whether it would be more appropriate for one of the regulators to carry out an investigation, keeping the other informed. (See also EG 4.34 to EG 4.35).

Assisting overseas regulators

- 2.16 The ~~FSA~~ FCA views co-operation with its overseas counterparts as an essential part of its regulatory functions. Section ~~354~~ 354A of the *Act* imposes a duty on the ~~FSA~~FCA to take such steps as it considers appropriate to co-operate with others who exercise functions similar to its own. This duty extends to authorities in the UK and overseas. In fulfilling this duty the ~~FSA~~ FCA may share information which it is not prevented from disclosing, including information obtained in the course of the ~~FSA's~~ FCA's own investigations, or exercise certain of its powers under Part XI of the *Act*. Further details of the ~~FSA's~~ FCA's powers to assist overseas regulators are provided at *EG* 3.12 – 3.15 (Investigations to assist overseas authorities), *EG* 4.8 (Use of statutory powers to require the production of documents, the provision of information or the answering of questions), *EG* 4.25 – 4.27 (Interviews in response to a request from an overseas regulator), and *EG* 8.18 – 8.25 (Exercising the power under section ~~47~~ 55Q to vary or cancel a firm's ~~part IV~~ Part 4A permission, or to impose requirements, in support of an overseas regulator). The ~~FSA's~~ FCA's statement of policy in relation to interviews which representatives of overseas regulators attend and participate in is set out in *DEPP* 7.

...

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

- 2.18 The ~~FSA's~~ FCA's approach to regulation involves a combination of high-level principles and detailed *rules* and *guidance*. ~~While this broad structure is both necessary and desirable, the FSA is moving towards a more principles-based approach. This is because the FSA believes an approach that is based less on detailed rules and that focuses more on outcomes will allow it to achieve its regulatory objectives in a more efficient and effective way. The FSA regards the increased emphasis on the Principles as a development of its current approach rather than a fundamental change of direction.~~
- 2.19 ~~This policy approach is leading to increased focus on principles-based enforcement action. The use of the Principles in enforcement cases is far from new. They have been used regularly in an enforcement context over many years. However, as part of its overall strategy in this area, the FSA~~ http://www.legislation.gov.uk/ukpga/2012/21/pdfs/ukpga_20120021_en.pdf will be giving more prominence to the *Principles* including, ~~The~~ FCA will in appropriate cases, ~~taking~~ take enforcement action on the basis of the *Principles* alone (see also *DEPP* 6.2.14 G). This will have the benefit of providing further clear examples of how the *Principles* work in practice.

...

3 Use of information gathering and investigation powers

...

Reports by skilled persons (~~section~~ sections 166 and 166A)

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

...

3.6A Under section 166A of the Act, the FCA also has a power to require a firm to appoint a skilled person to collect or update information, or itself to appoint a skilled person to do so, where it considers that the firm has failed to provide information required by the FCA or update information previously provided to the FCA.

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

...

4 Conduct of investigations

...

Scoping discussions

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

...

Involvement of FSA FCA supervisors during the investigation phase

4.14 ~~As a general rule, the FSA supervisors of a firm are not directly involved in an enforcement investigation. This approach has its advantages in that it maintains a clear division between the conduct of the investigation on the one hand and the need to maintain the supervisory relationship with continue with the ongoing supervision of the firm on the other . However, this division of responsibility may mean that the investigation does not benefit as much as it might otherwise do from the knowledge of the firm or individuals that the supervisors will have built up, or from their general understanding of the firm's business or sector. Before matters are referred to the Enforcement Division for investigation, FCA staff from its Enforcement Division will often work closely together with staff from the Supervision Division in order to determine the proper course of action to take. Accordingly~~ Following a referral, the FCA takes the following general considerations into account in relation to the potential role of a supervisor in an investigation.

...

...

Joint investigations with the PRA

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

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

...

6 Publicity

...

Publicity during, or upon the conclusion of regulatory action

6.7 For *supervisory notices* (as defined in section 395(13)) which have taken effect¹, *decision notices* and *final notices*, section 391 of the Act requires the ~~FSA~~ FCA to publish, in such manner as it considers appropriate, such information about the matter to which the notice relates as it considers appropriate. However, section 391 provides that the ~~FSA~~ FCA cannot publish information if publication of it would, in its opinion, be unfair to the *person* with respect to whom the action was taken (or was proposed to be taken), ~~or~~ prejudicial to the interests of consumers, or detrimental to the stability of the UK financial system.

¹ Section ~~55Y(2)~~ 53(2) and section 391(8) of the Act define when a variation of permission under a supervisory notice takes effect

Decision notices and final notices

...

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

...

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

...

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

...

The ~~FSA~~ FCA register: publication of ~~disqualifications of~~ disciplinary measures against auditors and actuaries (see chapter 15)

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

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

...

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

...

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

...

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

The ~~FSA~~ FCA's use of sanctions

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

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

- (1) It may publish a statement:

...

- (c) against a *sponsor* under section ~~89~~ 88A of the *Act*;
- (ca) against a primary information provider under section 89Q of the *Act*;

...

- (ea) if a natural or legal person has contravened any provision of the *shortselling regulation*, or any requirement imposed on that person under section 131E or 131F, under section 131G of the *Act*; ~~and~~
- (eb) against a qualifying parent undertaking under section 192K of the *Act*;
- (ec) against an auditor under section 249 of the *Act*;
- (ed) against a *recognised investment exchange* under section 312E of the *Act*;
- (ee) against an auditor and/or an *actuary* under section 345 of the *Act*;
and

...

(2) It may impose a financial penalty:

...

- (ab) on a *sponsor* under section 88A of the *Act*;
- (ac) on a *primary information provider* under section 89Q of the *Act*;
- ...
- (ca) on a natural or legal person who has contravened any provision of the *short selling regulation*, or any requirement imposed on that person under section 131E or 131F, or any natural or legal person who was knowingly concerned in the contravention, under section 131G of the *Act*; ~~and~~
- (cb) on a qualifying parent undertaking under section 192K of the *Act*;
- (d) on a *firm*, or an *unauthorised person* to whom section 404C applies, under section 206 of the *Act*;
- (da) on an auditor under section 249 of the *Act*;
- (db) on a *recognised investment exchange* under section 312F of the *Act*; and
- (dc) on an auditor and/or *actuary* under section 345 of the *Act*.

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

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

- (b) on a sponsor under section 88A of the Act;
- (c) on a primary information provider under section 89Q of the Act;
and
- (d) on a firm under section 206A of the Act.

7.2A Section 415B of the *Act* requires the *FCA* to consult with the *PRA* before it takes certain enforcement action in relation to a PRA-*authorised person* or someone who has a qualifying relationship (as defined in section 415B(4) of the *Act*) with a PRA-*authorised person*. Further detail on when the *FCA* is required to consult the *PRA*, and when it has agreed to notify the *PRA* of certain matters, is set out in the Memorandum of Understanding between the PRA and the FCA.

...

FSA FCA's statements of policy

7.4 The FSA's *FCA*'s statement of policy in relation to the imposition of financial penalties is set out in *DEPP* 6.2 (Deciding whether to take action), *DEPP* 6.3 (Penalties for market abuse) and *DEPP* 6.4 (Financial penalty or *public censure*). The FSA's *FCA*'s statement of policy in relation to the amount of a financial penalty is set out in *DEPP* 6.5 to *DEPP* 6.5D. The FSA's *FCA*'s statement of policy in relation to financial penalties for late submission of reports is set out in *DEPP* 6.6. The *FCA*'s statement of policy in relation to the imposition of suspensions or restrictions is set out in *DEPP* 6A (The power to impose a suspension or restriction).

...

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

8.1 The FSA *FCA* has powers under section ~~45~~ 55J of the *Act* to vary or cancel an *authorised person*'s ~~*Part IV*~~ *Part 4A* permission and a power under section 55L to impose requirements on an *authorised person*. The FSA *FCA* may use these powers where:

- (1) the person is failing or is likely to fail to satisfy the *threshold conditions* for which the *FCA* is responsible;
- (2) the person has not carried on ~~any~~ a *regulated activity* to which the *Part 4A* permission relates for a period of at least 12 months; or
- (3) it is desirable to exercise the power in order to ~~meet any~~ advance one or more of its *regulatory objectives* *operational objectives*.

8.1A The powers to vary and cancel a person's ~~Part IV~~ Part 4A permission and to impose requirements are exercisable in the same circumstances. However, the statutory procedure for the exercise of ~~each powers~~ the own-initiative powers is different to the statutory procedure for the exercise of the cancellation power and this may determine how the ~~FSA~~ FCA acts in a given case. Certain types of behaviour which may cause the ~~FSA~~ FCA to cancel permission in one case, may lead it to impose requirements, vary, or vary and cancel, permission in another, depending on the circumstances. The non-exhaustive examples provided below are therefore illustrative but not conclusive of which action the ~~FSA~~ FCA will take in a given case.

Varying a firm's ~~Part IV~~ Part 4A permission or imposing requirements on the ~~FSA~~ FCA's own initiative

...

8.5 Examples of circumstances in which the ~~FSA~~ FCA will consider varying a firm's ~~Part IV~~ Part 4A permission because it has serious concerns about a firm, or about the way its business is being or has been conducted include where:

(1) in relation to the grounds for exercising the power under section ~~45(1)(a)~~ 55J(1)(a) or section ~~55L(2)(a)~~ 55L(2)(a) of the Act, the firm appears to be failing, or appears likely to fail, to satisfy the *threshold conditions* relating to one or more, or all, of its *regulated activities*, because for instance:

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

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

...

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

...

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

(d) the firm is not capable of effective supervision by the FCA, for example, because of the way in which its business is organised, or because it is a member of a group.

- (2) in relation to the grounds for exercising the power under section ~~45(1)(e)~~ 55J(1)(c)(i) or section 55L(2)(c), it appears that the interests of *consumers* are at risk because the *firm* appears to have breached any of *Principles* 6 to 10 of the FSA's *FCA's Principles* (see *PRIN* 2.1.1R) to such an extent that it is desirable that *limitations*, restrictions, or prohibitions are placed on the *firm's regulated activity*.

Use of the own-initiative powers in urgent cases

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

...

- 8.9 The FSA ~~FCA~~ will consider the full circumstances of each case when it decides whether an urgent variation of ~~Part IV~~ Part 4A permission or an imposition of a requirement is appropriate. The following is a non-exhaustive list of factors the FSA ~~FCA~~ may consider.

...

Limitations and requirements that the FSA ~~FCA~~ may impose when exercising its section ~~45~~ power 55J and 55L powers

...

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

- 8.11A Under its section 55L power (or section 55Q power), the FCA may, at any time and of its own initiative, impose on an authorised person such requirements as it considers appropriate.

...

- 8.14 The grounds on which the FSA ~~FCA~~ may exercise its power to cancel an *authorised person's* permission under section ~~45-55J~~ of the *Act* are the same as the grounds for variation and for imposition of requirements. They are set out in section ~~45(1)~~ 55J(1) and section 55L(2) and described in *EG* 8.1. Examples of the types of circumstances in which the FSA ~~FCA~~ may cancel a *firm's* ~~Part IV~~ Part 4A permission include:

...

8.15 Depending on the circumstances, the ~~FSA~~ FCA may need to consider whether it should first use its *own-initiative powers* to impose requirements on a firm or to vary a firm's ~~Part IV~~ Part 4A permission before going on to cancel it. Amongst other circumstances, the ~~FSA~~ FCA may use this power where it considers it needs to take immediate action against a *firm* because of the urgency and seriousness of the situation.

...

Exercising the power under section 47 55Q to vary or cancel a firm's ~~Part IV~~ Part 4A permission or to impose requirements on a firm in support of an overseas regulator: the ~~FSA's~~ FCA's policy

8.18 The ~~FSA~~ FCA has a power under section 47 55Q to vary, or alternatively cancel, a *firm's ~~Part IV~~ Part 4A permission, or to impose requirements on a firm*, in support of an *overseas regulator*. Section ~~47(3), (4) and (5)~~ 55Q(4), (5) and (6) set out matters the ~~FSA~~ FCA may, or must, take into account when it considers whether to exercise these powers. The circumstances in which the ~~FSA~~ FCA may consider varying a *firm's ~~Part IV~~ Part 4A permission* or imposing requirements in support of an *overseas regulator* depend on whether the ~~FSA~~ FCA is required to consider exercising the power in order to comply with a Community obligation. This reflects the fact that under section 47 55Q, if a relevant *overseas regulator* acting under prescribed provisions has made a request to the ~~FSA~~ FCA for the exercise of its *own-initiative powers* to vary or cancel a *~~Part IV~~ Part 4A permission* or to impose requirements, the ~~FSA~~ FCA must consider whether it must exercise the power in order to comply with a Community obligation.

...

8.21 The ~~FSA~~ FCA will actively consider any other requests for assistance from relevant *overseas regulators* (that is requests in relation to which it is not obliged to act under a Community obligation). Section ~~47(4)~~ 55Q(5), which sets out matters the ~~FSA~~ FCA may take into account when it decides whether to vary or cancel a *firm's ~~Part IV~~ Part 4A permission* or to impose requirements on a firm in support of the *overseas regulator*, applies in these circumstances.

8.22 Where section ~~47(4)~~ 55Q(5) applies and the ~~FSA~~ FCA is considering whether to vary a *firm's ~~Part IV~~ Part 4A permission* or to impose requirements on a firm, it may take account of all the factors described in paragraphs 8.18 to 8.25 but may give particular weight to:

- (1) the matters set out in paragraphs (c) and (d) of section ~~47(4)~~ 55Q(5) (seriousness, importance to persons in the United Kingdom, and the public interest); and
- (2) any specific request made to it by the *overseas regulator* to impose requirements or to vary, rather than cancel, the *firm's ~~Part IV~~ Part 4A permission*.

8.23 The ~~FSA~~ FCA will give careful consideration to whether the relevant authority's concerns would provide grounds for the ~~FSA~~ FCA to exercise its *own-initiative*

~~power powers~~ to vary, impose requirements or cancel if they related to a UK *firm*. It is not necessary for the ~~FSA~~ FCA to be satisfied that the overseas provisions being enforced mirror precisely those which apply to UK *firms*. However, the ~~FSA~~ FCA will not assist in the enforcement of regulatory requirements or other provisions that appear to extend significantly beyond the purposes of UK *regulatory provisions*.

8.24 Similarly, the ~~FSA~~ FCA will not need to be satisfied that precisely the same assistance would be provided to the United Kingdom in precisely the same situation. However, it will wish to be confident that the relevant authorities in the jurisdiction concerned would have powers available to them to provide broadly similar assistance in aid of UK authorities, and would be willing properly to consider exercising those powers. The ~~FSA~~ FCA may decide, under section 47(5) ~~55Q(6)~~, not to exercise its *own-initiative* ~~power powers~~ to vary or cancel in response to a request unless the regulator concerned undertakes to make whatever contribution towards the cost of its exercise the ~~FSA~~ FCA considers appropriate.

8.25 Paragraphs 8.11 and 8.12 set out some examples of *limitations* and *requirements* the ~~FSA~~ FCA may impose when exercising its section 47(4) ~~power to vary a firm's Part IV permission~~ 55Q(5) powers.

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

8.26 The ~~FSA~~ FCA adopts a similar approach to the exercise of its *power of intervention* under section 196 as it does to its *own-initiative powers* to vary ~~Part IV~~ Part 4A permission or impose requirements, but with suitable modification for the differences in the statutory grounds for exercising the powers. Consequently the factors and considerations set out in paragraphs 8.1B to 8.12 and 8.18 to 8.25 may also be relevant when the ~~FSA~~ FCA is considering regulatory concerns about *incoming firms*.

...

9 Prohibition Orders and withdrawal of approval

...

Prohibition orders and withdrawal of approval - approved persons

...

9.14A The FCA will consult the PRA before withdrawing an approval given by the PRA.

...

Applications for variation or revocation of prohibition orders

...

9.22A The FCA will consult the PRA before varying or revoking a prohibition order if, as a result of the variation or revocation, an individual will either be prohibited from, or no longer be prohibited from, a function of interest to the PRA as defined at section 56(7B) of the Act.

...

The effect of the FSA FCA's decision to withdraw approval

...

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

...

15 Disqualification of auditors and actuaries

...

15.1A The FCA also has the power under section 345 to impose a financial penalty and a public censure on an auditor or actuary in respect of a failure to comply with a duty imposed on the auditor or actuary by rules made by the FCA, or a failure to comply with a duty imposed under the Act to communicate information to the FCA. The FCA has the power under section 249 to impose a financial penalty and a public censure on an auditor in respect of a failure to comply with a duty imposed on him by trust scheme rules. The FCA's statement of policy in relation to the imposition of financial penalties is set out in DEPP 6.2 (Deciding whether to take action) and DEPP 6.4 (Financial penalty or public censure). The FCA's statement of policy in relation to determining the amount of a financial penalty is set out in DEPP 6.5 to DEPP 6.5D.

...

18 Cancellation of approval as sponsor or primary

information provider on the FSA's FCA's own initiative

...

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

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

- (1) the competence of the primary information provider;
- (2) the adequacy of the primary information provider's systems and controls;
- (3) the primary information provider's history of compliance with the information provider rules;
- (4) the nature, seriousness and duration of the suspected failure of the primary information provider to meet (at all times) the criteria for approval as a primary information provider set out in DTR 8.3;
- (5) any matter which the FCA could take into account if it were considering an application for approval as a primary information provider made under section 89P(4)(c) of the Act.

19 Non-FSMA powers

...

Buildings Societies Act 1986

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

- ~~• make a prohibition order against the society (section 36A);~~
- ~~• petition the High Court for a winding up order where a society breaches certain requirements, for example, if it contravenes a prohibition order or where it fails to comply with certain directions given to it by the FSA (section 37); and~~
- ~~• exercise the FSA's powers under section 45 of the Act to cancel or vary a Part IV permission where a society fails to comply with a direction from the FSA to transfer all its engagements or to transfer its business (section 42B).~~

19.14 ~~The FSA will use these powers in a manner consistent with its approach to using them under the Act. Distinguishing features of the procedure for giving statutory~~

notices under the Building Societies Act are set out in *DEPP 2.5.18G*. Decisions of the FSA made under the Building Societies Act may not be referred to the *Tribunal*.

...

Appendix 2

Designation of Handbook provisions

1. FSA Handbook provisions will be ‘designated’ to create a FCA Handbook and a PRA Handbook on the date that the regulators exercise their legal powers to do so. Please visit our website¹ for further details about this process.
2. We plan to designate the EG Provisions which we are proposing to create and/or amend within this Consultation Paper as FCA provisions.

¹ One-minute guide <http://media.fsahandbook.info/latestNews/One-minute%20guide.pdf>

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