

07/12

Financial Services Authority

**Decision Procedure
and Penalties
Manual and the
Enforcement Guide**

Feedback on CP07/2 Review
of the Enforcement and
Decision making manuals

July 2007



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This Policy Statement reports on the issues arising from Consultation Paper 07/2 relating to the review of the Enforcement and Decision making manuals. It publishes the final text of the new Decision Procedure and Penalties manual, the Enforcement Guide and the Unfair Contract Terms Regulatory Guide, along with relevant consequential changes to the Handbook, Handbook Guides, Regulatory Guides and the Reader's Guide to the Handbook.

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1 Overview

Introduction

- 1.1 In this Policy Statement (PS) we respond to comments received in relation to Consultation Paper 07/2*** Review of the Enforcement and Decision making manuals (CP07/2) and we set out the final text of the new Decision Procedure and Penalties module of the Handbook and the new Enforcement Guide.
- 1.2 We received 18 responses to CP07/2. A list of the people from whom we received non-confidential responses is set out in Annex 1 to the PS. We are grateful to all respondents for taking the time to share their views with us. We have carefully considered the comments made and have amended the proposals we made in CP07/2 as a result.

Main feedback messages

- 1.3 Our aim in carrying out the review of the Enforcement (ENF) and Decision making (DEC) manuals was to make our existing statements of policy in these areas clearer and easier to use. Most respondents agreed that the material in the proposed Decision Procedure and Penalties manual (DEPP) and Enforcement Guide (EG) achieved that aim and improved on the existing Handbook modules. We also received considerable support for our proposals to improve the flexibility of the decision making process. For example, respondents supported our proposals to allow FSA staff to refer decisions that would otherwise be made under executive procedures to the RDC where the RDC is considering a closely related matter.
- 1.4 But there was considerable opposition to some of our key proposals. Much of this appeared to stem from uncertainty over the role of enforcement in a principles-based environment. The main areas in which respondents raised concerns were:
 - the status of EG as a Regulatory Guide and the removal of aspects of enforcement policy from the Handbook, with related concerns about when we intended to consult on changes to the new Guide;
 - the role of guidance, public statements by us, and industry guidance in an enforcement context; and

- the impact that settled decisions have and the extent to which subsequent decision makers are required to follow earlier, particularly settled, decisions and to have regard to FSA policy.
- 1.5 We are satisfied that the rationale for the general approach described in CP07/2 is sound and we are therefore proceeding to create DEPP and EG. This means that we are not making significant changes to the proposals we set out in CP07/2. However, we have sought to clarify and, where appropriate, adjust our policies in the key areas of concern outlined above. Some of the concerns that were expressed about the way in which material was structured, and the fact that aspects of enforcement policy are being removed from the Handbook, can be addressed by ensuring that there is adequate opportunity to comment on changes to EG as well as DEPP. Therefore we confirm that we will consult on any change we propose to make to EG. We set out the consultation process we intend to follow in Chapter 2 of this PS.
- 1.6 We received no comments about our proposal to create a new Unfair Contract Terms Regulatory Guide (UNFCOG) and so have adopted this proposal.

Who should read this PS?

- 1.7 This PS will be of interest to all persons who wish to understand our enforcement policy and enforcement powers and how we use them. It also describes the procedures by which we make decisions to give a person a warning notice, decision notice or supervisory notice and discusses the roles and responsibilities of the different decision makers involved in making those decisions. The PS may be of interest to consumers, to the extent they will benefit from or be affected by our approach to enforcement or decision making.

Structure of the PS

- 1.8 This PS is structured as follows:
- (1) Chapter 2 outlines the responses we received to CP07/2 and how we have addressed the issues raised;
 - (2) Annex 1 sets out the non-confidential responses we received to CP07/2;
 - (3) Appendix 1 contains the final text of DEPP;
 - (4) Appendix 2 contains the final text of EG;
 - (5) Appendix 3 contains the final text of UNFCOG;
 - (6) Appendix 4 contains the final text of consequential amendments required to the Handbook as a result of the changes described in this PS; and
 - (7) Appendix 5 contains the final text of consequential amendments to Handbook Guides, Regulatory Guides and the Reader's Guide required as a result of the changes described in this PS.

Next steps

- 1.9 DEPP, EG and UNFCOG will come into effect on 28 August 2007, as will the consequential amendments that we need to make as a result, unless stated otherwise in Appendices 4 and 5.
- 1.10 Certain changes to DEPP and EG will take effect on 1 November 2007 when the Markets in Financial Instruments Directive (MiFID) comes into effect. Those changes are set out in Annex 2 of Appendix 1 of this PS (for DEPP) and Annex 2 of Appendix 2 of this PS (for EG).

2 Responses received to CP07/2

Introduction

- 2.1 This chapter summarises the responses we received to CP07/2, and explains how we have addressed respondents' comments. The chapter is structured as follows:
- We explain some general matters relating to the structure, content and status of DEPP and EG.
 - We then set out the responses we received to each question asked in CP07/2, explaining what changes we have made as a result or why we did not consider it necessary or appropriate to make a change.

General matters

- 2.2 Most respondents commented on the status and structure of DEPP and EG and on the distribution of material between them.
- 2.3 One respondent suggested that the way in which EG was arranged, with sections on settlement and publicity appearing ahead of sections relating to investigation powers and the conduct of investigations, was inappropriate. We have therefore sought to make EG easier to navigate by restructuring it into two main sections. The first section, from Chapter 2 to Chapter 6, contains an overview of the enforcement process. It starts with our approach to enforcement, then deals with our use of information gathering and investigation powers and the conduct of investigations, and concludes with the chapters on settlement and publicity. The second section, from Chapter 7 to Chapter 18, describes the use of specific powers.
- 2.4 We have clarified in Chapter 1 of EG that it contains 'general guidance' as defined in section 158 of the Financial Services and Markets Act (FSMA). However, neither EG nor DEPP contain guidance on rules. The key distinction between DEPP and EG is that DEPP is a module of the Handbook and is subject to the full Handbook consultation process. In PS07/10 (Implementing the Regulatory Reform Order in relation to guidance) we explained how our Guidance Committee will normally issue guidance that will be published outside the Handbook, but could potentially issue some guidance in the Handbook. As DEPP is in the Handbook we anticipate that any

changes to it will be made by our Board. Any change to EG will be subject to at least 28 days consultation and will be approved by our Guidance Committee or our Board.

- 2.5 Some respondents found DEPP and EG difficult to navigate. So we have added some cross-references, for example to the text in DEPP and EG relating to the role of guidance in enforcement. We will also publish a table of destinations/derivations describing the transfer of materials from ENF and DEC.
- 2.6 Two respondents asked us to provide more information about our approach to co-operating with overseas regulators. So we have said more about this, and have listed in Chapter 2 of EG the various references to international co-operation made in other parts of the Guide.
- 2.7 One respondent asked us to delay the introduction of DEPP and EG so as to coincide with the date when MiFID comes into force. But we do not believe that the changes we are making will impose a significant burden on firms, in terms of the resource required to get to grips with the new structure and updated material in DEPP and EG. We are also committed to introducing changes to our Handbook material as quickly as possible where we think these help deliver our goals of greater clarity and coherence. This includes making improvements to our decision-making process. As such, we feel it is better to bring the material into force sooner rather than later. DEPP and EG will replace DEC and ENF with effect from 28 August 2007.
- 2.8 One respondent said our cost benefit analysis of the impact of our proposals did not adequately take account of the risks they perceived from pressures within the system which arise when applying our enforcement and decision making procedures in a principles-based regulatory environment. We acknowledge the level of interest in our proposals and that there are some issues that the regulated community has concerns about, on which it would like further clarity. We have sought to address many of these in this PS and we are satisfied that our cost benefit analysis is based on correct considerations and remains valid.
- 2.9 Several respondents expressed strong concerns about our proposals on the use of guidance and other materials in an enforcement context. Some were concerned about all non-binding materials, including 'formal' guidance. Others suggested that formal guidance was clearly relevant in determining whether or not a Principle has been breached and were more concerned about the inclusion of other, supporting materials such as speeches and Dear CEO letters, because we had not consulted on these materials.
- 2.10 We have given a lot of thought to arguments raised about the role that guidance and other published materials should play in enforcement cases. At the heart of our approach is our recognition that FSA rules are binding and guidance and other published materials are not. We give guidance for several purposes. We might wish to explain what we think a particular rule requires; or to help those subject to the rule to understand its operation and to form their own judgement about what it means. Equally, we might intend to communicate concerns about a particular issue or about a sector of the industry and to raise awareness of something we see as a potential problem. These different purposes do not, however, blur the fundamental difference between an FSA requirement and something we say by way of guidance.

- 2.11 Persons subject to our rules – including the Principles – must comply with those requirements. But it is for them to decide how to do so. And the fact that a person has chosen to comply in a manner other than as suggested by us in guidance is not, and could not be, a basis for enforcement action. We understand therefore the concerns raised in respect of DEPP 6.2.1(4), and have changed the language of DEPP so as not to identify the extent to which a person has sought to follow guidance as a self-standing factor in deciding whether to take action.
- 2.12 On the other hand, DEPP 6.2.1(4) continues to make clear that persons can rely on the statements we have made in determining the approach they adopt. It says that we will not take action against a person for behaviour that is in line with guidance, other materials published by us in support of the Handbook, or FSA-confirmed Industry Guidance which were current at the time of the behaviour in question.
- 2.13 This does not mean that we will never refer to guidance issued by us, or indeed by others, when we take enforcement action. If we believe that conduct falls below the standards that a rule requires, and there is FSA guidance or other supporting materials relevant to the conduct or practice in question, it would be surprising and unhelpful for us not to refer to it. Guidance may identify areas of concern to us, and the giving of guidance may precede the use of other regulatory tools to secure our objectives. This might include enhanced supervision, thematic work or enforcement action. Guidance is therefore part of the regulatory context notwithstanding the fact that there is no obligation to follow it.
- 2.14 We have changed the language in EG 2.22 to 2.27 in the light of respondents' concerns; but we still believe that it is right that EG should acknowledge the reality that FSA guidance and other materials may form part of the jigsaw when we, or possibly the Tribunal, look at the regulatory context for a suspected breach and examine the standards in place at the time. This does not imply that such guidance establishes the benchmark against which conduct is to be judged: we are very alive to the point that principles-based regulation requires that firms are able to exercise their own judgements about how best to meet the regulator's requirements. But we are satisfied that it is right to acknowledge that we may wish to refer to guidance when we explain how we have approached an issue, including the steps we have taken to promote compliance or to alert the industry to our concerns.
- 2.15 We also think it is legitimate for us to say that where a firm or individual has been made aware of our concern but has ignored it, then this may be relevant to the assessment of the seriousness of any regulatory failure where the person has been found to have breached our rules: see DEPP 6.5.2(12). The warning or guidance cannot of itself be evidence of a breach of those rules. Nor do we regard a decision not to follow guidance as indicative of a poor compliance culture, or as exacerbating a breach where it is apparent that the person concerned has sought to make a responsible judgement about what is needed to meet a regulatory requirement. But the existence of guidance may be relevant to penalty if, despite that guidance, a person subject to enforcement action appears not to have engaged with what FSA rules mean or has closed its mind to trying to understand our requirements.

Our high level proposals

Q1: Do you agree that the proposed length and structure of DEPP 1 to 5 will achieve our goal of a clearer and more easily understood statement of our approach to decision making?

Q2: Do you agree that our proposals for revising our enforcement related material will achieve our objectives of providing text which is more focused, relevant and user friendly than ENF?

- 2.16 Many respondents considered that the proposed text of DEPP and EG was an improvement on current material. Respondents agreed that the less formal drafting style of EG made it more user friendly. Some respondents said that removing the text repeating statutory provisions made DEPP and EG easier to read.
- 2.17 Most respondents raised concerns over the split of material between DEPP and EG. Many commented that key aspects of enforcement policy should remain in the Handbook; although there was some difference of opinion about what those key aspects were. Many respondents sought clarification about EG's status and about when and how we would consult on changes to EG. Some respondents said that reducing the size of the Handbook should not be the driving force for change, and that brevity should not be achieved at the expense of clarity. One respondent felt that the Enforcement manual was already perfectly clear.
- 2.18 One respondent noted that not all of the relevant recommendations from the Enforcement Process Review were reflected in the proposed text and asked that these be included. Some respondents requested that we include links in EG to relevant material on our website, and asked that the links be comprehensive and the material both on the website and in EG be regularly updated.
- 2.19 One respondent asked why DEPP did not contain an explanation of how the FSA takes all regulatory decisions, and asked which decisions had been omitted. Another said that we had gone too far in removing the detail of statutory provisions.

Our response: We have maintained the division between DEPP and EG. None of the material which currently makes up the Decision making or Enforcement manuals is rules or guidance on rules. It does not sit comfortably therefore with the other material in the Handbook. However, we recognise that Parliament provided expressly for the publication of certain statements of FSA policy or procedure, such as those relating to our policy on the imposition of penalties. And we think it is right to distinguish between these statements and other guidance or policy statements that we make.

We have therefore retained in the Handbook those statements of enforcement-related policy or decision-making procedure which the FSMA expressly requires us to publish. Such material is located in DEPP, the Handbook module, and other enforcement-related policy statements now appear in EG, which is a Regulatory Guide.

EG contains 'general guidance' as defined in section 158 of FSMA. To address respondents' concerns about accountability in respect of those statements of policy that will no longer be included in the Handbook, we confirm that we will consult on all changes to EG. Significant changes to the policy in EG will remain subject to a full Handbook-style consultation

process and we anticipate that these will continue to be made by our Board (although our Guidance Committee does have the power to make changes to EG in these cases). In other cases, we propose to place a notice of the intended changes on our website for a minimum of 28 days. As is our current practice with consultations, we will draw these notices to the attention of those to whom we think they will be of particular interest. We will consider responses and amend our proposals as appropriate. We may also consider conducting a longer, more detailed consultation exercise if, for example, responses raise concerns we have not anticipated or if they otherwise show that a fuller debate would be beneficial.

Any changes to EG will be made by our Guidance Committee or our Board. We anticipate that changes to EG that we make after the shorter, web-based consultation will be made by our Guidance Committee. This is a committee which the Board has established, with the power to issue general guidance. The Guidance Committee has the same membership as our Regulatory Policy Committee (RPC), which is at present the Chief Executive Officer, the Managing Directors, General Counsel, the Director of Enforcement, the Director of Strategy & Risk and the Director of Communications. As we set out in PS07/10, a number of factors will together ensure the guidance we produce remains consistent both in terms of quality and substance, whether it is issued by our Board or our Guidance Committee.

Consistent with our rationale for including material in DEPP, DEPP contains the statement of decision making procedure that we are required to make by section 395 of FSMA. This relates to the giving of statutory notices. DEPP does not attempt to explain how the FSA reaches all its decisions. This is why we have not included the information previously set out in DEC 1.2.8 – 1.2.10 (Other decisions).

We have added new text to reflect relevant recommendations of the Enforcement Process Review which had not been included in ENF or DEC. This includes clarifying, in EG 4.12, the information that we will provide during a scoping visit and, in EG 2.36, confirming that a case will be reviewed by a lawyer who is not a part of the case team before it is submitted to the RDC. We have also included more links in EG to useful source materials referred to in the text. And we have included some additional text where we think this will be helpful; for example in Chapter 9 of EG we have added examples of cases in which we have prohibited an individual or withdrawn an individual's approval.

Our detailed proposals for DEPP

Q3: Do you agree that the scope for referring a decision to the RDC should be extended beyond change of control cases in the manner proposed in DEPP 2.1.4?

- 2.20 Most respondents supported our proposal that the scope for referring decisions to the RDC be extended beyond change of control cases. One respondent suggested that advance notice should be given to the person in question where this happens. This respondent said that DEPP needs to clarify what constitutes a 'closely related matter'. Another respondent, although generally agreeing that it was positive to increase discretion about which decision making procedure to apply, warned that this could increase the risk that the discretion might be abused, and suggested that we regularly review the use of our decision making powers.

Our response: We have adopted our proposals about increasing the scope for the referral of decisions to the RDC when it is considering closely related matters. The aim of these proposals is to promote sensible and flexible decision making. We do not consider that it would be helpful to generate more detailed definitions of what a ‘closely related matter’ is; we prefer to promote flexibility by having regard to the circumstances of each particular case.

The FSA monitors closely the effectiveness and outcomes of its decision making process. For example, our Board receives quarterly reports from Enforcement and the Chairman of the RDC, and we publish our Enforcement Annual Performance Account as part of our commitment to transparency and accountability. We do not consider that further dedicated reviews are required.

Q4: Do you agree that the stated approach for the decision maker when deciding whether to give a statutory notice is the correct one?

- 2.21 Overall, respondents agreed with our proposals. One respondent suggested that we amend DEPP 2.2.3 to state that the decision maker, when deciding whether to give a warning notice or first supervisory notice, will also consider material that does not support or which undermines the recommended action; another commented that the decision maker should consider ‘adverse material’. One respondent said the consideration of whether material ‘was adequate to support’ a recommendation to give a warning notice or first supervisory notice was too low. Two respondents asked us to confirm who the ‘others’ were that might comment on a person’s representations to the decision maker in DEPP 2.3.1.

Our response: We have amended DEPP 2.2.3(2) to make clear that the decision maker must satisfy itself that it is appropriate in all the circumstances of the case to take the action that our staff have recommended. We have clarified in DEPP 1 that all decision makers will have regard to, amongst other things, FSA priorities and policies when making decisions (see our response to question 7 below). We have therefore removed from DEPP 2.2.3(2) the statement that decision makers will satisfy themselves that the action recommended is in line with our policies.

Experts and third parties are examples of ‘others’ who might comment on a person’s representations.

Q5: Do you agree with the proposed restatement of our approach to decision making for applications and listing cases?

- 2.22 Most respondents who commented on this question agreed with our proposals. Some respondents queried whether the reallocation of listing decisions was for reasons other than to be consistent with the decision making process relating to prospectuses. One respondent raised the related query about why we were proposing to adopt different procedures for applications and listing cases.

Our response: We have adopted the proposed restatement of our approach to decision making for applications and listing cases. We aligned listings decision processes with those relating to prospectuses (and thus adopting different procedures to those in applications cases) to facilitate a co-ordinated approach to decisions in respect of related matters and not for any other reason.

Q6: Do you agree that the decisions identified in DEPP 2.5.13 should be taken under executive procedures where the person concerned has indicated agreement to or acceptance of the action proposed?

2.23 Those respondents who commented on this proposal were in favour of the decisions identified in DEPP 2.5.13 being taken under executive procedures where the person concerned has indicated agreement or acceptance of the action proposed.

Our response: We have adopted this proposal.

Q7: Do you agree that the proposed statement in DEPP Chapter 3 accurately and adequately describes the nature and role of the RDC?

2.24 Respondents welcomed the attempt to explain better the FSA's decision-making procedure, including the role and nature of the RDC. But some respondents had concerns about aspects of DEPP Chapter 3. Most respondents were positive about the change in definition of a 'straightforward case'. One respondent did not feel that this change was appropriate and also objected to the fact that RDC approval was not required if the FSA decided to discontinue a case after the RDC had issued a decision notice. One respondent suggested that the agreement of the affected party was a further factor that could be considered when determining whether a case was straightforward.

2.25 Some respondents expressed concern that the RDC should have 'full regard to FSA policy'. They asked for clarification about what this meant and asked us to define 'FSA policy'. These respondents were anxious that the RDC, when deciding whether particular conduct amounts to a breach of FSA rules, should not follow slavishly the approach adopted by the FSA as a matter of policy, especially if that approach was not published or was published without consultation. There was also concern that if the RDC was bound to follow FSA policy including, for example, as expressed in decisions in settled enforcement cases this would effectively mean that firms were required to do the same.

2.26 Some respondents felt that we should make clearer that the RDC makes decisions based on its own view, not the views of the FSA staff recommending action. One respondent said that DEPP did not make the RDC's independence from the executive clear enough and asked that we amend DEPP 3.3.1 and 3.3.2 to reflect paragraph 4.39 of CP07/2. Another said that if the RDC decided not to give a decision notice it should be the RDC who issued a notice of discontinuance.

Our response: The RDC is a committee of the FSA and it is right that it should have regard to FSA policy when it makes decisions. This does not deflect the RDC from looking at the facts of the case before it and making a decision about the appropriate action for the FSA to take. So we do not propose any substantive change to the way in which we have described the RDC's role. However, we do recognise that this applies to all statutory notice decisions, not just those made by the RDC, in that all of the 'decision makers' defined in DEPP must have regard to FSA policy. We have therefore replaced DEPP 3.1.3 with a general statement in DEPP 1.2.7 that applies to all statutory notice decision makers. We have also applied the provisions of DEPP 3.1.5 about record keeping requirements to all decision makers. This paragraph now appears as DEPP 1.2.8.

DEPP 1.2.7 notes that the decision makers will have regard to the relevant facts, law, and FSA priorities and policies (including on matters of legal interpretation). This is intended to make it clearer that the decision maker will always be interested in the context and justification for the recommendation that a statutory notice be given.

We do not propose to define 'FSA policy'. 'Policy' is not a term of art; it is simply a way of describing the approach or view that we have decided to take in relation to a particular subject. Typically FSA regulatory policy will be determined by our Regulatory Policy Committee, or by our Board itself, but aspects of policy may also be determined by others within the FSA depending on the nature of the policy, its impact, and the matter to which it relates.

Decision makers should have regard to relevant policy irrespective of whether or not the policy has been published. But we recognise that a clearly defined and articulated statement will provide the clearest guidance as to an FSA policy position. Moreover, if the policy is unpublished, but is material on which the decision maker relies when deciding to give a statutory notice, then we must disclose it to the person who receives the notice. FSA staff making recommendations to the decision maker cannot themselves set or create FSA policy solely for the purposes of resolving the immediate matter before the decision maker.

The way in which we deploy our enforcement resource is governed to a large extent by the priorities we establish in line with our risk-based approach. Our priorities form an important part of the background to many of the decisions we make. In particular cases this may mean that the decision maker will wish to understand why – consistent with our risk-based approach – FSA staff recommend action against particular persons or in respect of particular types of conduct. But it does not follow from this that the decision maker will accede to a recommendation to give a statutory notice only because the relevant matter relates to an area or issue the FSA has identified as high-priority. In each case the decision maker will need to be satisfied that the facts of the case support the recommendation to take action and that giving the notice is the proper action for the FSA to take.

The 'separation requirement' set out in section 395 of FSMA does not apply to decisions to discontinue cases or issue a notice of discontinuance. So there is no need for such decisions to be made by the RDC rather than by the FSA staff who have investigated a case or made recommendations to the RDC.

Q8: Do you agree that the proposed statement in DEPP Chapter 4 is an adequate description of our procedure for taking decisions under executive procedures and that we are correct to continue to distinguish between RDC and executive procedures in the manner set out?

- 2.27 Respondents were broadly positive about our proposed distinction between RDC and executive procedures.
- 2.28 Some respondents wanted RDC and executive procedures to be aligned. By this, we understood them to mean that, in cases decided under executive procedures, the FSA staff making the decision should seek independent legal advice; all communications between the executive decision maker and the FSA staff recommending enforcement action should be disclosed; and there should be no continuing contact between staff and executive decision maker after representations had been made.
- 2.29 One respondent asked whether a firm could request that the RDC make a decision that would otherwise be made under executive procedures. Another suggested that we limit the circumstances in which a single member of staff can take a decision. A further respondent suggested that there should be equivalent provisions of DEPP 3.1.3 (the basis on which a decision is taken) and DEPP 3.1.5 (recording decision making and maintenance of records) for executive procedures.

Our response: As noted in our response to question 7 above, we have introduced paragraphs in DEPP 1 which apply the provisions that were previously contained in DEPP 3.1.3 and 3.1.5 to all decision makers rather than only to the RDC.

DEPP explains that our assessment of who is the appropriate decision maker to give a statutory notice will depend on the nature of the decision, including its complexity, importance and urgency. The different procedures properly reflect the allocation of decisions between the decision makers and the circumstances in which they will be asked to decide whether to give a statutory notice. So we do not propose to extend to executive procedures all those provisions which describe the separation of the RDC from FSA staff recommending enforcement action. This is not necessary to meet the separation requirement in section 395 of FSMA, and we are concerned that it would create a less flexible and efficient decision making process.

The decision to give a statutory notice will in each case be made by the allocated decision maker – the parties involved in a case cannot nominate which decision maker will make decisions in their case. The exception to a decision being taken by the allocated decision maker is that the FSA staff responsible for making a decision under executive procedures may refer a decision to the RDC when the RDC is considering or about to consider a closely related matter. We are satisfied that our existing procedures are sufficiently robust to ensure appropriate allocation of decision making, and that decisions will only be made by a single member of staff in appropriate circumstances, as outlined in DEPP.

Q9: Do you agree that the proposed new, shorter statement in DEPP 5 is an adequate statement of our procedure for giving statutory notices in settled cases?

- 2.30 Most respondents who commented on this question supported our settlement decision procedure and welcomed its inclusion in DEPP. However, several respondents expressed a desire for greater independent scrutiny of settled decisions. Some respondents complained that settled cases are decided on the basis of less-complete information. They felt that firms and FSA staff are under too much pressure to settle early and that ‘stage 1’ described in the settlement discount scheme is invoked too early, before we have a proper understanding of a case. These respondents therefore expressed concerns about the validity of settled decisions as ‘precedents’. They were troubled by the extent to which the RDC in a subsequent and similar case would be bound or committed to follow the approach adopted by the settlement decision makers in a settled case and by the extent to which we expected firms to act on statements in final notices where the notice had been negotiated. There was a call for greater clarity about the basis on which settlements were reached and for greater detail in the published facts.
- 2.31 Several respondents queried whether the fact that we have reduced the amount of material included in DEPP and EG about mediation indicated that we were ‘downgrading’ its importance.
- 2.32 We received mixed responses on our proposal to replace references in DEC to ‘without prejudice discussions’ with a more general statement that parties may agree not to seek to rely on admissions made in the course of settlement discussions if the matter is subsequently considered by the RDC or the Tribunal. One respondent said this change might discourage people from holding open discussions and stated that discussions should be held on a ‘without prejudice’ basis. Another respondent said they shared our views but noted that, regardless of how settlement discussions were labelled, agreements not to rely on admissions would need to carry significant weight for confidence to be attached to the settlement process.

Our response: We believe strongly that early settlement is advantageous, but disagree that our staff are ‘under pressure’ to settle early. Nor do we accept that decisions to settle are taken on the basis of insufficient information (either by firms or by us). Settlement decision makers will only agree to settle where they have sufficient information to be satisfied that this is the correct regulatory outcome. However, we have taken on board respondents’ concerns that we have not always articulated or communicated what most troubles us about a firm’s conduct and we will continue to seek to improve the clarity of published enforcement decisions. As part of this, our recent practice has been for the Litigation and Legal Review department in Enforcement to review warning notices before they are considered by settlement decision makers. This provides scrutiny from outside the investigation team and helps to ensure consistency of decision making.

Our response to comments made in respect of the ‘precedent value’ of settled decisions is set out in our response to question 17 below, which relates to the settlement chapter in EG.

We remain committed to mediating in appropriate cases. We are pleased with the effectiveness of mediation in the enforcement cases in which it has been used so far. Our rationale for removing the detailed provisions about mediation previously contained in DEC Appendix 1 was in part to provide greater flexibility and to broaden our opportunities to mediate. We do not therefore propose to reinstate the previous text. However, we have included a reference to mediation in DEPP and changed the language in EG to reflect better our commitment to mediation. Please see our website for more information about mediating with us:
<http://www.fsa.gov.uk/pages/doing/regulated/law/focus/mediation.shtml>

Q10: Do you agree that our proposals to consolidate the lists of penalty factors are helpful?

- 2.33 All respondents who commented on this question were in favour of our proposal to consolidate the lists of penalty factors. One respondent said it would be useful if we provided examples of how we combine factors to produce different levels of penalty in different cases. Another said that although the consolidation was helpful, the list of factors appeared out of context in DEPP.

Our response: We have adopted our proposal to consolidate the lists of factors included in DEPP 6. As explained in more detail in our response to question 14 below, we intend to give further consideration to the way in which we determine levels of penalty. This is in part as a result of responses we received to CP07/2. While this work is ongoing we do not propose to make significant changes to the way in which our policy on determining penalty is expressed.

Q11: Do you have any comments on our proposals to clarify existing factors and to include certain additional factors?

- 2.34 Several respondents raised concerns about the new factors we proposed to include. They thought it was inappropriate to include guidance and other ‘public statements’ by us as a factor when deciding whether to take action or when determining the level of penalty. One respondent asked what ‘public statements’ we intended to include. Respondents expressed concern about the accessibility of statements and stated that the burden of keeping track of materials such as speeches and Dear CEO letters was too onerous on firms. Respondents argued that, as such materials are not binding on firms and had not been consulted on, they should not be taken into account at all in an enforcement context. They also said that if we refer to our guidance when we take enforcement action, firms will be less inclined to exercise their own judgement about what a Principle requires and will cluster around what guidance says.
- 2.35 There were also concerns that the use of confirmed industry guidance could lead to the creation of industry standards, against which firms that choose to comply with requirements other than by following such guidance would later be judged. There were divided views about whether the extent to which a firm’s conduct departed from current market practice should be included in the list of factors that may be relevant when determining the level of penalty in Part VI cases. One respondent queried why this factor was listings-specific, arguing that it should be applicable to

all cases (going to the seriousness of the breach or the deliberate/reckless nature in which the breach was committed). Another respondent said it should not be a factor at all, as it could stifle innovation.

- 2.36 In respect of the ‘difficulty of detection’ factor, some respondents said that it seemed inappropriate that persons should be penalised for a breach where they were less likely to be aware the breach had been committed (that is, because it was harder to detect) or because we had put insufficient resource into an investigation. One respondent queried whether this factor would sit better as an indicator of a more serious breach rather than as a factor in its own right. And they said that if a person did discover and report a breach that was difficult to detect, this should count as a positive rather than a negative factor.
- 2.37 Several respondents also took issue with our proposal to say that the level of penalty might be increased in appropriate circumstances for persons with significant financial resources. They thought that this had no basis in law and queried the practicality of determining what a person’s resources were.
- 2.38 We received no comments for or against our proposal to include deterrence as a factor when deciding whether to impose a penalty and determining the level of penalty to be imposed.

Our response: We explain at paragraphs 2.9 to 2.15 of the PS the approach we have taken in relation to guidance and other published materials and the extent to which it may be relevant to enforcement action.

We have revised the difficulty of detection factor to make clear that it is not intended to capture breaches that have been committed unwittingly. Rather it is aimed at targeting situations in which the difficulty of detection may act as an incentive to a person to commit a breach, or where a person may have taken steps to reduce the risk of getting caught.

As mentioned in our response to question 14, we are considering our approach to determining levels of penalty. We believe that there is a sound legal basis for maintaining that wealth can be relevant to the assessment of penalty, in that this can be relevant to the effectiveness of a penalty in changing behaviour. However, given the level of concern raised on this issue, we have chosen to maintain our existing policy in respect of the penalty factors relating to whether the person is an individual and the size, financial resources and other circumstances of a person, pending the outcome of a further review. We have, however, retained the additional statement in DEPP 6.5.2(4) that an individual’s status, position or responsibilities may increase the seriousness with which we view any breach that he has committed. This may in turn lead to us imposing on him a higher penalty.

Q12: Do you have any comments on our proposals relating to the text on action against individuals?

- 2.39 Respondents had few comments on this question. One asked us to clarify that when assessing an individual’s conduct we would apply the standards that applied ‘at the time of the conduct concerned’.

- 2.40 Another expressed frustration that we did not bring more actions against individuals despite the requirement for firms to allocate senior management responsibility. On this point, one respondent queried how our approach to enforcing on the basis of personal culpability interlinked with the emphasis on collective senior management responsibility in MiFID.

Our response: We have included confirmatory wording in DEPP 6.2.4 and 6.2.7 that personal culpability will be assessed against the standards required 'at the time of the conduct concerned. We maintain our commitment to bringing action against individuals in appropriate cases. Our view is that MiFID provisions relating to senior management responsibility do not conflict with our policy of taking action in cases of personal culpability. Please see CP07/16 (Consequential Handbook amendments) for more detail on the operation of MiFID in this respect.

Q13: Do you have any comments on our proposals relating to the text on discipline for breaches of the Principles for Businesses?

- 2.41 Respondents generally emphasised their approval of our principles-based approach to regulation. But while some respondents approved of the realignment of our comments in DEPP 6.2.14 about discipline for breaches of the Principles for Businesses, most respondents who commented on this question objected to the reduction of the previous text in ENF 11.6, particularly the omission of the examples of when we may take action on the basis of Principles alone contained in ENF 11.6.3. Some respondents queried why this had been deleted when the equivalent text relating to breaches of the Listing Principles had been retained in DEPP 6.2.17 (now 6.2.18).
- 2.42 Several respondents expressed a strong preference that we should continue to rely primarily on detailed rules where applicable, rather than on Principles alone. They expressed concerns, for example, about the implications that not doing so had for the clarity of the rules and for enabling firms to assess compliance.
- 2.43 Several respondents asked that we provide greater clarity about the role of 'reasonable predictability' in taking action for a breach of Principles. Respondents also expressed concern that, if Principles were reinterpreted over time, the FSA might take retrospective action against conduct that was accepted practice when the conduct took place. One respondent asked that we reinsert the text currently at ENF 14.8 explaining our policy about taking action for market abuse or a breach of the Principles.

Our response: We have clearly signposted our intention to place greater reliance on the Principles for Businesses and less on detailed rules. The text in ENF 11.6.3 no longer accurately reflects our policy in this area and was removed for that reason. We have, however, added text previously set out in ENF 11.6.2 confirming that in determining whether a Principle has been broken, it is necessary to look to the standard of conduct required by the Principle in question and that the onus will be on the FSA to show that a firm has been at fault in some way.

Our increased emphasis on Principles does not mean that rules have no place, and we will continue to refer to detailed rules in appropriate cases. In all cases we will refer to the rules, whether they are detailed rules or Principles, that best describe the misconduct. In contrast, our policy in relation to breaches of the Listing Principles has not changed and so we have kept the text of ENF 21.6.5 – 7 in DEPP 6.2.16-18.

We have considerably revised what we say about enforcing the Principles in Chapter 2 of EG. We did this to provide greater clarity about what we mean when we say that it must be possible reasonably to predict that a course of conduct would breach a Principle and to confirm that we will not take action on the basis of later, higher standards. For further comments on this, please see our response to question 16 below.

We do not consider that the statements previously made in ENF 14.8 add clarity to our policy and have not included this text in EG. Whether we take action for a breach of Principle 5 or for market abuse will depend on the facts and circumstances of the specific case.

Q14: Do you have any other comments on the proposed text of DEPP 6 and 7?

- 2.44 We received few specific responses to this question. Some concerns were expressed about the inclusion of public statements and wealth in our list of possible penalty factors. Several respondents noted that the lists of factors provided useful background. But they said it would be helpful if we were clearer about the methodology applied when determining penalties and which factors should be applied.
- 2.45 Some respondents commented on the settlement discount scheme. One said that, while they agreed that it was beneficial to have discounts for early and negotiated settlement, firms should not be penalised by being fined more for exercising their rights to fully challenge the FSA. Another thought that the discount scheme was insufficiently generous and there should be a greater difference between the discounts for settling at stage 1 and stage 3 of the process. This respondent said there should be greater transparency about how the settlement decision makers determine penalty. And they stated that a person has no real understanding about how their representations have been taken into account and is dependent on the FSA staff handling settlement discussions to ensure their points are properly represented to the settlement decision makers.

Our response: Our comments on issues relating to the new factors in the lists of factors in DEPP 6 are set out in our response to question 11 above. We have amended the text of DEPP 6.5.2(3)(b) to include a more specific reference to a ‘firm’s internal procedures’. We have also clarified, in line with one of the Enforcement Process Review recommendations, in DEPP 6.7.5 that the fact that a case was settled, and the level of any settlement discount applied, will be stated in the final notice.

We intend to do further work in respect of our approach to determining the level of penalty. This is in part as a result of responses to CP07/2. We will, as part of this work, assess whether we are content with what we say about the factors we take into account when determining the level of penalty to be imposed.

Firms are under no obligation to settle with us. We will not settle unless we are satisfied that in doing so we will achieve the right regulatory outcome. In the same way, a firm should not settle unless it is content with the outcome. The level of penalty that we impose does not increase because a firm challenges our findings. Rather, a firm will be told at an early stage in any settlement discussions what level of penalty we believe is appropriate, but will not have to pay the full amount of that penalty if it agrees to settle within the discount period. We do not consider it necessary or appropriate to change the levels of discount or the stages of the process to which they apply.

Our Detailed Proposals for EG

Q15: Do you have any comments on the text of Chapter 1 of the proposed guide?

- 2.46 Few respondents commented on Chapter 1 of EG. One respondent was concerned that firms could not be assured that we will follow what we say in EG or that we will consult on changes to EG. They also commented that the division of material from ENF into both DEPP and EG was unhelpful and required a lot of cross-referencing.

Our response: For the reasons set out in our response to questions 1 and 2 above, we propose to retain the split between DEPP and EG. We also confirm that we will consult on all changes to EG and outlines our proposed approach to consultation. As noted in paragraph 2.5 of this PS, we have included some additional cross-references.

Q16: Do you have any comments on the text of Chapter 2 of the proposed guide?

- 2.47 Respondents generally expressed their approval of our principles-based approach to regulation, but were concerned about how we intend to enforce a principles-based regime. Respondents requested clarity about the ‘reasonable predictability test’. A repeated strand of comment was that, where a detailed rule had been breached, we should take action for the breach of the detailed rule rather than taking action on the basis of Principles alone.
- 2.48 Some respondents requested clarification about the role of industry guidance in an enforcement context. They expressed concerns that reliance on industry guidance could lead to the setting of benchmarks of standards and behaviours which firms would feel bound to follow for fear of being subject to enforcement action. Respondents asked us to confirm that industry guidance points to an acceptable practice, not to the only acceptable practice.
- 2.49 One respondent criticised our focus on outcomes, arguing that they have no role to play in answering the question of whether or not a Principle had been breached. They said it would be dangerous and wrong for us to approach the question of whether a breach had been committed by asking whether our desired outcomes had been attained.

- 2.50 One respondent commented that our case selection policy did not sit easily with the fact that action that we have taken in previous, similar cases is included in the lists of factors when deciding whether to take action in DEPP 6. Another asked us to clarify the circumstances in which we would take action against a firm's senior management for, for example, systemic failings of the firm.
- 2.51 Two respondents commented on the possible impact on thematic work of the approach to enforcement outlined in Chapter 2 of EG. They noted that there was a risk that the prospect of enforcement action would diminish firms' willingness to work with us voluntarily on thematic issues, particularly where our work is exploratory in nature. They suggested it would be helpful to make some reference to this in EG.

Our response: Our commitment to taking action on the basis of Principles alone in appropriate cases is a fundamental aspect of our principles-based approach. But we acknowledge that firms are sometimes uncertain about what the increased focus on Principles in the enforcement context will mean in practice. So we have sought to clarify the circumstances in which we expect to take action for a breach of the Principles. We have therefore revised the section on 'Enforcement and the FSA's Principles for Businesses'. And we have set out the amended text and related sections on 'FSA guidance and supporting materials' and 'industry guidance' in paragraphs 2.22 to 2.30 of EG.

We have clarified that 'reasonable predictability' should not be seen as a legal test, but is a reaffirmation by the FSA that we will not take action on the basis of later, higher standards. We have confirmed that we will not take enforcement action unless it was possible to predict at the time that the relevant conduct took place that the conduct would fall short of what the Principles require. We have also explained that guidance and other materials (whether published by us or others) provides one way, rather than the only way, of complying with our rules and requirements.

Our response to question 13 contains further discussion about the interplay between the Principles and detailed rules. Paragraphs 2.9 to 2.15 of this PS explain our approach to the role of guidance in enforcement.

We consider that our case selection process is appropriate and do not see any discord between choosing which cases to bring, and taking account of those cases in subsequent similar action. Nor do we think we can usefully add to what we say about the circumstances in which we will take action against senior management.

The active engagement of industry in thematic work brings clear benefits to us and to regulated markets and consumers more generally. Thematic work is a method that we use to supervise firms, along with the supervisory relationships we have with individual firms. We expect firms to participate in thematic work in the same way we expect them to participate in other supervisory visits and discussions. We use a mixture of horizontal (thematic) and vertical (firm specific) supervision with the firms we regulate to help us to meet our statutory objectives. In the same way that we cannot ignore a breach that comes to light in other supervisory work, we cannot ignore a breach that comes to light in thematic work. Enforcement is one of the tools available to us should this occur and will be considered as it would be in any other case. We note the comments made on this subject, but do not think it is necessary to add to what we say about thematic work in EG 2.

Q17: Do you have any comments on the text of Chapter 3 of the proposed guide?

- 2.52 Recurring themes in the responses to CP07/2 were concerns about:
- (a) the extent to which we expect other firms to follow or draw guidance from a decision in a settled case; and
 - (b) the extent to which a decision in a settled case commits the FSA itself in a subsequent contested case to reach the same view on the application of a Principle.
- 2.53 These concerns stemmed from respondents' views that we and the person subject to investigation were under pressure, or at least had an incentive, to settle. This resulted, they said, in compromises and in decisions being taken by both sides on the basis of incomplete information. They argued that this undermined the value of the decisions reached.

Our response: As explained in paragraph 2.3 of this PS, the material in EG relating to settlement is now located in Chapter 5.

We have revised the opening paragraphs of the settlement chapter of EG. We accept that the use of the word 'precedent' in the context of decisions by an administrative decision maker is unhelpful; it is wrong to think in terms of the FSA 'binding itself' when it reaches a decision in an enforcement case. By the same token, firms do not lose the opportunity to advance arguments about the proper scope or application of a Principle because similar issues have been raised before. The fact that the subject of earlier action by us chose to settle does not preclude a firm from fighting a subsequent case.

Rather than talking about our decisions having the effect of 'precedent' we think it is important to focus on the consistency of decisions made by all FSA decision makers. The RDC, and indeed the two FSA directors constituting the settlement decision makers, are able to depart from an earlier FSA view of the proper application of a Principle in a given context. But they will take the earlier decision into account when they reach their decision, and will depart from the earlier approach only when they have good reasons for doing so.

We have addressed comments relating to the 'pressure to settle' in our response to question 9 above. As noted in our response to question 9 above, we reject arguments that decisions to settle are taken on the basis of incomplete information.

Q18: Do you have any comments on the text of Chapter 4 of the proposed guide?

- 2.54 Most respondents had no comments on the text of Chapter 4 of EG.
- 2.55 One respondent queried the basis on which we considered that six years was a sensible time frame for the review of press releases. Some respondents suggested that, where notices and press releases are removed from the website, they be placed in a searchable, online archive. A respondent felt that press releases present a distorted picture of the grounds upon which a case was settled. Another felt that the press release should be discussed with the firm in settled cases.

Our response: The chapter on publicity appears as Chapter 6 of the final version of EG.

We acknowledge stakeholders' concerns about ongoing access to notices of enforcement action. It is not our intention to remove cases which continue to send useful enforcement messages, which retain deterrent value or are of sufficient interest to consumers and the general public to justify continued publication. However, we also recognise the potential impact that ongoing publication may have on any person to whom the published information relates. In this light, we consider that six years is an appropriate review period, consistent with limitation periods and record-keeping requirements. When reviewing notices and press releases, we will consider anonymising or otherwise amending information in appropriate circumstances. Any material which we consider, on balance, should be removed may be the subject of requests for information and thus may still be obtainable even when no longer available on the website.

We understand the importance of publishing press releases that send clear messages about our enforcement action in a particular case. We do not propose to alter our policy of not negotiating the language of press releases with firms. However, we consider it helpful to include confirmation that the RDC Chairman or one of his Deputies will approve press releases in cases decided by the RDC (unless the RDC's decision is superseded by a decision of the Tribunal). This reflects a recommendation of the Enforcement Process Review.

Q19: Do you have any comments on the text of Chapters 5 and 6 of the proposed guide?

- 2.56 Most respondents did not comment on Chapters 5 and 6 of EG. One respondent queried whether EG 6.8 and 6.9 were inconsistent. Another respondent asked for clarification about when a preliminary findings letter would be issued and if this would be within 28 days from the issue of the stage 1 letter.
- 2.57 One respondent queried whether EG 6.7 on the confidentiality of investigations adequately reflected paragraph 5.22 of CP07/2. The respondent also questioned the basis on which we would seek to impose upon the subject of an investigation wider confidentiality restrictions than those contained in section 348 of FSMA. They suggested that it was more appropriate to focus on the notion that it is desirable for people not to impede an FSA investigation.
- 2.58 A respondent queried three changes in EG to previous Enforcement manual text which were not specifically discussed in CP07/2. These were: the removal of a phrase in ENF 2.12.2 relating to 'inadvertent incrimination' from its equivalent position in EG 6.1; the inclusion of a new sentence in EG 6.8-6.11 relating to our reliance on Principle 11 of the Principles for Businesses or Statement of Principle 4 for Approved Persons in investigations; and the inclusion of references in EG 6.11 and 6.20 to 'adverse inferences' where a person fails to comply with a requirement imposed on them under FSMA. The respondent said that if the refusal to attend or participate in an interview was a factor considered when deciding whether to take action, impose a penalty or when determining the level of penalty, it should be included in the lists of factors in DEPP 6. The respondent added that it might not always be appropriate for a supervisor to be part of an investigation team and that firms should thus be notified of this before investigators were appointed to enable them to raise any objections early in the process.

Our response: Chapters 5 and 6 of the version of EG upon which we consulted have become Chapters 3 and 4 of the final version of EG. To avoid confusion, we have included references to the consultation paragraph numbers, with the final paragraph numbers in brackets afterwards.

In line with the Enforcement Process Review recommendation, the preliminary findings letter is not produced until after the end of the 'early settlement' phase or stage 1 of the enforcement process. Firms who settle before the end of stage 1 receive a 30% discount for doing so. This is to encourage firms to settle early, thus enabling us to send messages and secure customer redress earlier than would otherwise have been the case. It is also to acknowledge the resource saving to us if a matter is resolved before we draft investigation documentation and carry out a legal review of the case. This is why the drafting of detailed documents, and the legal review of a case, does not usually happen until stage 2 of the process.

We have revised paragraphs 6.8-6.12 (4.8 – 4.11) of EG so that they more closely reflect our existing statements relating to the use of statutory powers in an investigation and the interaction between the use of those powers and Principle 11 or Statement of Principle 4. We do not consider that our statements are contradictory. They are intended to confirm that we will not argue that a person is failing to comply with its co-operation requirements as set out in Principle 11 or Statement of Principle 4 solely because they choose not to attend an interview or provide information on a voluntary basis during an investigation. However, on the question of our referring to 'adverse inferences', we consider it important to make people aware that, although we will not seek to rely on Principle 11 or Statement of Principle 4 in these circumstances, there may be other consequences of failing to provide voluntary assistance. It will be for the relevant decision maker to decide in the circumstances of the specific case whether there is any significance in the fact that a person has refused, for example, to attend or participate in a voluntary interview. As to the relevance of non-cooperation, a person's conduct after the breach, including their co-operation in the investigation, is already included in the lists of factors in DEPP 6.

We have amended paragraph 6.7 (4.7) of EG to confirm that, subject to the restrictions in section 348 of FSMA, our own expectations that a person will maintain the confidentiality of an investigation do not prevent that person from making their own enquiries. In respect of paragraph 6.1 (4.1) of EG, we removed the 'inadvertent incrimination' phrase from the Enforcement manual text which it replaces as we did not consider that it usefully added to the text. This remains our view and we have not reinstated the relevant text.

We are satisfied that our existing policy on the appointment of supervisors as investigators is appropriate. It is not always feasible to notify a person of the identity of the investigators before their appointment. But we confirm that, if a firm does raise objections, these will be considered and where we think it is appropriate in the circumstances, the supervisor will be removed from the investigation team.

We have amended EG 5.20 to emphasise our commitment to mediation in appropriate circumstances. This also links into responses received to question 9 in CP07/2.

Q20: Do you have any comments on the text of Chapter 7 of the proposed guide?

- 2.59 Most respondents did not comment on Chapter 7 of EG. One respondent said that the text did not make clear whether there was a formal right of response to a private warning. Another respondent said they did not believe that a private warning should be an aggravating factor when considering subsequent, similar action unless a firm should have, and failed to, take steps to address the issue to which the private warning related. The respondent suggested that we make EG 7.15 clearer on this point.

Our response: We consider that paragraph 7.15 of EG makes sufficiently clear that a person who receives a private warning may respond to that warning. We disagree that private warnings are only relevant in subsequent enforcement action in relation to similar or the same conduct. Private warnings form a part of a firm's compliance history and it is illogical to seek to distinguish between private warnings and, say, normal supervisory correspondence in this context.

Q21: Do you have any comments on the text of Chapter 8 of the proposed guide?

- 2.60 Most respondents did not comment on Chapter 8 of EG. One suggestion was that there is scope to extend situations in which cancellation will be favoured over disciplinary action, and that the use of more examples would be helpful.

Our response: We have amended Chapter 8 of EG to provide some further practical examples of situations in which these powers would be exercised. For example, in paragraph 8.14 of EG we have confirmed that we may cancel permission when a firm has repeatedly failed to pay its FSA fees, except under threat of enforcement action; or when it has failed to provide or maintain valid contact details, so we have no means of communicating with the firm.

Q22: Do you have any comments on the text of Chapter 9 of the proposed guide?

- 2.61 Most respondents did not comment on Chapter 9 of EG. One respondent thought that it would be useful to provide examples of the types of behaviour that would be likely to result in prohibition. A respondent asked if removing the wording 'only in the more serious cases' meant that prohibitions would be used more widely. Another respondent said that they felt that the test of 'appropriateness' would be inadequate and too subjective and that powers to withdraw approval/prohibit should only be used where other powers were inadequate.

Our response: Withdrawing a person's approval or prohibiting a person can clearly have a real impact on the individual involved. However, we do not agree that it is appropriate to use our powers to prohibit a person or withdraw approval only when other sanctions are inadequate. The powers to withdraw approval or prohibit a person are protective in nature and we consider that there are circumstances in which it may be appropriate both to impose a financial penalty on a person and prohibit them or, in the case of an approved person, withdraw their approval (or both).

To provide a clearer understanding of the type of conduct which may result in us prohibiting a person or withdrawing approval, we have replaced the hypothetical examples in paragraph 9.12 of EG with descriptions of behaviour from previous cases which resulted in us exercising our prohibition and withdrawal powers. We have confirmed in paragraph 9.9 of EG that a further factor that we may consider when deciding whether to use these powers is whether a person has engaged in market abuse.

Q23: Do you have any comments on the text of Chapter 10 of the proposed guide?

- 2.62 Most respondents did not comment on this chapter of EG, nor were any comments made in respect of our proposal to create a separate Regulatory Guide in respect of unfair terms in consumer contracts. Those respondents who did comment welcomed the simplification and clarification of the text.

Our response: We are creating the new Unfair Contract Terms Regulatory Guide (UNFCOG). UNFCOG contains text relating to our powers under the Unfair Terms Regulation which was previously located in Chapter 20 of ENF, with the exception of text relating to the use of our injunctive powers under these Regulations. This is included (with some minor amendments) in paragraphs 10.12 to 10.19 of EG. UNFCOG also includes links to relevant statements of good practice that we publish on our website.

Q24: Do you have any comments on the text of Chapter 11 of the proposed guide?

- 2.63 Most respondents did not comment on the text in this chapter. Those who did welcomed the clarification of the text in Chapter 11 of EG.

Our response: We have made no changes to the text of Chapter 11 of EG on which we consulted.

Q25: Do you have any comments on the text of Chapter 12 of the proposed guide?

- 2.64 Most respondents did not have any comments on Chapter 12 of EG. One respondent suggested that it would be helpful to provide a link to the discussion of the power to prosecute friendly societies referred to in the text.

Our response: We have included a link to the paper on our website about our power to prosecute friendly societies. With the exception of some consequential changes (for example to remove references to the Collective Investment Scheme module of the Handbook which is no longer in effect) Chapter 12 is otherwise unchanged from the version on which we consulted.

Q26: Do you have any comments on the text of Chapters 13 to 18 of the proposed guide?

- 2.65 With the exception of one respondent who welcomed the simplification of the text, respondents did not comment on Chapters 13 to 18 of EG.

Our response: With the exception of some consequential changes (for example to remove references to the Collective Investment Scheme module of the Handbook which is no longer in effect) Chapters 13 to 18 are unchanged from the version on which we consulted.

Future Reviews of EG and DEPP and Transitional Matters

Q27: Do you have any comments on the proposals in paragraphs 6.1 to 6.6 of this CP?

- 2.66 Among respondents who commented, some were in favour of our proposals. Others wanted a firm commitment that we will consult on material changes to EG. One respondent said that anything of significance should be discussed with as wide an audience as possible.
- 2.67 One respondent suggested that we should have a robust process for monitoring and reviewing DEPP and EG. This respondent suggested that key stakeholders be notified in advance of informal consultation. Another respondent noted that we do not expand on what would be a major or minor change. This respondent stated they would like the ‘fast track’ procedure to be limited to preliminary issues and not used for matters of substance.

Our response: We will consult on all changes to EG, in the manner outlined in our response to questions 1 and 2 above. We will review the material in DEPP and EG at least annually and where we consider that changes are appropriate we will follow the consultation processes that we have described in this PS.

List of non-confidential responses

The Association of British Insurers (ABI)

AXA

Aviva Plc

The British Bankers Association (BBA)

CMS Cameron McKenna LLP

The Financial Services Consumer Panel

Deloitte

Eversheds LLP

FSML City Liaison Group enforcement committee

Friends Provident Life & Pensions Ltd

Investment & Life Assurance Group (ILAG)

Investment Management Association (IMA)

Lockton Companies International Ltd

Prudential Plc

Royal & SunAlliance

UnumProvident

Decision Procedure and Penalties Manual

DECISION PROCEDURE AND PENALTIES MANUAL INSTRUMENT 2007

Powers exercised

- A. The Financial Services Authority makes this instrument in the exercise of the following powers in or under the Financial Services and Markets Act 2000:
- (1) section 69(1) (Statement of policy);
 - (2) section 93(1) (Statement of policy);
 - (3) section 124(1) (Statement of policy);
 - (4) section 157(1) (Guidance);
 - (5) section 169(9) (Investigations etc. in support of overseas regulator);
 - (6) section 210(1) (Statements of policy); and
 - (7) section 395(5) (The Authority's procedures).

Commencement

- B. Annex A to this instrument comes into force on 28 August 2007.
- C. Annex B to this instrument comes into force on 1 November 2007.

Making the Decision Procedure and Penalties manual

- D. The Financial Services Authority gives the guidance set out in Annex A to this instrument.
- E. The manual in Annex A to this instrument (including its schedules) may be cited as the Decision Procedure and Penalties manual (or DEPP).

Changes to the Handbook

- F. The Decision Procedure and Penalties manual (DEPP) is amended in accordance with Annex B to this instrument.

Citation

- G. This instrument may be cited as the Decision Procedure and Penalties Manual Instrument 2007.

By order of the Board
26 July 2007

Annex A

Decision Procedure and Penalties manual (DEPP)

This Annex makes the new Decision Procedure and Penalties manual (DEPP). All the text is new and is not shown underlined. This Annex contains the following sections of DEPP.

| Chapter | Chapter Title | Sections made |
|----------------|--|----------------------|
| 1 | Application and Purpose | Sections 1.1 to 1.2 |
| 2 | Statutory notices and the allocation of decision making | Sections 2.1 to 2.5 |
| 3 | The nature and procedure of the RDC | Sections 3.1 to 3.4 |
| 4 | Decisions by FSA staff under executive procedures | Sections 4.1 to 4.2 |
| 5 | Settlement decision procedure | Section 5.1 |
| 6 | Penalties | Sections 6.1 to 6.7 |
| 7 | The FSA's statement of policy on section 169(7) interviews | Sections 7.1 to 7.2 |

1 Application and Purpose

1.1 Application and Purpose

Application

- 1.1.1 G This manual (*DEPP*) is relevant to *firms, approved persons* and other *persons*, whether or not they are regulated by the *FSA*. It sets out:
- (1) the *FSA's* decision-making procedure for giving *statutory notices*. These are *warning notices, decision notices* and *supervisory notices* (*DEPP* 1.2 to *DEPP* 5);
 - (2) the *FSA's* policy with respect to the imposition and amount of penalties under the *Act* (see *DEPP* 6);
 - (3) the *FSA's* policy with respect to the conduct of interviews by investigators appointed in response to a request from an overseas regulator (*DEPP* 7).

Purpose

- 1.1.2 G The purpose of *DEPP* is to satisfy the requirements of sections 69(1), 93(1), 124(1), 169(7), 210(1) and 395 of *the Act* that the *FSA* publish the statements of procedure or policy referred to in *DEPP* 1.1.1G.

1.2 Introduction to statutory notices

Statutory notices

- 1.2.1 G Section 395 of the *Act* (The *FSA's* procedures) requires the *FSA* to publish a statement of its procedure for the giving of *statutory notices*. The procedure must be designed to secure, among other things, that the decision which gives rise to the obligation to give a *statutory notice* is taken by a person not directly involved in establishing the evidence on which that decision is based. The types of *statutory notices* and related notices, and the principal references to them in the *Act* and *DEPP* are set out in *DEPP* 1.2.2G.
- 1.2.2 G Table: Summary of statutory and related notices

| Notice | Description | Act reference | Further information |
|-----------------------|--|---------------|---------------------|
| <i>Warning notice</i> | Gives the recipient details about action that the <i>FSA</i> proposes to take and about the right to make representations. | Section 387 | <i>DEPP</i> 2.2 |

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| <i>Decision notice</i> | Gives the recipient details about action that the <i>FSA</i> has decided to take. The <i>FSA</i> may also give a further <i>decision notice</i> if the recipient of the original <i>decision notice</i> consents. | Section 388 | <i>DEPP</i> 2.3 |
| <i>Notice of discontinuance</i> | Identifies proceedings set out in a <i>warning notice</i> or <i>decision notice</i> and which are not being taken or are being discontinued. | Section 389 | <i>DEPP</i> 1.2.4G and <i>DEPP</i> 3.2.26G |
| <i>Final notice</i> | Sets out the terms of the action that the <i>FSA</i> is taking. | Section 390 | <i>DEPP</i> 1.2.4G |
| <i>Supervisory notice</i> | Gives the recipient details about action that the <i>FSA</i> has taken or proposes to take, for example to vary a <i>Part IV permission</i> . | Section 395(13) | <i>DEPP</i> 2.2 and 2.3 |

1.2.3 G In *DEPP* the *supervisory notice* about a matter first given to the recipient is referred to as the "first *supervisory notice*" and the *supervisory notice* given after consideration of any representations is referred to as the "second *supervisory notice*".

1.2.4 G The requirement in section 395 of the *Act* to publish a procedure for the giving of notices does not extend to the giving of a *notice of discontinuance* or a *final notice*. Neither of these notices is a *statutory notice* for the purposes of *DEPP*; nor is the decision to give such a notice a *statutory notice associated decision*.

The decision makers

1.2.5 G Decisions on whether to give a *statutory notice* will be taken by a 'decision maker'. The *FSA*'s assessment of who is the appropriate decision maker is subject to the requirements of section 395 of the *Act* and will depend upon the nature of the decision, including its complexity, importance and urgency. References to the 'decision maker' in *DEPP* are to:

- (1) the *Regulatory Decisions Committee (RDC)*; or
- (2) *FSA* staff under *executive procedures*; or
- (3) *FSA* staff under the *settlement decision procedure*.

- 1.2.6 G The decision maker will also take decisions associated with a *statutory notice* (a '*statutory notice associated decision*'). *Statutory notice associated decisions* include decisions:
- (1) to set or extend the period for making representations;
 - (2) on whether the *FSA* is required to give a copy of the *statutory notice* to any third party and, if so, the period for the third party to make representations; and
 - (3) on whether to refuse access to *FSA* material, relevant to the relevant *statutory notice*, under section 394 of the *Act*.
- 1.2.7 G In each case, the decision maker will make decisions by applying the relevant statutory tests, having regard to the context and nature of the matter, that is, the relevant facts, law, and *FSA* priorities and policies (including on matters of legal interpretation).
- 1.2.8 G The *FSA* will make and retain appropriate records of those decisions, including records of meetings and the representations (if any) and materials considered by the decision makers.
- 1.2.9 G *DEPP 2 to DEPP 5* set out:
- (1) which decisions require the giving of statutory notices and who takes them (*DEPP 2*);
 - (2) the nature and procedures of the *RDC* (*DEPP 3*);
 - (3) the procedure for decision making by *FSA* staff under *executive procedures* (*DEPP 4*);
 - (4) the procedure for decision making by *FSA* staff under the *settlement decision procedure* (*DEPP 5*).

2 Statutory notices and the allocation of decision making

2.1 Statutory notices

When statutory notices are required

- 2.1.1 G The circumstances in which the *warning notice* and *decision notice* procedure apply are set out in *DEPP 2 Annex 1G*.
- 2.1.2 G The circumstances in which the *supervisory notice* procedure apply are set out in *DEPP 2 Annex 2G*.
- 2.1.3 G *DEPP 2 Annex 1G* and *DEPP 2 Annex 2G* identify the provisions of the *Act* or other enactment giving rise to the need for the relevant notice, and whether the decision maker is the *RDC* or *FSA* staff under *executive procedures* in each case.

Consistent decision making

- 2.1.4 G *FSA* staff responsible for the taking of a *statutory notice* decision under *executive procedures* may refer the matter to the *RDC* for the *RDC* to decide whether to give the statutory notice if:
 - (1) the *RDC* is already considering, or is shortly to consider, a closely related matter; and
 - (2) the relevant *FSA* staff believe, having regard to all the circumstances, that the *RDC* should have responsibility for the decision. The relevant considerations might include:
 - (a) the desirability of consistency in *FSA* decision making;
 - (b) potential savings in the time and cost of reaching a decision;
 - (c) the factors identified in *DEPP 3.3.2G* as relevant to an assessment of whether a decision should be regarded as straightforward.

2.2 Warning notices and first supervisory notices

- 2.2.1 G If *FSA* staff consider that action requiring a *warning notice* or first *supervisory notice* is appropriate, they will recommend to the relevant decision maker that the notice be given.
- 2.2.2 G For first *supervisory notices*, the *FSA* staff will recommend whether the action should take effect immediately, on a specified date, or when the matter is no longer open to review (see *DEPP 2.2.5G*).
- 2.2.3 G The decision maker will:

- (1) consider whether the material on which the recommendation is based is adequate to support it; the decision maker may seek additional information about or clarification of the recommendation, which may necessitate additional work by the relevant *FSA* staff;
 - (2) satisfy itself that the action recommended is appropriate in all the circumstances;
 - (3) decide whether to give the notice and the terms of any notice given.
- 2.2.4 G If the *FSA* decides to take no further action and the *FSA* had previously informed the *person* concerned that it intended to recommend action, the *FSA* will communicate this decision promptly to the *person* concerned.
- 2.2.5 G A matter is open to review (as defined in section 391(8) (Publication) of the *Act*) (in relation to a *supervisory notice* which does not take effect immediately or on a specified date) when:
- (1) the period during which any *person* may refer a matter to the *Tribunal* is still running; or
 - (2) the matter has been referred to the *Tribunal* but has not been dealt with; or
 - (3) the matter has been referred to the *Tribunal* and dealt with but the period during which an appeal may be brought against the *Tribunal's* decision is still running; or
 - (4) such an appeal has been brought but has not been determined.

2.3 Decision notices and second supervisory notices

Approach of decision maker

- 2.3.1 G If a decision maker is asked to decide whether to give a *decision notice* or second *supervisory notice*, it will:
- (1) review the material before it;
 - (2) consider any representations made (whether written, oral or both) and any comments by *FSA* staff or others in respect of those representations;
 - (3) decide whether to give the notice and the terms of any notice given.

Default procedures

- 2.3.2 G If the *FSA* receives no response or representations within the period specified in a *warning notice*, the decision maker may regard as undisputed the allegations or matters in that notice and a *decision notice* will be given

accordingly. A *person* who has received a *decision notice* and has not previously made any response or representations to the *FSA*, may nevertheless refer the *FSA's* decision to the *Tribunal*.

- 2.3.3 G If the *FSA* receives no response or representations within the period specified in a first *supervisory notice*, the *FSA* will not give a second *supervisory notice*. The outcome depends on when the relevant action took or takes effect (as stated in the notice). If the action:
- (1) took effect immediately, or on a specified date which has already passed, it continues to have effect (subject to any decision on a referral to the *Tribunal*); or
 - (2) was to take effect on a specified date which is still in the future, it takes effect on that date (subject to any decision on a referral to the *Tribunal*); or
 - (3) was to take effect when the matter was no longer *open for review*, it takes effect when the period to make representations (or the period for referral to the *Tribunal*, if longer) expires, unless the matter has been referred to the *Tribunal*.

- 2.3.4 G In exceptional cases, the decision maker may permit representations from a *person* who has received a *decision notice* (or a second *supervisory notice*) or against whom action, detailed in a first *supervisory notice*, has taken effect, and shows on reasonable grounds that he did not receive the *warning notice* (or first *supervisory notice*), or that he had reasonable grounds for not responding within the specified period. In these circumstances, the decision maker may decide to give a further *decision notice* (or a written notice or a *supervisory notice*).

Further decision notice

- 2.3.5 G Under section 388(3) of the *Act*, following the giving of a *decision notice* but before the *FSA* takes action to which the *decision notice* relates, the *FSA* may give the *person* concerned a further *decision notice* relating to different action concerning the same matter. Under section 388(4) of the *Act*, the *FSA* can only do this if the *person* receiving the further *decision notice* gives its consent. In these circumstances the following procedure will apply:
- (1) *FSA* staff will recommend to the decision maker that a further *decision notice* be given, either before or after obtaining the *person's* consent;
 - (2) the decision maker will consider whether the action proposed in the further *decision notice* is appropriate in the circumstances;
 - (3) if the decision maker decides that the action proposed is inappropriate, he will decide not to give the further *decision notice*. In this case, the original *decision notice* will stand and the *person's* rights in relation to that notice will be unaffected. If the *person's* consent has already been obtained, the *FSA* will notify the *person* of

the decision not to give the further *decision notice*;

- (4) if the decision maker decides that the action proposed is appropriate then, subject to the *person's* consent being (or having been) obtained, a further *decision notice* will be given;
- (5) a *person* who had the right to refer the matter to the *Tribunal* under the original *decision notice* will have that right under the further *decision notice*. The time period in which the reference to the *Tribunal* may be made will begin from the date on which the further *decision notice* is given.

- 2.3.6 G For the purpose of establishing whether the *person* receiving the further *decision notice* gives its consent, the *FSA* will normally require consent in writing.

2.4 Third party rights and access to *FSA* material

- 2.4.1 G Sections 393 (Third party rights) and 394 (Access to *FSA* material) of the *Act* confer additional procedural rights relating to third parties and to disclosure of *FSA* material. These rights apply in certain *warning notice* and *decision notice* cases referred to in section 392 of the *Act* (Application of sections 393 and 394). The cases in which these additional rights apply are identified in *DEPP 2* Annex 1G by asterisks; these are generally cases in which the *warning notice* or *decision notice* is given on the *FSA's* own initiative rather than in response to an application or notification made to the *FSA*.

2.5 Provision for certain categories of decision

Purpose

- 2.5.1 G Some of the decisions referred to in *DEPP 2* Annex 1G and *DEPP 2* Annex 2G share similar characteristics. For convenience, *DEPP 2.5* sets out some of these and the particular features they have.

Different decision makers

- 2.5.2 G The decision to give a *warning notice* and a *decision notice* in a particular matter will often not be taken by the same decision maker. Certain types of action require that the *warning notice* decision be taken by *FSA* staff under *executive procedures* and the *decision notice* decision be taken by the *RDC*. Similarly, in enforcement cases the *RDC* might take the decision to give a *warning notice*, but the decision to give a *decision notice* could be taken by the *settlement decision makers* on the basis that the *person* concerned does not contest the action proposed (see *DEPP 5*).

Decisions relating to applications for authorisation or approval

- 2.5.3 G *FSA* staff under *executive procedures* will take the decision to give a *warning notice* if the *FSA* proposes to:
- (1) refuse an application for a *Part IV permission* or to refuse an application to cancel a *Part IV permission*;
 - (2) impose a limitation or a requirement which was not applied for, or specify a narrower description of regulated activity than that applied for, on the grant of a *Part IV permission*;
 - (3) refuse an application to vary a *Part IV permission*, or to restrict a *Part IV permission* on the grant of a variation (by imposing a limitation or a requirement which was not applied for or by specifying a narrower description of regulated activity than that applied for);
 - (4) refuse *approved person* status;
 - (5) refuse an application for a *small e-money issuer certificate* (see *ELM* 8 (Small e-money issuers));
 - (6) refuse an application for variation or rescission of a requirement imposed on an *incoming EEA firm*.
- 2.5.4 G If no representations are made in response to a *warning notice* proposing the action set out at *DEPP* 2.5.3G within the period specified, a *decision notice* will be given accordingly: see *DEPP* 2.3.2G (Default procedures).
- 2.5.5 G If representations are made in response to a *warning notice* proposing the action set out at *DEPP* 2.5.3G(1), (4) or (5), then the *RDC* will take the decision to give a *decision notice*.
- 2.5.6 G If representations are made in response to a *warning notice* proposing the action set out at *DEPP* 2.5.3G(2) (3) or (6), then the *RDC* will take the decision to give a *decision notice* if the action involves a fundamental change (see *DEPP* 2.5.8G) to the nature of a *permission*. Otherwise, the decision to give the *decision notice* will be taken by *FSA* staff under *executive procedures*.

FSA's own-initiative power

- 2.5.7 G The *RDC* will take the decision to give a *supervisory notice* exercising the *FSA's* own initiative power (by removing a regulated activity, by imposing a limitation or requirement or by specifying a narrower description of regulated activity) if the action involves a fundamental change (see *DEPP* 2.5.8G) to the nature of a *permission*. Otherwise, the decision to give the *decision notice* will be taken by *FSA* staff under *executive procedures*.
- 2.5.8 G A fundamental change to the nature of a *permission* means:
- (1) removing a type of activity or *investment* from the *firm's permission*;
- or

- (2) refusing an application to include a type of activity or *investment*; or
- (3) restricting a *firm* from taking on new business, dealing with a particular category of *client* or handling *client money* by imposing a *limitation* or *requirement*, or refusing an application to vary or cancel such a *limitation* or *requirement*; or
- (4) imposing or varying an assets requirement (as defined in section 48(3) of the *Act* (Prohibitions and restrictions)), or refusing an application to vary or cancel such a requirement.

Decisions relating to listing of securities

- 2.5.9 G *FSA* staff under *executive procedures* will take the following *statutory notice* decisions:
- (1) the refusal of an application for listing of securities;
 - (2) the suspension of *listing* on the *FSA's* own initiative or at the request of the issuer;
 - (3) the suspension of trading in a *financial instrument*;
 - (4) the discontinuance of *listing* of securities at the issuer's request;
 - (5) the exercise of any of the powers in sections 87K or 87L of the *Act* in respect of a breach of any applicable provision;
 - (6) the cancellation of a *person's* approval as a *sponsor* at the *sponsor's* request; and
 - (7) the refusal of an application by an issuer for cancellation of a suspension of *listing* made under section 77 of the *Act*.
- 2.5.10 G The *RDC* will take *statutory notice decisions* relating to the discontinuance of listing of securities on the *FSA's* own initiative.
- 2.5.11 G If securities have matured or otherwise ceased to exist the *FSA* will remove any reference to them from the official list. This is a purely administrative process, and not a discontinuance of listing in the sense used in Part 6 of the *Act*.

Modified procedures in collective investment scheme and certain other cases

- 2.5.12 G *FSA* staff will usually inform or discuss with the *person* concerned any action they contemplate before they recommend to the *RDC* that the *FSA* takes formal action. The *FSA* may also be invited to exercise certain powers by the *persons* who would be affected by the exercise of those powers. In these circumstances if the *person* concerned has agreed to or accepted the action proposed then the decisions referred to in *DEPP* 2.5.13G will be taken by *FSA* staff under *executive procedures* rather than by the *RDC*.

- 2.5.13 G The decisions referred to in *DEPP* 2.5.12G are:
- (1) the decision to give a *supervisory notice* pursuant to section 259(3), (8) or 9(b) (directions on authorised unit trust schemes); section 268(3), 7(a) or 9(a) (directions in respect of recognised overseas schemes); or section 282(3), (6) or (7)(b) (directions in respect of relevant recognised schemes) of the *Act*;
 - (2) the decision to give a *warning notice* or *decision notice* pursuant to section 280(1) or (2)(a) (revocation of recognised investment scheme) of the *Act*;
 - (3) the decision to give a *supervisory notice* in accordance with regulation 27(3), (8) or 9(b) of the *OEIC Regulations*;
 - (4) the decision to give a *warning notice* or *decision notice* pursuant to regulation 24 or regulation 28 of the *OEIC Regulations*;
 - (5) the decision to give a direction under section 42B(1) of the Building Societies Act 1986 that a building society transfers all its engagements to one or more other building societies or that it transfers its business to an existing company (under section 94 or section 97 respectively of the Building Societies Act 1986); and
 - (6) the decision to give a decision notice under section 93(6) of the Building Societies Act 1986 (permission for successor society on amalgamation) where the terms of the permission have been agreed with the successor building society.
- 2.5.14 G In determining whether there is agreement to or acceptance of the action proposed, an indication by the following *persons* will be regarded as conclusive:
- (1) in relation to an authorised unit trust, the manager and trustee;
 - (2) in relation to an *ICVC*, the directors and the depositary;
 - (3) in relation to a *recognised scheme*, the *operator* and, if any, the trustee or *depositary*.
- 2.5.15 G A decision to give a *warning notice* or *decision notice* refusing an application for an *authorisation order* declaring a unit trust scheme to be an *AUT* will be taken by the *RDC* only if the application is by an *authorised fund manager* who is not the *operator* of an existing *AUT* or *ICVC*. Otherwise, the decision to give the *warning notice* or *decision notice* will be taken by *FSA* staff under executive procedures.
- 2.5.16 G A notice under section 264(2) of the *Act* (notification of non-compliance with *UK* law) relating to a collective investment scheme constituted in another *EEA* State is not a *warning notice*, but the *FSA* will operate a procedure for a section 264(2) notice which will be similar to the procedure for a *warning notice*.

Notices under the Building Societies Act 1986 and other enactments

- 2.5.17 G The *FSA* expects to adopt a procedure in respect of notices under enactments other than the *Act* which is similar to that for *statutory notices* under the *Act*, but which recognises any differences in the legislative framework and requirements. *DEPP 2 Annex 1G* and *DEPP 2 Annex 2G* therefore identify notices to be given pursuant to other enactments and the relevant *FSA* decision maker.
- 2.5.18 G Some of the distinguishing features of notices given under enactments other than the *Act* are as follows:
- (1) Building Societies Act 1986, section 36A: There is no right to refer a decision to issue a prohibition order under section 36A to the *Tribunal*. Accordingly, a *decision notice* under section 36A(5A) is not required to give an indication of whether any such right exists. A *decision notice* under section 36A(5A) may only relate to the issue of a prohibition order under section 36A. Where such a *decision notice* is given, no *final notice* is required under section 390 of the *Act* and the *FSA* may issue the order at the same time as or after giving the *decision notice*. For the purposes of section 391 of the *Act* (Publication), the *decision notice* is treated as if it were a *final notice*.
 - (2) Building Societies Act 1986, section 93(6): The *FSA* notifies the successor of the *permission* by giving it a *decision notice*. The *decision notice* is not preceded by the giving of a *warning notice*. No *final notice* is required under section 390 of the *Act* and for the purposes of section 391 of the *Act* (Publication), the *decision notice* is treated as if it were a *final notice*. The giving of *permission* is treated for the purposes of section 55 of the *Act* (Right to refer matters to the *Tribunal*) as if it were the determination of an application made by the successor under Part IV of the *Act*. Part IX of the *Act* (Hearings and appeals) accordingly applies, but with the omission of section 133(9), which would otherwise prevent the *FSA* from giving the *permission* on the terms notified in the *decision notice* until after any reference and appeal.
 - (3) Friendly Societies Act 1992, section 58: The *warning notice* and *decision notice* must set out the terms of the direction which the *FSA* proposes or has decided to give and any specification of when the friendly society is to comply with it. A *decision notice* given under section 58A(3) must give an indication of the society's right, given by section 58A(5), to have the matter referred to the *Tribunal*. A *decision notice* under section 58A(3) may only relate to action under the same section of the *Friendly Societies Act 1992* as the action proposed in the *warning notice*. A *final notice* under section 390 of the *Act* must set out the terms of the direction and state the date from which it takes effect. Section 392 of the *Act* is to be read as if it included references to a *warning notice* given under section 58A(1) and a *decision notice* given under section 58A(3).

Note: Third party rights and access to *FSA* material apply to the powers listed in this Annex where indicated by an asterisk * (see *DEPP* 2.4)

| Section of the Act | Description | Handbook reference | Decision maker |
|--------------------|---|--------------------|---|
| 52(6)(a) | when the <i>FSA</i> is proposing to grant an application for a <i>Part IV permission</i> with a <i>limitation</i> or a <i>requirement</i> which was not applied for, or with a narrower description of <i>regulated activity</i> than that applied for | <i>SUP</i> 6 | <i>Executive procedures</i> |
| 52(6)(b) | when the <i>FSA</i> is proposing to grant an application to vary a <i>firm's Part IV permission</i> but, other than as part of the application, to restrict the <i>Part IV permission</i> (either by imposing a <i>limitation</i> or <i>requirement</i> which was not applied for or by specifying a narrower description of <i>regulated activity</i> than that applied for) | | <i>Executive procedures</i> |
| 52(7) | when the <i>FSA</i> is proposing to refuse an application for a <i>Part IV permission</i> | | <i>Executive procedures</i> |
| 52(7) | when the <i>FSA</i> is proposing to refuse an application to vary a <i>firm's Part IV permission</i> | <i>SUP</i> 6 | <i>Executive procedures</i> |
| 52(7) | when the <i>FSA</i> is proposing to refuse an application to cancel a <i>firm's Part IV permission</i> | <i>SUP</i> 6 | <i>Executive procedures</i> |
| 52(9)(a) | when the <i>FSA</i> is deciding to grant an application for a <i>Part IV permission</i> with a <i>limitation</i> or a <i>requirement</i> which was not applied for, or with a narrower description of <i>regulated activity</i> than that applied for | | <i>RDC</i> or <i>executive procedures</i> See <i>DEPP</i> 2.5.6G |
| 52(9)(b) | when the <i>FSA</i> is deciding to grant an | <i>SUP</i> 6 | <i>RDC</i> or |

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| | application to vary a <i>firm's Part IV permission</i> but, other than as part of the application, to restrict the <i>Part IV permission</i> (either by imposing a <i>limitation</i> or <i>requirement</i> which was not applied for or by specifying a narrower description of <i>regulated activity</i> than that applied for) | | <i>executive procedures</i> See <i>DEPP 2.5.6G</i> |
| 52(9)(c) | when the <i>FSA</i> is deciding to refuse an application for a <i>Part IV permission</i> | | <i>RDC</i> or <i>executive procedures</i> See <i>DEPP 2.5.5G</i> |
| 52(9)(c) | when the <i>FSA</i> is deciding to refuse an application to vary a <i>firm's Part IV permission</i> | <i>SUP 6</i> | <i>RDC</i> or <i>executive procedures</i> See <i>DEPP 2.5.6G</i> |
| 52(9)(c) | when the <i>FSA</i> is deciding to refuse an application to cancel a <i>firm's Part IV permission</i> | <i>SUP 6</i> | <i>RDC</i> or <i>executive procedures</i> See <i>DEPP 2.5.5G</i> |
| 54(1)/(2) | when the <i>FSA</i> is proposing or deciding to cancel a <i>firm's Part IV permission</i> otherwise than at its request* | | <i>RDC</i> |
| 57(1)/(3) | when the <i>FSA</i> is proposing or deciding to make a <i>prohibition order</i> against an individual* | | <i>RDC</i> |
| 58(3)/(4) | when the <i>FSA</i> is proposing or deciding to refuse an application for the variation or revocation of a <i>prohibition order</i> | | <i>RDC</i> |
| 62(2) | when the <i>FSA</i> is proposing to refuse an application for approval of a <i>person</i> performing a <i>controlled function</i> | <i>SUP 10</i> | <i>Executive procedures</i> |
| 62(3) | when the <i>FSA</i> is deciding to refuse an application for approval of a <i>person</i> performing a <i>controlled function</i> | <i>SUP 10</i> | <i>RDC</i> or <i>executive procedures</i> See <i>DEPP 2.5.5G</i> |
| 63(3)/(4) | when the <i>FSA</i> is proposing or deciding to | | <i>RDC</i> |

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| | withdraw approval from an <i>approved person</i> * | | |
| 67(1)/(4) | when the <i>FSA</i> is proposing or deciding to take action against an <i>approved person</i> by exercising the disciplinary powers conferred by section 66* | | <i>RDC</i> |
| 76(4)/(5) | when the <i>FSA</i> is proposing or deciding to refuse an application for <i>listing</i> of securities | <i>LR 2 and 3</i> | <i>Executive procedures</i> |
| 78(10)/ (11)(a) | when the <i>FSA</i> has suspended the <i>listing</i> of securities and is proposing or deciding to refuse an application by an issuer for cancellation of the suspension | <i>LR 5</i> | <i>Executive procedures</i> |
| 87M(2)/(3) | when the <i>FSA</i> is proposing or deciding to publish a statement censuring an issuer of <i>transferable securities</i> , a <i>person</i> offering <i>transferable securities</i> to the public or a <i>person</i> requesting the admission of <i>transferable securities</i> to trading on a <i>regulated market</i> | | <i>RDC</i> |
| 88(4)/(6) | when the <i>FSA</i> is proposing or deciding to (1) refuse a <i>person's</i> application for approval as a <i>sponsor</i> ; or (2) on its own initiative, cancel a <i>person's</i> approval as a <i>sponsor</i> | <i>LR 8</i> | <i>RDC</i> |
| 88(4)/(6) | when the <i>FSA</i> is proposing or deciding to cancel a <i>person's</i> approval as a <i>sponsor</i> at the <i>sponsor's</i> request | | <i>Executive procedures</i> |
| 89(2)/(3) | when the <i>FSA</i> is proposing or deciding to publish a statement censuring a <i>sponsor</i> | | <i>RDC</i> |
| 92(1)/(4) | when the <i>FSA</i> is proposing or deciding to take action against any person under section 91 for breach of Part 6 rules | | <i>RDC</i> |
| 126(1)/ 127(1) | when the <i>FSA</i> is proposing or deciding to impose a sanction for <i>market abuse</i> * | | <i>RDC</i> |
| 183(3)/ 186(1) | when the <i>FSA</i> is proposing or deciding to object to a change in <i>control</i> following receipt of a notice of <i>control</i> | <i>SUP 11</i> | <i>Executive procedures</i> |
| 185(3)/(4) | when the <i>FSA</i> is proposing or deciding to approve a change in <i>control</i> following | <i>SUP 11</i> | <i>Executive procedures</i> |

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| | receipt of a notice of control but subject to conditions | | |
| 187(1)/(3) and 188(1) | when the <i>FSA</i> is proposing or deciding to object to a <i>person</i> who has failed to submit a notice of <i>control</i> or a notice on acquiring, or increasing, <i>control</i> , or to object to an existing <i>controller</i> | <i>SUP 11</i> | <i>Executive procedures</i> |
| 200(4)/(5) | when the <i>FSA</i> is proposing or deciding to refuse an application for variation or rescission of a requirement imposed on an <i>EEA incoming firm</i> | | <i>RDC</i> or <i>executive procedures</i> See <i>DEPP 2.5.6G</i> |
| 207(1)/208(1) | when the <i>FSA</i> is proposing or deciding to publish a statement in respect of an <i>authorised person</i> (under section 205) or impose a financial penalty on an <i>authorised person</i> (under section 206)* | | <i>RDC</i> |
| 245(1)/(2) | when the <i>FSA</i> is proposing or deciding to refuse an application for an <i>authorisation</i> order declaring a <i>unit trust scheme</i> to be an <i>AUT</i> | <i>COLL 2</i> | <i>RDC</i> or <i>executive procedures</i> See <i>DEPP 2.5.15G</i> |
| 252(1)/(4) | when the <i>FSA</i> is proposing or deciding to refuse approval of a proposal to replace the <i>trustee</i> or <i>manager</i> of an <i>AUT</i> | <i>COLL 2</i> | <i>Executive procedures</i> |
| 255(1)/(2) | when the <i>FSA</i> is proposing or deciding to make an order under section 254 revoking the <i>authorisation order</i> of an <i>AUT</i> * | None, but see Chapter 14 of the Regulatory Guide <i>EG</i> . | <i>RDC</i> |
| 260(1)/(2) | when the <i>FSA</i> , on an application to revoke or vary a direction under section 257, proposes or decides to refuse to revoke or vary the direction or proposes or decides to vary the direction otherwise than in accordance with the application | | <i>RDC</i> |
| 264(2)/265(4) | when the <i>FSA</i> is notifying or deciding not to withdraw a notice, to the <i>operator</i> and relevant <i>EEA State</i> authorities, that the way in which a <i>collective investment scheme</i> constituted in another <i>EEA State</i> | <i>COLL 9</i> See <i>DEPP 2.5.16G</i> | <i>Executive procedures</i> |

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| | intends to invite <i>persons</i> in the <i>United Kingdom</i> to participate in the <i>scheme</i> does not comply with <i>UK law</i> | | |
| 269(1)/(2) | when the <i>FSA</i> , on an application under section 267(4) or (5) by an <i>operator</i> of a section 264 <i>recognised scheme</i> to revoke or vary a direction that the promotion of the <i>scheme</i> be suspended, proposes or decides to refuse the application or to vary the direction otherwise than in accordance with the application | | <i>RDC</i> |
| 271(1)/(3) | when the <i>FSA</i> is proposing or deciding to refuse approval of a <i>collective investment scheme</i> as a <i>recognised scheme</i> under section 270 | <i>COLL 9</i> | <i>Executive procedures</i> |
| 276(1)/(2) | when the <i>FSA</i> is proposing or deciding to refuse an application for an order declaring a <i>collective investment scheme</i> to be a <i>recognised scheme</i> under section 272 | <i>COLL 9</i> | <i>Executive procedures</i> |
| 280(1)/(2) | when the <i>FSA</i> is proposing or deciding to direct that a section 270 <i>recognised scheme</i> is to cease to be recognised or to revoke a section 272 order in respect of a <i>recognised scheme</i> * | | <i>RDC</i> |
| 321(8)/(9) | when the <i>FSA</i> is proposing or deciding to refuse an application for variation or revocation of a direction or a requirement imposed on a former underwriting member of Lloyd's* | | <i>RDC</i> |
| 331(1)/(3) | when the <i>FSA</i> is proposing or deciding to make an order disapplying the exemption from the <i>general prohibition</i> under section 327* | | <i>RDC</i> |
| 331(7)/(8) | when the <i>FSA</i> is proposing or deciding to refuse an application for the variation or revocation of an order made under section 329* | | <i>RDC</i> |
| 345(2)/(3) | when the <i>FSA</i> is proposing or deciding to disqualify an auditor or actuary from being the auditor of, or acting as an actuary for, any <i>authorised person</i> or class of <i>authorised person</i> or from being | | <i>RDC</i> |

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| | the auditor of any <i>AUT</i> or <i>ICVC</i> * | | |
| 385(1)/ 386 (1) | when the <i>FSA</i> is proposing or deciding to exercise the power under section 384(5) to require a <i>person</i> to pay restitution* | | <i>RDC</i> |
| Paragraph 15A(5) of Schedule 3 | when the <i>FSA</i> is notifying or deciding not to withdraw a notice issued to an <i>EEA UCITS management company</i> wishing to deal in units in a <i>collective investment scheme</i> in the <i>United Kingdom</i> and relevant <i>EEA State</i> authorities, that the way in which the <i>EEA UCITS management company</i> intends to market a <i>relevant scheme</i> in the <i>United Kingdom</i> does not comply with <i>UK</i> law | <i>SUP 13A</i> | <i>Executive procedures</i> |
| Paragraph 19(8)/ (12) of Schedule 3 | when the <i>FSA</i> is proposing or deciding to refuse to give a <i>consent notice</i> to a <i>UK firm</i> wishing to establish a <i>branch</i> under an <i>EEA right</i> | <i>SUP 13</i> | <i>RDC</i> |

| Section of the Building Societies Act 1986 | Description | Handbook reference | Decision maker |
|--|--|----------------------------|----------------|
| 36A(5)/(5A) | when the <i>FSA</i> is proposing or deciding to issue a prohibition order under section 36A prohibiting the continuance or carrying on of an activity and requiring the disposal of assets acquired or otherwise in a <i>building society's</i> possession by virtue of the activity, where the society has failed to carry into effect a restructuring plan which it has been directed to carry out by the <i>FSA</i> under section 36(8) | See <i>DEPP</i> 2.5.18G(1) | <i>RDC</i> |
| 46A(1)(a)/ (3)(a) | when the <i>FSA</i> is proposing or deciding to give a direction under section 36(3), (5), (6), (7) or (10) requiring a <i>building society</i> to submit for its approval a restructuring plan or to submit to the society's members the requisite transfer resolutions for a transfer of the society's business to a company or (if such a direction is given) imposing limitations | | <i>RDC</i> |

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| | on the issue of shares, acceptance of deposits or making of loans or requiring the society to take certain steps or refrain from certain action or requiring the removal of a director or other officer | | |
| 46A(1)(b)/ (3)(b) | when the <i>FSA</i> is proposing or deciding to give a direction under section 42B(1) (other than a direction varying a previous direction with the agreement of the <i>building society</i> concerned) that a <i>building society</i> transfers all its engagements to one or more other <i>building societies</i> under section 94 or that it transfers its business to an existing company under section 97* | | <i>RDC</i> or <i>executive procedures</i> See <i>DEPP</i> 2.5.12G |
| 93(6) | when the <i>FSA</i> , on an amalgamation between <i>building societies</i> , each of which has a <i>Part IV permission</i> to accept deposits , notifies the successor society of the terms of its <i>Part IV permission</i> | See <i>DEPP</i> 2.5.18G(2) | <i>RDC</i> or <i>executive procedures</i> see <i>DEPP</i> 2.5.12G |

| Section of the Credit Unions Act 1979 | Description | Handbook reference | Decision maker |
|---------------------------------------|---|----------------------------|----------------|
| 20 | where the <i>FSA</i> is proposing to cancel or suspend the registration of a <i>credit union</i> or to petition for the winding up of a <i>credit union</i> | <i>CRED</i> 15 Annex 1G | <i>RDC</i> |

| Section of the Friendly Societies Act 1992 | Description | Handbook reference | Decision maker |
|--|---|-------------------------------|----------------|
| 58A(1)(a)/ (3)(a) | when the <i>FSA</i> is proposing or deciding to give a direction under section 54 or section 55 requiring a <i>friendly society</i> to take or refrain from taking steps where certain activities have become disproportionate to those of the <i>friendly society</i> group or, as the case may be, the society, or varying such a direction other | See <i>DEPP</i> 2.5.18G(3) | <i>RDC</i> |

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| | than at the request of the society* | | |
| 58A(1)(b)/ (3)(b) | when the <i>FSA</i> is proposing or deciding to give a direction under section 90 providing for a transfer of the engagements of a <i>friendly society</i> * | | <i>RDC</i> |
| 85(4A) | when the <i>FSA</i> , on an amalgamation between <i>friendly societies</i> each of which has a <i>Part IV permission</i> , notifies the successor society of the terms of its <i>Part IV permission</i> | | <i>RDC</i> or <i>executive procedures</i> See <i>DEPP</i> 2.5.12G |

| OEIC Regulations reference | Description | Handbook reference | Decision maker |
|----------------------------------|---|--------------------|--|
| Regulation 16(1)/(2) | when the <i>FSA</i> is proposing or deciding to refuse an application for an <i>authorisation order</i> in respect of a proposed <i>ICVC</i> | <i>COLL 2</i> | <i>RDC</i> or <i>executive procedures</i> See <i>DEPP</i> 2.5.15G |
| Regulation 22(1)/(2)/ (4)/(5) | when the <i>FSA</i> is proposing to refuse approval of (or, having given a <i>warning notice</i> , deciding to refuse) a proposal to replace the <i>depository</i> or director of an <i>ICVC</i> , or any other proposal or decision falling within regulation 21 | <i>COLL 2</i> | <i>Executive procedures</i> |
| Regulation 24(1)/(2) | when the <i>FSA</i> is proposing or deciding to revoke an <i>authorisation order</i> relating to an <i>ICVC</i> under regulation 23(1)* | | <i>RDC</i> |
| Regulation 28(1)/(2) | when the <i>FSA</i> is proposing or deciding to refuse an application to revoke or vary a direction in accordance with a request under regulation 25(7) or to vary the direction in accordance with the application | | <i>RDC</i> |
| Paragraph 20 of Schedule 5 | when the <i>FSA</i> is proposing or deciding to use the disqualification powers under section 249(1)* | | <i>RDC</i> |

| Regulated Activities | Description | Handbook | Decision |
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| Order | | reference | maker |
|-------------------|---|------------------------|------------|
| Article 95(2)/(3) | when the <i>FSA</i> is proposing or deciding not to include, or to remove, an <i>appointed representative</i> from the <i>Register</i> * | <i>SUP</i> 12.4.10G | <i>RDC</i> |
| Article 95(7)/(8) | when the <i>FSA</i> is proposing or deciding to refuse an application to revoke a determination not to include, or to remove, an <i>appointed representative</i> from the <i>Register</i> * | <i>SUP</i> 12.4.10G | <i>RDC</i> |

DEPP 2 Supervisory notices
Annex 2G

| Section of the Act | Description | Handbook reference | Decision maker |
|--------------------|--|--------------------|--|
| 53(4)/(7)/(8)(b) | when the <i>FSA</i> is exercising its <i>own-initiative power</i> to vary a firm's <i>Part IV permission</i> | <i>SUP</i> 6 | <i>RDC</i> or <i>executive procedures</i> See <i>DEPP</i> 2.5.7G |
| 78(2)/(5) | when the <i>FSA</i> is proposing to discontinue or discontinues the <i>listing</i> of a security | <i>LR</i> 5 | <i>RDC</i> or <i>executive procedures</i> See <i>DEPP</i> 2.5.9G(4) and 2.5.10G |
| 78(2)/(5) | when the <i>FSA</i> is proposing to suspend or suspends the <i>listing</i> of a security | <i>LR</i> 5 | <i>Executive procedures</i> |
| 87O(2)/(5) | when the <i>FSA</i> is proposing or deciding to exercise or deciding to maintain, vary or revoke any of the powers in sections 87K or 87L in respect of an infringement of any applicable provision. | <i>PR</i> 5 | <i>Executive procedures</i> |
| 96C | when the <i>FSA</i> is proposing to suspend or suspends trading in a <i>financial instrument</i> | <i>DTR</i> | <i>Executive procedures</i> |
| 197(3)/ | when the <i>FSA</i> is exercising its power of | <i>SUP</i> 14 | <i>RDC</i> or |

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| (6)/(7)(b) | intervention in respect of an <i>incoming firm</i> | | <i>executive procedures</i> See <i>DEPP</i> 2.5.7G |
| 259(3)/(8)/(9) (b) | when the <i>FSA</i> is exercising its power to give or, on its own initiative, to vary a direction to the <i>manager</i> and <i>trustee</i> of an <i>AUT</i> | <i>COLL</i> | <i>RDC</i> |
| 268(3)/(7)(a) or (9)(a) (as a result of (8)(b)/(13)) | when the <i>FSA</i> is proposing or deciding to give or, on its own initiative, to vary a direction to the <i>operator</i> of a <i>recognised scheme</i> | <i>COLL</i> | <i>RDC</i> |
| 282 (3)/(6)/(7)(b) | when the <i>FSA</i> is exercising its power to give a direction to an <i>operator, trustee</i> or <i>depository</i> of a <i>recognised scheme</i> | <i>COLL</i> | <i>RDC</i> |
| 321(2)/(5) | when the <i>FSA</i> is exercising its power to impose a requirement on a former underwriting member of Lloyd's | | <i>RDC</i> |

| OEIC Regulations reference | Description | Handbook reference | Decision maker |
|----------------------------|--|--------------------|----------------|
| Regulation 27 | when the <i>FSA</i> is exercising its power to give or, on its own initiative, to vary a direction to an <i>ICVC</i> and its <i>depository</i> | <i>COLL</i> | <i>RDC</i> |

3 The nature and procedure of the RDC

3.1 The Regulatory Decisions Committee

- 3.1.1 G The *Regulatory Decisions Committee (RDC)* is a committee of the *FSA* Board. It is part of the *FSA*. It exercises certain regulatory powers on behalf of the *FSA* and is accountable to the *FSA* Board for its decisions generally.
- 3.1.2 G (1) The *RDC* is separate from the *FSA*'s executive management structure. Apart from its Chairman, none of the members of the *RDC* is an *FSA* employee.
- (2) All members of the *RDC* are appointed for fixed periods by the *FSA* Board. The *FSA* Board may remove a member of the *RDC*, but only in the event of that member's misconduct or incapacity.
- 3.1.3 G The *RDC* has its own legal advisers and support staff. The *RDC* staff are separate from the *FSA* staff involved in conducting investigations and making recommendations to the *RDC*.

3.2 The operation of the RDC

RDC meetings and composition of panels

- 3.2.1 G The *RDC* meets as often as necessary to discharge its functions. It may do so, in appropriate cases, in writing or by telephone or email or other electronic means. The *RDC* meets in private.
- 3.2.2 G The *RDC* may meet as a full committee, but will ordinarily meet in panels. Each meeting of the *RDC* will generally include:
- (1) its Chairman or a Deputy Chairman (who will chair the meeting); and
- (2) at least two other members.
- 3.2.3 G The composition and size of panels of the *RDC* may vary depending on the nature of the particular matter under consideration. In cases in which representations are made, it will be usual for the panel that is to consider the representations and decide whether to give a *decision notice* to include additional members of the *RDC* who have not previously considered the matter.

Conflicts of interest

- 3.2.4 G The *RDC* will seek not to invite a member to join a panel to consider a matter in which he has a potential conflict of interest.
- 3.2.5 G (1) If a member of the *RDC* has a potential conflict of interest in any matter in which he is asked to participate he will disclose the conflict

to the *RDC* Office, and disclose it:

- (a) in the case of the Chairman of the *RDC*, to the Chairman or Deputy Chairman of the *FSA*; or
- (b) in the case of a Deputy Chairman of the *RDC*, to the Chairman of the *RDC*, or if he is unavailable to the Chairman or Deputy Chairman of the *FSA*; or
- (c) in the case of any other member, to the Chairman or a Deputy Chairman of the *RDC*.

- (2) If the *person* to whom a conflict has been disclosed in accordance with (1)(a) to (c) considers it reasonable and appropriate, he will require the member of the *RDC* to stand down from consideration of that matter. He may ask another member of the *RDC* to assist him in considering the potential conflict.

- 3.2.6 G The *RDC* Office will record and document all disclosures of potential conflicts of interest and the steps taken to manage them.

Procedure: general

- 3.2.7 G The *RDC* will follow the procedure described in this section, but subject to that it will conduct itself in the manner the *RDC* Chairman or a Deputy Chairman considers suitable in order to enable the *RDC* to determine fairly and expeditiously the matter which it is considering.

- 3.2.8 G Each member of the *RDC* present is entitled to vote on the matter under consideration. The chairman of the meeting will have a vote as a member of the *RDC* and will have the casting vote in a tie.

- 3.2.9 G The *RDC* Chairman or a Deputy Chairman may, acting alone, decide:

- (1) matters relating to the arrangements for an *RDC* meeting, including its timing; and
- (2) the composition of the panel to consider a particular matter.

- 3.2.10 G If the *RDC* considers it relevant to its consideration, it may ask *FSA* staff to explain or provide any or all of the following:

- (1) additional information about the matter (which *FSA* staff may seek by further investigation); or
- (2) further explanation of any aspect of the *FSA* staff recommendation or accompanying papers; or
- (3) information about *FSA* priorities and policies (including as to the *FSA*'s view on the law or on the correct legal interpretation of provisions of the *Act*).

- 3.2.11 G The *RDC* has no power under the *Act* to require *persons* to attend before it or provide information. It is not a tribunal and will make a decision based

on all the relevant information available to it, which may include views of *FSA* staff about the relative quality of witness and other evidence.

Procedure: warning notices and first supervisory notices

- 3.2.12 G If *FSA* staff consider that action is appropriate in a matter for which the *RDC* is the decision maker, they will make a recommendation to the *RDC* that a *warning notice* or a *supervisory notice* should be given.
- 3.2.13 G In accordance with *DEPP* 2.2 the *RDC* will consider whether it is right in all the circumstances to give the statutory notice.
- 3.2.14 G If the *RDC* decides that the *FSA* should give a *warning notice* or a first *supervisory notice*:
- (1) the *RDC* will settle the wording of the *warning notice* or first *supervisory notice*, and will ensure that the *notice* complies with the relevant provisions of the *Act*;
 - (2) the *RDC* will make any relevant *statutory notice associated decisions*;
 - (3) the *RDC* staff will make appropriate arrangements for the *notice* to be given; and
 - (4) the *RDC* staff will make appropriate arrangements for the disclosure of the substantive communications between the *RDC* and the *FSA* staff who made the recommendation on which the *RDC*'s decision is based. This may include providing copies in electronic format.

Procedure: representations

- 3.2.15 G (1) A *warning notice* or a first *supervisory notice* will (as required by the *Act*) specify the time allowed for making representations. This will not be less than 28 days.
- (2) The *FSA* will also, when giving a *warning notice* or a first *supervisory notice*, specify a time within which the recipient is required to indicate whether he wishes to make oral representations.
- 3.2.16 G (1) The recipient of a *warning notice* or a first *supervisory notice* may request an extension of the time allowed for making representations. Such a request must normally be made within 14 days of the notice being given.
- (2) If a request is made, the Chairman or a Deputy Chairman of the *RDC* will decide whether to allow an extension, and, if so, how much additional time is to be allowed for making representations. In reaching his decision he may take account of any relevant comments from the *FSA* staff responsible for the matter.
- (3) The *RDC* staff will notify the relevant party and the *FSA* staff responsible for the matter of the decision in writing.

- 3.2.17 G (1) If the recipient of a *warning notice* or a first *supervisory notice* indicates that he wishes to make oral representations, the *RDC* staff, in conjunction with the Chairman or a Deputy Chairman of the *RDC*, will fix a date or dates for a meeting at which the relevant *RDC* members will receive those representations.
- (2) In making those arrangements the *RDC* staff will draw the Chairman's or Deputy Chairman's attention to any particular issues about the timing of the meeting which have been raised by the recipient of the *notice* or the relevant *FSA* staff.
- 3.2.18 G The chairman of the relevant meeting will ensure that the meeting is conducted so as to enable:
- (1) the recipient of the *warning notice* or first *supervisory notice* to make representations;
- (2) the relevant *FSA* staff to respond to those representations;
- (3) the *RDC* members to raise with those present any points or questions about the matter (whether in response to particular representations or more generally about the matter); and
- (4) the recipient of the notice to respond to points made by *FSA* staff or the *RDC*;
- but the chairman may ask the recipient of the notice or *FSA* staff to limit their representations or response in length or to particular issues arising from the *warning notice* or first *supervisory notice*.
- 3.2.19 G The recipient of the *warning notice* or *supervisory notice* may wish to be legally represented at the meeting, but this is not a requirement.
- 3.2.20 G In appropriate cases, the chairman of a meeting for oral representations may ask those present to provide additional information in writing after the meeting. If he does so, he will specify the time within which that information is to be provided.
- 3.2.21 G The *RDC* will not, after the *FSA* has given a *warning notice* or a first *supervisory notice*, meet with or discuss the matter whilst it is still ongoing with the *FSA* staff responsible for the case without other relevant parties being present or otherwise having the opportunity to respond.

Procedure: decision notices and second supervisory notices

- 3.2.22 G If no representations are made in response to the *warning notice* or first *supervisory notice*, the *FSA* will regard as undisputed the allegations or matters set out in the notice and the default procedure will apply: see *DEPP* 2.3.2G to 2.3.4G).
- 3.2.23 G However, if representations are made, in accordance with *DEPP* 2.3.1G the *RDC* will consider whether it is right in all the circumstances to give the *decision notice* or a second *supervisory notice* (as appropriate).

- 3.2.24 G If the *RDC* decides that the *FSA* should give a *decision notice* or a second *supervisory notice*:
- (1) the *RDC* will settle the wording of the *notice* which will include a brief summary of the key representations made and how they have been dealt with, and will ensure that the *notice* complies with the relevant provisions of the *Act*;
 - (2) the *RDC* will make any relevant *statutory notice associated decisions*, including whether the *FSA* is required to give a copy of the *notice* to a third party; and
 - (3) the *RDC* staff will make appropriate arrangements for the *notice* to be given.

- 3.2.25 G If the *RDC* decides that the *FSA* should not give a *decision notice* or a second *supervisory notice* the *RDC* staff will notify the relevant parties (including the relevant *FSA* staff) in writing of that decision.

Discontinuance of *FSA* action

- 3.2.26 G *FSA* staff responsible for recommending action to the *RDC* will continue to assess the appropriateness of the proposed action in the light of new information or representations they receive and any material change in the facts or circumstances relating to a particular matter. It may be therefore that they decide to give a *notice of discontinuance* to a *person* to whom a *warning notice* or *decision notice* has been given. The decision to give a *notice of discontinuance* does not require the agreement of the *RDC*, but *FSA* staff will inform the *RDC* of the discontinuance of the proceedings.

Tribunal proceedings

- 3.2.27 G A decision by the *RDC* to give a *decision notice* or *supervisory notice* may lead to a reference to the *Tribunal* under the *Act*. The conduct of proceedings before the *Tribunal* is not however a matter for the *RDC*.

3.3 Straightforward decisions

- 3.3.1 G In *statutory notice* cases for which the *RDC* is the decision-maker, the Chairman or a Deputy Chairman of the *RDC* may take a straightforward decision to give the *statutory notice*.
- 3.3.2 G The Chairman or, if he is unavailable, a Deputy Chairman will decide whether a decision is straightforward. In doing so he will have regard to all the circumstances. These may include:
- (1) the significance of the decision to those who would be affected by it;
 - (2) its novelty in the light of stated policy and established practice;

- (3) the complexity of the relevant considerations, including whether representations have been made;
 - (4) the range of alternative options;
 - (5) the extent to which the facts relating to the decision are or may be disputed.
- 3.3.3 G The *RDC* Chairman or a Deputy Chairman may, notwithstanding the fact that a decision is straightforward, take the decision to give the *statutory notice* jointly with one or more other members of the *RDC* if he considers it appropriate to do so.

3.4 Urgent supervisory notice cases

- 3.4.1 G In urgent *supervisory notice* cases for which the *RDC* is the decision maker, the decision to give the *supervisory notice* may be taken by the *RDC* Chairman or, if he is unavailable, a Deputy Chairman, and, if it is practicable, one or more other *RDC* members.
- 3.4.2 G The *RDC* Chairman or Deputy Chairman will take such a decision only if satisfied that the action proposed should occur before it is practicable to convene an *RDC* panel.
- 3.4.3 G In an exceptionally urgent case the decision to give a *supervisory notice* may be taken by a member of the *FSA's* executive of at least director of division level if:
- (1) *FSA* staff consider that the action should be taken before a recommendation to the Chairman or a Deputy Chairman of the *RDC* can be made; and
 - (2) an urgent decision on the proposed action is necessary to protect the interests of consumers.
- 3.4.4 G In the circumstances described in *DEPP* 3.4.3G, the *FSA* considers that it may be necessary for an *FSA* director of division to take the decision to give the *supervisory notice* even if he has been involved in establishing the evidence on which the decision is based, as permitted by section 395(3) of the *Act*. Where practicable, however, *FSA* staff will seek to ensure that the *FSA* director has not been so involved.

4 Decisions by FSA staff under executive procedures

4.1 Executive decision maker

Who takes the decision

4.1.1 G All *statutory notice decisions* under *executive procedures* will be taken either by a *senior staff committee* or by an individual *FSA* staff member.

4.1.2 G In either case, the decision will be taken by *FSA* staff who have not been directly involved in establishing the evidence on which the decision is based, except in accordance with section 395(3) of the *Act*.

Decisions by senior staff committee

4.1.3 G The *FSA's* senior executive committee will from time to time determine that particular categories of *statutory notice decision* to be taken under *executive procedures* will be taken by a *senior staff committee*.

4.1.4 G A *senior staff committee* will consist of such *FSA* staff members as the *FSA's* senior executive committee may from time to time determine. The *FSA's* senior executive committee may authorise the chairman of a *senior staff committee* to select its other members. A *senior staff committee* is accountable for its decisions to the *FSA's* senior executive committee and, through it, to the *FSA* Board.

4.1.5 G A *senior staff committee* may operate through standing or specific sub-committees to consider particular decisions or classes of decision, for which accountability will lie through the committee. Each meeting of a *senior staff committee*, or sub-committee, will include:

- (1) an individual with authority to act as its chairman; and
- (2) at least two other members.

4.1.6 G A *senior staff committee* will operate on the basis of a recommendation from an *FSA* staff member of at least the level of associate, and with the benefit of legal advice from an *FSA* staff member of at least the level of associate.

Decisions by individual *FSA* staff members

4.1.7 G *Statutory notice decisions* to be taken under *executive procedures*, and not falling within the responsibility of a *senior staff committee*, will be taken by an individual *FSA* staff member. The decision will be:

- (1) made by an executive director of the *FSA* Board or his delegate (who will be of at least the level of associate);
- (2) on the recommendation of an *FSA* staff member of at least the level of associate; and

- (3) with the benefit of legal advice from an *FSA* staff member of at least the level of associate.
- 4.1.8 G The individual who takes a decision under *executive procedures* is accountable to the *FSA* Board directly (if an executive director) or otherwise through line management responsible for the decision concerned.
- 4.1.9 G An *FSA* staff member who considers that a *statutory notice decision* should be taken above his own level is free to refer that decision to a more senior level. If an *FSA* staff member consults another staff member about a decision, the decision remains the independent decision of the *FSA* staff member who consults his colleague, unless it is agreed that the decision should instead be taken by the colleague, and the colleague has the delegated authority to do so.
- 4.1.10 G If an individual responsible for a decision under *executive procedures* (or a more senior *FSA* staff member with responsibilities in relation to the decision concerned) considers that it warrants collective consideration, the individual may:
- (1) take the decision himself, following consultation with other *FSA* staff members, as above; or
 - (2) refer it to a *senior staff committee*, which will take the decision itself.

Conflicts of interest

- 4.1.11 G
- (1) *FSA* staff are required by their contract of employment to comply with a code of conduct which imposes strict rules to cover the handling of conflicts of interest which may arise from personal interests or associations. *FSA* staff subject to a conflict of interest must declare that interest to the *person* to whom they are immediately responsible for a decision.
 - (2) If a member of a *senior staff committee* has a potential conflict of interest in any matter in which he is asked to participate he will disclose the conflict to the secretariat of the *senior staff committee*, and disclose it:
 - (a) in the case of the chairman of the senior staff committee, to a member of the *FSA's* senior executive committee or, if the *person* with the conflict is the chairman of the *FSA's* senior executive committee, to the Chairman of the *FSA*;
 - (b) in the case of the deputy chairman of the senior staff committee, to the chairman of the committee, or if he is unavailable, to a member of the *FSA's* senior executive committee;
 - (c) in the case of any other member to the chairman or deputy chairman of the *senior staff committee*.

- (3) If the person to whom the conflict has been disclosed in accordance with *DEPP* 4.1.11G(2) considers it reasonable and appropriate, he will require the member of the *senior staff committee* to stand down from consideration of the matter.

- 4.1.12 G The secretariat to the *senior staff committee* will record and document all disclosures of potential conflicts of interest and the steps taken to manage them.

Procedure

- 4.1.13 G The procedure for taking decisions under *executive procedures* will generally be less formal and structured than that for decisions by the *RDC*. Broadly, however, *FSA* staff responsible for taking *statutory notice* decisions under *executive procedures* will follow a procedure similar to that described at *DEPP* 3.2.7G to 3.2.27G for the *RDC* except that:

- (1) in a case where the decision will be taken by a *senior staff committee*:
 - (a) the chairman or deputy chairman of the *senior staff committee* will perform the role of the Chairman of the *RDC*; and
 - (b) the secretariat to the *senior staff committee* will perform the role of the *RDC* staff;
- (2) in a case where the decision will be taken by individual members of *FSA* staff, the distinction between the role of the *RDC*, its Chairman and the *RDC* staff has no application;
- (3) the *FSA* staff responsible for taking the *statutory notice decision* may be advised by legal advisers who have also advised *FSA* staff recommending action by the *FSA*;
- (4) the *FSA* will not normally disclose the communications between the *FSA* staff recommending that action be taken and those responsible for the decision to give the *statutory notice* unless the *FSA* has stated publicly that it will adopt a practice of disclosing such communications, or a class of communications, in respect of particular categories of decision taken by *FSA* staff under *executive procedures*; and
- (5) *DEPP* 3.2.11G and 3.2.21G will not apply.

4.2 Urgent statutory notice cases

- 4.2.1 G If *FSA* staff recommend that action be taken and they consider that the decision falls within the responsibility of a *senior staff committee*:

- (1) in general the *FSA* staff's recommendation will go before the *senior staff committee*;
- (2) in urgent *statutory notice* cases for which a *senior staff committee* is responsible, the decision to give the *statutory notice* may be taken by the chairman or, if he is unavailable, a deputy chairman of the *senior staff committee*, and, if it is practicable, one or more other members of the committee;
- (3) the chairman or deputy chairman of the senior staff committee will take such a decision only if satisfied that the action proposed should occur before it is practicable to convene a meeting of the senior staff committee;
- (4) in an exceptionally urgent *statutory notice* case, if in the *FSA* staff's opinion:
 - (a) the action should be taken before a recommendation to the chairman or a deputy chairman of the *senior staff committee* could be made; and
 - (b) an urgent decision on the proposed action is necessary to protect the interests of consumers;

the decision may be taken by a member of the *FSA*'s executive of at least director of division level or, in the case of a *senior staff committee* which reports directly to the *FSA*'s senior executive committee, by a member of that committee.

- 4.2.2 G In the circumstances described in *DEPP* 4.2.1G(4) the *FSA* considers that it may be necessary for an *FSA* director of division or member of a *senior staff committee* to take the decision to give a *supervisory notice* even if he has been involved in establishing the evidence on which the decision is based, as permitted by section 395(3) of the *Act*. Where practicable, however, *FSA* staff will seek to ensure that the *FSA* director or committee member has not been so involved.

5 Settlement decision procedure

5.1 Settlement decision makers

Introduction

- 5.1.1 G (1) A *person* subject to enforcement action may agree to a financial penalty or other outcome rather than contest formal action by the *FSA*.
- (2) The fact that he does so will not usually obviate the need for a statutory notice recording the *FSA's* decision to take that action. Where, however, the *person* subject to enforcement action agrees not to contest the content of a proposed *statutory notice*, the decision to give that statutory notice will be taken by senior *FSA* staff.
- (3) The decision will be taken jointly by two members of the *FSA's* executive of at least director of division level (the "*settlement decision makers*").
- (4) One of the directors taking the decision will usually be, but need not be, the director of Enforcement. (In exceptional cases, the director of Enforcement may have been directly involved in establishing the evidence on which the decision is based and would not therefore be able to participate (see section 395(2) of the *Act*.)
- (5) "Statutory notice" for these purposes:
- (a) means any *statutory notice* the giving of which would otherwise require a decision by the *RDC*;
 - (b) includes a *statutory notice associated decision*.

Procedure: general

- 5.1.2 G A *person* who is or may be subject to enforcement action may wish to discuss the proposed action with *FSA* staff through settlement discussions.
- 5.1.3 G Settlement discussions may take place at any time during the enforcement process if both parties agree. This might be before the giving of a *warning notice*, before a *decision notice*, or even after referral of the matter to the *Tribunal*. But the *FSA* would not normally agree to detailed settlement discussions until it has a sufficient understanding of the nature and gravity of the suspected misconduct or issue to make a reasonable assessment of the appropriate outcome. Settlement after a *decision notice* will be rare.
- 5.1.4 G *FSA* staff and the *person* concerned may agree that neither the *FSA* nor the *person* concerned would seek to rely against the other on any admissions or statements made in the course of their settlement discussions if the matter is considered subsequently by the *RDC* or the *Tribunal*.

Procedure: participation of decision makers in discussions

- 5.1.5 G (1) The *settlement decision makers* may, but need not, participate in the discussions exploring possible settlement.
- (2) If the *settlement decision makers* have not been involved in the discussions, but an agreement has been reached, they may ask to meet the relevant *FSA* staff or the *person* concerned in order to assist in the consideration of the proposed settlement.

- 5.1.6 G The terms of any proposed settlement:
- (1) will be put in writing and be agreed by *FSA* staff and the *person* concerned;
- (2) may refer to a draft of the proposed *statutory notices* setting out the facts of the matter and the *FSA's* conclusions;
- (3) may, depending upon the stage in the enforcement process at which agreement is reached, include an agreement by the *person* concerned to:
- (a) waive and not exercise any rights under sections 387 (Warning notices) and 394 (Access to Authority material) of the *Act* to notice of, or access to, material relied upon by the *FSA* and any secondary material which might undermine the *FSA* decision to give the *statutory* notice;
- (b) waive and not exercise any rights under section 387 of the *Act* or otherwise to make representations to the *RDC* in respect of a *warning notice* or first *supervisory notice*;
- (c) not object to the giving of a *decision notice* before the expiry of the 28 day period after the giving of a *warning notice* specified under section 387 of the *Act*;
- (d) not dispute with the *FSA* the facts and matters set out in a *warning notice*, *decision notice*, *supervisory notice* or *final notice* and to waive and not exercise any right under section 208 (Decision notice) of the *Act* to refer the matter to the *Tribunal*.

- 5.1.7 G The *settlement decision makers* may:
- (1) accept the proposed settlement by deciding to give a *statutory notice* based on the terms of the settlement; or
- (2) decline the proposed settlement;

whether or not the *settlement decision makers* have met with the relevant *FSA* staff or the *person* concerned.

- 5.1.8 G (1) Where the *settlement decision makers* decline to issue a *statutory notice* despite the proposed settlement, they may invite *FSA* staff and the *person* concerned to enter into further discussions to try to achieve an outcome the *settlement decision makers* would be prepared to endorse.
- (2) However, if the proposed action by the *FSA* has been submitted to the *RDC* for consideration, it will be for the *RDC* to decide:
- (a) whether to extend the period for representations in response to a *warning notice* or first *supervisory notice*; or
- (b) if representations have been made in response to a *warning notice* or first *supervisory notice*, whether to proceed to give a *decision notice* or second *supervisory notice*.

Settlement by mediation

- 5.1.9 G The *FSA* and other parties may agree to mediation as a way of facilitating settlement in appropriate cases.

Third party rights

- 5.1.10 G (1) *DEPP 2.4* sets out the *FSA's* approach to giving third parties copies of *statutory notices* pursuant to section 393 (Third party rights) of the *Act*.
- (2) The decision to give a *warning notice* or a *decision notice* to a third party is a *statutory notice associated decision*.
- (3) In cases therefore where the decision to give a *warning notice* or *decision notice* is taken by *settlement decision makers*, those decision makers will decide whether a copy of the notice should be given to a third party in accordance with section 393 of the *Act*. Any representations made by the third party in response to a *warning notice* will be considered by the *settlement decision makers*.

6 Penalties

6.1 Introduction

- 6.1.1 G *DEPP* 6 includes the *FSA*'s statement of policy with respect to the imposition and amount of penalties under the *Act*, as required by sections 69(1), 93(1), 124(1), and 210(1) of the *Act*.
- 6.1.2 G The principal purpose of imposing a financial penalty or issuing a *public censure* is to promote high standards of regulatory and/or market conduct by deterring *persons* who have committed *breaches* from committing further *breaches*, helping to deter other *persons* from committing similar *breaches*, and demonstrating generally the benefits of compliant behaviour. Financial penalties and *public censures* are therefore tools that the *FSA* may employ to help it to achieve its *regulatory objectives*.

6.2 Deciding whether to take action

- 6.2.1 G The *FSA* will consider the full circumstances of each case when determining whether or not to take action for a financial penalty or *public censure*. Set out below is a list of factors that may be relevant for this purpose. The list is not exhaustive: not all of these factors may be applicable in a particular case, and there may be other factors, not listed, that are relevant.
- (1) The nature, seriousness and impact of the suspected *breach*, including:
 - (a) whether the *breach* was deliberate or reckless;
 - (b) the duration and frequency of the *breach*;
 - (c) the amount of any benefit gained or loss avoided as a result of the *breach*;
 - (d) whether the *breach* reveals serious or systemic weaknesses of the management systems or *internal controls* relating to all or part of a *person's* business;
 - (e) the impact or potential impact of the *breach* on the orderliness of markets including whether confidence in those markets has been damaged or put at risk;
 - (f) the loss or risk of loss caused to *consumers* or other market users;
 - (g) the nature and extent of any *financial crime* facilitated,

- occasioned or otherwise attributable to the *breach*; and
- (h) whether there are a number of smaller issues, which individually may not justify disciplinary action, but which do so when taken collectively.
- (2) The conduct of the *person* after the *breach*, including the following:
- (a) how quickly, effectively and completely the *person* brought the *breach* to the attention of the *FSA* or another relevant regulatory authority;
 - (b) the degree of co-operation the *person* showed during the investigation of the *breach*;
 - (c) any remedial steps the *person* has taken in respect of the *breach*;
 - (d) the likelihood that the same type of *breach* (whether on the part of the *person* under investigation or others) will recur if no action is taken;
 - (e) whether the *person* concerned has complied with any requirements or rulings of another regulatory authority relating to his *behaviour* (for example, where relevant, those of the *Takeover Panel* or an *RIE*); and
 - (f) the nature and extent of any false or inaccurate information given by the *person* and whether the information appears to have been given in an attempt to knowingly mislead the *FSA*.
- (3) The previous disciplinary record and compliance history of the *person* including:
- (a) whether the *FSA* (or any *previous regulator*) has taken any previous disciplinary action resulting in adverse findings against the *person*;
 - (b) whether the *person* has previously undertaken not to do a particular act or engage in particular *behaviour*;
 - (c) whether the *FSA* (or any *previous regulator*) has previously taken protective action in respect of a *firm*, using its own initiative powers, by means of a variation of a *Part IV permission* or otherwise, or has previously requested the *firm* to take remedial action, and the extent to which such action has been taken; and
 - (d) the general compliance history of the *person*, including whether the *FSA* (or any *previous regulator*) has previously issued the *person* with a private warning.

(4) *FSA guidance* and other published materials:

The *FSA* will not take action against a person for *behaviour* that it considers to be in line with *guidance*, other materials published by the *FSA* in support of the *Handbook* or *FSA*-confirmed Industry Guidance which were current at the time of the *behaviour* in question. (The manner in which *guidance* and other published materials may otherwise be relevant to an enforcement case is described in *EG 2*.)

(5) Action taken by the *FSA* in previous similar cases.

(6) Action taken by other domestic or international regulatory authorities:

Where other regulatory authorities propose to take action in respect of the *breach* which is under consideration by the *FSA*, or one similar to it, the *FSA* will consider whether the other authority's action would be adequate to address the *FSA*'s concerns, or whether it would be appropriate for the *FSA* to take its own action.

6.2.2 G When deciding whether to take action for *market abuse* or *requiring or encouraging*, the *FSA* may consider the following additional factors:

(1) The degree of sophistication of the users of the market in question, the size and liquidity of the market, and the susceptibility of the market to *market abuse*.

(2) The impact, having regard to the nature of the *behaviour*, that any financial penalty or *public censure* may have on the financial markets or on the interests of *consumers*:

(a) a penalty may show that high standards of market conduct are being enforced in the financial markets, and may bolster market confidence;

(b) a penalty may protect the interests of *consumers* by deterring future *market abuse* and improving standards of conduct in a market;

(c) in the context of a *takeover bid*, the *FSA* may consider that the impact of the use of its powers is likely to have an adverse effect on the timing or outcome of that bid, and therefore it would not be in the interests of financial markets or *consumers* to take action for *market abuse* during the *takeover bid*. If the *FSA* considers that the proposed use of its powers may have that effect, it will consult the *Takeover Panel* and give due weight to its views.

Discipline for breaches of *FSA* rules on systems and controls against money laundering

6.2.3 G The *FSA's* rules on systems and controls against *money laundering* are set out in *SYSC 3.2* and *SYSC 6.3*. The *FSA*, when considering whether to take action for a financial penalty or censure in respect of a breach of those rules, will have regard to whether a *firm* has followed relevant provisions in the *Guidance for the UK financial sector issued by the Joint Money Laundering Steering Group*.

Action against approved persons under section 66 of the Act

6.2.4 G The primary responsibility for ensuring compliance with a *firm's* regulatory obligations rests with the *firm* itself. However, the *FSA* may take disciplinary action against an *approved person* where there is evidence of personal culpability on the part of that *approved person*. Personal culpability arises where the *behaviour* was deliberate or where the *approved person's* standard of *behaviour* was below that which would be reasonable in all the circumstances at the time of the conduct concerned.

6.2.5 G In some cases it may not be appropriate to take disciplinary measures against a *firm* for the actions of an *approved person* (an example might be where the *firm* can show that it took all reasonable steps to prevent the *breach*). In other cases, it may be appropriate for the *FSA* to take action against both the *firm* and the *approved person*. For example, a *firm* may have breached the *rule* requiring it to take reasonable care to establish and maintain such systems and controls as are appropriate to its business (*SYSC 3.1.1R* or *SYSC 4.1.1R*), and an *approved person* may have taken advantage of those deficiencies to front run orders or misappropriate assets.

6.2.6 G In addition to the general factors outlined in *DEPP 6.2.1G*, there are some additional considerations that may be relevant when deciding whether to take action against an *approved person* pursuant to section 66 of the *Act*. This list of those considerations is non-exhaustive. Not all considerations below may be relevant in every case, and there may be other considerations, not listed, that are relevant.

(1) The *approved person's* position and responsibilities. The *FSA* may take into account the responsibility of those exercising *significant influence functions* in the *firm* for the conduct of the *firm*. The more senior the *approved person* responsible for the misconduct, the more seriously the *FSA* is likely to view the misconduct, and therefore the more likely it is to take action against the *approved person*.

(2) Whether disciplinary action against the *firm* rather than the *approved person* would be a more appropriate regulatory response.

(3) Whether disciplinary action would be a proportionate response to the nature and seriousness of the breach by the *approved person*.

6.2.7 G The *FSA* will not discipline *approved persons* on the basis of vicarious liability (that is, holding them responsible for the acts of others), provided appropriate delegation and supervision has taken place (see *APER 4.6.13G* and *APER 4.6.14G*). In particular, disciplinary action will not be taken

against an *approved person* performing a *significant influence function* simply because a regulatory failure has occurred in an area of business for which he is responsible. The *FSA* will consider that an *approved person* performing a *significant influence function* may have breached *Statements of Principle 5 to 7* only if his conduct was below the standard which would be reasonable in all the circumstances at the time of the conduct concerned (see also *APER 3.1.8G*).

- 6.2.8 G An *approved person* will not be in breach if he has exercised due and reasonable care when assessing information, has reached a reasonable conclusion and has acted on it.
- 6.2.9 G Where disciplinary action is taken against an *approved person* the onus will be on the *FSA* to show that the *approved person* has been guilty of misconduct.
- Action against directors, former directors and persons discharging managerial responsibilities for breaches under Part VI of the Act
- 6.2.10 G The primary responsibility for ensuring compliance with Part VI of the *Act*, the *Part 6 rules*, the *prospectus rules* or a provision otherwise made in accordance with the *Prospectus Directive* or a requirement imposed under such provision rests with the persons identified in section 91(1) and section 91(1A) (Penalties for breach of Part 6 rules) of the *Act* respectively. Normally therefore, any disciplinary action taken by the *FSA* for contraventions of these obligations will in the first instance be against those persons.
- 6.2.11 G However, in the case of a contravention by a *person* referred to in section 91(1)(a) or section 91(1)(b)(i) or section 91(1A) of the *Act* ("P"), where the *FSA* considers that another *person* who was at the material time a *director* of P was knowingly concerned in the contravention, the *FSA* may take disciplinary action against that *person*. In circumstances where the *FSA* does not consider it appropriate to seek a disciplinary sanction against P (notwithstanding a breach of relevant requirements by such person), the *FSA* may nonetheless seek a disciplinary sanction against any other person who was at the material time a *director* of P and was knowingly concerned in the contravention.
- 6.2.12 G *Persons* discharging managerial responsibilities within an issuer and their *connected persons*, who have requested or approved the admission of a *financial instrument* to trading on a *regulated market*, and *connected persons* have their own responsibilities under the *disclosure rules*, as set out in *DTR 3*, for which they are primarily responsible. Accordingly, disciplinary action for a breach of the *disclosure rules* will not necessarily involve the issuer.

[**Note:** In paragraph 6.2.12, 'connected person' has the meaning in relation to a *person discharging managerial responsibilities* within an *issuer* attributed to it in subsection (5) of the definition of 'connected person' in the *Handbook Glossary*.]

- 6.2.13 G In deciding whether to take action, the *FSA* will consider the full circumstances of each case. Factors that may be relevant for this purpose include, but are not limited to, the factors at *DEPP* 6.2.1G.

Discipline for breaches of the Principles for Businesses

- 6.2.14 G The *Principles* are set out in *PRIN* 2.1.1R. The *Principles* are a general statement of the fundamental obligations of *firms* under the *regulatory system*. The *Principles* derive their authority from the *FSA's* rule-making powers set out in section 138 (General rule-making power) of the *Act*. A breach of a *Principle* will make a *firm* liable to disciplinary action. Where the *FSA* considers this is appropriate, it will discipline a *firm* on the basis of the *Principles* alone.

- 6.2.15 G In determining whether a *Principle* has been breached, it is necessary to look to the standard of conduct required by the *Principle* in question at the time. Under each of the *Principles*, the onus will be on the *FSA* to show that a *firm* has been at fault in some way.

Discipline for breaches of the Listing Principles

- 6.2.16 G The Listing Principles are set out in *LR* 7. The Listing Principles are a general statement of the fundamental obligations of *listed companies*. The Listing Principles derive their authority from the *FSA's* rule making powers set out in section 73A(1) (Part 6 Rules) of the *Act*. A breach of a Listing Principle will make a *listed company* liable to disciplinary action by the *FSA*.

- 6.2.17 G In determining whether a Listing Principle has been broken, it is necessary to look to the standard of conduct required by the Listing Principle in question. Under each of the Listing Principles, the onus will be on the *FSA* to show that a *listed company* has been at fault in some way. This requirement will differ depending upon the Listing Principle.

- 6.2.18 G In certain cases, it may be appropriate to discipline a *listed company* on the basis of the Listing Principles alone. Examples include the following:

- (1) where there is no detailed listing rule which prohibits the *behaviour* in question, but the *behaviour* clearly contravenes a Listing Principle;
- (2) where a *listed company* has committed a number of breaches of detailed rules which individually may not merit disciplinary action, but the cumulative effect of which indicates the breach of a Listing Principle.

Action involving other regulatory authorities or enforcement agencies

- 6.2.19 G Some types of *breach* may potentially result not only in action by the *FSA*, but also action by other domestic or overseas regulatory authorities or enforcement agencies.

- 6.2.20 G When deciding how to proceed in such cases, the *FSA* will examine the circumstances of the case, and consider, in the light of the relevant investigation, disciplinary and enforcement powers, whether it is appropriate for the *FSA* or another authority to take action to address the *breach*. The *FSA* will have regard to all the circumstances of the case including whether the other authority has adequate powers to address the *breach* in question.
- 6.2.21 G In some cases, it may be appropriate for both the *FSA* and another authority to be involved, and for both to take action in a particular case arising from the same facts. For example, a breach of *RIE* rules may be so serious as to justify the *FSA* varying or cancelling the *firm's Part IV permission*, or withdrawing approval from *approved persons*, as well as action taken by the *RIE*. In such cases, the *FSA* will work with the relevant authority to ensure that cases are dealt with efficiently and fairly, under operating arrangements in place (if any) between the *FSA* and the relevant authority.
- 6.2.22 G In relation to *behaviour* which may have happened or be happening in the context of a *takeover bid*, the *FSA* will refer to the *Takeover Panel* and give due weight to its views in the context of the *Takeover Panel's* powers and responsibilities. Where the *Takeover Code* has procedures for complaint about any behaviour, the *FSA* expects parties to exhaust those procedures. The *FSA* will not, save in exceptional circumstances, take action under any of section 123 (*FSA's* power to impose penalties), section 129 (Power of court to impose penalties), section 381 (Injunctions), sections 383 or 384 (Restitution) in respect of *behaviour* to which the *Takeover Code* is relevant before the conclusion of the procedures available under the *Takeover Code*.
- 6.2.23 G The *FSA* will not take action against a *person* over *behaviour* which (a) conforms with the *Takeover Code* or rules of an *RIE* and (b) falls within the terms of any provision of the *Code of Market Conduct* which states that *behaviour* so conforming does not amount to *market abuse*. The *FSA* will seek the *Takeover Panel's* or relevant *RIE's* views on whether *behaviour* complies with the *Takeover Code* or *RIE* rules and will attach considerable weight to its views.
- 6.2.24 G If any of the circumstances in *DEPP* 6.2.26G apply, and the *FSA* considers that the use of its disciplinary powers under section 123 or section 129, or of its injunctive powers under section 381 or of its powers relating to restitution under section 383 or 384 is appropriate, it will not take action during an offer to which the *Takeover Code* applies except in the circumstances set out in *DEPP* 6.2.27G.
- 6.2.25 G In any case where the *FSA* considers that the use of its powers under any of sections 123, 129, 381, 383 or 384 of the *Act* may be appropriate, if that use may affect the timetable or outcome of a *takeover bid* or where it is appropriate in the context of any exercise by the *Takeover Panel* of its powers and authority, the *FSA* will consult the *Takeover Panel* before using any of those powers.

- 6.2.26 G Where the *behaviour* of a *person* which amounts to *market abuse* is *behaviour* to which the *Takeover Code* is relevant, the use of the *Takeover Panel's* powers will often be sufficient to address the relevant concerns. In cases where this is not so, the *FSA* will need to consider whether it is appropriate to use any of its own powers under the *market abuse regime*. The principal circumstances in which the *FSA* is likely to consider such exercise are:
- (1) where the *behaviour* falls within sections 118(2), 118(3) or 118(4) of the *Act*;
 - (2) where the *FSA's* approach in previous similar cases (which may have happened otherwise than in the context of a *takeover bid*) suggests that a financial penalty should be imposed;
 - (3) where the *behaviour* extends to *securities* or a class of *securities* which may be outside the *Takeover Panel's* jurisdiction;
 - (4) where the *behaviour* threatens or has threatened the stability of the *financial system*; and
 - (5) where for any other reason the *Takeover Panel* asks the *FSA* to consider the use of any of its powers referred to in *DEPP* 6.2.22G.
- [**Note:** In this section, 'securities' has the same meaning given in subsection (1) of the definition of 'security' in the *Handbook Glossary*]
- 6.2.27 G The exceptional circumstances in which the *FSA* will consider the use of powers during a *takeover bid* are listed in *DEPP* 6.2.26G(1), *DEPP* 6.2.26G(3) and *DEPP* 6.2.26G(4), and, depending on the circumstances, *DEPP* 6.2.26G(5).
- 6.2.28 G *DEPP* 6.2.26G and *DEPP* 6.2.27G do not apply to a *person* who has no responsibilities under the *Takeover Code*.

6.3 Penalties for market abuse

- 6.3.1 G Section 123(2) of the *Act* states that the *FSA* may not impose a penalty on a *person* if there are reasonable grounds to be satisfied that:
- (1) the *person* concerned believed, on reasonable grounds, that his *behaviour* did not amount to *market abuse* or *requiring or encouraging*; or
 - (2) the *person* concerned took all reasonable precautions and exercised all due diligence to avoid engaging in *market abuse* or *requiring or encouraging*.
- 6.3.2 G The factors which the *FSA* may take into account when deciding whether

either of the two conditions in *DEPP* 6.3.1G are met include, but are not limited to:

- (1) whether, and if so to what extent, the *behaviour* in question was or was not analogous to *behaviour* described in the *Code of Market Conduct* (see *MAR* 1) as amounting or not amounting to *market abuse* or *requiring or encouraging*;
- (2) whether the *FSA* has published any *guidance* or other materials on the *behaviour* in question and if so, the extent to which the *person* sought to follow that *guidance* or take account of those materials (see the Reader's Guide to the *Handbook* regarding the status of *guidance*.) The *FSA* will consider the nature and accessibility of any *guidance* or other published materials when deciding whether it is relevant in this context and, if so, what weight it should be given;
- (3) whether, and if so to what extent, the *behaviour* complied with the rules of any relevant *prescribed market* or any other relevant market or other regulatory requirements (including the *Takeover Code*) or any relevant codes of conduct or best practice;
- (4) the level of knowledge, skill and experience to be expected of the *person* concerned;
- (5) whether, and if so to what extent, the *person* can demonstrate that the *behaviour* was engaged in for a legitimate purpose and in a proper way;
- (6) whether, and if so to what extent, the *person* followed internal consultation and escalation procedures in relation to the *behaviour* (for example, did the *person* discuss the *behaviour* with internal line management and/or internal legal or compliance departments);
- (7) whether, and if so the extent to which, the *person* sought any appropriate expert legal or other expert professional advice and followed that advice; and
- (8) whether, and if so to what extent, the *person* sought advice from the market authorities of any relevant *prescribed market* or, where relevant, consulted the *Takeover Panel*, and followed the advice received.

6.4 Financial penalty or public censure

- 6.4.1 G The *FSA* will consider all the relevant circumstances of the case when deciding whether to impose a penalty or issue a *public censure*. As such, the factors set out in *DEPP* 6.4.2G are not exhaustive. Not all of the factors may be relevant in a particular case and there may be other factors, not listed, that are relevant.

- 6.4.2 G The criteria for determining whether it is appropriate to issue a *public censure* rather than impose a financial penalty are similar to those for determining the amount of penalty set out in *DEPP* 6.5. Some particular considerations that may be relevant when the *FSA* determines whether to issue a *public censure* rather than impose a financial penalty are:
- (1) whether or not deterrence may be effectively achieved by issuing a *public censure*;
 - (2) if the *person* has made a profit or avoided a loss as a result of the *breach*, this may be a factor in favour of a financial penalty, on the basis that a *person* should not be permitted to benefit from its *breach*;
 - (3) if the *breach* is more serious in nature or degree, this may be a factor in favour of a financial penalty, on the basis that the sanction should reflect the seriousness of the *breach*; other things being equal, the more serious the *breach*, the more likely the *FSA* is to impose a financial penalty;
 - (4) if the *person* has brought the *breach* to the attention of the *FSA*, this may be a factor in favour of a *public censure*, depending upon the nature and seriousness of the *breach*;
 - (5) if the *person* has admitted the *breach* and provides full and immediate co-operation to the *FSA*, and takes steps to ensure that those who have suffered loss due to the *breach* are fully compensated for those losses, this may be a factor in favour of a *public censure*, rather than a financial penalty, depending upon the nature and seriousness of the *breach*;
 - (6) if the *person* has a poor disciplinary record or compliance history (for example, where the *FSA* has previously brought disciplinary action resulting in adverse findings in relation to the same or similar *behaviour*), this may be a factor in favour of a financial penalty, on the basis that it may be particularly important to deter future cases;
 - (7) the *FSA's* approach in similar previous cases: the *FSA* will seek to achieve a consistent approach to its decisions on whether to impose a financial penalty or issue a *public censure*; and
 - (8) the impact on the *person* concerned. In exceptional circumstances, if the *person* has inadequate means (excluding any manipulation or attempted manipulation of their assets) to pay the level of financial penalty which their *breach* would otherwise attract, this may be a factor in favour of a lower level of penalty or a public statement. However, it would only be in an exceptional case that the *FSA* would be prepared to agree to issue a *public censure* rather than impose a financial penalty if a financial penalty would otherwise be the appropriate sanction. Examples of such exceptional cases could

include where there is:

- (a) verifiable evidence that a *person* would suffer serious financial hardship if the *FSA* imposed a financial penalty;
- (b) verifiable evidence that the *person* would be unable to meet other regulatory requirements, particularly financial resource requirements, if the *FSA* imposed a financial penalty at an appropriate level; or
- (c) in Part VI cases in which the *FSA* may impose a financial penalty, where there is the likelihood of a severe adverse impact on a *person's* shareholders or a consequential impact on market confidence or market stability if a financial penalty was imposed. However, this does not exclude the imposition of a financial penalty even though this may have an impact on a *person's* shareholders.

6.5 Determining the appropriate level of financial penalty

- 6.5.1 G (1) The *FSA* will consider all the relevant circumstances of a case when it determines the level of financial penalty (if any) that is appropriate and in proportion to the *breach* concerned. The list of factors in *DEPP* 6.5.2G is not exhaustive: not all of these factors may be relevant in a particular case, and there may be other factors, not included below, that are relevant.
- (2) The *FSA* does not apply a tariff of penalties for different kinds of *breach*. This is because there will be very few cases in which all the circumstances of the case are essentially the same and because of the wide range of different *breaches* in respect of which the *FSA* may take action. The *FSA* considers that, in general, the use of a tariff for particular kinds of *breach* would inhibit the flexible and proportionate policy which it adopts in this area.
- 6.5.2 G The following factors may be relevant to determining the appropriate level of financial penalty to be imposed on a *person* under the *Act*:
- (1) Deterrence
- When determining the appropriate level of penalty, the *FSA* will have regard to the principal purpose for which it imposes sanctions, namely to promote high standards of regulatory and/or market conduct by deterring *persons* who have committed *breaches* from committing further *breaches* and helping to deter other *persons* from committing similar *breaches*, as well as demonstrating generally the benefits of compliant business.
- (2) The nature, seriousness and impact of the *breach* in question

The *FSA* will consider the seriousness of the *breach* in relation to the nature of the *rule*, requirement or provision breached. The following considerations are among those that may be relevant:

- (a) the duration and frequency of the *breach*;
 - (b) whether the *breach* revealed serious or systemic weaknesses in the *person's* procedures or of the management systems or *internal controls* relating to all or part of a *person's* business;
 - (c) in market abuse cases, the *FSA* will consider whether the breach had an adverse effect on markets and, if it did, how serious that effect was, which may include having regard to whether the orderliness of, or confidence in, the markets in question has been damaged or put at risk. This factor may also be relevant in other types of case;
 - (d) the loss or risk of loss caused to *consumers*, investors or other market users;
 - (e) the nature and extent of any *financial crime* facilitated, occasioned or otherwise attributable to the *breach*; and
 - (f) in the context of contraventions of Part VI of the *Act*, the extent to which the *behaviour* which constitutes the contravention departs from current market practice.
- (3) The extent to which the *breach* was deliberate or reckless

The *FSA* will regard as more serious a *breach* which is deliberately or recklessly committed. The matters to which the *FSA* may have regard in determining whether a *breach* was deliberate or reckless include, but are not limited to, the following:

- (a) whether the *breach* was intentional, in that the *person* intended or foresaw the potential or actual consequences of its actions;
- (b) where the *person* has not followed a *firm's* internal procedures and/or *FSA guidance*, the reasons for not doing so;
- (c) where the *person* has taken decisions beyond its or his field of competence, the reasons for the decisions and for them being taken by that *person*;
- (d) whether the *person* has given no apparent consideration to the consequences of the *behaviour* that constitutes the *breach*;
- (e) in the context of a contravention of any *rule* or requirement imposed by or under Part VI of the *Act*, whether the *person* sought any professional advice before the contravention

occurred and whether the *person* followed that professional advice. Seeking professional advice does not remove a *person's* responsibility for compliance with applicable *rules* and requirements.

If the *FSA* decides that the *breach* was deliberate or reckless, it is more likely to impose a higher penalty on a *person* than would otherwise be the case.

- (4) Whether the person on whom the penalty is to be imposed is an individual

When determining the amount of a penalty to be imposed on an individual, the *FSA* will take into account that individuals will not always have the resources of a *body corporate*, that enforcement action may have a greater impact on an individual, and further, that it may be possible to achieve effective deterrence by imposing a smaller penalty on an individual than on a *body corporate*. The *FSA* will also consider whether the status, position and/or responsibilities of the individual are such as to make a *breach* committed by the individual more serious and whether the penalty should therefore be set at a higher level.

- (5) The size, financial resources and other circumstances of the person on whom the penalty is to be imposed

- (a) The *FSA* may take into account whether there is verifiable evidence of serious financial hardship or financial difficulties if the *person* were to pay the level of penalty appropriate for the particular *breach*. The *FSA* regards these factors as matters to be taken into account in determining the level of a penalty, but not to the extent that there is a direct correlation between those factors and the level of penalty.
- (b) The purpose of a penalty is not to render a *person* insolvent or to threaten the *person's* solvency. Where this would be a material consideration, the *FSA* will consider, having regard to all other factors, whether a lower penalty would be appropriate. This is most likely to be relevant to a *person* with lower financial resources; but if a *person* reduces its solvency with the purpose of reducing its ability to pay a financial penalty, for example by transferring assets to third parties, the *FSA* will take account of those assets when determining the amount of a penalty.
- (c) The degree of seriousness of a *breach* may be linked to the size of the *firm*. For example, a systemic failure in a large *firm* could damage or threaten to damage a much larger number of *consumers* or investors than would be the case with a small *firm*: *breaches* in *firms* with a high volume of business over a protracted period may be more serious than *breaches* over

similar periods in *firms* with a smaller volume of business.

- (d) The size and resources of a *person* may also be relevant in relation to mitigation, in particular what steps the *person* took after the *breach* had been identified; the *FSA* will take into account what it is reasonable to expect from a *person* in relation to its size and resources, and factors such as what proportion of a *person's* resources were used to resolve a problem.
- (e) The *FSA* may decide to impose a financial penalty on a mutual (such as a *building society*), even though this may have a direct impact on that mutual's *customers*. This reflects the fact that a significant proportion of a mutual's *customers* are shareholder-members; to that extent, their position involves an assumption of risk that is not assumed by *customers* of a *firm* that is not a mutual. Whether a *firm* is a mutual will not, by itself, increase or decrease the level of a financial penalty.

(6) The amount of benefit gained or loss avoided

The *FSA* may have regard to the amount of benefit gained or loss avoided as a result of the *breach*, for example:

- (a) the *FSA* will propose a penalty which is consistent with the principle that a *person* should not benefit from the *breach*; and
- (b) the penalty should also act as an incentive to the *person* (and others) to comply with regulatory standards and required standards of market conduct.

(7) Difficulty of detecting the *breach*

A *person's* incentive to commit a *breach* may be greater where the *breach* is, by its nature, harder to detect. The *FSA* may, therefore, impose a higher penalty where it considers that a *person* committed a *breach* in such a way as to avoid or reduce the risk that the *breach* would be discovered, or that the difficulty of detection (whether actual or perceived) may have affected the *behaviour* in question.

(8) Conduct following the *breach*

The *FSA* may take the following factors into account:

- (a) the conduct of the *person* in bringing (or failing to bring) quickly, effectively and completely the *breach* to the *FSA's* attention (or the attention of other regulatory authorities, where relevant);

- (b) the degree of co-operation the *person* showed during the investigation of the *breach* by the *FSA*, or any other regulatory authority allowed to share information with the *FSA*, such as an *RIE* or the *Takeover Panel*. Where a *person* has fully co-operated with the *FSA*'s investigation, this will be a factor tending to reduce the level of financial penalty;
 - (c) any remedial steps taken since the *breach* was identified, including whether these were taken on the *person*'s own initiative or that of the *FSA* or another regulatory authority; for example, identifying whether *consumers* or investors or other market users suffered loss and compensating them where they have; correcting any misleading statement or impression; taking disciplinary action against staff involved (if appropriate); and taking steps to ensure that similar problems cannot arise in the future; and
 - (d) whether the *person* concerned has complied with any requirements or rulings of another regulatory authority relating to the *breach* (for example, where relevant, those of the *Takeover Panel*).
- (9) Disciplinary record and compliance history

The *FSA* may take the previous disciplinary record and general compliance history of the *person* into account. This will include:

- (a) whether the *FSA* (or any *previous regulator*) has taken any previous disciplinary action against the *person*;
- (b) whether the *person* has previously undertaken not to do a particular act or engage in particular *behaviour*;
- (c) whether the *FSA* (or any *previous regulator*) has previously taken protective action in respect of a *firm* using its own initiative powers, by means of a variation of a *firm*'s *Part IV permission*, or has previously requested the *firm* to take remedial action and the extent to which that action has been taken.
- (d) the general compliance history of the *person*, including whether the *FSA* (or any *previous regulator*) has previously brought to the *person*'s attention, including by way of a private warning, issues similar or related to the conduct that constitutes the *breach* in respect of which the penalty is imposed.

A *person*'s disciplinary record could lead to the *FSA* imposing a higher penalty, for example where the *person* has committed similar *breaches* in the past.

In assessing the relevance of a *person's* disciplinary record and compliance history, the age of a particular matter will be taken into account, although a long-standing matter may still be relevant.

(10) Other action taken by the *FSA* (or a *previous regulator*)

Action that the *FSA* (or a *previous regulator*) has taken in relation to similar *breaches* by other *persons* may be taken into account. This includes previous actions in which the *FSA* (whether acting by the *RDC* or the *settlement decision makers*) and a *person* on whom a penalty is to be imposed have reached agreement as to the amount of the penalty. As stated at *DEPP* 6.5.1G(2), the *FSA* does not operate a tariff system. However, the *FSA* will seek to apply a consistent approach to determining the appropriate level of penalty.

(11) Action taken by other domestic or international regulatory authorities

Considerations could include, for example:

- (a) action taken or to be taken against a *person* by other regulatory authorities which may be relevant where that action relates to the *breach* in question;
- (b) the degree to which any remedial or compensatory steps required by other regulatory authorities have been taken (and whether taken promptly).

(12) *FSA guidance* and other published materials

- (a) A *person* does not commit a *breach* by not following *FSA guidance* or other published examples of compliant *behaviour*. However, where a *breach* has otherwise been established, the fact that *guidance* or other published materials had raised relevant concerns may inform the seriousness with which the *breach* is to be regarded by the *FSA* when determining the level of penalty.
- (b) The *FSA* will consider the nature and accessibility of the *guidance* or other published materials when deciding whether they are relevant to the level of penalty and, if they are, what weight to give them in relation to other relevant factors.

(13) The timing of any agreement as to the amount of the penalty

The *FSA* and the *person* on whom a penalty is to be imposed may seek to agree the amount of any financial penalty and other terms. In recognition of the benefits of such agreements, *DEPP* 6.7 provides that the amount of the penalty which might otherwise have been payable will be reduced to reflect the stage at which the *FSA* and the *person* concerned reach an agreement.

- 6.5.3 G Part III (Penalties and fees) of Schedule 1 to the *Act* specifically provides that the *FSA* may not, in determining its policy with respect to the amount of penalties, take account of expenses which it incurs, or expects to incur, in discharging its functions.

6.6 Financial penalties for late and incomplete submission of reports

- 6.6.1 G (1) The *FSA* attaches considerable importance to the timely submission by *firms* of reports. This is because the information that they contain is essential to the *FSA's* assessment of whether a *firm* is complying with the requirements and standards of the *regulatory system* and to the *FSA's* understanding of that *firm's* business.
- (2) *DEPP* 6.6.1G to 6.6.5G set out the *FSA's* policy in relation to financial penalties for late submission of reports and is in addition to the *FSA's* policy relating to financial penalties including the factors relevant to determining their appropriate level (see *DEPP* 6.5.2 G).
- 6.6.2 G In addition to the factors relevant to determining the appropriate level of financial penalty (see *DEPP* 6.5.2 G), the following considerations are relevant.
- (1) In general, the *FSA's* approach to disciplinary action arising from the late submission of a report will depend upon the length of time after the due date that the report in question is submitted.
- (2) If the *person* concerned is an individual, it is open to him to make representations to the *FSA* as to why he should not be the subject of a financial penalty, or why a lower penalty should be imposed. If he does so, the matters to which the *FSA* will have regard will include the matters set out in *DEPP* 6.5.2G(4) and (5). It should be noted that an administrative difficulty such as pressure of work does not, in itself, constitute a relevant circumstance for this purpose.
- (3) The *FSA* will have regard to repeated failures to submit reports on time. In the majority of cases involving such repeated failure, the *FSA* considers that it will be appropriate to seek more serious disciplinary sanctions or other enforcement action, including seeking to apply for the cancellation of the *firm's* permission.
- (4) The *FSA* will also have regard to the submission frequency of the late report when assessing the seriousness of the contravention. For example, a short delay in submitting a weekly or monthly report can have serious implications for the supervision of the *firm* in question. Such a delay may therefore be subject to a higher penalty than might otherwise be the case.
- 6.6.3 G In addition, in appropriate cases, the *FSA* may bring disciplinary action against the *approved persons* within the *firm's* management who are

ultimately responsible for ensuring that the *firm's* reports are completed and returned to the *FSA*.

- 6.6.4 G In applying the *guidance* in this section, the *FSA* may treat a report which is materially incomplete or inaccurate as not received until it has been submitted in a form which is materially complete and accurate. For the purposes of the *guidance*, the *FSA* may also treat a report as not received where the method by which it is submitted to the *FSA* does not comply with the prescribed method of submission.
- 6.6.5 G In most late reporting cases, it will not be necessary for the *FSA* to appoint an investigator since the fact of the breach will be clear. It follows that the *FSA* will not usually send the *firm* concerned a preliminary findings letter for late-reporting disciplinary action.

6.7 Discount for early settlement

- 6.7.1 G *Persons* subject to enforcement action may be prepared to agree the amount of any financial penalty and other conditions which the *FSA* seeks to impose by way of such action. Such conditions might include, for example, the amount or mechanism for the payment of compensation to consumers. The *FSA* recognises the benefits of such agreements, in that they offer the potential for securing earlier redress or protection for consumers and the saving of cost to the *person* concerned and the *FSA* itself in contesting the financial penalty. The penalty that might otherwise be payable in respect of a *breach* by the *person* concerned will therefore be reduced to reflect the timing of any settlement agreement.
- 6.7.2 G In appropriate cases the *FSA's* approach will be to negotiate with the *person* concerned to agree in principle the amount of a financial penalty having regard to the factors set out in *DEPP* 6.5.2G. (This starting figure will take no account of the existence of the *settlement discount scheme* described in this section.) Such amount ("A") will then be reduced by a percentage of A according to the stage in the process at which agreement is reached. The resulting figure ("B") will be the amount actually payable by the *person* concerned in respect of the *breach*. However, where part of a proposed financial penalty specifically equates to the disgorgement of profit accrued or loss avoided then the percentage reduction will not apply to that part of the penalty.
- 6.7.3 G (1) *The FSA* has identified four stages of an action for these purposes:
- (a) the period from commencement of an investigation until the *FSA* has:
 - (i) a sufficient understanding of the nature and gravity of the *breach* to make a reasonable assessment of the appropriate penalty; and

- (ii) communicated that assessment to the *person* concerned and allowed a reasonable opportunity to reach agreement as to the amount of the penalty ("stage 1");
 - (b) the period from the end of stage 1 until the expiry of the period for making written representations or, if sooner, the date on which the written representations are sent in response to the giving of a *warning notice* ("stage 2");
 - (c) the period from the end of stage 2 until the giving of a *decision notice* ("stage 3");
 - (d) the period after the end of stage 3, including proceedings before the *Tribunal* and any subsequent appeals ("stage 4").
- (2) The communication of the *FSA's* assessment of the appropriate penalty for the purposes of *DEPP* 6.7.3 G (1)(a) need not be in a prescribed form but will include an indication of the *breaches* alleged by the *FSA*. It may include the provision of a draft *warning notice*.
- (3) The reductions in penalty will be as follows:

| Stage at which agreement reached | Percentage reduction |
|---|-----------------------------|
| Stage 1 | 30 |
| Stage 2 | 20 |
| Stage 3 | 10 |
| Stage 4 | 0 |

- 6.7.4 G
- (1) Any settlement agreement between the *FSA* and the *person* concerned will therefore need to include a statement as to the appropriate penalty discount in accordance with this procedure.
 - (2) In certain circumstances the *person* concerned may consider that it would have been possible to reach a settlement at an earlier stage in the action, and argue that it should be entitled to a greater percentage reduction in penalty than is suggested by the table at *DEPP* 6.7.3G(3). It may be, for example, that the *FSA* no longer wishes to pursue its action in respect of all of the acts or omissions previously alleged to give rise to the *breach*. In such cases, the *person* concerned might argue that it would have been prepared to agree an appropriate penalty at an earlier stage and should therefore benefit from the discount which would have been available at that time. Equally, *FSA* staff may consider that greater openness from the *person* concerned could have resulted in an earlier settlement.
 - (3) Arguments of this nature risk compromising the goals of greater clarity and transparency in respect of the benefits of early settlement, and

invite dispute in each case as to when an agreement might have been possible. It will not usually be appropriate therefore to argue for a greater reduction in the amount of penalty on the basis that settlement could have been achieved earlier.

- (4) However, in exceptional cases the *FSA* may accept that there has been a substantial change in the nature or seriousness of the action being taken against the *person* concerned, and that an agreement would have been possible at an earlier stage if the action had commenced on a different footing. In such cases the *FSA* and person concerned may agree that the amount of the reduction in penalty should reflect the stage at which a settlement might otherwise have been possible.

6.7.5 G In cases in which the *settlement discount scheme* is applied, the fact of settlement and the level of the discount to the financial penalty imposed by the *FSA* will be set out in the *final notice*.

7 Statement of policy on section 169(7) interviews

7.1 Application and purpose

Application

- 7.1.1 G *DEPP 7* applies when the *FSA* :
- (1) has appointed an investigator at the request of an *overseas regulator*, under section 169(1)(b) (Assistance to overseas regulators) of the *Act*; and
 - (2) has directed, or is considering directing, the investigator, under section 169(7) of the *Act*, to permit a representative of the *overseas regulator* to attend, and take part in, any interview conducted for the purposes of the investigation.
- 7.1.2 G In *DEPP 7*, a "section 169(7) interview" means any interview conducted for the purposes of an investigation under section 169(1)(b) of the *Act* in relation to which the *FSA* has given a direction under section 169(7) of the *Act*.

Purpose

- 7.1.3 G The purpose of *DEPP 7* is to set out the *FSA*'s statement of policy on the conduct of interviews to which a direction under section 169(7) has been given or the *FSA* is considering giving. The *FSA* is required to prepare and publish this statement of policy by section 169(9) and (11) of the *Act*. As required by section 169(10) of the *Act*, the Treasury has approved the statement of policy.
- 7.1.4 G The *FSA* is keen to promote co-operation with *overseas regulators*. It views provision of assistance to *overseas regulators* as an essential part of the principles set out in section 2(3)(e) of the *Act* to which it must have regard in discharging its general functions.

7.2 Interviews

Appointment of investigator and confidentiality of information

- 7.2.1 G Under section 169(1)(b) of the *Act*, the *FSA* may appoint an investigator to investigate any matter at the request of an *overseas regulator*. The powers of the investigator appointed by the *FSA* (referred to here as the '*FSA*'s investigator') include the power to require *persons* to attend at a specified time and place and answer questions (the compulsory interview power).
- 7.2.2 G Where the *FSA* appoints an investigator in response to a request from an *overseas regulator* it may, under section 169(7) of the *Act*, direct him to permit a representative of that regulator to attend and take part in any

interviews conducted for the purposes of the investigation. The *FSA* may only give a direction under section 169(7) if it is satisfied that any information obtained by an *overseas regulator* as a result of the interview will be subject to the safeguards equivalent to those contained in Part XXIII (Public Record, Disclosure of Information and Cooperation) of the *Act*.

- 7.2.3 G Part XXIII of the *Act* contains restrictions on the disclosure of confidential information. The restrictions are subject to exceptions contained in regulations made by the Treasury under section 349.

Policy on use of investigative powers

- 7.2.4 G The *FSA's* policy on how it will use its investigative powers, including its power to appoint investigators, in support of *overseas regulators*, is set out in the *FSA's* Enforcement Guide (*EG*).

Use of direction powers

- 7.2.5 G The *FSA* may need to consider whether to use its direction power at two stages of an investigation:

- (1) at the same time that it considers the request from the *overseas regulator* to appoint investigators;
- (2) after it has appointed investigators, either at the request of the *overseas regulator* or on the recommendation of the investigators.

- 7.2.6 G Before making a direction under section 169(7) the *FSA* will discuss and determine with the *overseas regulator* how this statement of policy will apply to the conduct of the interview, taking into account all the circumstances of the case. Amongst other matters, the *FSA* will at this stage determine the extent to which the representative of the *overseas regulator* will be able to participate in the interview. The *overseas regulator* will be notified of this determination on the issuing of the direction.

- 7.2.7 G The direction will contain the identity of the representative of the *overseas regulator* that is permitted to attend any interview and the role that he will play in the interview. If the *FSA* envisages that there will be more than one interview in the course of the investigation, the direction may also specify which interview(s) the overseas representative is allowed to attend.

Conduct of interview

- 7.2.8 G In circumstances where an interview is to be conducted as part of the investigation, the *FSA's* investigator will have conduct of the interview. In general, the *FSA's* investigators will be employees of the *FSA*, but in appropriate cases the *FSA* may appoint *persons* who are not its employees. In those cases, the *FSA* may choose to require that an *FSA* employee is present at the interview and may choose to appoint that *person* as an investigator.

- 7.2.9 G The *FSA's* investigator will act on behalf of the *FSA* and under its control. He may be instructed to permit the representative of the *overseas regulator* to assist in the preparation of the interview. Where the *FSA* considers it appropriate, it may permit the representative to attend and ask questions of the interviewee in the course of the interview. The interview will be conducted according to the terms of the direction and the notification referred to in *DEPP 7.2.6G*.
- 7.2.10 G If the direction does permit the representative of an *overseas regulator* to attend the interview and ask the interviewee questions, the *FSA's* investigator will retain control of the interview throughout. Control of the interview means the following will apply:
- (1) The *FSA's* investigator instigates and concludes the interview, introduces everyone present and explains the procedure of the interview. He warns the interviewee of the possible consequences of refusing to answer questions and the uses to which any answers that are given can and cannot be put. The *FSA's* investigator will always ask preliminary questions, such as those establishing the identity of the interviewee.
 - (2) The *FSA's* investigator determines the duration of the interview and when, if at all, there should be any breaks in the course of it.
 - (3) The *FSA's* investigator has responsibility for making a record of the interview. The record should note the times and duration of any breaks in the interview and any periods when the representative of the *overseas regulator* was either present or not present.
 - (4) Where the *FSA's* investigator considers it appropriate, he may either suspend the interview, ask the overseas representative to leave the interview, or terminate the interview and reschedule it for another occasion. In making that decision he will bear in mind the terms of the direction, any agreement made with the *overseas regulator* as to the conduct of the interview and the contents of this statement of policy.
- 7.2.11 G The *FSA* will in general provide written notice of the appointment of an investigator to the *person* under investigation pursuant to the request of an *overseas regulator*. Whether or not the interviewee is the *person* under investigation, the *FSA's* investigator will inform the interviewee of the provisions under which he has been appointed, the identity of the requesting authority and general nature of the matter under investigation. The interviewee will also normally be informed if a representative of the *overseas regulator* is to attend and take part in the interview. Notification of any of these matters may not be provided in advance of the interview if the *FSA* believes that the circumstances are such that notification would be likely to result in the investigation being frustrated.
- 7.2.12 G The interviewee will normally be given a copy of the direction issued under section 169(7) in advance of the interview unless to do so would be likely to

result in the investigation being frustrated. The interviewee will also be provided with a copy of this statement of policy.

- 7.2.13 G The *FSA's* investigator will determine the venue and timing of the interview. The interviewee will be notified of the venue and timing of the interview in advance and in writing.
- 7.2.14 G When the *FSA's* investigator has exercised the compulsory interview power, at the outset of the interview the interviewee will be given an appropriate warning. The warning, amongst other things, must state that the interviewee is obliged to answer all questions put to them during the interview, including any put by the representative of the *overseas regulator*. It will also state that in criminal proceedings or proceedings for *market abuse* the *FSA* will not use as evidence against the interviewee any information obtained under compulsion during the interview.
- 7.2.15 G The *FSA's* investigator may decide which documents or other information may be put to the interviewee, and whether it is appropriate to give the interviewee sight of the *documents* before the interview takes place. Where the *overseas regulator* wishes to ask questions about *documents* during the interview and the *FSA's* investigator wishes to inspect those *documents* before the interview, he will be given the opportunity to do so. If the *FSA's* investigator wishes to inspect them and has not been able to do so before the interview, he may suspend the interview until he has had an opportunity to inspect them.
- 7.2.16 G When the *FSA's* investigator has exercised the compulsory interview power, the *FSA's* investigator will require the *person* attending the interview to answer questions. Where appropriate, questions may also be posed by the representative of the *overseas regulator*. The interviewee will also be required to answer these questions. The *FSA's* investigator may intervene at any stage during questioning by the representative of the *overseas regulator*.

Language

- 7.2.17 G Interviews will, in general, be conducted in English. Where the interviewee's first language is not English, at the request of the interviewee arrangements will be made for the questions to be translated into the interviewee's first language and for his answers to be translated back into English. If a translator is employed at the request of the representative of the *overseas regulator* then the translation costs will normally be met by the *overseas regulator*. Where interviews are being conducted in pursuance of a Community obligation these costs will be met by the *FSA*. In any event, the meeting of costs in relation to translators and, where applicable, the translation of *documents* will always be agreed in advance with the *overseas regulator*.

Tape-recording

- 7.2.18 G All compulsory interviews will be tape-recorded. The method of recording will be decided on and arranged by the *FSA's* investigator. Costs will be

addressed similarly to that set out in the preceding paragraph. The *FSA* will not provide the *overseas regulator* with transcripts of the tapes of interviews unless specifically agreed to, but copies of the tapes will normally be provided where requested. The interviewee will be provided with a copy of tapes of the interview but will only be provided with transcripts of the tapes or translations of any transcripts if he agrees to meet the cost of producing them.

Representation

- 7.2.19 G The interviewee may be accompanied at the interview by a legal adviser or a non-legally qualified observer of his choice. The costs of any representation will not be met by the *FSA*. The presence at the interview of a representative of the *overseas regulator* may mean that the interviewee wishes to be represented or accompanied by a *person* either from or familiar with that regulator's jurisdiction. As far as practical the arrangements for the interview should accommodate this wish. However, the *FSA* reserves the right to proceed with the interview if it is not possible to find such a *person* within a reasonable time or no such *person* is able to attend at a suitable venue.
- 7.2.20 G In relation to the publication of investigations by *overseas regulators*, the *FSA* will pursue a policy similar to the policy that relates to its own investigations.

DEPP TP 1 Transitional provisions applying to the Decision Procedure and Penalties Manual

G

1. Table DEPP TP 1

| (1) | (2) Material to which the transitional provision applies | (3) | (4) Transitional provision | (5) Transitional provision dates in force: | (6) Handbook provision coming into force |
|-----|---|-----|--|---|---|
| 1 | <i>DEPP</i> | G | <i>GEN</i> contains some transitional provisions that apply throughout the <i>Handbook</i> and which are designed to ensure a smooth transition at <i>commencement</i> . | From <i>commencement</i> | (Various dates) |
| 2 | <i>DEPP</i> 6.7 (Discount for early settlement), | G | These provisions (in summary, relating to the discount scheme) apply only to cases where investigators are appointed on or after 20 October 2005. | From 20 October 2005 | 20 October 2005 |
| 3 | <i>DEPP</i> | G | <i>DEPP</i> 1 to <i>DEPP</i> 5 take effect on 28 August 2007, save to the | From 28 August 2007 | 28 August 2007 |

| | | | | | |
|---|-------------|---|--|---------------------|----------------|
| | | | <p>extent described below:</p> <p><i>DEPP 1 to DEPP 5 do not apply to any statutory notice or related notice issued on or after 28 August where a warning notice, first supervisory notice or decision notice was given by the FSA before 28 August in relation to the same matter. The procedure to be followed in respect of such statutory notices or related notices given on or after 28 August will be the same as that described in the Decision making manual (DEC) immediately before DEPP comes into effect.</i></p> | | |
| 4 | <i>DEPP</i> | G | <p><i>DEPP 6 takes effect on 28 August 2007, save to the extent described below.</i></p> <p><i>The FSA's policy in respect of the imposition and amount of penalty will continue to be as described in the Enforcement manual (ENF) in relation to any statutory notice or related notice given on or after 28 August where a warning notice, first supervisory notice or decision notice was given by the FSA before 28 August in relation to the same matter.</i></p> | From 28 August 2007 | 28 August 2007 |

Annex B

Amendment to the Decision Procedure and Penalties manual (DEPP)

In this Annex, underling indicates new text and striking through indicates deleted text

DEPP 2 Annex 1G

| Section of the Act | Description | Handbook reference | Decision maker |
|------------------------|--|--------------------|------------------------------------|
| ... | | | |
| 280(1)/(2) | when the <i>FSA</i> is proposing or deciding to direct that a section 270 <i>recognised scheme</i> is to cease to be recognised or to revoke a section 272 order in respect of a <i>recognised scheme</i> * | | <i>RDC</i> |
| <u>301C(5)/(7)</u> | <u>when the <i>FSA</i> is proposing/deciding to object to a change in control of a <i>UK RIE</i> following receipt of a notice of control.</u> | <u>REC 4.2C</u> | <u><i>Executive procedures</i></u> |
| <u>301D(1)/(3)/(4)</u> | <u>when the <i>FSA</i> has imposed a requirement on an institution to suspend a <i>financial instrument</i> from trading and it is proposing/deciding to refuse an application by the institution or the issuer for the revocation of the requirement.</u> | <u>REC 4.2C</u> | |
| <u>313B(9)</u> | <u>when the <i>FSA</i> has required an institution to suspend a financial instrument from trading and it is proposing or deciding to refuse an application by the institution or the issuer for the cancellation of the suspension.</u> | <u>REC 4.2.4</u> | <u><i>Executive procedures</i></u> |
| 321(8)/(9) | when the <i>FSA</i> is proposing or deciding to refuse an application for variation or revocation of a direction or a requirement imposed on a former underwriting member of Lloyd's* | | <i>RDC</i> |
| ... | | | |
| 385(1)/386(1) | when the <i>FSA</i> is proposing/deciding to | | <i>RDC</i> |

| | | | |
|--------------------|--|--|------------------------------------|
| | exercise the power under section 384(5) to require a <i>person</i> to pay restitution* | | |
| <u>412B(2)/(3)</u> | <u>when the <i>FSA</i> is proposing/deciding to refuse to approve a relevant system as defined in section 412A(9) of the <i>Act</i></u> | | <u><i>Executive procedures</i></u> |
| <u>412B(4)/(5)</u> | <u>when the <i>FSA</i> is proposing/deciding to suspend or withdraw its approval in relation to a relevant system as defined in section 412A(9) of the <i>Act</i>*</u> | | <u><i>Executive procedures</i></u> |
| <u>412B(8)/(9)</u> | <u>when the <i>FSA</i> is proposing/deciding to refuse an application to cancel the suspension of approval in relation to a relevant system as defined in section 412A(9) of the <i>Act</i>*</u> | | <u><i>Executive procedures</i></u> |
| ... | | | |

Enforcement Guide

ENFORCEMENT REGULATORY GUIDE INSTRUMENT 2007

Powers exercised

- A. The Financial Services Authority makes this instrument in the exercise of the power in section 157(1) (Guidance) of the Financial Services and Markets Act 2000.

Commencement

- B. Annex A to this instrument comes into force on 28 August 2007.
- C. Annex B to this instrument comes into force on 1 November 2007.

General guidance for providers and distributors

- D. General guidance on the FSA's approach to exercising its main enforcement powers is set out in Annex A to this instrument. This guidance is a Regulatory Guide and does not form part of the Handbook.
- E. The guide in Annex A to this instrument (including its schedules) may be cited as the Enforcement Guide (or EG).

Changes to the Enforcement Guide

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

Citation

- G. This instrument may be cited as the Enforcement Regulatory Guide Instrument 2007.

By order of the Board
26 July 2007

Annex A

Enforcement Guide (EG)

This Annex makes the Enforcement Guide (EG). All the text is new and is therefore not shown underlined. This Annex contains the following sections of EG:

The Enforcement Guide

Contents list

1. Introduction

Overview

2. The FSA's approach to enforcement

3. Use of information gathering and investigation powers

4. Conduct of investigations

5. Settlement

6. Publicity

Specific enforcement powers

7. Penalties and censures

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

9. Prohibition orders and withdrawal of approval

10. Injunctions

11. Restitution and redress

12. Prosecution of criminal offences

13. Insolvency

14. Collective investment schemes

15. Disqualification of auditors and actuaries

16. Disapplication orders against members of the professions

17. Directions against incoming ECA providers

18. Cancellation of approval as a sponsor

Annex 1: Table of other enforcement powers

Annex 2: Guidelines on the investigation of cases of interest or concern to the FSA and other prosecuting and other investigating authorities

Transitional Provisions

1. Introduction

- 1.1 This guide describes the FSA's approach to exercising the main enforcement powers given to it by the Financial Services and Markets Act 2000 (the *Act*) and by regulation 12 of the *Unfair Terms Regulations*. It is broken down into two parts. The first part provides an overview of enforcement policy and process, with chapters about the FSA's approach to enforcement (chapter 2), the use of its main information gathering and investigation powers under the *Act* (chapter 3), the conduct of investigations (chapter 4), settlement (chapter 5) and publicity (chapter 6). The second part contains an explanation of the FSA's policy concerning specific enforcement powers such as its powers to: vary a *firm's Part IV permission* on its own initiative (chapter 8); make *prohibition orders* (chapter 9); and prosecute criminal offences (chapter 12).
- 1.2 In the areas set out below, the *Act* expressly requires the FSA to prepare and publish statements of policy or procedure on the exercise of its enforcement and investigation powers and in relation to the giving of *statutory notices*.
- (1) sections 69 and 210 require the FSA to publish statements of policy on the imposition, and amount, of financial penalties on *firms* and *approved persons*;
 - (2) section 93 requires the FSA to publish a statement of its policy on the imposition, and amount, of financial penalties under section 91 of the *Act* (penalties for breach of Part 6 rules);
 - (3) section 124 requires the FSA to publish a statement of its policy on the imposition, and amount, of financial penalties for *market abuse*;
 - (4) section 169 requires the FSA to publish a statement of its policy on the conduct of certain interviews in response to requests from *overseas regulators*; and
 - (5) section 395 requires the FSA to issue a statement of procedures relating to the giving of *supervisory notices*, *warning notices* and *decision notices*.

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

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

or more powers. So in any particular case, it may be necessary to refer to a number of chapters of the guide.

- 1.5 Since most of the FSA's enforcement powers are derived from it, this guide contains a large number of references to the *Act*. Users of the guide should therefore refer to the *Act* as well as to the guide where necessary. In the event of a discrepancy between the *Act*, or other relevant legislation, and the description of an enforcement power in the guide, the provisions of the *Act* or the other relevant legislation prevail. Defined terms used in the text are shown in italic type. Where a word or phrase is in italics, its definition will be the one used for that word or phrase in the glossary to the FSA Handbook.
- 1.6 The FSA has further enforcement powers and information gathering and investigation powers, including those listed in annex 1, which are not discussed in this guide. The FSA will use the powers where it considers this is appropriate in all the circumstances.
- 1.7 This guide will be kept under review and amended as appropriate in the light of further experience and developing law and practice.
- 1.8 The material in this guide does not form part of the FSA Handbook and is not guidance on rules, but it is 'general guidance' as defined in section 158 of the *Act*. If you have any doubt about a legal or other provision or your responsibilities under the *Act* or other relevant requirements, you should seek appropriate legal advice from your legal adviser.

2. The FSA's approach to enforcement

- 2.1 The FSA's effective and proportionate use of its enforcement powers plays an important role in the pursuit of its *regulatory objectives* of protecting *consumers*, maintaining confidence in the *financial system*, promoting public awareness and reducing *financial crime*. For example, using enforcement helps to contribute to the protection of *consumers* and to deter future contraventions of FSA and other applicable requirements and *financial crime*. It can also be a particularly effective way, through publication of enforcement outcomes, of raising awareness of regulatory standards.
- 2.2 There are a number of principles underlying the FSA's approach to the exercise of its enforcement powers:
- (1) The effectiveness of the regulatory regime depends to a significant extent on maintaining an open and co-operative relationship between the FSA and those it regulates.
 - (2) The FSA will seek to exercise its enforcement powers in a manner that is transparent, proportionate, responsive to the issue, and consistent with its publicly stated policies.
 - (3) The FSA will seek to ensure fair treatment when exercising its enforcement powers.
 - (4) The FSA will aim to change the behaviour of the *person* who is the subject of its action, to deter future non-compliance by others, to eliminate any financial gain or benefit from non-compliance, and where appropriate, to remedy the harm caused by the non-compliance.
- 2.3 Enforcement is only one of a number of regulatory tools available to the FSA. As a risk based regulator with limited resources, throughout its work the FSA prioritises its resources in the areas which pose the biggest threat to its *regulatory objectives*. This applies as much to the enforcement tool as it does to any other tool available to it. The next section of this chapter summarises how in practice the FSA takes a risk based approach towards its use of the enforcement tool, and the subsequent sections comment on other aspects of the FSA's approach to enforcement.
- 2.4 Where a *firm* or other *person* has failed to comply with the requirements of the *Act*, the *rules*, or other relevant legislation, it may be appropriate to deal with this without the need for formal disciplinary or other enforcement action. The proactive supervision and monitoring of *firms*, and an open and cooperative relationship between *firms* and their supervisors, will, in some cases where a contravention has taken place, lead the FSA to decide against taking formal disciplinary action. However, in those cases, the FSA will expect the *firm* to act promptly in taking the necessary remedial action agreed with its supervisors to deal with the FSA's concerns. If the *firm* does not do this, the FSA may take disciplinary or other enforcement action in respect of the original contravention.

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

- 2.5 Other than in the area of a *firm's* failure to satisfy the FSA's *Threshold Conditions* for authorisation (as to which, see paragraph 2.11), the selection method for cases involving *firms* and *approved persons*, *market abuse* and listing matters (for example, breaches of the listing, prospectus or disclosure rules) occurs at two main levels:
- (1) strategic planning; and
 - (2) decisions on individual cases.
- 2.6 The FSA does not have a set of enforcement priorities that are distinct from the priorities of the FSA as a whole. Rather, the FSA consciously uses the enforcement tool to deliver its overall strategic priorities. The areas and issues which the FSA as an organisation regards as priorities at any particular time are therefore key in determining at a strategic level how enforcement resource should be allocated. FSA priorities will influence the use of resources in its supervisory work and as such, make it more likely that the FSA will identify possible breaches in these priority areas. Further, should evidence emerge of potential breaches, these areas are more likely to be supported by enforcement action than non-priority areas.
- 2.7 One way in which the FSA focuses on priority areas is through its thematic work. This work involves the FSA looking at a particular issue or set of issues across a sample of *firms*. Themes are, in general, selected to enable the FSA to improve its understanding of particular industry areas or to assess the validity of concerns the FSA has about risks those areas may present to the *regulatory objectives*. Thematic work does not start with the presumption that it will ultimately lead to enforcement outcomes. But if the FSA finds significant issues, these may become the subject of enforcement investigations as they would if the FSA had discovered them in any other circumstance. Also, by definition, the fact they are in areas that are of importance to the FSA means, following the FSA's risk-based approach through, that they are proportionately more likely to result in the FSA determining that an enforcement investigation should be carried out than issues in lower priority areas.
- 2.8 This does not mean that the FSA will only take enforcement action in priority strategic areas. There will always be particularly serious cases where enforcement action is necessary, ad hoc cases of particular significance in a markets, *consumer* protection or *financial crime* context, or cases that the FSA thinks are necessary to achieve effective deterrence.
- 2.9 The combination of the priority given to certain types of misconduct over others and the FSA's risk-based approach to enforcement means that certain cases will be subject to enforcement action and others not, even where they may be similar in nature or impact. The FSA's choice as to the use of the enforcement tool is therefore a question of how the FSA uses its resources effectively and efficiently and how it ensures that it is an effective regulator.
- 2.10 Before it proceeds with an investigation, the FSA will satisfy itself that there are grounds to investigate under the statutory provisions that give the FSA powers to

appoint investigators. If the statutory test is met, it will decide whether to carry out an investigation after considering all the relevant circumstances. To assist its consideration of cases, the FSA has developed a set of assessment criteria. The current criteria (which are published on the Enforcement section of the FSA web site¹) are framed as a set of questions. They take account of the FSA's *regulatory objectives*, its strategic/supervision priorities (see above) and other issues such as the response of the *firm* or individual to the issues being referred. Not all of the criteria will be relevant to every case and there may be other considerations which are not mentioned in the list but which are relevant to a particular case. The FSA's assessment will include considering whether using alternative tools is more appropriate taking into account the overall circumstances of the *person* or *firm* concerned and the wider context. Another consideration will be whether the FSA is under a Community obligation to take action on behalf of, or otherwise to provide assistance to, an authority from another *EU* member state. Paragraph [2.15](#) discusses the position where other authorities may have an interest in a case.

Case selection: Threshold Conditions cases

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

Case selection: Unauthorised business

- 2.12 Where this poses a significant risk to the *consumer* protection objective or to the FSA's other *regulatory objectives*, *unauthorised* activity will be a matter of serious concern for the FSA. The FSA deals with cases of suspected *unauthorised* activity in a number of ways and it will not use its investigation powers and/or take enforcement action in every single instance.
- 2.13 The FSA's primary aim in using its investigation and enforcement powers in the context of suspected *unauthorised* activities is to protect the interests of *consumers*. The FSA's priority will be to confirm whether or not a *regulated activity* has been carried on in the United Kingdom by someone without *authorisation* or exemption, and, if so, the extent of that activity and whether other related contraventions have occurred. It will seek to assess the risk to *consumers'* assets and interests arising from the activity as soon as possible.

¹ <http://www.fsa.gov.uk/pages/Doing/Regulated/Law/criteria.shtml>

- 2.14 The FSA will assess on a case-by-case basis whether to carry out a formal investigation, after considering all the available information. Factors it will take into account include:
- (1) the elements of the suspected contravention or breach;
 - (2) whether the FSA considers that the *persons* concerned are willing to co-operate with it;
 - (3) whether obligations of confidentiality inhibit individuals from providing information unless the FSA compels them to do so by using its formal powers;
 - (4) whether the *person* concerned has offered to undertake or undertaken remedial action.

Cases where other authorities have an interest

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

Assisting overseas regulators

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

Sources of cases

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

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

- 2.18 The FSA's approach to regulation involves a combination of high-level principles and detailed rules and guidance. While this broad structure is both necessary and desirable, the FSA is moving towards a more principles-based approach. This is because the FSA believes an approach that is based less on detailed rules and that focuses more on outcomes will allow it to achieve its *regulatory objectives* in a more efficient and effective way. The FSA regards the increased emphasis on the *Principles* as a development of its current approach rather than a fundamental change of direction.
- 2.19 This policy approach is leading to increased focus on principles-based enforcement action. The use of the *Principles* in enforcement cases is far from new. They have been used regularly in an enforcement context over many years. However, as part of its overall strategy in this area, the FSA will be giving more prominence to the *Principles* including, in appropriate cases, taking enforcement action on the basis of the *Principles* alone (see also DEPP 6.2.14 G). This will have the benefit of providing further clear examples of how the *Principles* work in practice.
- 2.20 The FSA wishes to encourage firms to exercise judgement about, and take responsibility for, what the *Principles* mean for them in terms of how they conduct their business. But we also recognise the importance of an environment in which *firms* understand what is expected of them. So we have indicated that *firms* must be able reasonably to predict, at the time of the action concerned, whether the conduct would breach the *Principles*. This has sometimes been described as the "reasonable predictability test" or "condition of predictability", but it would be wrong to think of this as a legal test to be met in deciding whether there has been a breach of FSA rules. Rather, our intention has been to acknowledge that firms may comply with the *Principles* in different ways; and to indicate that the FSA will not take enforcement action unless it was possible to determine at the time that the relevant conduct fell short of our requirements.
- 2.21 To determine whether there has been a failure to comply with a *Principle*, the standards we will apply are those required by the *Principles* at the time the conduct took place. The FSA will not apply later, higher standards to behaviour when deciding whether to take enforcement action for a breach of the *Principles*. Importantly, however, where conduct falls below expected standards the FSA considers that it is legitimate for consequences to follow, even if the conduct is widespread within the industry or the *Principle* is expressed in general terms.

FSA guidance and supporting materials

- 2.22 The FSA uses *guidance* and other materials to supplement the *Principles* where it considers this would help *firms* to decide what action they need to take to meet the necessary standard.
- 2.23 *Guidance* is not binding on those to whom the FSA's *rules* apply. Nor are the variety of materials (such as case studies showing good or bad practice, FSA speeches, and generic letters written by the FSA to Chief Executives in particular sectors) published to support the rules and *guidance* in the Handbook. Rather, such materials are intended to illustrate ways (but not the only ways) in which a person can comply with the relevant rules.
- 2.24 *DEPP* 6.2.1(4) G explains that the FSA will not take action against someone where we consider that they have acted in accordance with what we have said. However, *guidance* does not set out the minimum standard of conduct needed to comply with a rule, nor is there any presumption that departing from *guidance* indicates a breach of a rule. If a *firm* has complied with the *Principles* and other rules, then it does not matter whether it has also complied with other material the FSA has issued.
- 2.25 *Guidance* and supporting materials are, however, potentially relevant to an enforcement case and a decision maker may take them into account in considering the matter. Examples of the ways in which the FSA may seek to use *guidance* and supporting materials in an enforcement context include:
- (1) To help assess whether it could reasonably have been understood or predicted at the time that the conduct in question fell below the standards required by the *Principles*.
 - (2) To explain the regulatory context.
 - (3) To inform a view of the overall seriousness of the breaches e.g. the decision maker could decide that the breach warranted a higher penalty in circumstances where the FSA had written to chief executives in the sector in question to reiterate the importance of ensuring a particular aspect of its business complied with relevant regulatory standards.
 - (4) To inform the consideration of a *firm's* defence that the FSA was judging the *firm* on the basis of retrospective standards.
 - (5) To be considered as part of expert or supervisory statements in relation to the relevant standards at the time.
- 2.26 The extent to which *guidance* and supporting materials are relevant will depend on all the circumstances of the case, including the type and accessibility of the statement and the nature of the *firm's* defence. It is for the decision maker (see [paragraphs 2.37 to 2.39](#)) - whether the *RDC*, *Tribunal* or an executive decision maker - to determine this on a case-by-case basis.

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

Industry guidance

- 2.28 The FSA recognises that Industry Guidance has an important part to play in a principles-based regulatory environment, and that firms may choose to follow such guidance as a means of seeking to meet the FSA's requirements. This will be true especially where Industry Guidance has been 'confirmed' by the FSA. *DEPP* 6.2.1(4) G confirms that, as with FSA *guidance* and supporting materials, the FSA will not take action against a firm for behaviour that we consider is in line with FSA-confirmed Industry Guidance that was current when the conduct took place.
- 2.29 Equally, however, FSA-confirmed Industry Guidance is not mandatory. The FSA does not regard adherence to Industry Guidance as the only means of complying with FSA rules and *Principles*. Rather, it provides examples of behaviour which meets the FSA's requirements; and non-compliance with confirmed Industry Guidance creates no presumption of a breach of those requirements.
- 2.30 Industry Guidance may be relevant to an enforcement case in ways similar to those described at [paragraph 2.25](#). But the FSA is aware of the concern that firms must have scope to exercise their own judgement about what FSA rules require, and that Industry Guidance should not become a new prescriptive regime in place of detailed FSA rules. This, and the specific status of FSA-confirmed Industry Guidance, will be taken into account when the FSA makes judgements about the relevance of Industry Guidance in enforcement cases.

Senior management responsibility

- 2.31 The FSA is committed to ensuring that senior managers of *firms* fulfil their responsibilities. The FSA expects senior management to take responsibility for ensuring *firms* identify risks, develop appropriate systems and controls to manage those risks, and ensure that the systems and controls are effective in practice. The FSA will not pursue senior managers where there is no personal culpability. However, where senior managers are themselves responsible for misconduct, the FSA will, where appropriate, bring cases against individuals as well as *firms*. The FSA believes that deterrence will most effectively be achieved by bringing home to such individuals the consequences of their actions. The FSA's policy on disciplinary action against senior management and against other *approved persons* under section 66 of the *Act* is set out in *DEPP* 6.2.4 G to *DEPP* 6.2.9 G. The FSA's policy on prohibition and withdrawal of approval is set out in chapter 9 of this guide.
- 2.32 The FSA recognises that cases against individuals are very different in their nature from cases against corporate entities and the FSA is mindful that an individual will generally face greater risks from enforcement action, in terms of financial implications, reputation and livelihood than would a corporate entity. As such, cases against individuals tend to be more strongly contested, and at many practical levels are harder to prove. They also take longer to resolve. However, taking action against individuals sends an important message about the FSA's *regulatory objectives* and priorities and the FSA considers that such cases have important deterrent values. The

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

Co-operation

- 2.33 An important consideration before an enforcement investigation and/or enforcement action is taken forward is the nature of a *firm's* overall relationship with the FSA and whether, against that background, the use of enforcement tools is likely to further the FSA's aims and objectives. So, for any similar set of facts, using enforcement tools will be less likely if a *firm* has built up over time a strong track record of taking its senior management responsibilities seriously and been open and communicative with the FSA. In addition, a *firm's* conduct in response to the specific issue which has given rise to the question of whether enforcement tools should be used will also be relevant. In this respect, relevant matters may include whether the *person* has self-reported, helped the FSA establish the facts and/or taken remedial action such as addressing any systems and controls issues and compensating any consumers who have lost out. Such matters will not, however, necessarily mean that enforcement tools will not be used. The FSA has to consider each case on its merits and in the wider regulatory context, and any such steps cannot automatically lead to no enforcement sanction. However, they may in any event be factors which will mitigate the penalty.
- 2.34 On its web site, the FSA has given anonymous examples of where it has decided not to investigate or take enforcement action in relation to a possible *rule* breach because of the way in which the *firm* has conducted itself when putting the matter right. This is part of an article entitled 'The benefits to firms and individuals of co-operating with the FSA'². However, in those cases where enforcement action is not taken and/or a formal investigation is not commenced, the FSA will expect the *firm* to act promptly to take the necessary remedial action agreed with its supervisors to deal with the FSA's concerns. If the *firm* does not do this, the FSA may take disciplinary or other enforcement action in respect of the original contravention.

Late reporting or non-submission of reports to the FSA

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

Legal review

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

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

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

Decision making in the context of regulatory enforcement action

- 2.37 When the FSA is proposing to exercise its regulatory enforcement powers, the *Act* generally requires the FSA to give *statutory notices* (depending on the nature of the action, a *warning notice* and *decision notice* or *supervisory notice*) to the subject of the action. The person to whom a *warning notice* or *supervisory notice* is given has a right to make representations on the FSA's proposed decision.
- 2.38 The procedures the FSA will follow when giving *supervisory notices*, *warning notices* and *decision notices* are set out in *DEPP* 1 to 5. Under these procedures, the decisions to issue such notices in contested enforcement cases are generally taken by the *RDC*, an FSA Board committee that is appointed by, and accountable to, the FSA Board for its decisions generally. Further details about the *RDC* can be found in *DEPP* 3 and on the pages of the FSA web site relating to the *RDC*.³ However, decisions on settlements and *statutory notices* arising from them are taken by two members of FSA senior management of at least director level, under a special settlement decision procedure (see [chapter 5](#)).
- 2.39 A *person* who receives a *decision notice* or *supervisory notice* has a right to refer the matter to the *Tribunal* within prescribed time limits. The *Tribunal* is independent of the FSA and members of the *Tribunal* are appointed by the Lord Chancellors Department. Where a matter has been referred to it, the *Tribunal* will determine what action, if any, it is appropriate for the FSA to take in relation to that matter. Further details about the *Tribunal* can be found in an item on the *Tribunal* on the Enforcement pages of the FSA web site⁴ and on the *Tribunal's* own web site⁵.

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

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

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

3 Use of information gathering and investigation powers

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

Information requests (section 165)

- 3.2 The FSA may use its section 165 power to require information and documents from *firms* to support both its supervisory and its enforcement functions.
- 3.3 An officer with authorisation from the FSA may exercise the section 165 power to require information and documents from *firms*. This includes an FSA employee or an agent of the FSA.

Reports by skilled persons (section 166)

- 3.4 Under section 166 of the *Act*, the FSA has a power to require a *firm* and certain other persons to provide a report by a *skilled person*. The FSA may use its section 166 power to require reports by *skilled persons* to support both its supervision and enforcement functions.
- 3.5 The factors the FSA will consider when deciding whether to use the section 166 power include:
- (1) If the FSA's objectives for making further enquiries are predominantly for the purposes of fact finding i.e. gathering historic information or evidence for determining whether enforcement action may be appropriate, the FSA's information gathering and investigation powers under sections 167 and 168 of the *Act* are likely to be more effective and more appropriate than the power under section 166.
 - (2) If the FSA's objectives include obtaining expert analysis or recommendations (or both) for, say, the purposes of seeking remedial action, it may be appropriate to use the power under section 166 instead of, or in conjunction with, the FSA's other available powers.
- 3.6 Where it exercises this power, the FSA will make clear both to the *firm* and to the *skilled person* the nature of the concerns that led the FSA to decide to appoint a *skilled person* and the possible uses of the results of the report. But a report the FSA commissions for purely diagnostic purposes could identify issues which could lead to the appointment of an investigator and/or enforcement action.
- 3.7 Chapter 5 of the FSA's Supervision manual (Reports by skilled persons) contains *rules* and guidance that will apply whenever the FSA uses the section 166 power.

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

- 3.8 Where the FSA has decided that an investigation is appropriate (see chapter 2) and it appears to it that there are circumstances suggesting that contraventions or offences set out in section 168 may have happened, the FSA will normally appoint investigators pursuant to section 168. Where the circumstances do not suggest any specific breach or contravention covered by section 168, but, the FSA still has concerns about a *firm*, an *appointed representative* or an *unauthorised incoming ECA provider*, such that it considers there is good reason to conduct an investigation into the nature, conduct or state of the *person's* business or a particular aspect of that business, or into the ownership or control of an *authorised person*, the FSA may appoint investigators under section 167.
- 3.9 In some cases involving both general and specific concerns, the FSA may consider it appropriate to appoint investigators under both section 167 and section 168 at the outset. Also, where, for example, it has appointed investigators under section 167, it may subsequently decide that it is appropriate to extend the appointment to cover matters under section 168 as well.

Official listing investigations (section 97)

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

Investigations into collective investment schemes (section 284)

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

Investigations to assist overseas authorities (section 169)

- 3.12 The FSA's power to conduct investigations to assist overseas authorities is contained in section 169 of the *Act*. The section provides that at the request of an *overseas regulator*, the FSA may use its power under section 165 to require the production of documents or the provision of information under section 165 or to appoint a person to investigate any matter.
- 3.13 If the *overseas regulator* is a *competent authority* and makes a request in pursuance of any Community obligation, section 169(3) states that the FSA must, in deciding whether or not to exercise its investigative power, consider whether the exercise of that power is necessary to comply with that obligation.
- 3.14 Section 169(4) and (5) set out factors that the FSA may take into account when deciding whether to use its investigative powers. However, these provisions do not apply if the FSA considers that the use of its investigative powers is necessary to comply with a Community obligation.

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

Liaison where other authorities have an interest

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

4 Conduct of investigations

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

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

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

- 4.2 The *Act* does not always require the FSA to give written notice of the appointment of investigators, for example, where investigators are appointed as a result of section 168(1) or (4) of the *Act* and the FSA believes that the provision of notice would be likely to result in the investigation being frustrated, or where investigators are appointed as a result of section 168(2) of the *Act*.
- 4.3 Although the FSA is not required to give written notice of the appointment of investigators appointed as a result of section 168(2), when it becomes clear who the *person* under investigation is, the FSA will, nevertheless, normally notify them that they are under investigation when it exercises its statutory powers to require information from them, providing such notification will not, in the FSA's view, prejudice the FSA's ability to conduct the investigation effectively.

Notification where a particular person is not yet under investigation

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

Appointment of additional investigators

- 4.5 In some cases, the FSA will appoint an additional investigator or additional investigators during the course of an investigation. If this occurs and the FSA has

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

Notice of termination of investigations

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

What a subject of investigation can say to third parties

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

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

- 4.8 The FSA's standard practice is generally to use statutory powers to require the production of documents, the provision of information or the answering of questions in interview. This is for reasons of fairness, transparency and efficiency. It will sometimes be appropriate to depart from this standard practice, for example:
- (1) For suspects or possible suspects in criminal or *market abuse* investigations, the FSA may prefer to question that *person* on a voluntary basis, possibly under caution. In such a case, the interviewee does not have to answer but if they do, those answers may be used against them in subsequent proceedings, including criminal or *market abuse* proceedings.
 - (2) In the case of third parties with no professional connection with the financial services industry, such as the victims of an alleged fraud or misconduct, the FSA will usually seek information voluntarily.
 - (3) In some cases, the FSA is asked by *overseas regulators* to obtain documents or conduct interviews on their behalf. In these cases, the FSA will not necessarily adopt its standard approach as it will consider with the *overseas regulator* the most appropriate method for obtaining evidence for use in their country.
- 4.9 *Firms* and *approved persons* have an obligation to be open and co-operative with the FSA (as a result of Principle 11 for Businesses and Statement of Principle 4 for Approved Persons respectively). The FSA will make it clear to the *person* concerned whether it requires them to produce information or answer questions under the *Act* or

whether the provision of answers is purely voluntary. The fact that the *person* concerned may be a regulated person does not affect this.

- 4.10 The FSA will not bring disciplinary proceedings against a *person* under the above *Principles* simply because, during an investigation, they choose not to attend or answer questions at a purely voluntary interview. However, there may be circumstances in which an adverse inference may be drawn from the reluctance of a *person* (whether or not they are a *firm* or *approved person*) to participate in a voluntary interview.
- 4.11 If a *person* does not comply with a requirement imposed by the exercise of statutory powers, they may be held to be in contempt of court. The FSA may also choose to bring proceedings for breach of *Principle 11* or *Statement of Principle 4* as this is a serious form of non-cooperation.

Scoping discussions

- 4.12 For cases involving *firms* or *approved persons*, the FSA will generally hold scoping discussions with the *firm* or individuals concerned close to the start of the investigation (and may do so in other cases). The purpose of these discussions is to give the *firm* or individuals concerned in the investigation an indication of: why the FSA has appointed investigators (including the nature of and reasons for the FSA's concerns); the scope of the investigation; how the process is likely to unfold; the individuals and documents the team will need access to initially and so on. There is a limit, however, as to how specific the FSA can be about the nature of its concerns in the early stages of an investigation. The FSA team for the purposes of the scoping discussions will normally include the supervisor if the subject is a *firm* which is relationship-managed.
- 4.13 In addition to the initial scoping discussions, there will be an ongoing dialogue with the *firm* or individuals throughout the investigative process. Where the nature of the FSA's concerns changes significantly from that notified to the person under investigation and the FSA, having reconsidered the case, is satisfied that it is appropriate in the circumstances to continue the investigation, the FSA will notify the person of the change in scope.

Involvement of FSA supervisors during the investigation phase

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

- (2) Such assistance will include: making the case team aware of the *firm's* history and compliance track record; the current supervisory approach to the area concerned; current issues with the *firm*; and acting as a sounding board on questions that emerge from the investigation about industry practices and standards.
- (3) Equally, there may be circumstances where someone in the FSA other than the *firm's* supervisor can more effectively and efficiently provide information on the current supervisory approach to the area under investigation or current market standards. In this case it makes good sense for the FSA to draw on that other source of expertise.
- (4) In the event that a *firm's* supervisor becomes part of the investigation team, the FSA will notify the firm of this in the normal way.

The timeframe for responding to information and document requirements

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

Approach to interviews and interview procedures

- 4.17 [Paragraph 4.8](#) explains the FSA's approach to the use of its statutory powers to require, amongst other matters, individuals to be interviewed. The type of interview is a decision for the FSA.
- 4.18 A *person* required to attend an interview by the use of statutory powers has no entitlement to insist that the interview takes place voluntarily. If someone does not attend an interview required under the *Act*, then he can be dealt with by the court as if he were in contempt (where the penalties can be a fine, imprisonment or both).
- 4.19 Similarly, a *person* asked to attend an interview on a purely voluntary basis is not entitled to insist that he be served with a requirement. A *person* is not obliged to attend a voluntary interview or to answer questions put to them at that time. But they should be aware that in an appropriate case, an adverse inference may be drawn from the failure to attend a voluntary interview, or a refusal to answer any questions at such an interview.

Interviews generally

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

Interviews under caution

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

Subsequent interviews

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

Interviews under arrest

- 4.24 On occasion, where the police have a power of arrest, the FSA may make a request to the police for assistance to arrest the individual for questioning by the FSA (FSA investigators do not have powers of arrest), for example:
- (1) where it appears likely that inviting an individual to attend on a voluntary basis would prejudice an ongoing investigation or risk the destruction of evidence or the dissipation of assets; or
 - (2) where a suspect declines an invitation to attend a voluntary interview.

The procedure the FSA may follow on such occasions in seeking assistance from the police is set out in a Memorandum of Understanding with the Association of Chief Police Officers of England, Wales and Northern Ireland dated 3 August 2005.⁶

Interviews in response to a request from an overseas regulator

⁶ <http://www.fsa.gov.uk/pubs/mou/fsacolp.pdf>

- 4.25 Where the FSA has appointed an investigator in response to a request from an *overseas regulator*, it may, under section 169(7) of the *Act*, direct the investigator to allow a representative of that regulator to attend, and take part in, any interview conducted for the purposes of the investigation. However, the FSA may only use this power if it is satisfied that any information obtained by an *overseas regulator* as a result of the interview will be subject to safeguards equivalent to those in Part XXIII of the *Act* (section 169(8)).
- 4.26 The factors that the FSA may take into account when deciding whether to make a direction under section 169(7) include the following:
- (1) the complexity of the case;
 - (2) the nature and sensitivity of the information sought;
 - (3) the FSA's own interest in the case;
 - (4) costs, where no Community obligation is involved, and the availability of resources; and
 - (5) the availability of similar assistance to UK authorities in similar circumstances.
- 4.27 Under section 169(9), the FSA is required to prepare a statement of policy with the approval of the Treasury on the conduct of interviews attended by representatives of *overseas regulators*. The statement is set out in *DEPP 7*.

Search and seizure powers

- 4.28 Under section 176 of the *Act*, the FSA has the power to apply to a justice of the peace for a warrant to enter premises where documents or information is held. The circumstances under which the FSA may apply for a search warrant include:
- (1) where a *person* on whom an information requirement has been imposed fails (wholly or in part) to comply with it; or
 - (2) where there are reasonable grounds for believing that if an information requirement were to be imposed, it would not be complied with, or that the documents or information to which the information requirement relates, would be removed, tampered with or destroyed.
- 4.29 A warrant obtained pursuant to section 176 of the *Act* authorises a police constable or an FSA investigator in the company, and under the supervision of, a police constable, to do the following, amongst other things: to enter and search the premises specified in the warrant and take possession of any documents or information appearing to be documents or information of a kind in respect of which the warrant was issued or to take, in relation to any such documents or information, any other steps which may appear to be necessary for preserving them or preventing interference with them.

Preliminary findings letters and preliminary investigation reports

- 4.30 In cases where the FSA proposes to submit an investigation report to the *RDC* with a recommendation for regulatory action, the FSA's usual practice is to send a

preliminary findings letter to the subject of an investigation before the matter is referred to the *RDC*. The letter will normally annex the investigators' preliminary investigation report. Comment will be invited on the contents of the preliminary findings letter and the preliminary investigation report.

- 4.31 The FSA recognises that preliminary findings letters serve a very useful purpose in focussing decision making on the contentious issues in the case. This in turn makes for better quality and more efficient decision making. However, there are exceptional circumstances in which the FSA may decide it is not appropriate to send out a preliminary findings letter. This includes:
- (1) where the subject consents to not receiving a preliminary findings letter; or
 - (2) where it is not practicable to send a preliminary findings letter, for example where there is a need for urgent action in the interests of consumer protection, restoring market confidence or reducing *financial crime* or if the whereabouts of the subject are unknown; or
 - (3) where the FSA believes that no useful purpose would be achieved in sending a preliminary findings letter, for example where it has otherwise already substantially disclosed its case to the subject and the subject has had an opportunity to respond to that case.
- 4.32 In cases where it is sent, the preliminary findings letter will set out the facts which the investigators consider relevant to the matters under investigation (normally, as indicated above, by means of an annexed preliminary investigation report). And it will invite the *person* concerned to confirm that those facts are complete and accurate, or to provide further comment. FSA staff will allow a reasonable period (normally 28 days) for a response to this letter, and will take into account any response received within the period stated in the letter. They are not obliged to take into account any response received outside that period.
- 4.33 Where the FSA has sent a preliminary findings letter and it then decides not to take any further action, the FSA will communicate this decision promptly to the person concerned.

5 Settlement

Settlement and the FSA – an overview

- 5.1 The FSA resolves many enforcement cases by settlement. Early settlement has many potential advantages as it can result, for example, in *consumers* obtaining compensation earlier than would otherwise be the case, the saving of FSA and industry resources, messages getting out to the market sooner and a public perception of timely and effective action. The FSA therefore considers it is in the public interest for matters to settle, and settle early, if possible.
- 5.2 The possibility of settlement does not, however, change the fact that enforcement action is one of the tools available to the FSA to secure our *regulatory objectives*. The FSA seeks to change the behaviour not only of those subject to the immediate action, but also of others who will be alerted to our concerns in a particular area. There is no distinction here between action taken following agreement with the subject of the enforcement action and action resisted by a firm before the *RDC*. In each case, the FSA must be satisfied that its decision is the right one, both in terms of the immediate impact on the subject of the enforcement action but also in respect of any broader message conveyed by the action taken.
- 5.3 Settlements in the FSA context are not the same as ‘out of court’ settlements in the commercial context. An FSA settlement is a regulatory decision, taken by the FSA, the terms of which are accepted by the *firm* or individual concerned. So, when agreeing the terms of a settlement, the FSA will carefully consider its *regulatory objectives* and other relevant matters such as the importance of sending clear, consistent messages through enforcement action, and will only settle in appropriate cases where the agreed terms of the decision result in acceptable regulatory outcomes. Redress to *consumers* who may have been disadvantaged by a *firm’s* misconduct may be particularly important in this respect. Other than in exceptional circumstances, FSA settlements that give rise to the issue of a *final notice* or *supervisory notice* will result in some degree of publicity (see chapter 6), unlike commercial out of court settlements, which are often confidential.
- 5.4 In recognition of the value of early settlement, the FSA operates a scheme to award explicit discounts for early settlement of cases involving financial penalties. Details of the scheme, which applies only to settlement of cases where investigators were appointed on or after 20 October 2005, are set out in *DEPP* 6.7. This chapter provides some commentary on certain practical aspects of the operation of the scheme.
- 5.5 Decisions on settlements and *statutory notices* arising from them are taken by two members of FSA senior management of at least director level, rather than by the *RDC* (*DEPP* refers to these individuals as the ‘*settlement decision makers*’). Full details of the special decision making arrangements for settlements are set out in *DEPP* 5.

When settlement discussions may take place

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

- 5.7 The FSA considers that in general, the earlier settlement discussions can take place the better this is likely to be from a public interest perspective. However, the FSA will only engage in such discussions once it has a sufficient understanding of the nature and gravity of the suspected misconduct or issue to make a reasonable assessment of the appropriate outcome. At the other end of the spectrum, the FSA expects that settlement discussions following a *decision notice* or *second supervisory notice* will be rare.
- 5.8 In the interests of efficiency and effectiveness, the FSA will set clear and challenging timetables for settlement discussions to ensure that they result in a prompt outcome and do not divert resources unnecessarily from progressing a case through the formal process. To this end, the FSA will aim to organise its resources so that the preparation for the formal process continues in parallel with any settlement discussions. The FSA will expect *firms* and others to give it all reasonable assistance in this regard.

The basis of settlement discussions

- 5.9 As described above, the FSA operates special decision-making arrangements under which members of FSA senior management take decisions on FSA settlements. This means that settlement discussions will take place without involving the *RDC*. The FSA would expect to hold any settlement discussions on the basis that neither FSA staff nor the *person* concerned would seek to rely against the other on any admissions or statements made if the matter is considered subsequently by the *RDC* or the *Tribunal*. This will not, however, prevent the FSA from following up, through other means, on any new issues of regulatory concern which come to light during settlement discussions. The *RDC* may be made aware of the fact negotiations are taking place if this is relevant, for example, to an application for an extension of the period for making representations.
- 5.10 If the settlement negotiations result in a proposed settlement of the dispute, FSA staff will put the terms of the proposed settlement in writing and agree them with the *person* concerned. The *settlement decision makers* will then consider the settlement under the procedures set out in *DEPP 5*. A settlement is also likely to result in the giving of *statutory notices* (see [paragraphs 2.37 to 2.39](#)).

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

- 5.11 Enforcement cases often involve multiple parties, for example a *firm* and individuals in the *firm*. Enforcement action may be appropriate against just the *firm*, just the individuals or both. In some cases, it will not be possible to reach an acceptable settlement unless all parties are able to reach agreement.
- 5.12 Even where action is not taken against connected parties, these parties may have what the *Act* calls ‘third party rights’. Broadly, if any of the reasons contained in a *warning notice* or *decision notice* identifies a *person* (the third party) other than the *person* to whom the notice is given, and in the opinion of the FSA is prejudicial to the third party, a copy of the notice must be given to the third party unless that *person* receives a separate *warning notice* or *decision notice* at the same time. The third party has the right to make representations and ultimately can refer the matter to the *Tribunal*. Any representations made by the third party in response to a *warning notice* or *decision*

notice will be considered by the *settlement decision makers*, who will also decide whether to give the *decision notice* or *final notice*.

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

The settlement discount scheme

- 5.14 The *settlement discount scheme* allows a reduction in a financial penalty that would otherwise be imposed on a *person* according to the stage at which the agreement is reached. Full details of the scheme are set out in *DEPP* 6.7.
- 5.15 Normally, where the outcome is potentially a financial penalty, the FSA will send a letter at an early point in the enforcement process to the subject of the investigation. This is what the FSA refers to as a stage 1 letter.
- 5.16 The scheme does not apply to civil or criminal proceedings brought in the courts, or to *public censure*, *prohibition orders*, withdrawal of *authorisation* or approval or the payment of compensation or redress.
- 5.17 There is no set form for a stage 1 letter though it will always explain the nature of the misconduct, the FSA's view on penalty, and the period within which the FSA expects any settlement discussions to be concluded. In some cases, a draft *statutory notice* setting out the alleged *rule* breaches and the proposed penalty may form part of the letter, to convey the substance of the case team's concerns and reasons for arriving at a particular penalty figure.
- 5.18 The timing of the stage 1 letter will vary from case to case. Sufficient investigative work must have taken place for the FSA to be able to satisfy itself that the settlement is the right regulatory outcome. In many cases, the FSA can send out the stage 1 letter substantially before the *person* concerned is provided with the FSA's preliminary investigation report (see paragraphs 4.30 to 4.33). The latest point the FSA will send a stage 1 letter is when the *person* is provided with the preliminary investigation report.
- 5.19 The FSA considers that 28 days following a stage 1 letter will normally be the 'reasonable opportunity to reach agreement as to the amount of penalty' before the expiry of stage 1 contemplated by *DEPP* 6.7.3. Extensions to this period will be granted in exceptional circumstances only.

Mediation

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

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

The relevance of settled cases to subsequent action

- 5.22 Decisions recorded in FSA *final notices* or *supervisory notices* will be taken into account in any subsequent case if the later case raises the same or similar issues to those considered by the FSA when it reached its earlier decision. Not to do so would expose the FSA to accusations of arbitrary and inconsistent decision-making. The need to look at earlier cases applies irrespective of whether the decisions were reached following settlement or consideration by the *RDC* or the *Tribunal*. This reflects the fact that a person’s agreement to the action proposed by the FSA in the earlier case would not have relieved the FSA of the obligation to ensure that the final decision was the right regulatory outcome, both for the person concerned and more generally.
- 5.23 The FSA recognises the importance of consistency in its decision-making and that it must consider the approach previously taken to, say, the application of a particular rule or *Principle* in a given context. This applies equally to consideration by the *RDC* or by the *settlement decision makers* when they look at action taken by the FSA in earlier, similar, cases. This is not to say that the FSA cannot take a different view to that taken in the earlier case: the facts of two enforcement cases are very seldom identical, and it is also important that the FSA is able to respond to the demands of a changing and principles-based regulatory environment. But any decision to depart from the earlier approach will be made only after careful consideration of the reasons for doing so.

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

6 Publicity

Publicity during FSA investigations

- 6.1 The FSA will not normally make public the fact that it is or is not investigating a particular matter, or any of the findings or conclusions of an investigation except as described in other sections of this chapter. The following paragraphs deal with the exceptional circumstances in which the FSA may make a public announcement that it is or is not investigating a particular matter.
- 6.2 Where the matter in question has occurred in the context of a *takeover bid*, and the following circumstances apply, the FSA may make a public announcement that it is not investigating, and does not propose to investigate, the matter. Those circumstances are where the FSA:
- (1) has not appointed, and does not propose to appoint, investigators; and
 - (2) considers (following discussion with the *Takeover Panel*) that such an announcement is appropriate in the interests of preventing or eliminating public uncertainty, speculation or rumour.
- 6.3 Where it is investigating any matter, the FSA will, in exceptional circumstances, make a public announcement that it is doing so if it considers such an announcement is desirable to:
- (1) maintain public confidence in the *financial system* or the market; or
 - (2) protect *consumers* or investors; or
 - (3) prevent widespread malpractice; or
 - (4) help the investigation itself, for example by bringing forward witnesses; or
 - (5) maintain the smooth operation of the market.
- In deciding whether to make an announcement, the FSA will consider the potential prejudice that it believes may be caused to any *persons* who are, or who are likely to be, a subject of the investigation.
- 6.4 The exceptional circumstances referred to above may arise where the matters under investigation have become the subject of public concern, speculation or rumour. In this case it may be desirable for the FSA to make public the fact of its investigation in order to allay concern, or contain the speculation or rumour. Where the matter in question relates to a *takeover bid*, the FSA will discuss any announcement beforehand with the *Takeover Panel*. Any announcement will be subject to the restriction on disclosure of *confidential information* in section 348 of the *Act*.
- 6.5 There will also be cases where publicity is unavoidable. For example, investigations into suspected criminal offences may often lead the FSA into making enquiries amongst the general public which might attract publicity.

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

Publicity during, or upon the conclusion of regulatory action

- 6.7 For both *supervisory notices* (as defined in section 395(13)) which have taken effect⁸ and *final notices*, section 391 of the *Act* requires the FSA to publish, in such manner as it considers appropriate, such information about the matter to which the notice relates as it considers appropriate. However, section 391 provides that the FSA cannot publish information if publication of it would, in its opinion, be unfair to the *person* with respect to whom the action was taken or prejudicial to *consumers*.

Final notices

- 6.8 The FSA will consider the circumstances of each case, but will ordinarily publicise enforcement action where this has led to the issue of a *final notice*. Publication will generally include placing the notice on the FSA web site and this will often be accompanied by a press release. The FSA will also consider what information about the matter should be included on the *FSA Register*. Additional guidance on the FSA's approach to the publication of information on the *FSA Register* in certain specific types of cases is set out at the end of this chapter.
- 6.9 However, as required by the *Act* (see paragraph 6.7 above), the FSA will not publish information if publication of it would, in its opinion, be unfair to the *person* in respect of whom the action is taken or prejudicial to the interests of *consumers*. It may make that decision where, for example, publication could damage market confidence or undermine market integrity in a way that could be damaging to the interests of *consumers*.
- 6.10 Publishing *final notices* is important to ensure the transparency of FSA decision-making; it informs the public and helps to maximise the deterrent effect of enforcement action. The FSA will review *final notices* and related press releases that are published on the FSA's web site after a period of six years. The FSA will determine at that time whether continued publication is appropriate, or whether notices and publicity should be removed or amended.

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

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

- 6.11 Where the FSA is using its *own-initiative power* to vary a *firm's Part IV permission* in support of its supervisory function, and the variation does not bring about a fundamental change in the *firm's Part IV permission* (see *DEPP 2.5.8G*), the FSA will not normally publish the *supervisory notice* where this would disclose confidential information about the individual *firm* or would prejudice *consumers'* interests. However, the FSA will amend the *FSA Register* to reflect a *firm's* actual *Part IV permission* following any variation.
- 6.12 However, publishing fundamental variations of *Part IV permission* (and interventions), and maintaining an accurate public record, are important elements of the FSA's approach to its *consumer* protection objective. The FSA will always aim to balance both the interests of *consumers* and the possibility of unfairness to the *person* subject to the FSA's action. The FSA will publish relevant details of fundamental variations of *Part IV permission* and interventions imposed on *firms*. But it will use its discretion not to do so if it considers this would best serve the interests of the *firm's* existing customers. Publication will generally include placing the notice on the FSA web site and this may be accompanied by a press release. As with *final notices*, *supervisory notices* and related press releases that are published on the FSA's web site will be reviewed after a period of six years. The FSA will determine at that time whether continued publication is appropriate, or whether notices and related press releases should be removed or amended.

Directions against ECA providers

- 6.13 This is discussed in chapter 17 of this guide.

Publicity in RDC cases

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

Publicity during, or upon the conclusion of civil action

- 6.15 Civil court proceedings nearly always take place in public from the time they begin. Therefore, civil proceedings for an *injunction* (see chapter 10) or a restitution order (see chapter 11), for example, will often be public as soon as they start.
- 6.16 The FSA considers it generally appropriate to publish details of its successful applications to the court for civil remedies including *injunctions* or restitution orders. For example, where the court has ordered an *injunction* to prohibit further illegal *regulated activity*, the FSA thinks it is appropriate to publicise this to tell *consumers* of the position and help them avoid dealing with the *person* who is the subject of the *injunction*. Similarly, a restitution order may be publicised to protect and inform *consumers* and maintain market confidence. However, there may be circumstances when the FSA decides not to publicise, or not to do this immediately. These circumstances might, for example, be where publication could damage confidence in

the *financial system* or undermine market integrity in a way that would be prejudicial to the interests of *consumers*.

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

- 6.17 Like civil proceedings, criminal court proceedings nearly always take place in public from the time they begin. However, the FSA will always be very careful to ensure that any FSA publicity does not prejudice the fairness of any subsequent trial. The FSA will normally publicise the outcome of public hearings in criminal prosecutions.

Behaviour in the context of takeover bid

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

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

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

- (1) The FSA will maintain an entry on the *FSA Register* while a *prohibition order* is in effect. If the FSA grants an application to vary the order, it will make a note of the variation on the *FSA Register*.
- (2) Where the FSA grants an application to revoke a *prohibition order*, it will make a note on the *FSA Register* that the order has been revoked giving reasons for the revocation. The availability to *firms* and *consumers* of a full record of FSA action taken in relation to an individual's fitness and propriety will help it in furthering its *regulatory objectives*. In particular, it will help with protecting *consumers* and the maintaining of confidence in the *financial system*.
- (3) The FSA will maintain an annotated record of revoked *prohibition orders* for six years from the date of the revocation after which time it will remove the record from the *FSA Register*.

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

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

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

- 6.21 In general, the FSA considers that publishing relevant information about orders to disapply an exemption in respect of a member of a *designated professional body* will be in the interests of clients and *consumers*. The FSA will consider what additional information about the circumstances of the order to include on the record maintained on the *FSA Register* taking into account any prejudice to the *person* concerned and the interests of *consumer* protection.
- 6.22 The FSA's normal approach to maintaining information about a disapplication order on the *FSA Register* is as follows.
- (1) While a disapplication order is in effect, the FSA will maintain a record of the order on the *FSA Register*. If the FSA grants an application to vary the order, a note of the variation will be made against the relevant entry on the *FSA Register*.
 - (2) The FSA's policy in relation to section 347(4) of the *Act* is that where an application to revoke an order is granted, it will make a note on the *FSA Register* saying that the order has been revoked giving reasons for its revocation. Having a full record of action the FSA has taken against *persons* granted an exemption under section 327 of the *Act* available will help the FSA to fulfil its *regulatory objectives* of protecting *consumers* and maintaining confidence in the *financial system*.
 - (3) This is why the FSA will maintain the annotated record of the disapplication order for a period of six years from the date of the revocation of the order, after which period the record will be removed from the record on the *FSA Register*.

7 Financial penalties and public censures

The FSA's use of sanctions

- 7.1 Financial penalties and *public censures* are important regulatory tools. However, they are not the only tools available to the FSA, and there will be many instances of non-compliance which the FSA considers it appropriate to address without the use of financial penalties or *public censures*. Having said that, the effective and proportionate use of the FSA's powers to enforce the requirements of the *Act*, the *rules* and the Statements of Principle for Approved Persons will play an important role in the FSA's pursuit of its *regulatory objectives*. Imposing financial penalties and *public censures* shows that the FSA is upholding regulatory standards and helps to maintain market confidence, promote public awareness of regulatory standards and deter *financial crime*. An increased public awareness of regulatory standards also contributes to the protection of *consumers*.
- 7.2 The FSA has the following powers to impose a financial penalty and to publish a *public censure*.
- (1) It may publish a statement:
 - (a) against an *approved person* under section 66 of the *Act*;
 - (b) against an *issuer* under section 87M of the *Act*;
 - (c) against a *sponsor* under section 89 of the *Act*;
 - (d) where there has been a contravention of the Part VI rules, under section 91 of the *Act*;
 - (e) where there has been *market abuse*, against a *person* under section 123 of the *Act*; and
 - (f) against a *firm* under section 205 of the *Act*.
 - (2) It may impose a financial penalty:
 - (a) on an *approved person*, under section 66 of the *Act*;
 - (b) where there has been a contravention of the Part 6 rules, under section 91 of the *Act*;
 - (c) where there has been *market abuse*, on any *person*, under section 123 of the *Act*; and
 - (d) on a *firm*, under section 206 of the *Act*.

Alternatives to financial penalties and public censures

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

- (1) where a *firm's* continuing ability to meet the *threshold conditions* or where an *approved person's* fitness and propriety to perform the *controlled functions* to which his approval relates are called into question:
 - (a) varying and/or cancelling of *permission* and the withdrawal of a *firm's* authorisation (see chapter 8); and
 - (b) the withdrawal of an individual's status as an *approved person* and/or the prohibition of an individual from performing a specified function in relation to a *regulated activity* (see chapter 9).
- (2) where the smooth operation of the market is, or may be, temporarily jeopardised or where protecting investors so requires, the FSA may suspend, with effect from such time as it may determine, the *listing* of any *securities* at any time and in such circumstances as it thinks fit (whether or not at the request of the *issuer* or its *sponsor* on its behalf);
- (3) when the FSA is satisfied there are special circumstances which preclude normal regular dealings in any *listed securities*, it may cancel the *listing* of any *security*;
- (4) where there are reasonable grounds to suspect non compliance with the *disclosure rules*, the FSA may require the suspension of trading of a financial instrument with effect from such time as it may determine; and
- (5) where there are reasonable grounds for suspecting that a provision of Part VI of the *Act*, a provision contained in the *prospectus rules*, or any other provision made in accordance with the *Prospectus Directive* has been infringed, the FSA may:
 - (a) suspend or prohibit the offer to the public of transferable securities as set out in section 87K of the *Act*; or
 - (b) suspend or prohibit admission of transferable securities to trading on a regulated market as set out in section 87L of the *Act*.

FSA's statements of policy

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

Apportionment of financial penalties

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

Payment of financial penalties

- 7.6 Financial penalties must be paid within the period (usually 14 days) that is stated on the FSA's *final notice*.
- 7.7 A *person* may ask the FSA to allow them to pay a financial penalty by instalments. However, the FSA will consider agreeing to payment of a financial penalty by instalments only where there is verifiable evidence of serious financial hardship or financial difficulties if the *person* was required to pay the full payment in a single instalment. This reflects the fact that the purpose of a penalty is not to render a *person* insolvent or to threaten solvency. The FSA will determine the appropriate level and number of instalments having regard to the overall circumstances of the case. However, in such cases, the full payment of the penalty will generally have to be made within one year from the date of the *final notice*.
- 7.8 Chapter 6 of the General Provisions module of the FSA Handbook contains rules prohibiting a *firm* or *member* from entering into, arranging, claiming on or making a payment under a *contract of insurance* that is intended to have, or has, the effect of indemnifying any *person* against a financial penalty.
- 7.9 Rule 1.5.33 in the FSA's Prudential Sourcebook for Insurers prohibits a *long-term insurer* (including a *firm* qualifying for *authorisation* under Schedule 3 or 4 to the *Act*), which is not a mutual, from paying a financial penalty from a long-term insurance fund.

Private warnings

- 7.10 In certain cases, despite concerns about a *person's* behaviour or evidence of a *rule* breach, the FSA may decide that it is not appropriate, having regard to all the circumstances of the case, to bring formal action for a financial penalty or *public censure*. This is consistent with the FSA's risk-based approach to enforcement. In such cases, the FSA may give a private warning to make the *person* aware that they came close to being subject to formal action.
- 7.11 Private warnings are a non-statutory tool. Fundamentally they are no different to any other FSA communication which criticises or expresses concern about a *person's* conduct. But private warnings are a more serious form of reprimand than would usually be made in the course of ongoing supervisory correspondence. A private warning requires that the FSA identifies and explains its concerns about a *person's* conduct and/or procedures, and tells the subject of the warning that the FSA has seriously considered formal steps to impose a penalty or censure. They are primarily used by the FSA as an enforcement tool, but they may also be used by other parts of the FSA.
- 7.12 Typically, the FSA might give a private warning rather than take formal action where the matter giving cause for concern is minor in nature or degree, or where the person has taken full and immediate remedial action. But there can be no exhaustive list of the conduct or the circumstances which are likely to lead to a private warning rather than more serious action. The FSA will take into account all the circumstances of the case before deciding whether a private warning is appropriate. Many of the criteria

identified in *DEPP 6* for determining whether the FSA should take formal action for a financial penalty or *public censure* will also be relevant to a decision about whether to give a private warning.

- 7.13 Generally, the FSA would expect to use private warnings in the context of *firms* and *approved persons*. However, the FSA may also issue private warnings in circumstances where the *persons* involved may not necessarily be authorised or approved. For example, private warnings may be issued in potential cases of *market abuse*; cases where the FSA has considered making a *prohibition order* or a disapplication order; or cases involving breaches of provisions imposed by or under Part VI of the *Act* (Official Listing).
- 7.14 In each case, the FSA will consider the likely impact of a private warning on the recipient and whether any risk that *person* poses to the *regulatory objectives* requires the FSA to take more serious action. Equally, where the FSA gives a private warning to an *approved person*, the FSA will consider whether it would be desirable and appropriate to inform the *approved person's firm* (or employer, if different) of the conduct giving rise to the warning and the FSA's response.
- 7.15 A private warning is not intended to be a determination by the FSA as to whether the recipient has breached the FSA's rules. However, private warnings, together with any comments received in response, will form part of the *person's* compliance history. In this sense they are no different to other FSA correspondence, but the weight the FSA attaches to a private warning is likely to be greater. They may therefore influence the FSA's decision whether to commence action for a penalty or censure in relation to future breaches. Where action is commenced in those circumstances, earlier private warnings will not be relied upon in determining whether a breach has taken place. However, if a *person* has previously been told about the FSA's concerns in relation to an issue, either by means of a private warning or in supervisory correspondence, then this can be an aggravating factor for the level of a penalty imposed in respect of a similar issue that is the subject of later FSA action.
- 7.16 Where the FSA is assessing the relevance of private warnings in determining whether to commence action for a financial penalty or a *public censure*, the age of a private warning will be taken into consideration. However, a long-standing private warning may still be relevant.
- 7.17 Private warnings may be considered cumulatively, although they relate to separate areas of a *firm's* or other *person's* business, where the concerns which gave rise to those warnings are considered to be indicative of a *person's* compliance culture. Similarly, private warnings issued to different subsidiaries of the same parent company may be considered cumulatively where the concerns which gave rise to those warnings relate to a common management team.

How a person will know they are receiving a private warning

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

The procedure for giving a private warning

- 7.19 The FSA's normal practice is to follow a "minded-to" procedure before deciding whether to give a private warning. This means that it will notify in writing the intended recipient of the warning that it has concerns about their conduct and inform them that the FSA proposes to give a private warning. The recipient will then have an opportunity to comment on our understanding of the circumstances giving rise to the FSA's concerns and whether a private warning is appropriate. The FSA will carefully consider any response to its initial letter before it decides whether to give the private warning. The decision will be taken by an FSA head of department or a more senior member of FSA staff.

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

The FSA's general approach to exercising the own-initiative power under section 45 of the Act to vary a firm's Part IV permission: the FSA's policy

- 8.1 When it considers how it should deal with a concern about a *firm*, the FSA will have regard to its *regulatory objectives* and the range of regulatory tools that are available to it. It will also have regard to:
- (1) the responsibilities of a *firm's* management to deal with concerns about the *firm* or about the way its business is being or has been run; and
 - (2) the principle that a restriction imposed on a *firm* should be proportionate to the objectives the FSA is seeking to achieve.
- 8.2 The FSA will proceed on the basis that a *firm* (together with its directors and senior management) is primarily responsible for ensuring the *firm* conducts its business in compliance with the *Act*, the *Principles* and other *rules*. In the context of its enforcement activities, the FSA will take formal action affecting the conduct of a *firm's* commercial business only if that business is being or has been conducted in such a way that the FSA judges it necessary to act in order to secure compliance with those requirements and/or address the consequences of non-compliance. In the context of its supervision activities, the FSA may take formal action in the circumstances described in *SUP 7.3*.
- 8.3 In the course of its supervision and monitoring of a *firm*, the FSA may make it clear that it expects the *firm* to take certain steps to ensure it continues to meet regulatory requirements. These steps might include the correction of financial, conduct of business or control weaknesses. The FSA envisages that *firms* will normally take these steps without the need for it to use its *own-initiative powers*. In the vast majority of cases the FSA will seek to agree with a *firm* those steps the *firm* must take to address the FSA's concerns.
- 8.4 Where the FSA considers that it cannot rely on a *firm* taking effective action, or if the *firm* fails to comply with the FSA's reasonable request for it to take remedial steps, the FSA will consider exercising its formal powers under section 45 of the *Act* to vary a *firm's* permission. This may include instances where the FSA is concerned that the consequences of a *firm* not taking the desired steps may be serious and:
- (1) the *firm* appears unwilling or unable to take adequate and timely steps to address the FSA's concerns; or
 - (2) the imposition of a formal statutory requirement may assist the *firm* to take steps which would otherwise be difficult because of legal obligations owed to third parties.
- 8.5 Circumstances in which the FSA will consider varying a *firm's Part IV permission* in support of its enforcement function include those where it has serious concerns about

a *firm*, or about the way its business is being or has been conducted. Examples of these circumstances are where:

- (1) in relation to the grounds for exercising the power under section 45(1)(a) of the *Act*, the firm appears to be failing, or appears likely to fail, to satisfy the *threshold conditions* relating to one or more, or all, of its *regulated activities*, because for instance:
 - (a) the *firm's* material and financial resources appear inadequate for the scale or type of *regulated activity* it is carrying on, for example, where it has failed to maintain professional indemnity insurance; or
 - (b) the *firm* appears not to be a fit and proper *person* to carry on a *regulated activity* because:
 - (i) it has not conducted its business in compliance with high standards which may include putting itself at risk of being used for the purposes of *financial crime* or being otherwise involved in such crime;
 - (ii) it has not been managed competently and prudently and has not exercised due skill, care, and diligence in carrying on one or more, or all, of its *regulated activities*;
 - (iii) it has breached requirements imposed on it by or under the *Act* (including the *Principles* and the *rules*), for example in respect of its disclosure or notification requirements, and the breaches are material in number or in individual seriousness;
- (2) in relation to the grounds for exercising the power under section 45(1)(c), it appears that the interests of *consumers* are at risk because the *firm* appears to have breached any of *Principles* 6 to 10 of the FSA's *Principles* (see *PRIN* 2.1.1R) to such an extent that it is desirable that *limitations*, restrictions, or prohibitions are placed on the *firm's regulated activity*.

Use of the own-initiative power in urgent cases

- 8.6 The FSA may impose a variation of permission so that it takes effect immediately or on a specified date if it reasonably considers it necessary for the variation to take effect immediately (or on the date specified), having regard to the ground on which it is exercising its *own-initiative power*.
- 8.7 The FSA will consider exercising its *own-initiative power* as a matter of urgency where:
- (1) the information available to it indicates serious concerns about the *firm* or its business that need to be addressed immediately; and

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

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

- (1) information indicating significant loss, risk of loss or other adverse effects for *consumers*, where action is necessary to protect their interests;
- (2) information indicating that a *firm's* conduct has put it at risk of being used for the purposes of *financial crime*, or of being otherwise involved in crime;
- (3) evidence that the *firm* has submitted to the FSA inaccurate or misleading information so that the FSA becomes seriously concerned about the *firm's* ability to meet its regulatory obligations;
- (4) circumstances suggesting a serious problem within a *firm* or with a *firm's* *controllers* that calls into question the *firm's* ability to continue to meet the *threshold conditions*.

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

- (1) The extent of any loss, or risk of loss, or other adverse effect on *consumers*. The more serious the loss or potential loss or other adverse effect, the more likely it is that the FSA's urgent exercise of *own-initiative powers* will be appropriate, to protect the *consumers'* interests.
- (2) The extent to which *customer* assets appear to be at risk. Urgent exercise of the FSA's *own-initiative power* may be appropriate where the information available to the FSA suggests that *customer* assets held by, or to the order of, the *firm* may be at risk.
- (3) The nature and extent of any false or inaccurate information provided by the *firm*. Whether false or inaccurate information warrants the FSA's urgent exercise of its *own-initiative powers* will depend on matters such as:
 - (a) the impact of the information on the FSA's view of the *firm's* compliance with the regulatory requirements to which it is subject, the *firm's* suitability to conduct *regulated activities*, or the likelihood that the *firm's* business may be being used in connection with *financial crime*;
 - (b) whether the information appears to have been provided in an attempt knowingly to mislead the FSA, rather than through inadvertence;

- (c) whether the matters to which false or inaccurate information relates indicate there is a risk to *customer* assets or to the other interests of the *firm's* actual or potential *customers*.
- (4) The seriousness of any suspected breach of the requirements of the legislation or the *rules* and the steps that need to be taken to correct that breach.
 - (5) The financial resources of the *firm*. Serious concerns may arise where it appears the *firm* may be required to pay significant amounts of compensation to *consumers*. In those cases, the extent to which the *firm* has the financial resources to do so will affect the FSA's decision about whether exercise of the FSA's *own-initiative power* is appropriate to preserve the *firm's* assets, in the interests of the *consumers*. The FSA will take account of any insurance cover held by the *firm*. It will also consider the likelihood of the *firm's* assets being dissipated without the FSA's intervention, and whether the exercise of the FSA's power to petition for the winding up of the *firm* is more appropriate than the use of its *own-initiative power* (see [chapter 13](#) of this guide).
 - (6) The risk that the *firm's* business may be used or has been used to facilitate *financial crime*, including *money laundering*. The information available to the FSA, including information supplied by other law enforcement agencies, may suggest the *firm* is being used for, or is itself involved in, *financial crime*. Where this appears to be the case, and the *firm* appears to be failing to meet the *threshold conditions* or has put its *customers'* interests at risk, the FSA's urgent use of its *own-initiative powers* may well be appropriate.
 - (7) The risk that the *firm's* conduct or business presents to the *financial system* and to confidence in the *financial system*.
 - (8) The *firm's* conduct. The FSA will take into account:
 - (a) whether the *firm* identified the issue (and if so whether this was by chance or as a result of the *firm's* normal *controls* and monitoring);
 - (b) whether the *firm* brought the issue promptly to the FSA's attention;
 - (c) the *firm's* past history, management ethos and compliance culture;
 - (d) steps that the *firm* has taken or is taking to address the issue.
 - (9) The impact that use of the FSA's *own-initiative powers* will have on the *firm's* business and on its *customers*. The FSA will take into account the (sometimes significant) impact that a variation of *permission* may have on a *firm's* business and on its *customers'* interests, including the effect of variation on the *firm's* reputation and on market confidence. The FSA will need to be satisfied that the impact of any use of the *own-initiative power* is likely to be proportionate to the concerns being addressed, in the context of the overall aim of achieving its *regulatory objectives*.

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

- 8.10 When varying *Part IV permission* at its own-initiative under its section 45 power (or section 47 power), the FSA may include in the *Part IV permission* as varied any *limitation* or restriction which it could have imposed if a fresh *permission* were being given in response to an application under section 40 of the *Act*.
- 8.11 Examples of the *limitations* that the FSA may impose when exercising its *own-initiative power* in support of its enforcement function include *limitations* on: the number, or category, of *customers* that a *firm* can deal with; the number of specified investments that a *firm* can deal in; and the activities of the *firm* so that they fall within specific regulatory regimes (for example, so that *oil market participants*, *locals*, *corporate finance advisory firms* and service providers are permitted only to carry on those types of activities).
- 8.12 Examples of *requirements* that the FSA may consider including in a *firm's Part IV permission* when exercising its *own-initiative power* in support of its enforcement function are: a *requirement* not to take on new business; a *requirement* not to hold or control *client money*; a *requirement* not to trade in certain categories of *specified investment*; a *requirement* that prohibits the disposal of, or other dealing with, any of the *firm's* assets (whether in the United Kingdom or elsewhere) or restricts those disposals or dealings; and a *requirement* that all or any of the *firm's* assets, or all or any assets belonging to investors but held by the *firm* to its order, must be transferred to a *trustee* approved by the FSA.

Exercising the power to cancel Part IV permission on its own initiative under section 45 of the Act: the FSA's policy

- 8.13 The FSA will consider cancelling a *firm's Part IV permission* using its *own-initiative powers* contained in sections 45 and 47 respectively of the *Act* in two main circumstances:
- (1) where the FSA has very serious concerns about a *firm*, or the way its business is or has been conducted;
 - (2) where the *firm's regulated activities* have come to an end and it has not applied for *cancellation* of its *Part IV permission*.
- 8.14 The grounds on which the FSA may exercise its power to cancel an authorised person's permission under section 45 of the *Act* are set out in section 45(1). Examples of the types of circumstances in which the FSA may cancel a *firm's Part IV permission* include:
- (1) non-compliance with a *Financial Ombudsman Service* award against the *firm*;
 - (2) material non-disclosure in an application for authorisation or approval or material non-notification after authorisation or approval has been granted. The information which is the subject of the non-disclosure or non-notification may also be grounds for cancellation;

- (3) failure to have or maintain professional indemnity insurance, or other adequate financial resources, or a failure to comply with regulatory capital requirements;
- (4) non-submission of regulatory returns, or repeated failure to submit such returns in a timely fashion;
- (5) non-payment of FSA fees or repeated failure to pay FSA fees except under threat of enforcement action; and
- (6) failure to provide the FSA with valid contact details or failure to maintain the details provided, such that the FSA is unable to communicate with the *firm*.

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

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

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

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

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

for the exercise of its *own-initiative power* to vary or cancel a *Part IV permission*, the FSA must consider whether it must exercise the power in order to comply with a Community obligation.

- 8.19 Relevant Community obligations which the FSA may need to consider include those under the Banking Consolidation Directive, the Insurance Directives, the Investment Services Directive/Markets in Financial Instruments Directive; and the Insurance Mediation Directive. Each of these Directives imposes general obligations on the relevant *EEA competent authority* to cooperate and collaborate closely in discharging their functions under the Directives.
- 8.20 The FSA views this cooperation and collaboration as essential to effective regulation of the international market in financial services. It will therefore exercise its *own-initiative power* wherever:
- (1) an *EEA Competent authority* requests it to do so; and
 - (2) it is satisfied that the use of the power is appropriate (having regard to the considerations set out at [paragraphs 8.1 to 8.5](#)) to enforce effectively the regulatory requirements imposed under the *Single Market Directives* or other Community obligations.
- 8.21 The FSA will actively consider any other requests for assistance from relevant *overseas regulators* (that is requests in relation to which it is not obliged to act under a Community obligation). Section 47(4), which sets out matters the FSA may take into account when it decides whether to vary or cancel a *firm's Part IV permission* in support of the *overseas regulator*, applies in these circumstances.
- 8.22 Where section 47(4) applies and the FSA is considering whether to vary a *firm's Part IV permission*, it may take account of all the factors described in [paragraphs 8.18 to 8.25](#) but may give particular weight to:
- (1) the matters set out in paragraphs (c) and (d) of section 47(4) (seriousness, importance to persons in the United Kingdom, and the public interest); and
 - (2) any specific request made to it by the *overseas regulator* to vary, rather than cancel, the *firm's Part IV permission*.
- 8.23 The FSA will give careful consideration to whether the relevant authority's concerns would provide grounds for the FSA to exercise its *own-initiative power* to vary or cancel if they related to a UK *firm*. It is not necessary for the FSA to be satisfied that the overseas provisions being enforced mirror precisely those which apply to UK *firms*. However, the FSA will not assist in the enforcement of regulatory requirements or other provisions that appear to extend significantly beyond the purposes of *UK regulatory provisions*.
- 8.24 Similarly, the FSA will not need to be satisfied that precisely the same assistance would be provided to the United Kingdom in precisely the same situation. However, it will wish to be confident that the relevant authorities in the jurisdiction concerned would have powers available to them to provide broadly similar assistance in aid of

UK authorities, and would be willing properly to consider exercising those powers. The FSA may decide, under section 47(5), not to exercise its *own-initiative power* to vary or cancel in response to a request unless the regulator concerned undertakes to make whatever contribution towards the cost of its exercise the FSA considers appropriate.

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

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

- 8.26 The FSA adopts a similar approach to the exercise of its *power of intervention* under section 196 as it does to its *own-initiative powers* to vary *Part IV permission*, but with suitable modification for the differences in the statutory grounds for exercising the powers. Consequently the factors and considerations set out in paragraphs [8.1 to 8.12](#) and [8.18 to 8.25](#) may also be relevant when the FSA is considering regulatory concerns about *incoming firms*.
- 8.27 Save in urgent cases, the FSA will seek, and take account of, the views of the *firm's Home State regulator* when it is considering action against an *incoming firm*.

9 Prohibition Orders and withdrawal of approval

Introduction

- 9.1 The FSA's power under section 56 of the *Act* to prohibit individuals who are not fit and proper from carrying out functions in relation to *regulated activities* helps the FSA to work towards achieving its *regulatory objectives*. The FSA may exercise this power to make a *prohibition order* where it considers that, to achieve any of those objectives, it is appropriate either to prevent an individual from performing any function in relation to *regulated activities*, or to restrict the functions which he may perform.
- 9.2 The FSA's effective use of the power under section 63 of the *Act* to withdraw approval from an *approved person* will also help ensure high standards of regulatory conduct by preventing an *approved person* from continuing to perform the *controlled function* to which the approval relates if he is not a fit and proper person to perform that function. Where it considers this is appropriate, the FSA may prohibit an *approved person*, in addition to withdrawing their approval.

The FSA's general policy in this area

- 9.3 In deciding whether to make a *prohibition order* and/or, in the case of an *approved person*, to withdraw its approval, the FSA will consider all the relevant circumstances including whether other enforcement action should be taken or has been taken already against that individual by the FSA. As is noted below, in some cases the FSA may take other enforcement action against the individual in addition to seeking a *prohibition order* and/or withdrawing its approval. The FSA will also consider whether enforcement action has been taken against the individual by other enforcement agencies or *designated professional bodies*.
- 9.4 The FSA has the power to make a range of *prohibition orders* depending on the circumstances of each case and the range of *regulated activities* to which the individual's lack of fitness and propriety is relevant. Depending on the circumstances of each case, the FSA may seek to prohibit individuals from performing any class of function in relation to any class of *regulated activity*, or it may limit the *prohibition order* to specific functions in relation to specific *regulated activities*. The FSA may also make an order prohibiting an individual from being employed by a particular *firm*, type of *firm* or any *firm*.
- 9.5 The scope of a *prohibition order* will depend on the range of functions which the individual concerned performs in relation to *regulated activities*, the reasons why he is not fit and proper and the severity of risk which he poses to *consumers* or the market generally.
- 9.6 Where the FSA issues a *prohibition order*, it may indicate in the *final notice* that it would be minded to revoke the order on the application of the individual in the future, in the absence of new evidence that the individual is not fit and proper. If the FSA gives such an indication, it will specify the number of years after which it would be minded to revoke or vary the prohibition on an application. However, the FSA will only adopt this approach in cases where it considers it appropriate in all the

circumstances. In deciding whether to adopt this approach, the factors the FSA may take into account include, but are not limited to, where appropriate, the factors at [paragraphs 9.9 and at 9.17](#). The FSA would not be obliged to revoke an order after the specified period even where it gave such an indication. Further, if an individual's *prohibition order* is revoked, he would still have to satisfy the FSA as to his fitness for a particular role in relation to any future application for approval to perform a *controlled function*.

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

Prohibition orders and withdrawal of approval - approved persons

- 9.8 When the FSA has concerns about the fitness and propriety of an *approved person*, it may consider whether it should prohibit that person from performing functions in relation to *regulated activities*, withdraw its approval, or both. In deciding whether to withdraw its approval and/or make a *prohibition order*, the FSA will consider in each case whether its *regulatory objectives* can be achieved adequately by imposing disciplinary sanctions, for example, *public censures* or financial penalties, or by issuing a private warning.
- 9.9 When it decides whether to make a *prohibition order* against an *approved person* and/or withdraw its approval, the FSA will consider all the relevant circumstances of the case. These may include, but are not limited to those set out below.
- (1) The matters set out in section 61(2) of the *Act*.
 - (2) Whether the individual is fit and proper to perform functions in relation to *regulated activities*. The criteria for assessing the fitness and propriety of *approved persons* are set out in *FIT 2.1* (Honesty, integrity and reputation); *FIT 2.2* (Competence and capability) and *FIT 2.3* (Financial soundness).
 - (3) Whether, and to what extent, the *approved person* has:
 - (a) failed to comply with the *Statements of Principle* issued by the FSA with respect to the conduct of *approved persons*; or
 - (b) been knowingly concerned in a contravention by the relevant *firm* of a requirement imposed on the *firm* by or under the *Act* (including the *Principles* and other rules).
 - (4) Whether the *approved person* has engaged in *market abuse*.
 - (5) The relevance and materiality of any matters indicating unfitness.
 - (6) The length of time since the occurrence of any matters indicating unfitness.

- (7) The particular *controlled function* the *approved person* is (or was) performing, the nature and activities of the *firm* concerned and the markets in which he operates.
 - (8) The severity of the risk which the individual poses to *consumers* and to confidence in the *financial system*.
 - (9) The previous disciplinary record and general compliance history of the individual including whether the FSA, any *previous regulator*, *designated professional body* or other domestic or international regulator has previously imposed a disciplinary sanction on the individual.
- 9.10 The FSA may have regard to the cumulative effect of a number of factors which, when considered in isolation, may not be sufficient to show that the individual is fit and proper to continue to perform a *controlled function* or other function in relation to *regulated activities*. It may also take account of the particular *controlled function* which an *approved person* is performing for a *firm*, the nature and activities of the *firm* concerned and the markets within which it operates.
- 9.11 Due to the diverse nature of the activities and functions which the FSA regulates, it is not possible to produce a definitive list of matters which the FSA might take into account when considering whether an individual is not a fit and proper person to perform a particular, or any, function in relation to a particular, or any, *firm*.
- 9.12 The following are examples of types of behaviour which have previously resulted in the FSA deciding to issue a *prohibition order* or withdraw the approval of an *approved person*:
- (1) Providing false or misleading information to the FSA; including information relating to identity, ability to work in the United Kingdom, and business arrangements;
 - (2) Failure to disclose material considerations on application forms, such as details of County Court Judgments, criminal convictions and dismissal from employment for regulatory or criminal breaches. The nature of the information not disclosed can also be relevant;
 - (3) Severe acts of dishonesty, e.g. which may have resulted in financial crime;
 - (4) Serious lack of competence; and
 - (5) Serious breaches of the *Statements of Principle for approved persons*, such as failing to make terms of business regarding fees clear or actively misleading clients about fees; acting without regard to instructions; providing misleading information to clients, consumers or third parties; giving clients poor or inaccurate advice; using intimidating or threatening behaviour towards clients and former clients; failing to remedy breaches of the general prohibition or to ensure that a firm acted within the scope of its permissions.
- 9.13 Certain matters that do not fit squarely, or at all, within the matters referred to above may also fall to be considered. In these circumstances the FSA will consider

whether the conduct or matter in question is relevant to the individual's fitness and propriety.

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

Prohibition orders against exempt persons and members of professional firms

- 9.15 In cases where it is considering whether to exercise its power to make a *prohibition order* against an individual performing functions in relation to *exempt regulated activities* by virtue of an exemption from the *general prohibition* under Part XX of the *Act*, the FSA will consider whether the particular unfitness might be more appropriately dealt with by making an order disapplying the exemption using its power under section 329 of the *Act*. In most cases where the FSA is concerned about the fitness and propriety of a specific individual in relation to *exempt regulated activities* by virtue of an exemption under Part XX of the *Act*, it will be more appropriate to make an order prohibiting the individual from performing functions in relation to *exempt regulated activities* than to make a disapplication order.
- 9.16 When considering whether to exercise its power to make a *prohibition order* against an *exempt person*, the FSA will consider all relevant circumstances including, where appropriate, the factors set out in [paragraph 9.9](#).

Prohibition orders against other individuals

- 9.17 Where the FSA is considering making a *prohibition order* against an individual other than an individual referred to in [paragraphs 9.8 to 9.14](#), the FSA will consider the severity of the risk posed by the individual, and may prohibit the individual where it considers this is appropriate to achieve one or more of its *regulatory objectives*.
- 9.18 When considering whether to exercise its power to make a *prohibition order* against such an individual, the FSA will consider all the relevant circumstances of the case. These may include, but are not limited to, where appropriate, the factors set out in [paragraph 9.9](#).

Applications for variation or revocation of prohibition orders

- 9.19 When considering whether to grant or refuse an application to revoke or vary a *prohibition order*, the FSA will consider all the relevant circumstances of a case. These may include, but are not limited to:
- (1) the seriousness of the misconduct or other unfitness that resulted in the order;
 - (2) the amount of time since the original order was made;
 - (3) any steps taken subsequently by the individual to remedy the misconduct or other unfitness;

- (4) any evidence which, had it been known to the FSA at the time, would have been relevant to the FSA's decision to make the *prohibition order*;
- (5) all available information relating to the individual's honesty, integrity or competence since the order was made, including any repetition of the misconduct which resulted in the prohibition order being made;
- (6) where the FSA's finding of unfitness arose from incompetence rather than from dishonesty or lack of integrity, evidence that this unfitness has been or will be remedied; for example, this may be achieved by the satisfactory completion of relevant training and obtaining relevant qualifications, or by supervision of the individual by his employer;
- (7) the financial soundness of the individual concerned; and
- (8) whether the individual will continue to pose the level of risk to *consumers* or confidence in the *financial system* which resulted in the original prohibition if it is lifted.

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

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

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

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

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

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

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

The effect of the FSA's decision to withdraw approval

- 9.25 When the FSA's decision to withdraw an approval has become effective, the position of the *firm* which applied for that approval depends on whether it directly employs the *person* concerned, or whether the *person* is employed by one of its contractors.
- 9.26 Section 59(1) is relevant where the *firm* directly employs the *person* concerned. Under the provision, a firm ('A') must take reasonable care to ensure that no *person* performs a *controlled function* under an *arrangement* entered into by A in relation to the carrying on by it of a *regulated activity*, unless the FSA approves the performance by that *person* of the *controlled function* to which the approval relates. Therefore, if the *firm* continues to employ the *person* concerned to carry out a *controlled function*, it will be in breach of section 59(1) and the FSA may take enforcement action against it.
- 9.27 Section 59(2) is relevant where the *person* is employed by a contractor of the *firm*. It requires a *firm* ('A') to take reasonable care to ensure that no *person* performs a *controlled function* under an *arrangement* entered into by a contractor of A in relation to the carrying on by A of a *regulated activity*, unless the FSA approves the performance by that *person* of the *controlled function* to which the approval relates. Therefore, if a contractor of the *firm* employs the *person* concerned, and the contractor continues to employ the *person* to carry out a *controlled function*, the *firm* itself will be in breach of section 59(2) unless it has taken reasonable care to ensure that this does not happen. The FSA may take enforcement action against a *firm* that breaches this requirement.
- 9.28 *Firms* should be aware of the potential effect that these provisions may have on their contractual relationships with *approved persons* employed by them and with contractors engaged by them, and their obligations under those contracts.

10 Injunctions

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

Section 380 (injunctions for breaches of relevant requirements⁹) and section 381 (injunctions in cases of market abuse): the FSA's policy

- 10.2 The court may make three types of order under these provisions: to restrain a course of conduct, to take steps to remedy a course of conduct and to secure assets. As is explained below, the court may also make an order freezing assets under its inherent jurisdiction. In certain cases, the FSA may seek only one type of order, although in others it may seek several.
- 10.3 The broad test the FSA will apply when it decides whether to seek an *injunction* is whether the application would be the most effective way to deal with the FSA's concerns. In deciding whether an application for an *injunction* is appropriate in a given case, the FSA will consider all relevant circumstances and may take into account a wide range of factors. The following list of factors is not exhaustive; not all the factors will be relevant in a particular case and there may be other factors that are relevant.
- (1) The nature and seriousness of a contravention or expected contravention of a relevant requirement. The extent of loss, risk of loss, or other adverse effect on *consumers*, including the extent to which *client* assets may be at risk, may be relevant. The seriousness of a contravention or prospective contravention will include considerations of:
 - (a) whether the losses suffered are substantial;
 - (b) whether the numbers of *consumers* who have suffered loss are significant;
 - (c) whether the assets at risk are substantial; and
 - (d) whether the number of *consumers* at risk is significant.
 - (2) In cases of *market abuse*, the nature and seriousness of the misconduct or expected misconduct in question. The following may be relevant:

⁹ Under sections 380(6)(a) and (7)(a), a 'relevant requirement' means a requirement: which is imposed by or under the *Act*; or which is imposed by or under any other Act and whose contravention constitutes 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*.

- (a) the impact or potential impact on the *financial system* of the conduct in question. This would include the extent to which it has resulted in distortion or disruption of the markets, or would be likely to do so if it was allowed to take place or to continue;
 - (b) the extent and nature of any losses or other costs imposed, or likely to be imposed, on other users of the *financial system*, as a result of the misconduct.
- (3) Whether the conduct in question has stopped or is likely to stop and whether steps have been taken or will be taken by the *person* concerned to ensure that the interests of *consumers* are adequately protected. For example, an application for an *injunction* may be appropriate where the FSA has grounds for believing that a contravention of a relevant requirement, *market abuse* or both may continue or be repeated. It is likely to have grounds to believe this where, for example, the *Takeover Panel* has requested that a person stop a particular course of conduct and that *person* has not done so.
- (4) Whether there are steps a *person* could take to remedy a contravention of a relevant requirement or *market abuse*. The steps the FSA may require a *person* to take will vary according to the circumstances but may include the withdrawal of a misleading *financial promotion* or publishing a correction, writing to clients or investors to notify them of FSA action, providing financial redress and repatriating funds from an overseas jurisdiction. An application by the FSA to the court under section 380(2) or 381(2) for an order requiring a *person* to take such steps may not be appropriate if, for example, that *person* has already taken or proposes to take appropriate remedial steps at his own initiative or under a ruling imposed by another regulatory authority (such as the *Takeover Panel* or a *recognised investment exchange*). If another authority has identified the relevant steps and the *person* concerned has failed to take them, the FSA will take this into account and (subject to all other relevant factors and circumstances) may consider it is appropriate to apply for an *injunction*. In those cases the FSA may consult with the relevant regulatory authority before applying for an *injunction*.
- (5) Whether there is a danger of assets being dissipated. The main purpose of an application under section 380(3), sections 381(3) and (4) or pursuant to the court's inherent jurisdiction, is likely to be to safeguard funds containing *client* assets (e.g. *client* accounts) and/or funds and other assets from which restitution may be made. The FSA may seek an *injunction* to secure assets while a suspected contravention is being investigated or where it has information suggesting that a contravention is about to take place.
- (6) The costs the FSA would incur in applying for and enforcing an *injunction* and the benefits that would result. There may be other cases which require the FSA's attention and take a higher priority, due to the nature and seriousness of the breaches concerned. There may, therefore, be occasions on which the FSA considers that time and resources should not be diverted from other cases in order to make an application for an *injunction*. These factors reflect the FSA's

duty under the *Act* to have regard to the need to use its resources in the most efficient and economic way.

- (7) The disciplinary record and general compliance history of the *person* who is the subject of the possible application. This includes whether the FSA (or a *previous regulator*) has taken any previous disciplinary, remedial or protective action against the *person*. It may also be relevant, for example, whether the *person* has previously given any undertakings to the FSA (or any *previous regulator*) not to do a particular act or engage in particular behaviour and is in breach of those undertakings.
- (8) Whether the conduct in question can be adequately addressed by other disciplinary powers, for example *public censure* or financial penalties.
- (9) The extent to which another regulatory authority can adequately address the matter. Certain circumstances may give rise not only to possible enforcement action by the FSA, but also to action by other regulatory authorities. The FSA will examine the circumstances of each case, and consider whether it is appropriate for the FSA to take action to address the relevant concern. In most cases the FSA will consult with other relevant regulatory authorities before making an application for an order.
- (10) Whether there is information to suggest that the *person* who is the subject of the possible application is involved in *financial crime*.
- (11) In any case where the FSA is of the opinion that any potential exercise of its powers under section 381 may affect the timetable or the outcome of a *takeover bid*, the FSA will consult the *Takeover Panel* before taking any steps to exercise these powers and will give due weight to its views.

Asset-freezing injunctions

- 10.4 Where the FSA applies to the court under section 380(3) or sections 381(3) and (4) of the *Act*, the FSA may ask the court to exercise its inherent jurisdiction to make orders on an interim basis, restraining a *person* from disposing of, or otherwise dealing with, assets. To succeed in an application for such interim relief, the FSA will have to show a good arguable case for the granting of the *injunction*. The FSA will not have to show that a contravention has already occurred or may have already occurred.
- 10.5 The FSA may request the court to exercise its inherent jurisdiction in cases, for example, where it has evidence showing that there is a reasonable likelihood that a *person* will contravene a requirement of the *Act* and that the contravention will result in the dissipation of assets belonging to investors.

Other relevant powers

- 10.6 The FSA has a range of powers it can use to take remedial, protective and disciplinary action against a *person* who has contravened a relevant requirement or engaged in *market abuse*, as well as its powers to seek *injunctions* under sections 380 and 381 of the *Act* and under the courts' inherent jurisdiction. Where appropriate, the FSA may

exercise these other powers before, at the same time as, or after it applies for an *injunction* against a *person*.

- 10.7 When, in relation to *firms*, the FSA applies the broad test outlined in paragraph 10.3, it will consider the relative effectiveness of the other powers available to it, compared with injunctive relief. For example, where the FSA has concerns about whether a *firm* will comply with restrictions that the FSA could impose by exercising its *own-initiative powers*, it may decide it would be more appropriate to seek an *injunction*. This is because breaching any requirement imposed by the court could be punishable for contempt. Alternatively, where, for example, the FSA has already imposed requirements on a *firm* by exercising its *own-initiative powers* and these requirements have not been met, the FSA may seek an *injunction* to enforce those requirements.
- 10.8 The FSA's *own-initiative powers* do not apply to *unauthorised persons*. This means that an application for an *injunction* is the only power by which the FSA may seek directly to prevent *unauthorised persons* from actual or threatened breaches or *market abuse*. The FSA will decide whether an application against an *unauthorised person* is appropriate, in accordance with the approach discussed in paragraph 10.3. The FSA may also seek an *injunction* to secure assets where it intends to use its insolvency powers against an *unauthorised person*.
- 10.9 In certain cases, conduct that may be the subject of an *injunction* application will also be an offence which the FSA has power to prosecute under the *Act*. In those cases, the FSA will consider whether it is appropriate to prosecute the offence in question, as well as applying for *injunctions* under section 380, section 381, or both.
- 10.10 Where the FSA exercises its powers under section 380, section 381 and/or invokes the court's inherent jurisdiction to obtain an order restraining the disposal of assets, it may also apply to the court for a restitution order for the distribution of those assets.

Section 198: the FSA's policy

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

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

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

¹⁰ [link to UNFCOG]

ask the *person* to undertake to stop including the term in new contracts and stop relying on it in contracts which have been concluded.

- 10.13 If the *person* either declines to give an undertaking, or gives such an undertaking and fails to follow it, the FSA will consider the need to apply to court for an *injunction* under regulation 12 of the *Unfair Terms Regulations*.
- 10.14 In determining whether to seek an *injunction* against a *person*, the FSA will consider the full circumstances of each case. A number of factors may be relevant for this purpose. The following list is not exhaustive; not all of the factors may be relevant in a particular case, and there may be other factors that are relevant.
- (1) whether the FSA is satisfied that the contract term which is the subject of the complaint may properly be regarded as unfair within the meaning of the *Unfair Terms Regulations*;
 - (2) the extent and nature of the detriment to *consumers* resulting from the term or the potential detriment which could result from the term;
 - (3) whether the *person* has fully cooperated with the FSA in resolving the FSA's concerns about the fairness of the particular contract term;
 - (4) the likelihood of success of an application for an *injunction*;
 - (5) the costs the FSA would incur in applying for and enforcing an *injunction* and the benefits that would result from that action; the FSA is more likely to be satisfied that an application is appropriate where an *injunction* would not only prevent the continued use of the particular contract term, but would also be likely to prevent the use or continued use of similar terms, or terms having the same effect, used or recommended by other *firms* concluding contracts with *consumers*.
- 10.15 In an urgent case, the FSA may seek a temporary *injunction*, to prevent the continued use of the term until the fairness of the term could be fully considered by the court. An urgent case is one in which the FSA considers that the actual or potential detriment is so serious that urgent action is necessary. In deciding whether to apply for a temporary *injunction*, the FSA may take into account a number of factors, including one or more of the factors set out in paragraph 10.14. In such an urgent case, the FSA may seek a temporary injunction without first consulting with the *person*.
- 10.16 In deciding whether to grant an *injunction*, the court will decide whether the term in question is unfair within the meaning of the *Unfair Terms Regulations* (see *UNFCOG* 1.3.2G). The court may grant an *injunction* on such terms as it sees fit. For example, it may require the *person* to stop including the unfair term in contracts with *consumers* from the date of the *injunction* and to stop relying on the unfair term in contracts which have been concluded. If the *person* fails to comply with the *injunction*, it will be in contempt of court.
- 10.17 Regulation 8 of the *Unfair Terms Regulations* provides that an unfair term is not binding on the *consumer*. This means that if the court finds that the term in question is unfair, the *person* would be unable to rely on the unfair term in existing contracts

governed by the *Unfair Terms Regulations*. To the extent that it is possible, the existing contract would continue in effect without the unfair term.

- 10.18 When the FSA considers that a case requires enforcement action under the *Unfair Terms Regulations*, it will take the enforcement action itself if the *person* is a *firm* or an *appointed representative*.
- 10.19 Where the *person* is not a *firm* or an *appointed representative*, the FSA will generally pass the case to the Office of Fair Trading, with a recommendation that it take the enforcement action. The Office of Fair Trading may then decide whether or not to take enforcement action.

FSA costs

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

11 Restitution and redress

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

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

Criteria for determining whether to exercise powers to obtain restitution

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

- (1) Are the profits quantifiable?

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

- (2) Are the losses identifiable?

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

- (3) The number of persons affected

The FSA will consider the number of *persons* who have suffered loss or other adverse effects and the extent of those losses or adverse effects. Where the

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

(4) FSA costs

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

(5) Is redress available elsewhere?

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

(6) Is redress available through another regulator?

The FSA will consider the availability of redress through another regulatory authority. Where another regulatory authority, such as *the Takeover Panel*, is in a position to require appropriate redress, the FSA will not generally exercise its own powers to do so. If the FSA does consider that action is appropriate

and the matters in question have happened in the context of a *takeover bid*, the FSA will only take action during the bid in the circumstances set out in *DEPP 6.2.25G* if the *person* concerned has responsibilities under the *Takeover Code*. If another *regulatory body* has required redress and a *person* has not met that requirement, the FSA will take this into account and (subject to all other relevant factors and circumstances) may consider it appropriate to take action to ensure that such redress is provided.

(7) Can persons bring their own proceedings?

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

(8) Is the firm solvent?

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

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

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

The FSA may decide to exercise its power to obtain a compulsory *insolvency order* or to apply for the appointment of a receiver rather than to exercise its powers to obtain restitution. This could happen if the FSA has particular concerns about a *person's* conduct, or financial position and, in particular, whether it is solvent (though the appointment by the court of a receiver is not conditional on the insolvency of the *person* concerned). The FSA may also consider the cost of seeking compulsory *insolvency orders* which will be paid out of the assets of the *firm*, or of the *unauthorised person* concerned, compared to the cost of seeking restitution. In the case of *unauthorised*

persons operating in breach of the *general prohibition*, a decision to apply for a compulsory *insolvency order* rather than restitution will depend on all the circumstances of the case. In particular, the FSA may consider the significance of the *unauthorised* activities compared to the whole of the business; the nature and conduct of the activities carried on in breach of the *general prohibition*; and the number and nature of the claims against the *person* or *firm* concerned. The FSA's powers to apply for compulsory *insolvency orders* are discussed in [chapter 13](#) of this guide.

(10) The behaviour of the persons suffering loss

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

(11) Other factors which may be relevant

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

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

The FSA's choice of powers

- 11.4 In cases where it is appropriate to exercise its powers to obtain restitution from *firms*, the FSA will first consider using its own administrative powers under section 384 of the *Act* before considering taking court action.
- 11.5 However, there may be circumstances in which the FSA will choose to use the powers under section 382 or section 383 of the *Act* to apply to the court for an order for restitution against a *firm*. Those circumstances may include, for example, where:

- (1) the FSA wishes to combine an application for an order for restitution with other court action against the *firm*, for example, where it wishes to apply to the court for an *injunction* to prevent the *firm* breaching a relevant requirement of the *Act*; the FSA's powers to apply for *injunctions* restraining *firms* from breaching relevant requirements of the *Act* are discussed in chapter 10 of this guide;
- (2) the FSA wishes to bring related court proceedings against an *unauthorised person* where the factual basis of those proceedings is likely to be the same as the claim for restitution against the *firm*;
- (3) there is a danger that the assets of the *firm* may be dissipated; in those cases, the FSA may wish to combine an application to the court for an order for restitution with an application for an asset-freezing *injunction* to prevent assets from being dissipated; or
- (4) the FSA suspects that the *firm* may not comply with an administrative requirement to give restitution; in those cases the FSA may consider that the sanction for breach of a court order may be needed to ensure compliance; a *person* who fails to comply with a court order may be in contempt of court and is liable to imprisonment, to a fine and/or to have his assets seized.

Determining the amount of restitution

- 11.6 The FSA may obtain information relating to the amount of profits made and/or losses or other adverse effects resulting from the conduct of *firms* or *unauthorised persons* as a result of the exercise of its powers to appoint investigators under sections 167 or 168 of the *Act*.
- 11.7 As well as obtaining information through the appointment of investigators, the FSA may consider using its power under section 166 of the *Act* to require a *firm* to provide a report prepared by a *skilled person*. That report may be requested to help the FSA to:
- (1) determine the amount of profits which have been made by the *firm*; or
 - (2) establish whether the conduct of the *firm* has caused any losses or other adverse effects to qualifying persons and/or the extent of such losses; or
 - (3) determine how any amounts to be paid by the *firm* are to be distributed between qualifying persons.

Other relevant powers

- 11.8 The FSA may apply to the court for an *injunction* if it appears that a *person*, whether *authorised* or not, is reasonably likely to breach a requirement of the *Act* or engage in *market abuse*. It can also apply for an *injunction* if a *person* has breached a requirement of the *Act* 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 has engaged in, or *required* or *encouraged* others to engage in, *market abuse*.

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

12 Prosecution of Criminal Offences

The FSA's general approach

- 12.1 The FSA has powers under sections 401 and 402 of the *Act* to prosecute a range of criminal offences in England, Wales and Northern Ireland. The FSA may also prosecute criminal offences for which it is not the statutory prosecutor, but where the offences form part of the same criminality as the offences it is prosecuting under the *Act*.
- 12.2 The FSA's general policy is to pursue through the criminal justice system all those cases where criminal prosecution is appropriate. When it decides whether to bring criminal proceedings in England, Wales or Northern Ireland, or to refer the matter to another prosecuting authority in England, Wales or Northern Ireland (see paragraph 12.11), it will apply the basic principles set out in the Code for Crown Prosecutors.¹¹ When considering whether to prosecute a breach of the *Money Laundering Regulations*, the FSA will also have regard to whether the person concerned has followed the *Guidance for the UK financial sector issued by the Joint Money Laundering Steering Group*.
- 12.3 The FSA's approach when deciding whether to commence criminal proceedings for *misleading statements and practices offences* and *insider dealing offences*, where the FSA also has power to impose a sanction for *market abuse*, is discussed further in [paragraphs 12.7 to 12.10](#).
- 12.4 In cases where criminal proceedings have commenced or will be commenced, the FSA may consider whether also to take civil or regulatory action (for example where this is appropriate for the protection of *consumers*) and how such action should be pursued. That action might include: applying to court for an *injunction*; applying to court for a restitution order; variation and/or cancellation of *permission*; and prohibition of individuals. The factors the FSA may take into account when deciding whether to take such action, where criminal proceedings are in contemplation, include, but are not limited to the following:
- (1) whether, in the FSA's opinion, the taking of civil or regulatory action might unfairly prejudice the prosecution, or proposed prosecution, of criminal offences;
 - (2) whether, in the FSA's opinion, the taking of civil or regulatory action might unfairly prejudice the defendants in the criminal proceedings in the conduct of their defence; and
 - (3) whether it is appropriate to take civil or regulatory action, having regard to the scope of the criminal proceedings and the powers available to the criminal courts.

¹¹ <http://www.cps.gov.uk/publications/docs/code2004english.pdf>

FSA cautions

- 12.5 In some cases, the FSA may decide to issue a formal caution rather than to prosecute an offender. In these cases the FSA will follow the Home Office Guidance on the cautioning of offenders, currently contained in the Home Office Circular 18/1994.
- 12.6 Where the FSA decides to administer a formal caution, a record of the caution will be kept by the FSA and on the Police National Computer. The FSA will not publish the caution, but it will be available to parties with access to the Police National Computer. The issue of a caution may influence the FSA and other prosecutors in their decision whether or not to prosecute the offender if he offends again. If the offender is a *firm* or an *approved person*, a caution given by the FSA will form part of the *firm's* or *approved person's* regulatory record for the purposes of *DEPP* 6.2.1 G (3). If relevant, the FSA will take the caution into account in deciding whether to take disciplinary action for subsequent regulatory misconduct by the *firm* or the *approved person*. The FSA may also take a caution into account when considering a *person's* honesty, integrity and reputation and his fitness or propriety to perform controlled or other functions in relation to *regulated activities* (see *FIT* 2.1.3G).

Criminal prosecutions in cases of market abuse

- 12.7 In some cases there will be instances of market misconduct that may arguably involve a breach of the criminal law as well as *market abuse* as defined in section 118 of the *Act*. When the FSA decides whether to commence criminal proceedings rather than impose a sanction for *market abuse* in relation to that misconduct, it will apply the basic principles set out in the Code for Crown Prosecutors. When deciding whether to prosecute market misconduct which also falls within the definition of *market abuse*, application of these basic principles may involve consideration of some of the factors set out in paragraph 12.8.
- 12.8 The factors which the FSA may consider when deciding whether to commence a criminal prosecution for market misconduct rather than impose a sanction for *market abuse* include, but are not limited to, the following:
- (1) the seriousness of the misconduct: if the misconduct is serious and prosecution is likely to result in a significant sentence, criminal prosecution may be more likely to be appropriate;
 - (2) whether there are victims who have suffered loss as a result of the misconduct: where there are no victims a criminal prosecution is less likely to be appropriate;
 - (3) the extent and nature of the loss suffered: where the misconduct has resulted in substantial loss and/or loss has been suffered by a substantial number of victims, criminal prosecution may be more likely to be appropriate;
 - (4) the effect of the misconduct on the market: where the misconduct has resulted in significant distortion or disruption to the market and/or has significantly damaged market confidence, a criminal prosecution may be more likely to be appropriate;

- (5) the extent of any profits accrued or loss avoided as a result of the misconduct: where substantial profits have accrued or loss avoided as a result of the misconduct, criminal prosecution may be more likely to be appropriate;
- (6) whether there are grounds for believing that the misconduct is likely to be continued or repeated: if it appears that the misconduct may be continued or repeated and the imposition of a financial penalty is unlikely to deter further misconduct, a criminal prosecution may be more appropriate than a financial penalty;
- (7) whether the person has previously been cautioned or convicted in relation to market misconduct or has been subject to civil or regulatory action in respect of market misconduct;
- (8) the extent to which redress has been provided to those who have suffered loss as a result of the misconduct and/or whether steps have been taken to remedy any failures in systems or controls which gave rise to the misconduct: where such steps are taken promptly and voluntarily, criminal prosecution may not be appropriate; however, potential defendants will not avoid prosecution simply because they are able to pay compensation;
- (9) the effect that a criminal prosecution may have on the prospects of securing redress for those who have suffered loss: where a criminal prosecution will have adverse effects on the solvency of a *firm* or individual in circumstances where loss has been suffered by *consumers*, the FSA may decide that criminal proceedings are not appropriate;
- (10) whether the *person* is being or has been voluntarily cooperative with the FSA in taking corrective measures; however, potential defendants will not avoid prosecution merely by fulfilling a statutory duty to take those measures;
- (11) whether an individual's misconduct involves dishonesty or an abuse of a position of authority or trust;
- (12) where the misconduct in question was carried out by a group, and a particular individual has played a leading role in the commission of the misconduct: in these circumstances, criminal prosecution may be appropriate in relation to that individual;
- (13) the personal circumstances of an individual may be relevant to a decision whether to commence a criminal prosecution.

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

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

brought or is seeking to bring disciplinary proceedings for *market abuse* arising from substantially the same allegations.

Liaison with other prosecuting authorities

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

Prosecution of Friendly Societies

- 12.12 The FSA's power to prosecute friendly societies is discussed in an article on the FSA web-site entitled 'Prosecuting Friendly Societies'.¹²

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

13 Insolvency

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

- (1) stop *firms* and *unauthorised persons* carrying on insolvent or unlawful business; and
- (2) ensure the orderly realisation and distribution of their assets.

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

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

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

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

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

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

13.6 The FSA would not ordinarily petition for an administration order unless it believes that the *company* or *partnership* is, or is likely to become, insolvent. Similarly, the FSA would not ordinarily petition for a compulsory winding up order solely on the

ground of inability to pay debts (as provided in the *Act*), unless it believes that the *company* or *partnership* is or is likely to be insolvent.

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

- (1) the default is the subject of continuing discussion between the *company* or *partnership* and the creditor, under the relevant agreement, which is likely to lead to a resolution;
- (2) the default is an isolated incident;
- (3) in other respects the *company* or *partnership* is meeting its obligations under agreements of this kind; and
- (4) the FSA has information to indicate that the *company* or *partnership* is able to pay its debts or, alternatively, that in addition to the specific default the *company* or *partnership* is in fact unable to pay its debts.

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

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

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

- (1) whether the *company* or *partnership* has taken or is taking steps to deal with its insolvency, including petitioning for its own administration, placing itself in voluntary winding up or proposing to enter into a company voluntary arrangement, and the effectiveness of those steps;
- (2) whether any consumer or other creditor of the *company* or *partnership* has taken steps to seek an *insolvency order* from the court;
- (3) the effect on the *company* or *partnership* and on the creditors of the *company* or *partnership* if an *insolvency order* is made;
- (4) whether the use of other powers, rights or remedies available to the FSA, *consumers* and creditors under the *Act* and other legislation will achieve the same or a more advantageous result in terms of the protection of *consumers*, and of market confidence and the restraint and remedy of unlawful activity, for example:

- (a) in the case of *authorised persons* and *appointed representatives*, the interests of *consumers* may, in certain circumstances, be met by the use of the FSA's intervention powers and by requiring restitution to *consumers*;
 - (b) in the case of *unauthorised companies* and *partnerships*, the FSA will consider whether the interests of *consumers* can be achieved by seeking an *injunction* to restrain continuation of the carrying on of the *regulated activity* and/or an order for restitution to consumers.
- (5) whether other regulatory authorities or law enforcement agencies propose to take action in respect of the same or a similar issue which would be adequate to address the FSA's concerns or whether it would be appropriate for the FSA to take its own action;
 - (6) the nature and extent of the *company* or *partnership* assets and liabilities, and in particular whether the *company* or *partnership* holds *client* assets and whether its secured and preferred liabilities are likely to exceed available assets;
 - (7) whether there is a significant cross border or international element to the business which the *company* or *partnership* is carrying on and the effect on foreign assets or on the continuation of the business abroad of making an *insolvency order*;
 - (8) whether an *insolvency order* is likely to achieve a fair and orderly realisation and distribution of assets; and
 - (9) whether there is a risk of creditors being preferred and any advantage in securing a moratorium in relation to proceedings against the *company* or *partnership*.

13.10 After the FSA has determined that it is appropriate to seek an *insolvency order*, and there is no moratorium in place under Schedule A1 to the Insolvency Act 1986 (as amended by the Insolvency Act 2000) (hereafter referred to in this chapter as 'the 1986 Act'), it will consider whether this order should be an administration order or a compulsory winding up order.

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

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

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

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

- (1) the extent to which the financial difficulties are, or are likely to be attributable to the management of the *company* or *partnership*, or to external factors, for example, market forces;
- (2) the extent to which it appears to the FSA that the *company* or *partnership* may, through an administrator, be able to trade its way out of its financial difficulties;
- (3) the extent to which the *company* or *partnership* can lawfully and viably continue to carry on *regulated activities* through an administrator;
- (4) the extent to which the sale of the business in whole or in part as a going concern is likely to be achievable;
- (5) the complexity of the business of the *company* or *partnership*;
- (6) whether recourse to one regime or another is likely to result in delays in redress to *consumers* or an additional cost;
- (7) whether recourse to one regime or another is likely to result in better redress to *consumers*;
- (8) the adequacy and reliability of the *company* or *partnership's* accounting or administrative records;
- (9) the extent to which the management of the *company* or *partnership* has co-operated with the FSA;
- (10) in the case of an *unauthorised company* or *partnership* carrying on a *regulated activity* as part of a larger enterprise, the scale and importance of the unauthorised activity in relation to the whole of the *company's* or *partnership's* business;
- (11) the extent to which the management of the *company* or *partnership* is likely to cooperate in determining whether one or more of the purposes of an administration order can be met;
- (12) in the case of an *unauthorised company* or *partnership* carrying on a *regulated activity* as part of a larger enterprise, the extent to which the *company's* or *partnership's* survival can be anticipated without the continuance of the unauthorised regulated activity;
- (13) where an administrative receiver is in place, whether the *debenture* holder is likely to agree to an application for an administration order;

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

Petitioning for compulsory winding up on just and equitable grounds

- 13.14 The FSA has power under section 367(3)(b) of the *Act* to petition the court for the compulsory winding up of a *company* or *partnership*, on the ground that it is just and equitable for the body to be wound up, regardless of whether or not the body is able to pay its debts. In some instances the FSA may need to consider whether to petition on this ground alone or in addition to the ground of insolvency.
- 13.15 When deciding whether to petition on this ground the FSA will consider all relevant facts including:
- (1) whether the needs of *consumers* and the public interest require the *company* or *partnership* to cease to operate;
 - (2) the need to protect *consumers'* claims and *client* assets;
 - (3) whether the needs of *consumers* and the public interest can be met by using the FSA's other powers;
 - (4) in the case of an *authorised person*, where the FSA considers that the *authorisation* should be withdrawn or where it has been withdrawn, the extent to which there is other business that the *person* can carry on without *authorisation*;
 - (5) in the case of an *unauthorised company* or *partnership* carrying on a *regulated activity* as part of a larger enterprise, the scale and importance of the *unauthorised regulated activity* and the extent to which the enterprise is likely to survive the restraint and remedying of that activity by the use of other powers available to the FSA having regard to any continuing risk to *consumers*;
 - (6) whether there is reason to believe that an *injunction* to restrain the carrying on of an *unauthorised regulated activity* would be ineffective;
 - (7) whether the *company* or *partnership* appears to be or to have been involved in *financial crime* or appears to be or to have been used as a vehicle for *financial crime*.
- 13.16 Where appropriate the FSA will also take the following factors into account:
- (1) the complexity of the *company* or *partnership* (as this may have a bearing on the effectiveness of winding up or any alternative action);
 - (2) whether there is a significant cross border or international element to the business being carried on by the *company* or *partnership* and the impact on the business in other jurisdictions;

- (3) the adequacy and reliability of the *company* or *partnership's* accounting or administrative records;
- (4) the extent to which the *company* or *partnership's* management has co-operated with the FSA.

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

- 13.17 Section 365(6) of the *Act* makes it clear that the FSA may petition for the compulsory winding up of a *company* even if it is already in voluntary winding up. This power is already available to creditors and contributories of *companies* in voluntary winding up. For example, the court can be asked to direct the liquidator to investigate a transaction which the *company* undertook before the winding up. In some circumstances, this power may be used in respect of partnerships (section 367 of the *Act*).
- 13.18 Given the powers available to creditors (or contributories), the FSA anticipates that there will only be a limited number of cases where it will exercise the right under section 365(6) to petition for the compulsory winding up of a company already in voluntary winding up. The FSA will only be able to exercise this right where one or both of the grounds on which it can seek compulsory winding up are met.
- 13.19 Factors which the FSA will consider when it decides whether to use this power (in addition to the factors identified in paragraphs 13.11 to 13.16 in relation to the FSA's decisions to seek compulsory winding up) include:
- (1) whether the FSA's concerns can properly and effectively be met by seeking a specific direction under section 365(2) of the *Act*;
 - (2) whether the affairs of the *company* require independent investigation of the kind which follows a compulsory winding up order and whether there are or are likely to be funds available for that investigation;
 - (3) the composition of the creditors of the company including the ratio of *consumer* and non-*consumer* creditors and the nature of their claims;
 - (4) the extent to which there are creditors who are or are likely to be connected to the *company* or its directors and management;
 - (5) the extent to which the directors and management are cooperating with the liquidator in voluntary winding up;
 - (6) the need to protect and distribute *consumers'* claims and *assets*;
 - (7) whether a petition by the FSA for compulsory winding up is likely to have the support of the majority or a large proportion of the creditors; and
 - (8) the extent of any resulting delay and additional costs in seeking a compulsory winding up order.

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

Power to apply to court for a provisional liquidator

- 13.21 Where a petition has been presented for the winding up of a body, the court may appoint a provisional liquidator in the interim period pending the hearing of the petition. An appointment may be sought and made to:
- (1) permit the continuation of the business for the protection of *consumers*; or
 - (2) secure, protect, or realise assets or property in the possession or under the control of the *company* or *partnership* (in particular where there is a risk that the assets will be dissipated) for the benefit of creditors or *consumers*.
- 13.22 In cases where it decides to petition for the compulsory winding up of a body under section 367 of the *Act*, the FSA will also consider whether it should seek the appointment of a provisional liquidator. The FSA will have regard, in particular, to the extent to which there may be a need to protect *consumers'* claims and *consumers'* funds or other assets. Where the FSA decides to petition for the compulsory winding up of a *company* or *partnership* on the just and equitable ground and where the *company* or *partnership* is solvent but may become insolvent, the FSA will also consider whether the appointment of a provisional liquidator would serve to maintain the solvency of the *company* or *partnership*.

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

- 13.23 The FSA recognises that the bankruptcy of an individual or the sequestration of an individual's estate are significant measures which may have significant personal and professional implications for the individual involved. In considering whether to present a petition the FSA's principal considerations will be its *regulatory objectives* including the protection of *consumers*.
- 13.24 The FSA is also mindful that whilst the winding up of an *unauthorised company* or *partnership* should bring an end to any unlawful activity, this is not necessarily the effect of bankruptcy or sequestration. The FSA may, in certain cases, consider the use of powers to petition for bankruptcy or sequestration in conjunction with the use of other powers to seek *injunctions* and other relief from the court. In particular, where the individual controls assets belonging to consumers and holds, or appears to hold, those assets on trust for consumers, those assets will not vest in the insolvency practitioner appointed in the bankruptcy or sequestration. The FSA will in those circumstances consider whether separate action is necessary to protect the assets and interests of *consumers*.
- 13.25 If an individual appears to be unable to pay a *regulated activity debt*, or to have no reasonable prospect of doing so, then section 372 of the *Act* permits the FSA to petition for the individual's bankruptcy, or in Scotland, for the sequestration of the

individual's estate. The FSA will petition for bankruptcy or sequestration only if it believes that the individual is, in fact, insolvent. In determining this, as a general rule, the FSA will serve a demand requiring the individual to establish, to the FSA's satisfaction, that there is a reasonable prospect that he will be able to pay the *regulated activity debt*.

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

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

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

- (1) whether others have taken steps to deal with the individual's insolvency, including a proposal by the individual of a voluntary arrangement, a petition by the individual for his own bankruptcy or sequestration, or a petition by a third party for the individual's bankruptcy or the sequestration of the individual's estate;
- (2) whether the FSA can adequately deal with the individual using other powers available to it under the *Act*, without the need to seek a bankruptcy order or sequestration award;
- (3) the extent of the individual's insolvency or apparent insolvency;
- (4) the number of *consumers* affected and the extent of their claims against the individual;
- (5) whether the individual has control over assets belonging to *consumers*;
- (6) the individual's conduct in his dealings with the FSA, including the extent of his cooperation with the FSA;
- (7) whether the individual appears to be, or to have been, involved in *financial crime*;
- (8) the adequacy of the individual's accounts and administration records;
- (9) in the case of an *unauthorised individual* who is carrying on or who has carried on a *regulated activity*, the nature, scale and importance of that activity and the individual's conduct in carrying on that activity;
- (10) whether there would be an advantage in securing a moratorium in respect of proceedings against the individual; and

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

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

- 13.28 In general terms, the approval of a voluntary arrangement (in relation to *companies*, *partnerships* and *individuals*) requires more than 75% of the creditors to whom notice of a meeting has been sent and who are present in person or by proxy. The arrangement must also not be opposed by more than 50% of creditors given notice of the meeting and who have notified their claim, but excluding secured creditors and creditors who are, in the case of companies or partnerships, connected persons and, in the case of individuals, associates. The FSA will therefore not normally challenge an arrangement approved by a majority of creditors.
- 13.29 Exceptionally, the FSA will consider making such a challenge using its powers in sections 356 and 357 of the *Act* after considering, in particular, the following matters:
- (1) The composition of the creditors of the company including the ratio of *consumer* to *non-consumer* creditors or the nature of their claims;
 - (2) whether the FSA has concerns, or is aware of concerns of creditors, about the regularity of the meeting or the identification of connected or associated creditors and the extent to which creditors with those concerns could themselves make an application to court;
 - (3) whether the *company*, *partnership* or individual has control of consumer assets which might be affected by the voluntary arrangement;
 - (4) the complexity of the arrangement;
 - (5) the nature and complexity of the regulated activity;
 - (6) the *company's*, *partnership's* or individual's previous dealings with the FSA, including the extent of its cooperation with the FSA and its compliance history;
 - (7) whether the FSA is aware of any matters which would materially affect the rights and expectations of creditors under the voluntary arrangement as approved; and
 - (8) the extent to which the debtor has made full and accurate disclosure of assets and liabilities in the proposal to creditors.
- 13.30 Similarly, the FSA will not normally use its powers under section 358 of the *Act* to petition for sequestration of a debtor's estate following the grant of a trust deed, if the trust deed has been, or appears likely to be, acceded to by a majority of creditors.
- 13.31 In considering whether to exercise its powers under Schedule A1 to the 1986 Act to make a challenge in relation to acts, omissions or decisions of a nominee during a moratorium, the FSA will have regard to the following matters in particular:

- (1) whether the FSA is aware of matters indicating that the proposed voluntary arrangement does not have a reasonable prospect of being approved and implemented or that the company is likely to have insufficient funds available to it to carry on its business during the moratorium;
- (2) whether consumer assets held by the company are or may be placed at risk; and
- (3) in the case of an *unauthorised company* whether that *company* is able to carry on its business lawfully during the moratorium without undertaking any *regulated activity* in contravention of the *general prohibition*.

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

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

- (1) the extent to which the relevant transactions involved dealings in *consumers'* funds;
- (2) whether it would be appropriate to petition for a winding up order, bankruptcy order, or sequestration award, in relation to the debtor and the extent to which the transaction could properly be dealt with in that winding up, bankruptcy or sequestration;
- (3) the number of *consumers* or other creditors likely to be affected and their ability to make an application of this nature; and
- (4) the size of the transaction.

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

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

Insolvency regime and relevant sections of the *Act*.

| Insolvency regime | Relevant sections of the Act |
|-----------------------|-------------------------------|
| Administration | Sections 361 and 362(3) |
| Compulsory winding up | Sections 369, 370, and 371(3) |
| Voluntary liquidation | Section 365(4) |
| Receivership | Sections 363(4) and 364 |

| | |
|--|---|
| Bankruptcy and sequestration | Sections 373 and 374(3) |
| Company moratoria Individual voluntary arrangements | Paragraph 44 of schedule A1 to the 1986 Act Section 357(3) - relates to notices of the result of the creditors' meetings. |
| Trust deeds for creditors | Section 358(2)(a) and (b) - relates to copies of trust deeds and copies of certain other documents of information sent to creditors. Section 358(4) - relates to notices of any meeting of creditors held in relation to the trust deed. |

- 13.35 Unless [paragraph 13.36](#) applies, the information and documents identified in 13.34 should be sent to the Financial Services Authority, 25 The North Colonnade, Canary Wharf, London E14 5HS marked 'Insolvency Information'. If the *person* who is subject to the insolvency regime ('the insolvent person') is an *authorised person*, the information and documents should, in the first instance, be addressed to the insolvent person's supervisory contact at the FSA (if known).
- 13.36 If the insolvent person is an *authorised person* and the sender of the information or documents knows that the insolvent person's supervisory contact operates from Edinburgh, information or documents should, in the first instance, be sent to the Financial Services Authority, Quayside House, 127 Fountainbridge, Edinburgh EH3 8DJ.

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

- 13.37 The FSA will exercise its rights under sections 362, 371 and 374 of the *Act* to be heard on a third party's petition or in subsequent hearings only where it believes it has information that it considers relevant to the court's consideration of the petition or application. These circumstances may include:
- (1) where the FSA has relevant information which it believes may not otherwise be drawn to the court's attention; especially where the FSA has been asked to attend for a particular purpose (for example to explain the operation of its rules);
 - (2) where the FSA believes that the *insolvency order* being sought by a third party is inappropriate to meet the needs of *consumers* and the public interest; and
 - (3) where the FSA believes that the making of an *insolvency order* will affect the FSA's exercise of its other powers under the *Act*, and wishes to make the court aware of this.

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

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

- (1) the extent of claims by *consumers* upon the body or individual;
- (2) the extent to which *consumer* assets are held by the body or individual;
- (3) the extent to which the FSA is aware of concerns of *consumers* (or other creditors or contributories) about the way in which the insolvency regime is proceeding;
- (4) whether the circumstances which gave rise to the insolvency regime might have general implications for others carrying on regulated business;
- (5) whether the creditors include *shareholders*, directors, or other *persons* who have a connection with the management or ownership of the body or are associated with the individual;
- (6) the complexity or specialisation of the business of the body or individual; and
- (7) where there is a significant cross border or international element to the business which the *company*, *partnership* or individual is carrying out.

14 Collective Investment Schemes.

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

- 14.1 The FSA will consider all the relevant circumstances of each case and may take a number of factors into account when it decides whether to use these powers. The following list is not exhaustive; not all these factors may be relevant in a particular case and there may be other factors that are relevant.
- (1) The seriousness of the breach or likely breach by a *manager* or *trustee* of a requirement imposed by or under the *Act*. The following may be relevant:
 - (a) the extent to which the *breach* was deliberate or reckless;
 - (b) the extent of loss, or risk of loss, caused to existing, past or potential participants in the *AUT* as a result of the *breach*;
 - (c) whether the *breach* highlights serious or systemic weaknesses in the management or control of either the *AUT* or *scheme property*;
 - (d) whether there are grounds for believing a *breach* is likely to be continued or repeated;
 - (e) the length of time over which the *breach* happened; and
 - (f) whether existing and/or past participants in the *AUT* have been misled in a material way, for example about the investment objectives or policy of the *scheme* or the level of investment risk.
 - (2) The consequences of a failure to satisfy a requirement for the making of an order authorising an *AUT*. The FSA will expect the non-compliance to be resolved as soon as possible. Important factors are likely to be whether existing and/or past *participants* have suffered loss due to the non-compliance and whether remedial steps will be taken to satisfy all the requirements of the order.
 - (3) Whether it is necessary to suspend the issue and redemption of units to protect the interests of existing or potential *participants* in the *AUT*. For example, this may be necessary if:
 - (a) information suggests the current price of units under the *AUT* may not accurately reflect the value *scheme property*; or
 - (b) the *scheme property* cannot be valued accurately.
 - (4) The effect on the interests of *participants* within the scheme of the use of either or both of its powers under sections 254 and 257. However, the FSA will also consider the interests of past and potential *participants*.

- (5) Whether the FSA's concerns can be resolved by taking enforcement action against the *manager* and/or *trustee* of the *AUT*. In some instances, the FSA may consider it appropriate to deal with a *breach* by a *manager* or *trustee* by taking direct enforcement action against the *manager* and/or *trustee* without using its powers under sections 254, 257, or 258. In other instances, the FSA may combine direct enforcement action against a *trustee* and/or *manager* with the use of one or more of the powers under sections 254, 257 and 258.
- (6) Whether there is information to suggest that a *trustee* or *manager* has knowingly or recklessly given the FSA false information. Giving false information is likely to cause very serious concerns, particularly if it shows there is a risk of loss to the *scheme property* or that *participants'* interests have been or may be affected in some other way.
- (7) The conduct of the *manager* or *trustee* in relation to, and following the identification of, the issue, for example:
 - (a) whether the *manager* or *trustee* discovered the issue or problem affecting the *AUT* and brought it to the FSA's attention promptly;
 - (b) the degree to which the *manager* or *trustee* is willing to cooperate with the FSA's investigation and to take protective steps, for example by suspending the issue and redemption of units in the *AUT*;
 - (c) whether the *manager* or *trustee* has compensated past and existing *participants* who have suffered loss.
- (8) The compliance history of the *trustee* or *manager*, including whether the FSA has previously taken disciplinary action against the *trustee* or *manager* in relation to the *AUT* or any other *collective investment scheme*.
- (9) Whether there is information to suggest that the *AUT* is being used for criminal purposes and/or that the *manager* or *trustee* is itself involved in *financial crime*.

Choice of powers

- 14.2 The FSA may use its powers under sections 254, 257 and 258 individually, together, and as well as direct enforcement action against a *trustee* or *manager* in their capacity as *firms*.
- 14.3 Where the FSA has a concern about an *AUT* that must be dealt with urgently, it will generally use its power to give directions under section 257 in the first instance.
- 14.4 The following are examples of situations where the FSA may consider it appropriate to seek a court order under section 258 to remove the *manager* or *trustee*:
 - (1) Where there are grounds for concern over the behaviour of the *manager* or *trustee* in respect of the management of the *scheme* or of its assets.
 - (2) Where a *manager* or *trustee* has breached a requirement imposed on him under the *Act* or has knowingly or recklessly given the FSA false information.

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

Exercise of the powers in respect of ICVCs: regulations 23 (revocation of authorisation), 25 (directions) and 28 (power to apply to court) of the Open-ended Investment Companies Regulations 2001

- 14.6 The factors the FSA may take into account when it decides whether to use one or more of these powers include, but are not limited to, factors which are broadly similar to those in [paragraph 14.1](#) in the context of *AUTs*. However, the relevant conduct will, of course, be that of the *ICVC*, the *director* or *directors* of the *ICVC* and its *depository* (another difference is that the FSA is also able to take disciplinary action against the *ICVC* itself since it will be an *authorised person*). When choosing which powers to use, the FSA will adopt an approach which is broadly similar to that described in [paragraphs 14.2 to 14.5](#).

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

- 14.7 When it decides whether a suspension order under section 267 is appropriate, the FSA will consider all the relevant circumstances. General factors that the FSA may consider include, but are not limited to:
- (1) the seriousness of the breach of *financial promotion* rules by the *operator* (the matters listed at [paragraph 14.1\(1\)\(a\) to \(f\)](#) may be relevant in this context); and
 - (2) the conduct of the *operator* after the *breach* was discovered including whether the *operator* has compensated past and existing *participants* who have suffered loss.

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

Exercise of the powers in respect of recognised schemes: sections 279 and 281 of the Act – powers to revoke recognition of schemes recognised under section 270 or section 272: the FSA's policy

- 14.9 The FSA will consider all the relevant circumstances of each case. The general factors which the FSA may consider include, but are not limited to, those set out in [paragraph 14.1\(1\) to \(9\)](#) (the conduct of the *operator* of the *scheme* and of the *trustee*

or *depository* will also, of course, be taken into account in relation to each of these factors).

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

15 Disqualification of auditors and actuaries

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

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

- 15.2 The FSA recognises that the use of its powers to disqualify auditors and *actuaries* will have serious consequences for the auditors or *actuaries* concerned and their clients; it will therefore exercise its power to impose a disqualification in a way that is proportionate to the particular breach of duty concerned. The FSA will consider the seriousness of the breach of duty when deciding whether to exercise its power to disqualify and the scope of any disqualification.
- 15.3 *Actuaries* appointed by *firms* under rule 4.3.1 of the FSA's Supervision Manual are *approved persons* and as such will be subject to the FSA's *Statements of Principle* and *Code of Practice for Approved Persons*. When deciding whether to exercise its power to disqualify an *actuary* who is an *approved person*, the FSA will consider whether the particular breach of duty can be adequately addressed by the exercise of its disciplinary powers in relation to *approved persons*.
- 15.4 In cases where the nature of the breach of duties imposed on the auditors and *actuaries* under the *Act* (and/or in the case of *actuaries* imposed by *trust scheme rules*) is such that the FSA has concerns about the fitness and propriety of an individual auditor or *actuary*, the FSA will consider whether it is appropriate to make a *prohibition order* instead of, or in addition to, disqualifying the individual.
- 15.5 A disqualification order will be made against the *person* appointed as auditor or *actuary* of the *firm*. In the case of *actuaries*, the disqualification order will be made against the individual appointed by the *firm*. In the case of auditors, the disqualification order will depend on the terms of the appointment. Where the *firm* has appointed a named individual as auditor the disqualification will be made against that individual and this will be the case where the individual concerned is a member of a *firm* of auditors. Where the *firm* has appointed a firm as auditor the disqualification order will be against that firm. Where the *person* appointed is a *limited liability partnership* the disqualification order will be against the *limited liability partnership* rather than its members.

Disqualification under section 345

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

- (1) the nature and seriousness of any breach of rules and the effect of that breach: the rules are set out in *SUP 3* (Auditors) and *SUP 4* (*Actuaries*), and in the case of *firms* which are *ICVCs*, in *COLL 4* (Investor relations) and *COLL 7* (Suspension of dealings and termination of authorised funds). The FSA will regard as particularly serious any breach of *rules* which has resulted in, or is likely to result in, loss to *consumers* or damage to confidence in the *financial system* or an increased risk that a *firm* may be used for the purposes of *financial crime*;
- (2) the nature and seriousness of any breach of the duties imposed under the *Act*: the FSA will regard as particularly serious any failure to disclose to it information which has resulted in, or is likely to result in, loss to *consumers* or damage to confidence in the *financial system* or an increased risk that a *firm* may be used for the purposes of *financial crime*;
- (3) action taken by the auditor or *actuary* to remedy the *breach*: this may include whether the auditor or *actuary* brought the *breach* to the attention of the FSA promptly, the degree of cooperation with the FSA in relation to any subsequent investigation, and whether remedial steps have been taken to rectify the breach and whether reasonable steps have been taken to prevent a similar breach from occurring;
- (4) action taken by professional bodies: the FSA will consider whether any disciplinary action has been or will be taken against the auditor or *actuary* by a relevant professional body and whether that action adequately addresses the particular breach of duty;
- (5) The previous compliance record of the auditor or *actuary* concerned: whether the FSA (or a *previous regulator*) or professional body has imposed any previous disciplinary sanctions on the *firm* or individual concerned.

Disqualification under section 249

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

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

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

- (3) action taken by a relevant professional body: The FSA will consider whether any disciplinary action has or will be taken against the auditor by a relevant professional body and whether such action adequately addresses the particular breach of a duty imposed by *trust scheme rules*;
- (4) the previous compliance record of the auditor concerned: whether the FSA (or a *previous regulator*) or professional body has imposed any previous disciplinary sanctions on the *firm* or individual concerned.

Removal of a disqualification

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

- (1) the seriousness of the breach of duty that resulted in the disqualification;
- (2) the amount of time since the original disqualification; and
- (3) any steps taken by the auditor or *actuary* after the disqualification to remedy the factors which led to the disqualification and any steps taken to prevent a similar breach of duty from happening again.

16 Disapplication orders against members of the professions

The FSA's general approach to making disapplication orders

- 16.1 The FSA's power under section 329 of the *Act* to make an order disapplying an exemption from the *general prohibition* in relation to a *person* who is a *member* of the professions on the grounds that the *member* is not a fit and proper person to conduct *exempt regulated activities*, and to maintain a public record of disapplication orders, will assist the FSA in pursuing its *regulatory objectives*.
- 16.2 The FSA may make a range of disapplication orders depending on the particular circumstances of each case, including the range of *exempt regulated activities* undertaken and the particular *exempt regulated activities* to which the *person's* lack of fitness and propriety in that context is relevant.
- 16.3 The FSA recognises that a decision to make a disapplication order may have serious consequences for a *member* in relation not only to the conduct by the member of *exempt regulated activities*, but also in relation to the other business carried on by the *member*. When it decides whether to exercise its power to make a disapplication order, the FSA will consider all relevant circumstances including whether other action, in particular the making of a *prohibition order* (see chapter 9 of this guide), would be more appropriate. In general, the FSA is likely to exercise its powers to make an order disapplying an exemption where it considers that a *member* of a profession presents such a risk to the FSA's *regulatory objectives* that it is appropriate to prevent the *member* from carrying out the *exempt regulated activities*. The FSA will also have regard to any disciplinary action taken, or to be taken, against the *person* by the relevant *designated professional body*.

Disapplication orders

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

- 16.6 The FSA will also take into account the potentially more serious consequences that a disapplication of an exemption will have for the *member* concerned compared with the consequences of a prohibition of a particular individual engaged in *exempt regulated activities*. However, the FSA may consider it appropriate in some cases to disapply an exemption where it decides that the *member* concerned is not fit and proper to carry out *exempt regulated activities* in accordance with section 327 of the *Act* (Exemption from the general prohibition).
- 16.7 As an alternative to making an order to disapply an exemption, the FSA may consider issuing a private warning. A private warning may be appropriate where the FSA has concerns in relation to a *member's* fitness and propriety but feels that its concerns in relation to the conduct of *exempt regulated activities* can be more appropriately addressed by a private warning than by a disapplication of the *member's* exemption.
- 16.8 When it decides whether to exercise its power to disapply an exemption from the *general prohibition* in relation to a *member*, the FSA will take into account all relevant circumstances which may include, but are not limited to, the following factors:
- (1) Disciplinary or other action taken by the relevant *designated professional body*, where that action relates to the fitness and propriety of the *member* concerned: where the FSA considers that its concerns in relation to the fitness and propriety of the *member* concerned may be, or have been adequately addressed by disciplinary or other action taken by the relevant *designated professional body* it may consider not making a disapplication order in addition to such action; however, where the FSA considers that its concerns, and in particular, any risks presented to the *member's clients* in respect of its *exempt regulated activities*, are not adequately addressed by that action, the FSA will consider making a disapplication order;
 - (2) The significance of the risk which the *member* presents to its *clients*: if the FSA is satisfied that there is a significant risk to *clients* and *consumers* it may consider making a disapplication order;
 - (3) The extent of the *member's* compliance with rules made by the FSA under section 332(1) of the *Act* (Rules in relation to whom the general prohibition does not apply) or by the relevant *designated professional body* under section 332(3) of the *Act*;
- 16.9 Where the FSA is considering whether to exercise its power to make a disapplication order in relation to a *member*, it will liaise closely with the relevant *designated professional body*.
- 16.10 Where the FSA is considering making a disapplication order against a *member* as a result of a breach of *rules* made by the FSA under section 323(1) of the *Act*, it will take into account any proposed application by the *member* concerned for *authorisation* under the *Act*. The FSA may refrain from making a disapplication order pending its consideration of the application for *authorisation*.

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

- 16.11 When considering whether to grant or refuse an application under section 329(3) of the *Act* to vary or revoke a disapplication order, the FSA will take into account all the relevant circumstances. These may include, but are not limited to:
- (1) any steps taken by the *person* to rectify the circumstances which gave rise to the original order;
 - (2) whether the *person* has ceased to present the risk to *clients* and *consumers* or to the FSA's *regulatory objectives* which gave rise to the original order;
 - (3) the circumstances giving rise to the original order and any additional information which, had it been known by the FSA, would have been relevant to the decision to make the order;
 - (4) the amount of time which has elapsed since the order was made.
- 16.12 The FSA will not generally grant an application to vary a disapplication order unless it is satisfied that the proposed variation will not result in the *person* presenting the same degree of risk to *clients* or *consumers* that originally gave rise to the order to disapply the exemption. Similarly, the FSA will not revoke a disapplication order unless and until it is satisfied that the *person* concerned is fit and proper to carry out *exempt regulated activities* generally or those specific *exempt regulated activities* in relation to which the exemption has been disapplied.

The effect of a disapplication order

- 16.13 When the FSA has made a disapplication order, the *member* against which it has been made may not perform the *exempt regulated activities* to which the order relates. If the member contravenes the order, there will be a breach of the *general prohibition* that may be prosecuted under section 23 of the *Act* ([see chapter 12](#)).
- 16.14 A disapplication order in relation to *exempt regulated activities* made against a *member* will be relevant should that *member* subsequently apply for *authorisation* under the *Act*. Whether or not such an application for *authorisation* is successful will depend on many factors, including the FSA's grounds for making the disapplication order. For example, if the order for disapplication of the exemption was made on the grounds of a breach of *rules* made under 332(1) the FSA may accept an application for *authorisation* notwithstanding the disapplication order. If, however, the order was made on grounds of a breach of the rules of a *designated professional body* resulting in a significant risk to *clients* in relation to the provision of *exempt regulated activities*, it is unlikely that an application for approval made by the *member* would be accepted by the FSA before the revocation of the disapplication order.

17 Directions against incoming ECA providers

- 17.1 Under regulation 6 of the *E-Commerce Directive Regulations*, provided certain policy and procedural conditions are met, the FSA may direct that an *incoming ECA provider* may no longer carry on a specified *incoming electronic commerce activity*, or may only carry it on subject to specified requirements.

Electronic commerce activity directions: the FSA's policy

- 17.2 The FSA will exercise the power to make an *electronic commerce activity direction* on a case-by-case basis. When deciding whether to make a direction, the FSA will undertake an assessment of whether the circumstances of the particular case meet the policy conditions set out in regulation 6.
- 17.3 The FSA envisages that its approach to the use of the direction power will be as follows. On obtaining information concerning possible *financial crime* facilitated through or involving an *incoming ECA provider*, or detriment to United Kingdom markets or UK *ECA recipients* caused by the activities of an *incoming ECA provider*, the FSA would contact the relevant *EEA regulator* of the *incoming ECA provider*. The FSA would expect the relevant *EEA regulator* to consider the matter, investigate it where appropriate and keep the FSA informed about what action, if any, was being taken. The FSA may not need to be involved further if the action by the relevant *EEA regulator* addresses the FSA's concerns.
- 17.4 However, there are likely to be circumstances in which the FSA will need to use the *electronic commerce activity direction* power. Examples could include where it was necessary to stop the behaviour complained of, or to make the continued provision of services by the *incoming ECA provider* conditional upon compliance with specified requirements. Overall, the FSA may use the direction power:
- (1) Where:
 - (a) the behaviour complained of was causing, or had the potential to cause, major detriment to *consumers* in the United Kingdom; or
 - (b) the *incoming ECA provider's* activities have been used, or have the potential to be used, to facilitate serious *financial crime* or to launder the proceeds of a crime; or
 - (c) the making of the direction is considered to be necessary for other reasons of public policy relevant to the *regulatory objectives*; and
 - (2) Either:
 - (a) the relevant *EEA regulator* is unable to take action, or has not within a reasonable time taken action which appears to the FSA to be adequate; or
 - (b) the relevant *EEA regulator* and the FSA agree that, having regard to the circumstances of the particular case, action against the wrong-doing would be taken more effectively by the FSA.

- 17.5 The question of whether the FSA decided to prevent or prohibit the *incoming electronic commerce activity*, or to make it subject to certain requirements (for example, compliance with specified rules), will depend on the overall circumstance of the case. A relevant consideration will be whether the FSA is satisfied that its concerns over the *incoming electronic commerce activity* can be adequately addressed through the imposition of a requirement, rather than a complete prohibition on the activity. Set out below is a list of factors the FSA may consider. The list is not exhaustive.
- (1) The extent of any loss, or risk of loss, or other adverse effect on UK *ECA recipients*: The more serious the loss or potential loss or other adverse effect on them, the more likely it is that the FSA's exercise of its powers to prohibit the activity altogether will be appropriate, to protect the interests of UK *ECA recipients*.
 - (2) The extent to which customer assets appear to be at risk.
 - (3) The risk that the *incoming ECA provider's* activities may be used or have been used to facilitate *financial crime* or to launder the proceeds of a crime: Information available to the FSA, including information supplied by other law enforcement agencies, may suggest that the *incoming ECA provider* is being used for, or is itself involved in, *financial crime*. Where this appears to be the case, a direction that the *incoming electronic commerce activity* should cease may be appropriate.
 - (4) The risk that the *incoming ECA provider's* activities present to the *financial system* and to confidence in the *financial system*.
 - (5) The impact that a complete prohibition on the activity would have on UK *ECA recipients*.
- 17.6 The FSA may consider that a case is urgent, in particular, where:
- (1) the information available to it indicates serious concerns about the *incoming electronic commerce activity* that need to be addressed immediately; and
 - (2) circumstances indicate that it is appropriate to use the direction power immediately to prohibit the *incoming electronic commerce activity*, or to make the carrying on of the activity subject to specified requirements.
- 17.7 The FSA will consider the full circumstances of the case when deciding whether exercising the direction power without first taking the procedural steps set out in Regulation 6 is an appropriate response to such concerns. The factors the FSA may consider include those listed in [paragraph 17.5 \(1\) to \(5\)](#) of this guide. There may be other relevant factors.
- Decision making**
- 17.8 The FSA's decision to make, revoke or vary an *electronic commerce activity direction* will generally be taken by the RDC Chairman. However, this is subject to two exceptions.

- (1) In an urgent case and if the Chairman is not available, the decision will be taken by an *RDC* Deputy Chairman and where possible, but subject to the need to act swiftly, one other *RDC* member.
 - (2) If a provider who has been notified of the FSA's intention to make a direction or to vary a direction on its own initiative makes representations within the period and in the manner required by the FSA, then those representations will be considered by the *RDC*, rather than by the *RDC* Chairman alone. Having taken into account the provider's representations, the *RDC* will then decide whether to make the direction, or to vary the existing direction.
- 17.9 Where a provider must be given the opportunity to make representations to the FSA in relation to a proposed direction or variation of a direction, the *RDC* Chairman will determine in each case the manner and the period within which those representations should be made.

Publicity

- 17.10 Regulation 10(8) of the *ECD Regulations* provides that if the FSA makes a direction, it may publish, in such manner as it considers appropriate, such information about the matter to which the direction relates as it considers appropriate in furtherance of any of the objectives referred to in [paragraph 17.4\(1\)](#) of this guide. However, under regulation 10(9), the FSA may not publish information relating to a direction if publication would, in the FSA's opinion, be unfair to the provider to whom the direction applies or prejudicial to the interests of *consumers*.
- 17.11 When deciding what information, if any, to publish and the appropriate manner of publication, the FSA will consider the full circumstances of each case. The FSA anticipates that it will generally be appropriate to publish relevant details of a direction, in order to protect and inform *consumers*. However, in accordance with the regulation 10(9) prohibition, it will not publish information if it considers that publication would be unfair to the provider or prejudicial to the interests of *consumers*.

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

- 18.1 The FSA may cancel a *sponsor's* approval under section 88 of the *Act* if it considers that a *sponsor* has failed to meet the criteria for approval as a *sponsor* as set out in *LR 8.6.5R*.
- 18.2 When considering whether to cancel a *sponsor's* approval on its own initiative, the FSA will take into account all relevant factors, including, but not limited to, the following:
- (1) the competence of the *sponsor*;
 - (2) the adequacy of the *sponsor's* systems and controls;
 - (3) the *sponsor's* history of compliance with the *listing rules*;
 - (4) the nature, seriousness and duration of the suspected failure of the *sponsor* to meet (at all times) the criteria for approval as a *sponsor* set out in *LR 8.6.5R*;
 - (5) any matter which the FSA could take into account if it were considering an application for approval as a *sponsor* made under section 88(3)(d) of the *Act*.

**Annex 1 – Table of investigation and enforcement powers not discussed in this guide
(see paragraph 1.6)**

| Legislation | Nature of investigation or enforcement power |
|--|---|
| Friendly Societies Act 1992 | Power to present petitions for the winding up by the court of incorporated friendly societies (section 22) |
| Friendly Societies Act 1974 | Powers to carry out inspections of books and to prosecute friendly societies for failure to submit annual return to the FSA (section 98) |
| Buildings Societies Act 1986 | Functions under the <i>Act</i> for example to investigate a firm's business or suspected breaches by a firm, to vary or cancel a firm's permission, to take disciplinary action against a firm, to apply to court for injunctions |
| Industrial and Provident Societies Act 1965 | Functions under the <i>Act</i> (e.g. Power to cancel registration of society (section 16), Inspection of books (section 47), Production of documents and provision of information for certain purposes (section 48); appointment of inspectors and calling of special meetings (section 49), power of registrar a petition for winding up (section 56) power to prosecute IPS for failure to submit annual return to the FSA (section 61) |
| Enterprise Act and Enterprise Act 2002 (Part 8) | FSA designated as a designated enforcer and a CPC enforcer under Part 8 of this Act |
| Proceeds of Crime Act 2002 | FSA staff may be designated as an accredited financial investigator for purpose of applying for restraining orders and confiscations investigations (Proceeds of Crime Act 2002 (References to Financial Investigators) Order 2003) s. 42(2)(c), 68(3)(c), 191(2)(c), 216(3)(c), 378(1)(b), 378(2)(d) |
| Insurance Accounts Directive (Lloyd's Syndicate and Aggregate Accounts) Regulations 2004 | Power to institute proceedings for an offence under these Regulations 2004 (section 16) |
| Credit Institutions (Reorganisation and Winding Up) Regulations 2004 | Power under section 45 of the <i>Act</i> to vary or cancel the UK credit institution's permission under Part IV of the <i>Act</i> to accept deposits or to issue electronic money as the case may be. (Reg 11(3)) |
| Financial Services (Distance Marketing) Regulations 2004 | FSA is an enforcement authority, in respect of 'specified contracts' for the purposes of reg. 18, 19, 22 (power to consider any complaint made to it about a breach (s. 18), power to apply for an injunction (including an interim injunction) against any person who appears to be responsible for a breach (s. 19), power to institute proceedings for an offence under these Regulations (s. 22)). |

| | |
|---|--|
| Financial Conglomerates Directive and Other Financial Groups Regulations 2004 Reg. 15 | Extension of power to vary <i>Part IV permission</i> |
| Regulated Activities Order Art. 95 | Power directly to de-register insurance intermediaries if not fit and proper |

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

Purpose, status and application of the guidelines

1. These guidelines have been agreed by the following bodies (the agencies):
 - the Financial Services Authority (the FSA);
 - the Serious Fraud Office (the SFO);
 - the Department of Trade and Industry (the DTI);
 - the Crown Prosecution Service (the CPS);
 - the Association of Chief Police Officers in England, Wales and Northern Ireland (ACPO);
 - the Crown Office;
 - the Department of the Director of Public Prosecutions for Northern Ireland (the DPP(NI));
 - the Association of Chief Police Officers in Scotland (ACPO(S)).
2. The guidelines are intended to assist the agencies when considering cases concerning financial crime and/or regulatory misconduct that are, or may be, of mutual interest to the FSA and one or more of the other agencies. Their implementation and wider points arising from them will be kept under review by the agencies who will liaise regularly.
3. The purpose of the guidelines is to set out some broad principles which the agencies agree should be applied by them in order to assist them to:
 - (a) decide which of them should investigate such cases;
 - (b) co-operate with each other, particularly in cases where more than one agency is investigating;
 - (c) prevent undue duplication of effort by reason of the involvement of more than one agency;
 - (d) prevent the subjects of proceedings being treated unfairly by reason of the unwarranted involvement of more than one agency.
4. The guidelines are intended to apply to the relationships between the FSA and the other agencies. They are not intended to apply to the relationships between those other agencies themselves where there is no FSA interest. They are not

legally binding.

5. The guidelines are subject to the restrictions on disclosure of information held by the agencies. They are not intended to override them.
6. The guidelines are relevant to ACPO and ACPO(S) only in so far as they relate to investigations. Similarly, they are relevant to the CPS and the DPP(NI) only in so far as they relate to prosecutions.

Commencing Investigations

7. The agencies recognise that there are areas in which they have an overlapping remit in terms of their functions and powers (the powers and functions of the agencies are set out in the Appendix to this document). The agencies will therefore endeavour to ensure that only the agency or agencies with the most appropriate functions and powers will commence investigations.
8. The agencies further recognise that in certain cases concurrent investigations may be the most quick, effective and efficient way for some cases to be dealt with. However, if an agency is considering commencing an investigation and another agency is already carrying on a related investigation or proceedings or is otherwise likely to have an interest in that investigation, best practice is for the agencies concerned to liaise and discuss which agency or agencies should take action, i.e. investigate, bring proceedings or otherwise deal with the matter.

Indicators for deciding which agency should take action

9. The following are indicators of whether action by the FSA or one of the other agencies is more appropriate. They are not listed in any particular order or ranked according to priority. No single feature of the case should be considered in isolation, but rather the whole case should be considered in the round.

(a) Tending towards action by the FSA

- Where the suspected conduct in question gives rise to concerns regarding market confidence or protection of consumers of services regulated by the FSA.
- Where the suspected conduct in question would be best dealt with by:
 - criminal prosecution of offences which the FSA has powers to prosecute by virtue of the Financial Services and Markets Act 2000 ("the 2000 Act") (See Appendix paragraph 1.4) and other incidental offences;
 - civil proceedings under the 2000 Act (including applications for injunctions, restitution and to wind up firms carrying on

- regulated activities);
 - regulatory action which can be referred to the Financial Services and Markets Tribunal (including proceedings for market abuse); and
 - proceedings for breaches of Part VI of the *Act*, of *Part 6 rules* or the *Prospectus Rules* or a provision otherwise made in accordance with the *Prospectus Directive* .
- Where the likely defendants are FSA authorised or approved persons.
- Where the likely defendants are issuers or sponsors of a security admitted to the official list or in relation to which an application for listing has been made.
- Where there is likely to be a case for the use of FSA powers which may take immediate effect (e.g. powers to vary the permission of an authorised firm or to suspend listing of securities).
- Where it is likely that the investigator will be seeking assistance from overseas regulatory authorities with functions equivalent to those of the FSA.
- Where any possible criminal offences are technical or in a grey area whereas regulatory contraventions are clearly indicated.
- Where the balance of public interest is in achieving reparation for victims and prosecution is likely to damage the prospects of this.
- Where there are distinct parts of the case which are best investigated with regulatory expertise.

(b) Tending towards action by one of the other agencies

- Where serious or complex fraud is the predominant issue in the conduct in question (normally appropriate for the SFO).
- Where the suspected conduct in question would be best dealt with by:
 - criminal proceedings for which the FSA is not the statutory prosecutor;
 - proceedings for disqualification of directors under the Company Directors Disqualification Act 1986 (normally appropriate for DTI)

action);

- winding up proceedings which FSA does not have statutory powers to bring (normally appropriate for DTI action); or
- criminal proceedings in Scotland.

- Where the conduct in question concerns the abuse of limited liability status under the Companies Acts (normally appropriate for DTI action).
- Where powers of arrest are likely to be necessary.
- Where it is likely that the investigator will rely on overseas organisations (such as law enforcement agencies) with which the other agencies have liaison.
- Where action by the FSA is likely to prejudice the public interest in the prosecution of offences for which the FSA is not a statutory prosecutor.
- Where the case falls only partly within the regulated area (or criminal offences for which FSA is a statutory prosecutor) and the prospects of splitting the investigation are not good.

10. It is also best practice for the agencies involved or interested in an investigation to continue to liaise as appropriate throughout in order to keep under review the decisions as to who should investigate or bring proceedings. This is particularly so where there are material developments in the investigation that might cause the agencies to reconsider its general purpose or scope and whether additional investigation by others is called for.

Conduct of concurrent investigations

11. The agencies recognise that where concurrent investigations are taking place, action taken by one agency can prejudice the investigation or subsequent proceedings brought by another agency. Consequently, it is best practice for the agencies involved in concurrent investigations to notify each other of significant developments in their investigations and of any significant steps they propose to take in the case, such as:

- interviewing a key witness;
- requiring provision of significant volumes of documents;
- executing a search warrant; or
- instituting proceedings or otherwise disposing of a matter.

12. If the agencies identify that particular action by one party might prejudice an investigation or future proceedings by another, it is desirable for the parties concerned to discuss and decide what action should be taken and by whom. In reaching these decisions, they will bear in mind how the public interest is best served overall. The examples provided in paragraph 9 above may also be used as indicators of where the overall balance of interest lies.

Deciding to bring proceedings

13. The agencies will consider, as necessary, and keep under review whether an investigation has reached the point where it is appropriate to commence proceedings. Where agencies are deciding whether to institute criminal proceedings, they will have regard to the usual codes or guidance relevant to that decision. For example, agencies other than the DPP(NI) or the Crown Office will have regard to the Code for Crown Prosecutors (Note: Different guidance applies to the DPP(NI) and the Crown Office. All criminal proceedings in Scotland are the responsibility of the Lord Advocate. Separate arrangements have been agreed between the FSA and the Crown Office for the prosecution of offences in Scotland arising out of FSA investigations). Where they are considering whether to bring non-criminal proceedings, they will take into account whatever factors they consider relevant (for example, in the case of market abuse proceedings brought by the FSA, these are set out in paragraph 14.4 of the FSA Enforcement manual).
14. The agencies recognise that in taking a decision whether to commence proceedings, relevant factors will include:
 - whether commencement of proceedings might prejudice ongoing or potential investigations or proceedings brought by other agencies; and
 - whether, in the light of any proceedings being brought by another party, it is appropriate to commence separate proceedings against the person under investigation.
15. Best practice in these circumstances, therefore, is for the parties concerned to liaise before a decision is taken.

Closing Cases

16. It is best practice for the agencies, at the conclusion of any investigation where it is decided that no further action need be taken, or at the conclusion of proceedings, to notify any other agencies concerned of the outcome of the investigation and/or proceedings and to provide any other helpful feedback.

APPENDIX TO THE GUIDELINES ON INVESTIGATION OF CASES OF INTEREST OR CONCERN TO THE FINANCIAL SERVICES AUTHORITY AND OTHER PROSECUTING AND INVESTIGATING AGENCIES

1. The FSA

1.1 The FSA is the single statutory regulator for all financial business in the UK. Its regulatory objectives under the Financial Services and Markets Act 2000 (the 2000 Act) are:

- market confidence;
- public awareness;
- the protection of consumers; and
- the reduction of financial crime.

(**Note:** The 2000 Act repealed and replaced various enactments which conferred powers and functions on the FSA and other regulators whose functions are now carried out by the FSA. Most notable in this context are the Financial Services Act 1986 and the Banking Act 1987. Transitional provisions under the 2000 Act permit the FSA to continue to investigate and bring proceedings for offences under the old legislation. Details of these transitional provisions are not set out in these guidelines)

1.2 The *FSA's regulatory objectives* as the competent authority under Part VI of the *Act* are:

- the protection of investors;
- access to capital; and
- investor confidence.

1.3 Under the 2000 Act the FSA has powers to investigate concerns including:

- regulatory concerns about authorised *firms* and individuals employed by them;
- suspected *market abuse* under s.118 of the 2000 Act;
- suspected misleading statements and practices under s.397 of the 2000 Act;
- suspected *insider dealing* under of Part V of the Criminal Justice Act 1993;
- suspected contraventions of the general prohibition under s.19 of the 2000 Act and related offences;

- suspected offences under various other provisions of the 2000 Act (see below);
- suspected breaches of Part VI of the *Act*, of *Part 6 rules* or the *prospectus rules* or a provision otherwise made in accordance with the *Prospectus Directive*.

The FSA's powers of information gathering and investigation are set out in Part XI of the 2000 Act and in s.97 in relation to its Part VI functions.

1.4 The FSA has power to take the following enforcement action:

- discipline authorised firms under Part XIV of the 2000 Act and approved persons under s.66 of the 2000 Act;
- impose civil penalties in cases of market abuse under s.123 of the 2000 Act;
- prohibit an individual from being employed in connection with a regulated activity, under s.56 of the 2000 Act;
- apply to Court for *injunctions* (or interdicts) and other orders against persons contravening relevant requirements (under s.380 of the 2000 Act) or engaging in *market abuse* (under s.381 of the 2000 Act);
- petition the court for the winding up or administration of companies, and the bankruptcy of individuals, carrying on *regulated activities*;
- apply to the court under ss.382 and 383 of the 2000 Act for restitution orders against persons contravening relevant requirements or persons engaged in *market abuse*;
- require restitution under s.384 of the 2000 Act of profits which have accrued to authorised persons contravening relevant requirements or persons engaged in *market abuse*, or of losses which have been suffered by others as a result of those *breaches*;
- (in England and Wales) prosecute offences under the Money Laundering Regulations 1993, Part V Criminal Justice Act 1993 (insider dealing) and various offences under the 2000 Act including (**Note:** The FSA may also prosecute any other offences which are incidental to those which it has express statutory power to prosecute):
 - carrying on *regulated activity* without authorisation or exemption, under s.23;
 - making false claims to be authorised or exempt, under s.24;

- promoting investment activity without authorisation, under s.25;
 - breaching a prohibition order, under s.56;
 - failing to co-operate with or giving false information to FSA appointed investigators, under s.177;
 - failing to comply with provisions about influence over authorised persons, under s.191;
 - making misleading statements and engaging in misleading practices, under s.397;
 - misleading the FSA, under s.398;
 - various offences in relation to the *FSA's* Part VI function;
- Fine, issue public censures, suspend or cancel listing for breaches of the Listing Rules by an issuer; and
 - Issue public censures or cancel a sponsor's approval.

2. DTI

- 2.1 The Secretary of State for Trade & Industry exercises concurrently with the FSA those powers and functions marked with an asterisk in paragraphs 1.3 above. The investigation functions are undertaken by Companies Investigation Branch (CIB) and the prosecution functions by the Solicitors Office.
- 2.2 The principal activities of CIB are, however, the investigations into the conduct of companies under the Companies Acts and the Fair Trading Act. These are fact-finding investigations but may lead to follow-up action by CIB such as petitioning for the winding up of a company, disqualification of directors of the company or referring the matter to the Solicitors Office for prosecution. CIB may also disclose information to other prosecution or regulatory authorities to enable them to take appropriate action under their own powers and functions. Such disclosure is, however, strictly controlled under a gateway disclosure regime.
- 2.3 The Solicitors Office advises on investigation work carried out by CIB and undertakes criminal investigations and prosecutions in respect of matters referred to it by CIB, the Insolvency Service or other divisions of the DTI or its agencies.

3. SFO

- 3.1 The aim of the SFO is to contribute to:

- reducing fraud and the cost of fraud;
- the delivery of justice and the rule of law;
- maintaining confidence in the UK's business and financial institutions.

3.2 Under the Criminal Justice Act 1987 the Director of the SFO may investigate any suspected offence which appears on reasonable grounds to involve serious or complex fraud and may also conduct, or take over the conduct of, the prosecution of any such offence. The SFO may investigate in conjunction with any other person with whom the Director thinks it is proper to do so; that includes a police force (or the FSA or any other regulator). The criteria used by the SFO for deciding whether a case is suitable for it to deal with are set out in paragraph 3.3.

3.3 The key criterion should be that the suspected fraud is such that the direction of the investigation should be in the hands of those who would be responsible for any prosecution.

The factors that are taken into account include:

- whether the amount involved is at least £1 million (this is simply an objective and recognisable signpost of seriousness and likely public concern rather than the main indicator of suitability);
- whether the case is likely to give rise to national publicity and widespread public concern. That includes those involving government bodies, public bodies, the governments of other countries and commercial cases of public interest;
- whether the case requires highly specialist knowledge of, for example, stock exchange practices or regulated markets;
- whether there is a significant international dimension;
- whether legal, accountancy and investigative skills need to be brought together; and
- whether the case appears to be complex and one in which the use of Section 2 powers might be appropriate.

4. CPS

4.1 The CPS has responsibility for taking over the conduct of all criminal proceedings instituted by the police in England and Wales. The CPS may advise the police in respect of criminal offences. The CPS prosecutes all kinds of criminal offences, including fraud. Fraud cases may be prosecuted by local CPS offices but the most serious and complex fraud cases will be prosecuted centrally.

5. ACPO and ACPO(S)

- 5.1 ACPO represents the police forces of England, Wales, and Northern Ireland. ACPO(S) represents the police forces of Scotland.

6. The Crown Office

- 6.1 The investigation and prosecution of crime in Scotland is the responsibility of the Lord Advocate, who is the head of the Procurator Fiscal Service, which comprises Procurators Fiscal and their Deputies, who are answerable to the Lord Advocate. The Procurator Fiscal is the sole public prosecutor in Scotland, prosecuting cases reported not only by the police but all regulatory departments and agencies. All prosecutions before a jury, both in the High Court of Justiciary and in the Sheriff Court, run in the name of the Lord Advocate; all other prosecutions run in the name of the local Procurator Fiscal. The Head Office of the Procurator Fiscal Service is the Crown Office and the Unit within the Crown Office which deals with serious and complex fraud cases and with the investigation of cases of interest or concern to the Financial Services Authority is the Fraud and Specialist Services Unit: the remit of this Unit is directly comparable to that of the Serious Fraud Office.

7. The DPP(NI)

- 7.1 The DPP(NI) is responsible for the prosecution of all offences on indictment in Northern Ireland, other than offences prosecuted by the Serious Fraud Office. The DPP(NI) is also responsible for the prosecution of certain summary offences, including offences reported to it by any government department.

Transitional provisions applying to the Enforcement Guide

| (1) | (2) Material to which the transitional provision applies | (3) | (4) Transitional provision | (5) Transitional provision dates in force: | (6) Regulatory Guide provision coming into force |
|-----|---|-----|---|---|---|
| 1 | <i>EG</i> | | <p><i>EG</i> takes effect on 28 August 2007, save to the extent described below.</p> <p>The <i>FSA</i>'s enforcement policy will continue to be as described in the Enforcement manual (ENF) in relation to any <i>statutory notice</i> or related notice given on or after 28 August where a <i>warning notice</i>, first <i>supervisory notice</i> or <i>decision notice</i> was given by the <i>FSA</i> before 28 August in relation to the same matter.</p> | From 28 August 2007 | 28 August 2007 |

Annex B

Amendments to the Enforcement Guide (EG)

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

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

- 3.8 Where the FSA has decided that an investigation is appropriate (see chapter 2) and it appears to it that there are circumstances suggesting that contraventions or offences set out in section 168 may have happened, the FSA will normally appoint investigators pursuant to section 168. Where the circumstances do not suggest any specific breach or contravention covered by section 168, but, the FSA still has concerns about a *firm*, an *appointed representative*, a recognised investment exchange or an *unauthorised incoming ECA provider*, such that it considers there is good reason to conduct an investigation into the nature, conduct or state of the *person's* business or a particular aspect of that business, or into the ownership or control of an *authorised person*, the FSA may appoint investigators under section 167.
- 8.14 The grounds on which the FSA may exercise its power to cancel an authorised person's permission under section 45 of the *Act* are set out in section 45(1). Examples of the types of circumstances in which the FSA may cancel a *firm's Part IV permission* include:
- (1) non-compliance with a *Financial Ombudsman Service* award against the *firm*;
 - (2) material non-disclosure in an application for authorisation or approval or material non-notification after authorisation or approval has been granted. The information which is the subject of the non-disclosure or non-notification may also be grounds for cancellation;
 - (3) failure to have or maintain professional indemnity insurance, or other adequate financial resources;
 - (4) non-submission of regulatory returns, or repeated failure to submit such returns in a timely fashion;
 - (5) non-payment of FSA fees or repeated failure to pay FSA fees except under threat of enforcement action; and
 - (6) failure to provide the FSA with valid contact details or failure to maintain the details provided, such that the FSA is unable to communicate with the *firm*.

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

- 8.27 ~~Save in urgent cases, the FSA will seek, and take account of, the views of the *firm's Home State regulator* when it is considering action against an *incoming firm*. When it~~

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

- 9.9 When it decides whether to make a *prohibition order* against an *approved person* and/or withdraw its approval, the FSA will consider all the relevant circumstances of the case. These may include, but are not limited to those set out below.
- (1) The matters set out in section 61(2) of the *Act*.
 - (2) Whether the individual is fit and proper to perform functions in relation to *regulated activities*. The criteria for assessing the fitness and propriety of *approved persons* are set out in *FIT 2.1* (Honesty, integrity and reputation); *FIT 2.2* (Competence and capability) and *FIT 2.3* (Financial soundness).
 - (3) Whether, and to what extent, the *approved person* has:
 - (a) failed to comply with the *Statements of Principle* issued by the FSA with respect to the conduct of *approved persons*; or
 - (b) been knowingly concerned in a contravention by the relevant *firm* of a requirement imposed on the *firm* by or under the *Act* (including the *Principles* and other *rules*) or failed to comply with any directly applicable Community regulation made under *MiFID*.

...

EG 10.2 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 made under *MiFID*; or which is imposed by or under any other *Act* and whose contravention constitutes 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*.

- 11.5 However, there may be circumstances in which the FSA will choose to use the powers under section 382 or section 383 of the *Act* to apply to the court for an order for restitution against a *firm*. Those circumstances may include, for example, where:
- (1) the FSA wishes to combine an application for an order for restitution with other court action against the *firm*, for example, where it wishes to apply to the court for an *injunction* to prevent the *firm* breaching a relevant requirement of the *Act* or any directly applicable Community regulation made under *MiFID*; the FSA's powers to apply for *injunctions* restraining *firms* from breaching relevant requirements of the *Act* or any directly applicable Community regulation under *MiFID* are discussed in chapter 10 of this guide;

...

Other relevant powers

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

Unfair Contract Terms Regulatory Guide

UNFAIR CONTRACT TERMS REGULATORY GUIDE INSTRUMENT 2007

Powers exercised

- A. The Financial Services Authority makes this instrument in the exercise of the power in section 157(1) (Guidance) of the Financial Services and Markets Act 2000.

Commencement

- B. This instrument comes into force on 28 August 2007.

General guidance on Unfair Contract Terms

- C. General guidance on Unfair Contract Terms is made in the form of the Annex to this instrument. This guidance is a Regulatory Guide and does not form part of the Handbook.

Citation

- D. This instrument may be cited as the Unfair Contract Terms Regulatory Guide Instrument 2007.
- E. The Regulatory Guide in the Annex to this instrument may be cited as the Unfair Contract Terms Regulatory Guide (or UNFCOG).

By order of the Board
26 July 2007

Annex

Unfair Contract Terms Regulatory Guide (UNFCOG)

In this Annex, all the text is new and is not underlined.

1.1 Application and purpose

- 1.1.1 G This Guide explains the *FSA's* policy on how it will use its powers under the *Unfair Terms Regulations* (the Regulations)
- 1.1.2 G We have agreed with the Office of Fair Trading ('OFT') that the *FSA* will consider the fairness (within the meaning of the Regulations) of financial services contracts for carrying on any *regulated activity*.
- 1.1.3 G The OFT will consider the fairness of other financial services contracts which involve activities governed by the Consumer Credit Act 1974. This includes second-charge mortgage loans, buy-to-let mortgages, and non-mortgage personal loans (including credit cards). Also, where the firm concerned is not a *firm* or an *appointed representative*, the OFT may take enforcement action under the Regulations in respect of financial services contracts involving the carrying on of *regulated activities* (see *EG* 10.16 and 10.17).
- 1.1.4 G This Guide applies to:
- (1) *firms*;
 - (2) *appointed representatives*; and
 - (3) other *persons*, whether or not a *person* with *permission*, who use, or recommend the use of, contracts to carry on *regulated activities*.
- 1.1.5 G This Guide uses "firm" to refer to all such persons.

1.2 Introduction

- 1.2.1 G This Guide explains the *FSA's* formal powers under the Regulations. It does not contain comprehensive *guidance* on the Regulations themselves, and you should refer to those Regulations for further details.
- 1.2.2 G This Guide also provides *guidance* on the approach we take before considering whether to exercise our formal powers under the Regulations.
- 1.2.3 G The *FSA* has powers as a qualifying body under the Regulations. The Regulations are not made under the *Act*, but, under the Regulations our functions are treated as functions under the *Act*. This:

- (1) makes the *regulatory objectives* relevant to forming policy that governs the discharge of our functions under the Regulations;
- (2) means that any complaints about the *FSA's* activities under the Regulations can be referred to the *Complaints Commissioner*;
- (3) allows the *FSA* to make full use of its information disclosure powers;
- (4) allows the *FSA* to use its power to give *guidance*;
- (5) protects the *FSA* against liability in damages in respect of its activities under the Regulations; and
- (6) allows the *FSA* to raise fees to fund its activities under the Regulations.

- 1.2.4 G
- (1) As such, we publish on our website details of cases that result in a change in the contract terms used by the firm. This may happen through either an undertaking by a firm or injunction obtained from the courts.
 - (2) Under regulation 14 of the Regulations the *FSA* has a duty to pass details of these cases to the OFT.
 - (3) The OFT also publishes details of cases that it, and other qualifying bodies, have dealt with in accordance with the OFT's duties under regulation 15 of the Regulations.

1.3 The Unfair Terms Regulations

Terms to which the Regulations apply

- 1.3.1 G
- (1) The Regulations apply, with certain exceptions, to terms in contracts concluded between a seller or supplier and a *consumer* which have not been individually negotiated.
 - (2) Terms cannot be reviewed for fairness within the meaning of the Regulations if they are terms which reflect:
 - (a) mandatory statutory or regulatory provisions; or
 - (b) the provisions or principles of international conventions to which the *EEA States* or the European Community as a whole are party.
 - (3) Terms written in plain, intelligible language cannot be reviewed for fairness within the meaning of the Regulations if the terms relate to:
 - the definition of the main subject matter of the contract; or
 - the adequacy of the price or remuneration, as against the goods

or services supplied in exchange.

However, we can review terms concerning these matters for fairness within the meaning of the Regulations if they are not written in plain, intelligible language. We do not consider that it is enough that a lawyer could understand the term for it to be excluded from such a review. The term must be plain and intelligible to the *consumer*.

When a term is 'unfair' within the meaning of the Regulations

- 1.3.2 G Terms are regarded as unfair if, contrary to the requirement of good faith, they cause a significant imbalance in the parties' rights and obligations to the detriment of the *consumer*.

The main powers of the courts and qualifying bodies under the Regulations

- 1.3.3 G (1) Under regulation 13 we have the power to request, for certain purposes:
- '(a) a copy of any document which that person has used or recommended for use, [...] as a pre-formulated standard contract in dealings with consumers;
 - (b) information about the use, or recommendation for use, by that person of that document or any other such document in dealings with consumers.'
- 1.3.4 G (1) Unless the case is urgent, we will generally first write to a firm to express our concern about the potential unfairness of a term or terms (within the meaning of the Regulations) and will invite the firm to comment on those concerns. If we still believe that the term is unfair, we will normally ask the firm to stop including the term in new contracts and to stop relying on it in any concluded contracts. If the firm either declines to give an undertaking, or gives an undertaking but fails to follow it, the FSA will consider the need to apply to the courts for an injunction under regulation 12.
- (2) In deciding whether to ask a firm to undertake to stop including a term in new contracts and to stop relying on it in concluded contracts, we will consider the full circumstances of each case. Several factors may be relevant for this purpose and the following list is not exhaustive, but will give some indication of the sorts of things we consider:
- (a) whether we are satisfied that the contract term may properly be regarded as unfair within the meaning of the Regulations;
 - (b) the extent and nature of the detriment to *consumers* resulting from the term or the potential harm which could result from the term;
 - (c) whether the firm has fully cooperated with the FSA in resolving our concerns about the fairness of the particular contract term.

- 1.3.5 G Regulation 12 states that:
- '(1) The [OFT] or [...] any qualifying body may apply for an injunction (including an interim injunction) against any person appearing to them to be using, or recommending the use of, an unfair term drawn up for general use in contracts concluded with consumers'.
 - '(3) The court, on an application under this regulation, may grant an *injunction* on such terms as it thinks fit.'

The *FSA* is a qualifying body for the purposes of regulation 12. Our approach to seeking an injunction under the Regulations is set out in Chapter 10 of *EG*.

- 1.3.6 G Regulation 8 states that an unfair term is not binding on the *consumer* but that the contract will continue to bind the parties if it is capable of continuing in existence without the unfair term. Therefore, if the court finds that the term in question is unfair, the firm would have to stop relying on the unfair term in existing contracts governed by the Regulations.

1.4 The Unfair Terms Regulations: the FSA's role and policy

- 1.4.1 G The *FSA* may consider the fairness of a contract within the meaning of the Regulations following a complaint from a *consumer* or other person or on its own initiative if the contract is within its scope.
- 1.4.2 G There are three main ways in which we might receive a complaint from a *consumer* or other person. These are:
- (1) directly; or
 - (2) from another qualifying body which considers that the *FSA* should deal with the complaint; or
 - (3) from the OFT.
- 1.4.3 G
- (1) The main way in which we would act on our own initiative is to undertake a review of contracts in a particular area of business. This might involve looking at the contract terms used by several firms in a particular sector.
 - (2) We will, for example, consider launching such a review if multiple *consumer* contract complaints or other intelligence lead us to believe that under the Regulations there may be a contractual issue of wider significance to firms and *consumers*.
- 1.4.4 G If, following either a complaint or an own-initiative review, we consider that a term in a contract is unfair, we may challenge firms about their use of that term.

Interaction with the FSA's powers under the Act

- 1.4.5 G (1) The *FSA* will consider using its powers under the Regulations in the context of its wider regulatory powers under the *Act*.
- (2) In some cases, it might be appropriate for us to use other powers to deal with issues identified under the Regulations. The powers available to the *FSA* under the *Act* may vary depending on the *regulated activities* which the firm carries out. For example, the use of the unfair term might involve a breach of a *Principle* or a *rule* in *COB*, *MCOB* or *ICOB*. If so, the *FSA* might also address the issue as a *rule* breach.
- (3) We may, in some circumstances, consider treating the matter under our powers in the *Act* itself and also under the Regulations.
- (4) However, the use of our powers under the *Act* will not be possible in all cases where a firm has used an unfair term. If we consider using an enforcement power under the *Act*, we will do so in accordance with the policy relating to that power as set out in *EG*.

1.5 Risk Management

- 1.5.1 G (1) Where a firm has given an undertaking or a court has ruled the firm's term unfair, then the *FSA* considers it desirable that the firm should promptly notify clients with whom it has already concluded contracts of the effect the undertaking or ruling will have on their contracts.
- (2) The firm should also, as part of its risk management, consider the effect on its own business, including whether there are relevant risks which need mitigation. For example, firms should consider the effect of regulation 8 of the Regulations which provides that an unfair term is not binding on the *consumer*, but that the contract will continue to bind the parties if it is capable of continuing in existence without the unfair term. The mitigation may involve the firm contacting existing customers to ask that they agree to an amended contract, although any such amendment will itself need to avoid unfairness within the meaning of the Regulations and to comply with the law of contract generally.
- (3) As part of their risk management, firms that have not themselves given an undertaking or been subject to a court decision should remain alert to undertakings or court decisions about other firms, since these will be of potential value in indicating the likely attitude of the courts, the *FSA*, the OFT or other qualifying bodies to similar terms or to terms with similar effects.

1.6 Redress

- 1.6.1 G (1) The *FSA* does not have the power under the Regulations to grant redress to *consumers* who have suffered loss because of an unfair term. *Consumers* may choose to complain to the firm and to seek redress from it. If the firm does not satisfy the *consumer's* complaint, the *consumer* may choose to refer the complaint to the *Financial Ombudsman Service*, if appropriate.
- (2) If the use of an unfair term also amounts to a *rule* breach, and that breach causes loss to *consumers*, the *FSA* can apply to court for restitution or require restitution. The *FSA* will consider whether to use these powers in accordance with the policy in *EG 11*.

2 Statements of Good Practice on fairness of terms in consumer contracts

- 2.1. G In Annexes 1 and 2 you will find 'Statements of Good Practice' where we have set out our views on the likely application of the Regulations in relation to certain types of clause in standard form *consumer* contracts. We will add further Statements of Good Practice relating to the Regulations as and when they are published. Please note that these Statements of Good Practice do not form general *guidance* on rules under the *Act*.

Annex 1

Fairness of terms in consumer contracts: Statement of Good Practice (May 2005)

[link to this Statement on the FSA website]

Annex 2

Fairness of terms in consumer contracts: Statement of Good Practice on mortgage exit administration fees (January 2007)

[link to this Statement on the FSA website]

Consequential Amendments to the Handbook

DECISION PROCEDURE AND PENALTIES MANUAL (CONSEQUENTIAL AMENDMENTS) INSTRUMENT 2007

Powers exercised

- A. The Financial Services Authority makes this instrument in the exercise of the following powers in or under the Financial Services and Markets Act 2000:
- (1) section 69(1) (Statement of policy);
 - (2) section 93(1) (Statement of policy);
 - (3) section 124(1) (Statement of policy);
 - (4) section 157(1) (Guidance);
 - (5) section 169(9) (Investigations etc. in support of overseas regulator);
 - (6) section 210(1) (Statements of policy); and
 - (7) section 395(5) (The Authority's procedures).

Commencement

- B. Annexes B, C, D, E, F, G, H, I, J, K, M, N, O, Q, R, S, U, V and W and Part 1 of Annexes A, L and P come into force on 28 August 2007.
- C. Annex T and Part 2 of Annexes A and L come into force on 1 November 2007.
- D. Part 2 of Annex P comes into force 1 January 2008.

Revocation of manuals

- E. The provisions of the Enforcement manual (ENF) are revoked by Annex M to this instrument.
- F. The provisions of the Decision making manual (DEC) are revoked by Annex N to this instrument.

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 |
| Senior Management Arrangements, Systems and Controls (SYSC) | Annex B |
| Threshold Conditions (COND) | Annex C |
| Statements of Principle and Code of Practice for Approved Persons (APER) | Annex D |
| General Provisions (GEN) | Annex E |
| Fees manual (FEES) | Annex F |
| Interim Prudential sourcebook for Investment Businesses (IPRU(INV)) | Annex G |
| Conduct of Business sourcebook (COB) | Annex H |
| Insurance: Conduct of Business sourcebook (ICOB) | Annex I |

| | |
|---|---------|
| Mortgages and Home Finance: Conduct of Business sourcebook (MCOB) | Annex J |
| Market Conduct sourcebook (MAR) | Annex K |
| Supervision manual (SUP) | Annex L |
| Enforcement manual (ENF) | Annex M |
| Decision making manual (DEC) | Annex N |
| Collective Investment Schemes sourcebook (COLL) | Annex O |
| Credit Unions sourcebook (CRED) | Annex P |
| Electronic Commerce Directive sourcebook (ECO) | Annex Q |
| Electronic Money sourcebook (ELM) | Annex R |
| Professional Firms sourcebook (PROF) | Annex S |
| Recognised Investment Exchanges and Recognised Clearing Houses sourcebook (REC) | Annex T |
| Listing Rules (LR) | Annex U |
| Prospectus Rules (PR) | Annex V |
| Disclosure Rules and Transparency Rules (DTR) | Annex W |

Citation

- H. This instrument may be cited as the Decision Procedure and Penalties Manual (Consequential Amendments) Instrument 2007.

By order of the Board
26 July 2007

Annex A

Amendments to the Glossary of definitions

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

Part 1 (comes into force on 28 August 2007)

Amend the following as they appear in the Glossary of definitions:

| | |
|-------------------------|---|
| <u>breach</u> | <u>in DEPP:</u> <ol style="list-style-type: none">(1) <u>misconduct in respect of which the FSA is empowered to take action pursuant to section 66 (Disciplinary powers) of the Act;</u> <u>or</u>(2) <u>a contravention in respect of which the FSA is empowered to impose a penalty pursuant to section 91 (Penalties for breach of listing rules) of the Act; or</u>(3) <u>a contravention for the purposes of Part XIV (Disciplinary Measures); or</u>(4) <u>behaviour amounting to market abuse, or to requiring or encouraging market abuse, in respect of which the FSA takes action pursuant to section 123 (Power to impose penalties in cases of market abuse) of the Act.</u> |
| <i>connected person</i> | <ol style="list-style-type: none">(1) ...(5) (in <i>DTR</i>; <u>and LR</u> and ENF 21 in relation to a <i>person discharging managerial responsibilities</i> within an <i>issuer</i>) (as defined in section 96B(2) of the <i>Act</i>):<ol style="list-style-type: none">(a) ... |
| <i>consumer</i> | <ol style="list-style-type: none">(1) ...(4) (in <i>ECO</i> and ENF 19 <u>EG 17</u>) an individual who is acting for purposes other than those of his trade, business or profession.(5) (in ENF-UNFCOG and <u>EG 10.12 to 10.19</u>) any natural person who, in contracts covered by the <i>Unfair Terms Regulations</i>, is acting for purposes which are outside his trade, business or profession. |
| DEC | the Decision Making manual |
| <u>DEPP</u> | <u>the Decision Procedure and Penalties manual.</u> |

- director*
- (1) (except in *COLL*, *DTR*, *LR*, *PR*, ~~*ENF 21*~~ and *CIS*) (in relation to any of the following (whether constituted in the *United Kingdom* or under the law of a country or territory outside it)):
 - ...
 - (2) ...
 - (3) (in *DTR*, *LR*, and *PR* ~~and *ENF 21*~~) (in accordance with section 417(1)(a) of the Act) a *person* occupying in relation to it the position of a director (by whatever name called) and, in relation to an *issuer* which is not a *body corporate*, a *person* with corresponding powers and duties.

EG the Enforcement Guide.

executive procedures the procedures relating to the giving of warning notices, decision notices and *supervisory notices* that ~~the FSA proposes to follow in the circumstances specified in *DEC 4.1.6 G* (Decisions to be taken by executive procedures), and that are described in *DEC 4.3* (Executive procedures for statutory notice decisions and statutory notice associated decisions)~~ *DEPP 4* (Decisions by FSA staff under executive procedures).

- issue* (in relation to *units*):
- (1) (except in ~~*ENFEG 14*~~) the issue of new *units* by the *trustee* of an *AUT* or by an *ICVC*;
 - (2) (in ~~*ENFEG 14*~~):
 - (a) an issue in accordance with (1); and
 - (b) the sale of *units*.

- listed*
- (1) (except in *LR*, ~~*ENF 21*~~ and *INSPRU*) included in an *official list*.
 - (2) (in *INSPRU*):
 - (a) included in an *official list*; or
 - (b) in respect of which facilities for *dealing* on a *regulated market* have been granted.
 - (3) (in ~~*LR*~~ ~~and *ENF 21*~~) admitted to the *official list* maintained by the *FSA* in accordance with section 74 of the *Act*.

| | |
|-----------------------|---|
| <i>listed company</i> | (in <i>LR</i> and <i>DEPP</i>) a <i>company</i> that has any <i>class</i> of its securities listed. |
| <i>member</i> | <p>(1) (except in <i>PROF</i>, <i>LR</i>, <i>ENF 18</i><i>EG 16</i> and <i>REC</i>) a <i>person</i> admitted to membership of the <i>Society</i> or any <i>person</i> by law entitled or bound to administer his affairs.</p> <p>(2) (in <i>PROF</i>, <i>LR</i> and <i>ENF 18</i><i>EG 16</i>) (as defined in section 325(2) of the <i>Act</i> (Authority's general duty)) (in relation to a profession) a <i>person</i> who is entitled to practise that profession and, in practising it, is subject to the rules of the relevant <i>designated professional body</i>, whether or not he is a member of that body.</p> <p>(3) (in <i>REC</i>) (in relation to a <i>recognised body</i>) a <i>person</i> who is entitled, under an arrangement or agreement between him and that body, to use that body's <i>facilities</i>.</p> |
| <i>offer</i> | <p>(1) (in <i>MAR 1</i> (Code of market conduct)) an offer as defined in the <i>Takeover Code</i>.</p> <p>(2) (in <i>MAR 2</i> (Buy-backs and Stabilisation)) an offer or invitation to make an offer.</p> <p>(3) (in <i>LR</i>, and <i>PR</i> and <i>ENF 21</i>) an <i>offer of transferable securities to the public</i>.</p> |
| <i>offeror</i> | <p>(1) (in <i>MAR 1</i> (The Code of Market Conduct) and <i>LR 5.2.10R</i>) an offeror as defined in the <i>Takeover Code</i></p> <p>(2) (in <i>MAR 2</i> (Buy-backs and Stabilisation)) (as defined in Article 2 of the <i>Buy-back and Stabilisation Regulation</i>) the prior holders of, or the entity issuing, the <i>relevant securities</i>).</p> <p>(3) (in <i>LR</i>, <i>PR</i>, and <i>FEES</i> provisions in relation to <i>PR</i>, and <i>ENF 21</i>) a <i>person</i> who makes an <i>offer of transferable securities to the public</i>.</p> |
| <i>official list</i> | <p>(1) (in <i>LR</i> and <i>ENF 21</i>) the list maintained by the <i>FSA</i> in accordance with section 74(1) of the <i>Act</i> for the purposes of Part VI of the <i>Act</i>.</p> <p>(2) (except in <i>LR</i> and <i>ENF 21</i>):</p> <p>(a) the list maintained by the <i>FSA</i> in accordance with section 74(1) of the <i>Act</i> (The official list) for the purposes of Part VI of the <i>Act</i> (Official Listing);</p> |

| | |
|---------------------------------------|---|
| | (b) any corresponding list maintained by a <i>competent authority</i> for listing in another <i>EEA State</i> . |
| <i>operator</i> | <p>(1) (except in ENFEG):</p> <p>(a) ...</p> <p>(2) (in ENFEG) (in accordance with section 237(2) of the <i>Act</i> (Other definitions)):</p> <p>(a) ...</p> |
| <i>public censure</i> | <p>(1) <u>a statement published under section 205 (Public censure) of the <i>Act</i>;</u></p> <p>(2) <u>a statement of misconduct published under section 66 (Disciplinary powers) of the <i>Act</i>;</u></p> <p>(3) <u>a statement published under section 123 (Power to impose penalties in cases of market abuse) of the <i>Act</i>;</u></p> <p>(4) <u>a statement published under section 87M (Public censure of issuer) of the <i>Act</i>, under section 89 (Public censure of sponsor) of the <i>Act</i> or under section 91 (Penalties for breach of listing rules) of the <i>Act</i>.</u></p> |
| <i>redemption</i> | <p>(1) (except in ENF 17EG 14 (Collective investment schemes)) (in relation to <i>units</i> in an <i>authorised fund</i>) the purchase of them from their <i>holder</i> by the <i>authorised fund</i> manager acting as a <i>principal</i>.</p> <p>(2) (in ENF 17EG 14 (Collective investment schemes)) redemption as in (1) but including their cancellation by the <i>trustee</i> of an <i>AUT</i> or by an <i>ICVC</i>.</p> |
| <i>Regulatory Decisions Committee</i> | a committee of the Board of the <i>FSA</i> , described in DEC 4.2 (The Regulatory Decisions Committee) <u>DEPP 3.1 (The nature and procedure of the RDC).</u> |
| <i>security</i> | <p>(1) (except in LR and ENF 21 (in accordance with article 3(1) of the <i>Regulated Activities Order</i> (Interpretation)) any of the following <i>investments</i> specified in that Order:</p> <p>(a) ...</p> <p>...</p> <p>(2) (in LR and ENF 21) (in accordance with section 102A of the <i>Act</i>) anything which has been, or may be admitted to the</p> |

official list.

| | |
|--------------------------------------|---|
| <i>senior staff committee</i> | (in DEC DEPP and EG) a committee consisting of senior FSA staff members that is empowered to make <i>statutory notice decisions</i> and <i>statutory notice associated decisions</i> by <i>executive procedures</i> . |
| <i>settlement decision makers</i> | (in DEC DEPP and EG) two members of the FSA's executive of at least director of division level with responsibility for deciding whether to give <i>statutory notices</i> in the circumstances described in DEC Appendix 1.2.2A GDEPP 5. |
| <i>settlement decision procedure</i> | (in DEC DEPP) the procedure for the making of <i>statutory notice decisions</i> in the circumstances described in DEC App 1.2.2A GDEPP 5. |
| <i>settlement discount scheme</i> | (in ENF DEPP and EG) the scheme described in ENF 13.7 DEPP 6.7 by which the financial penalty that might otherwise be payable in respect of a <i>person's</i> misconduct or contravention may be reduced to reflect the timing of any settlement agreement. |
| <u>UNFCOG</u> | <u>the Unfair Contract Terms Regulatory Guide.</u> |

Part 2 (comes into force on 1 November 2007)

| | |
|---------------|--|
| <i>breach</i> | in DEPP |
| | (1) ... |
| | (2) ... |
| | (3) ... |
| | (4) behaviour amounting to <i>market abuse</i> , or to <i>requiring</i> or <i>encouraging market abuse</i> , in respect of which the FSA takes action pursuant to section 123 (Power to impose penalties in cases of market abuse) of the <i>Act</i> ; <u>or</u> |
| | (5) <u>a contravention of any directly applicable Community regulation made under MiFID.</u> |

Annex B

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

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

SYSC App 1.1.1G

- 1.1.1 G The application of SYSC 2.1.3R, SYSC 2.2.3G and SYSC 3 to an *incoming EEA firm* or *incoming Treaty firm* depends on whether responsibility for the matter in question is reserved to the *firm's Home State regulator*. This appendix contains *guidance* designed to assist such *firms* in understanding the application of those provisions. This appendix is not concerned with the *FSA's* rights to take enforcement action against an *incoming EEA firm* or an *incoming Treaty firm*, which are covered in the ~~Enforcement manual~~ (ENF) Enforcement Guide (EG), or with the position of a *firm* with a *top-up permission*.

Annex C

Amendments to the Threshold Conditions (COND)

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

Exercise of the FSA's own-initiative power

- 1.2.3 G (1) If, among other things, a *firm* is failing to satisfy any of the *threshold conditions*, or is likely to fail to do so, section 45 of the *Act* (Variation etc. on the FSA's own initiative) states that the *FSA* may exercise its *own-initiative power*. Use of the *FSA's own-initiative power* is explained in *SUP 7* (Individual requirements), ~~*ENF 3* (Variation of Part IV permission on the FSA's own initiative) and *ENF 5* (Cancellation of Part IV permission on the FSA's own initiative and withdrawal of authorisation)~~ and *EG 8* (Variation and cancellation of permission on the FSA's own initiative and intervention against incoming firms).

...

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.

- 3.1.4 G (1) An *approved person* will only be in breach of a *Statement of Principle* where he is personally culpable. Personal culpability arises where an *approved person's* conduct was deliberate or where the *approved person's* standard of conduct was below that which would be reasonable in all the circumstances (see ~~ENF 11.5.3 G (Action against approved persons)~~ DEPP 6.2.4G (Action against approved persons under section 66 of the Act)).

Annex E

Amendments to the General Provisions (GEN)

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

- 1.3.5 G *GEN* 1.3.2R operates on the *FSA's rules*. It does not affect the *FSA's* powers to take action against a *firm* in an emergency, based on contravention of other requirements and standards under the *regulatory system*. For example, the *FSA* may exercise its *own-initiative power* in appropriate cases to vary a *firm's Part IV permission* based on a failure or potential failure to satisfy the *threshold conditions* (see *SUP* 7 (Applying the *FSA's* requirements to individual firms) and ~~*ENF* 4 (Variation of Part IV permission on the *FSA's* own initiative))~~*EG* 8 (Variation and cancellation of permission on the *FSA's* own initiative and intervention against incoming firms)).

Annex F

Amendments to the Fees manual (FEES)

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

Time of payment

- 4.3.6 R ...
- (4) If the *FSA* has exercised its *own-initiative powers* to cancel a *firm's Part IV permission* in the way set out in ~~*ENF 5 (Cancellation of Part IV permission on the FSA's own initiative)*~~*EG 8 (Variation and cancellation of permission on the FSA's own initiative and intervention against incoming firms)*, then (1) and (2) do not apply but the *firm* must pay the total amount due immediately before the cancellation becomes effective.
- 5.4.2 G Failure to submit a statement in accordance with the *rules* in this chapter may also lead to the imposition of a financial penalty and other disciplinary sanctions (see ~~*ENF 13.5 DEPP 6.6 .1 to DEPP 6.6.5G*~~).

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.

Appendix 1 (Interpretation) Glossary of terms for Chapter 5 (former IMRO firms)

investigation means an investigation authorised pursuant to the Enforcement ~~Manual~~
Guide.

Annex H

Amendments to the Conduct of Business sourcebook (COB)

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

6.12.12 G Other parts of the *Handbook* are also relevant to the fair treatment of *with-profits policy holders*, including:

...

(5) *COB* 6.5 (Content of key features and important information: life policies, schemes, ISA and CTF cash deposit components and stakeholder pension schemes) and *COB* 8 (Reporting to customers); and

(6) *DISP* 1 (Complaint handling procedures for firms) and *DISP* 3.8 (Determination by the Ombudsman); and

(7) ~~ENF 20 (Unfair terms in consumer contracts)~~-[deleted]

The following Regulatory Guides are also relevant:

(8) *UNFCOG* (Unfair Contract Terms Regulatory Guide).

(9) [intentionally blank]

Annex I

Amendments to the Insurance: Conduct of Business sourcebook (ICOB)

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

ICOB 1 Annex 2 G

| | Module | Application |
|----------------------|---|--|
| ... | | |
| Regulatory Processes | ... | ... |
| | Enforcement manual, ENF | Applies to an insurance intermediary when doing (1) or (2). |
| | Decision making manual, DEC <u>Decision, Procedure and Penalties Manual, DEPP</u> | Applies to an <i>insurance intermediary</i> when doing (1) or (2). |

...

- 5.3.28 G *Insurers and insurance intermediaries* will need to consider whether mid-term changes are compatible with the original *non-investment insurance contract*, in particular whether that *non-investment insurance contract* included terms reserving the right to vary *premiums*, charges or contract terms and conditions. *Insurers and insurance intermediaries* also need to ensure that any contract terms which reserve the right to make variations are not themselves unfair under the *Unfair Terms Regulations*. The *FSA* may, as a qualifying body under the *Unfair Terms Regulations*, issue from time to time case summaries or *guidance* of potential relevance to such variation terms (see UNFCOG ENF 20).

Annex J

Amendments to the Mortgages and Home Finance: Conduct of Business sourcebook (MCOB)

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

1.6.5 G ...

- (3) *MCOB* 1.6.3 R and *MCOB* 1.6.4 R do not override the application of *MCOB* to any *regulated mortgage contract*. *MCOB* applies notwithstanding a *firm's* genuine belief that a mortgage is unregulated. In deciding whether to take disciplinary action as a result of a breach of *MCOB*, the *FSA* will take into account whether the action by the *firm* was reckless or deliberate (see ~~*ENF* 11.4.1 G(1)(a)~~*DEPP* 6.2.1(1)(a)).

Annex K

Amendments to the Market Conduct sourcebook (MAR)

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

1.1.3 G The FSA's statement of policy about the imposition and amount of penalties in cases of *market abuse* (required by section 124 of the Act) is in ~~ENF 14~~DEPP 6.

5.5.3 G Handbook provisions applicable to ATSS

| | Part of Handbook | Applicability to ATSS |
|--------------------------------|---|---|
| Regulatory process | ... | |
| | Supervision manual (<i>SUP</i>) | This applies. |
| | Enforcement manual (<i>ENF</i>) | This applies. |
| | Decision making manual (<i>DEC</i>) <u>Decision, Procedure and Penalties Manual (<i>DEPP</i>)</u> | This applies. |
| ... | | |
| <u>Special Handbook guides</u> | Service companies (<i>SERV</i>) | This applies to a <i>service company</i> that operates an <i>ATS</i> . |
| | Energy market participants (<i>EMPS</i>) | This applies to an <i>energy market participant</i> that operates an <i>ATS</i> . |
| | Oil market participants (<i>OMPS</i>) | This applies to an <i>oil market participant</i> that operates an <i>ATS</i> . |

...

In addition to Handbook modules the following Regulatory Guides are also relevant:

- (1) The Enforcement Guide (*EG*)
- (2) [intentionally blank]

Annex L

Amendments to the Supervision manual (SUP)

In this Annex, underlining indicates new text and striking through indicates deleted text. Where an entire provision is deleted this is not struck through.

Part 1 (comes into force on 28 August 2007)

- 1.2.1 G (1) The Authorisation manual (*AUTH*), the Supervision manual (*SUP*), ~~the Enforcement manual (*ENF*) and the Decision making manual (*DEC*)~~Decision, Procedure and Penalties manual (*DEPP*) form the regulatory processes part of the *Handbook*.
- (2) ...
- (3) *SUP* sets out the relationship between the *FSA* and *authorised persons* (referred to in the *Handbook* as *firms*). As a general rule, material that is of continuing relevance after *authorisation* is in *SUP*.
- (4) ~~*ENF* describes the *FSA's* enforcement powers under the *Act* and sets out its policies for using those powers. [deleted]~~
- (5) ~~*DEC* is principally concerned with, and sets out, the *FSA's* decision making procedures for decisions that involve the giving of *statutory notices*. *DEPP* is principally concerned with and sets out the *FSA's* decision making procedures that~~involve the giving of *statutory notices*, the *FSA's* policy in respect to the imposition and amount of penalties, and the conduct of interviews to which a direction under section 169(7) of the *Act* has been given or the *FSA* is considering giving.

2.1 Application and purpose

- 2.1.4 G The *FSA* receives the information in *SUP* 2.1.3G through a variety of means, including notifications by *firms* (see *SUP* 15) and regular reporting by *firms* (see *SUP* 16). This chapter is concerned with the methods of information gathering that the *FSA* may use on its own initiative in the discharge of its functions under the *Act*. This chapter does not deal with the information gathering powers that the *FSA* has under the *Unfair Terms Regulations*. These are dealt with in ~~*ENF* 20.3.5~~*GUNFCOG*.
- 2.1.5 G Part XI of the *Act* (Information Gathering and Investigations) gives the *FSA* statutory powers, including:
- (1) to require the provision of information (see section 165 and

~~ENF 2EG 3~~);

- (2) to require reports from *skilled persons* (see section 166 and *SUP 5*);
- (3) to appoint investigators (see sections 167, 168 and 169 of the *Act* and ~~ENF 2EG 3~~); and
- (4) to apply for a warrant to enter premises (see section 176 of the *Act* and ~~ENF 2EG 4~~).

- 2.3.12 G In complying with *Principle 11*, the *FSA* considers that a *firm* should cooperate with it in providing information for other regulators. Section 169 of the *Act* (Investigations etc. in support of overseas regulator) gives the *FSA* certain statutory powers to obtain information and appoint investigators for *overseas regulators* if required (see ~~ENF 2DEPP 7~~ and *EG 3*).
- 3.4.6 G If it appears to the *FSA* that an auditor of a *firm* has failed to comply with a duty imposed on him under the *Act*, it may disqualify him under section 345 of the *Act*. For more detail about what happens when the disqualification of an auditor is being considered or put into effect, see ~~ENF 17EG 15~~. A list of *persons* who are disqualified by the *FSA* under section 345 of the *Act* may be found on the *FSA* website (www.fsa.gov.uk).
- 4.3.12 G If it appears to the *FSA* that an *actuary* has failed to comply with a duty imposed on him under the *Act*, it may disqualify him under section 345 of the *Act*. For more detail about what happens when the disqualification of an *actuary* is being considered or put into effect, see ~~ENF 17EG 15~~ (Disqualification of auditors and actuaries). A list of *actuaries* who are disqualified by the *FSA* may be found on the *FSA* website (www.fsa.gov.uk).
- 4.4.5 G If it appears to the *FSA* that an *appropriate actuary* has failed to comply with a duty imposed on him under the *Act*, it may disqualify him under section 345 of the *Act*. For more detail about what happens when the disqualification of an *actuary* is being considered or put into effect, see ~~ENF 17EG 15~~ (Disqualification of auditors and actuaries). A list of *actuaries* who have been disqualified by the *FSA* may be found on the *FSA* website (www.fsa.gov.uk).
- 4.6.6 G If it appears to the *FSA* that an *actuary* has failed to comply with a duty imposed on him under the *Act*, it may disqualify him under section 345 of the *Act*. For more detail about what happens when the disqualification of an *actuary* is being considered or put into effect, see ~~ENF 17EG 15~~. A list of *actuaries* who are disqualified by the *FSA* may be found on the *FSA* website.

- 4.6.14 G If it appears to the *FSA* that an *actuary* has failed to comply with a duty imposed on him under the *Act*, it may disqualify him under section 345 of the *Act*. For more detail about what happens when the disqualification of an *actuary* is being considered or put into effect, see ~~ENF 17~~EG 15. A list of *actuaries* who are disqualified by the *FSA* may be found on the *FSA* website.

Alternative tools available, including other statutory powers

- 5.3.5 G The *FSA* will have regard to alternative tools that may be available, including for example:
- (1) ...
 - (2) ...
 - (3) appointing investigators to carry out general investigations under section 167 of the *Act* (Appointment of persons to carry out general investigations) (see ~~ENF 2.5~~EG 3 for the *FSA*'s policy on the use of this power); and
 - (4) appointing investigators to carry out investigations in particular cases under section 168 of the *Act* (Appointment of persons to carry out investigations in particular cases) (see ~~ENF 2.5~~EG 3 for the *FSA*'s policy on the use of this power).
- 6.1.5 G This chapter also outlines the *FSA*'s powers to withdraw *authorisation* from a *firm* whose *Part IV permission* has been cancelled at the *firm*'s request. It does not, however, cover the *FSA*'s use of its *own-initiative powers* to vary or cancel a *firm*'s *Part IV permission* (see *SUP 7* (Individual requirements) and ~~ENF 5 (Cancellation of Part IV permission on the FSA's own initiative and withdrawal of authorisation)~~EG 8 (Variation and cancellation of permission on the FSA's own initiative and intervention against incoming firms)).
- 6.2.10 G A *firm* which is winding down (running off) its activities should contact its usual supervisory contact at the *FSA* to discuss its circumstances. The *FSA* will discuss the *firm*'s winding down plans and the need for the *firm* to vary or cancel its *Part IV permission*. Following these discussions, an application for variation or cancellation of *Part IV permission*, as appropriate, should usually be made by the *firm*, although, in certain circumstances, the *FSA* may use its *own-initiative powers* under section 45 of the *Act* (Variation etc. on the *FSA*'s own initiative) (see *SUP 7* and ~~ENF 3 (Variation of Part IV permission on the FSA's own initiative)~~EG 8 (Variation and cancellation of permission on the FSA's own

initiative and intervention against incoming firms)).

- 6.3.40 G *DECDEPP* gives guidance on the FSA's decision making procedures including the procedures it will follow if it proposes to refuse an application for variation of *Part IV permission* either in whole or in part (for example, an application granted by the FSA but subject to *limitations* or *requirements* not applied for).
- 6.3.42 G (1) *Firms* should be aware that the FSA may exercise its *own-initiative power* to vary or cancel their *Part IV permission* if they do not (see *EG 8 (Variation and cancellation of permission on the FSA's own initiative and intervention against incoming firms)*):
- (a) ...
- 6.4.23 G If the FSA has granted an application for cancellation of *Part IV permission* and withdrawn a *firm's* status as an *authorised person* (see *SUP 6.5*) it will retain certain investigative and enforcement powers in relation to the *firm* as a former *authorised person*.
- These include:
- (1) information gathering and investigation powers in Part XI of the *Act* (Investigation gathering and investigations) (see ~~*ENF 2 (Information gathering and investigation powers)*~~*EG 3 (Use of information gathering and investigation powers)*);
 - (2) powers to apply to court for injunctions and restitution orders in Part XXV of the *Act* (Injunctions and restitution) (see ~~*ENF 6-EG 10 (Injunctions)*~~ and ~~*ENF 9-EG 11 (Restitution and redress)*~~);
 - (3) powers in Part XXIV of the *Act* (Insolvency) to petition for administration orders or winding up orders against companies or insolvent partnerships, or bankruptcy orders (or in Scotland sequestration awards) against individuals (see ~~*ENF 10 (Insolvency proceedings and orders against debt avoidance)*~~*EG 13 (Insolvency)*);
 - (4) powers in Part XXVII of the *Act* (Offences) to prosecute offences under the *Act* and other specified provisions (see ~~*ENF 15-EG 12 (Prosecution of criminal offences)*~~).
- 6.4.26 G The FSA's use of those powers is outlined in ~~*ENF 11 (Discipline of authorised firms and approved persons: The FSA's general approach)*~~*DEPP 6 (Penalties)*.
- 6.4.29 G See *DECDEPP* for *guidance* on the FSA's decision making procedures, including the procedures it will follow if it proposes to refuse an application for cancellation of *Part IV permission*.

6 Annex 4 G ...

5. If, for example, the *FSA* has *consumer* protection concerns, it may, however, use its *own-initiative power* under section 45 of the *Act* (Variation etc. on the Authority's own initiative) (see SUP 7 (Individual requirements) and ~~ENF 3 (Variation of Part IV permission on the FSA's own initiative)~~ EG 8 (Variation and cancellation of permission on the FSA's own initiative and intervention against incoming firms)), to vary the *Part IV permission* of a *firm* which is winding down or transferring its *regulated activities*.

Processing an application

10.12.5 G The *Act* allows the *FSA* three *months* from the time it receives a properly completed application to consider it and come to a decision. The *FSA* must either grant the application or, if it proposes not to grant an application, issue a *warning notice* (see ~~DEC 2-DEPP 2~~). ...

10.12.12 G If the *FSA* proposes to refuse an application in relation to one or more *controlled functions*, it must follow the procedures for issuing *warning* and *decision notices* to all *interested parties*. The ~~requirements relating to warning and decision notices and the process for referrals to the Financial Services and Markets Tribunal~~ are in ~~DEPP 2-DEC 2 and DEC 5~~ respectively.

10 Ann 1G

| | Question | Answer |
|-----|----------|---|
| 11 | ... | The <i>FSA</i> expects <i>firms</i> to perform due and diligent enquiries into their <i>candidates</i> . Note also the requirements of ENF 8.12.2G <u>EG 6</u> and <i>TC 2.2.1R</i> |
| 11a | ... | It is for senior management to decide what checks should be made. By virtue of the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (see Articles 3 and 4 of the Order), the <i>FSA</i> and the industry also have a right to ask about spent, as well as unspent, criminal convictions for employment purposes about <i>candidates</i> for <i>approved person</i> status (see Question 5.01a of Form A (Application to perform controlled functions under the approved persons |

| | | |
|----|------------------------------------|--|
| | | regime)). Note also the provisions of ENF 8.12.2 G (Publication) <u>EG 6 (Publicity)</u> and <u>TC 2.2.1R (Recruitment)</u> . |
| 23 | How are non-routine cases handled? | Refer to DEC 2 Annex 2 <u>DEPP 2</u> |

SUP 10 Annex 3 – deleted in its entirety

Warning notices and decision notices

- 11.7.9 G The procedure followed by the *FSA* in relation to the giving of *warning notices* and *decision notices* ~~and the process for referrals to the *Financial Services and Markets Tribunal* are~~ is set out in ~~DEC 2~~ DEPP 2.
- 12.4.10 G ...
- (2) If the *FSA* proposes to use the power in (1), it must give the appointed representative a *warning notice*. If the *FSA* decides to proceed with its proposal, it must give the appointed representative a *decision notice*. The procedures followed by the *FSA* in relation to the giving of *warning notices* and *decision notices* are set out in ~~DEC 2~~ DEPP 2.
- 13.3.7 G ...
- (3) For details of the *FSA*'s procedures for the giving of *warning notices* or *decision notices* ~~and references to the *Tribunal* see DEC 2 (Statutory notice procedure: Warning notice and decision notice procedure) and DEC 5 (References to the *Tribunal*, publication and service of notices)~~ see DEPP 2 (Statutory notices and the allocation of decision making).

Issuing a consent notice or notifying the Host State regulator

- 13.4.4 G ...
- (2) (a) ...
- (b) The issue or refusal of a *consent notice* under paragraph 20 (3A) of Part III of Schedule 3 to the *Act* is the consequence of a regulatory decision, and this *consent notice* (unlike the *consent notice* for the establishment of a *branch*) is not a *statutory notice* as set out in section 395 of the *Act*. ~~As such, the *FSA* will follow the decision making procedures set out in DEC 1 (Application, Purpose and Introduction)~~. A *UK firm*

that receives notice that the *FSA* refuses to give a *consent notice* may refer the matter to the *Tribunal* under paragraph 20 (4A) of Part III of Schedule 3 to the *Act*. ~~For procedures relating to references to the *Tribunal* see DEC 5 (References to the *Tribunal*, publication and service of notices).~~

- 13.6.15 G If the *FSA* refuses to consent to a change, then under Regulations 11(6) and 13 (6):
- (1) ...;
 - (2) the *UK firm* may refer the matter to the *Tribunal*; ~~for details of procedures for a reference to the *Tribunal* see DEC 5 (References to the *Tribunal*, publication and service of notices).~~
- 13.7.9 G If the *FSA* refuses to consent to a change it ~~will follow the decision making process set out in DEC 1 (Application, Purpose and Introduction).~~ The *FSA* is required by regulation 16(7) to give notice of the refusal to the *UK firm*, stating its reasons and giving an indication of the *UK firm's* right to refer the matter to the *Tribunal* and the procedures that apply to such a reference. ~~For details of procedures relating to references to the *Tribunal* see DEC 5 (References to the *Tribunal*, publication and service of notices).~~
- 13A.3.2 G ...
- (2) ...
 - (c) For details of the *FSA's* procedures for the giving of *warning notices* and ~~references to the *Tribunal*, see DEC 2.2 (Statutory notice procedure: Warning notice and decision notice procedure) and DEC 5 (References to the *Tribunal*, publication and service of notices).~~ see DEPP 2 (Statutory notices and allocation of decision making).

Application of the Handbook to Incoming EEA firms

13A Annex 1 G

| | | |
|------------|---|---|
| <i>ENF</i> | <i>ENF</i> applies and contains guidance on the use of the <i>FSA's</i> enforcement powers (<i>ENF1</i>) | <i>ENF</i> applies and contains guidance on the use of the <i>FSA's</i> enforcement powers (<i>ENF1</i>) |
| <i>DEC</i> | <i>DEC</i> applies and contains | <i>DEC</i> applies and |

| | | |
|-------------|--|---|
| <u>DEPP</u> | <i>guidance on the FSA's decision making procedures (DEC1). DEPP applies and contains a description of the FSA's procedures for taking statutory notice decisions, the FSA's policy on the imposition and amount of penalties and the conduct of interviews to which a direction under section 169(7) of the Act has been given or the FSA is considering giving.</i> | contains <i>guidance on the FSA's decision making procedures (DEC1). DEPP applies and contains a description of the FSA's procedures for taking statutory notice decisions, the FSA's policy on the imposition and amount of penalties and the conduct of interviews to which a direction under section 169(7) of the Act has been given or the FSA is considering giving.</i> |
| ... | | |
| <i>DTR</i> | <i>DTR (Disclosure Rules and Transparency Rules) May apply if the <i>firm</i> is an <i>issuer</i>, any class of whose <i>financial instruments</i> have been <i>admitted to trading</i> on a <i>regulated market</i>, or are the subject of an application for <i>admission to trading</i> on a <i>regulated market</i>, other than <i>issuers</i> who have not requested or approved admission of their <i>financial instruments</i> to trading on a <i>regulated market</i>.</i> | <i>DTR (Disclosure Rules and Transparency Rules) As column (2).</i> |

EG describes the FSA's approach to exercising the main enforcement powers given to it by FSMA and by regulation 12 of the *Unfair Terms Regulations*. EG is a Regulatory Guide and as such does not form part of the Handbook.

15.3.22

D ...

(3) ...

(b) withdraw approval from an *approved person* acting for or on behalf of an *underwriting agent*, under section 63 of the Act (Withdrawal of approval) (see EG 9-ENF-7);

(c) prohibit an individual acting for or on behalf of an *underwriting agent* from involvement in *regulated*

activities, under section 56 of the *Act* (Prohibition orders) (see EG 9-ENF 8);

- (d) require an *underwriting agent* to make restitution, under section 384 of the *Act* (Power of Authority to require restitution) (see EG 11-ENF 9);
- (e) discipline an *underwriting agent*, or an *approved person* acting for it or on its behalf, for a breach of a requirement made under the *Act*, including the *Principles, Statements of Principle* and *rules* (see DEPP 6 and EG 7-ENF 11, ENF 12 and ENF 13);
- (f) apply to court for an *injunction*, restitution order or *insolvency order* (see EG 10, EG 11 and EG 13-ENF 6, ENF 9 and ENF 10); and
- (g) prosecute any criminal offence that the *FSA* has power to prosecute under the *Act* (see EG 12-ENF 15).

16.3.14A G Failure to submit a report in accordance with the rules in, or referred to in, this chapter or the provisions of relevant legislation may also lead to the imposition of a financial penalty and other disciplinary sanctions (see DEPP 6.6.1-6.6.5-ENF 13.5) ...

Part 2 (comes into force on 1 November 2007)

SUP 6.3.42 G ...

- (1A) The *FSA* may exercise its *own-initiative power* to cancel an *investment firm's Part IV permission* if the *investment firm* has provided or performed no *investment services and activities* at any time during the period of six months ending with the day on which the *warning notice* under section 54(1) of the *Act* is given (see ENF 5.3.2G EG 8).

Annex M

Amendments to the Enforcement manual (ENF)

ENF is deleted in its entirety.

Annex N

Amendments to the Decision making manual (DEC)

DEC is deleted in its entirety.

Annex O

Amendments to the Collective Investment Schemes sourcebook (COLL)

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

7.1.3 G ...

- (2) This chapter also helps with the *regulatory objective* of protecting *consumers*, by providing a cost effective and fair means of winding up *authorised funds* and terminating *sub-funds* of *ICVCs* and *AUTs*. ~~ENF 16~~EG 14 (Collective investment schemes) deals with the *FSA's* powers to revoke the authorisation of *authorised funds* otherwise than by consent.

Annex P

Amendments to the Credit Unions sourcebook (CRED)

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

Where an entire chapter, rule or sub-paragraph is deleted, it is not shown struck-through.

Part 1 (comes into force on 28 August 2007)

Rules: R

- 2.4.2 G If a *firm* contravenes such a *rule*, it may be subject to enforcement action(see ~~ENF~~).
- ...
- 2.4.10 G G is also used for the *FSA's* statement of the procedure for giving statutory notices under section 395 of the *Act*, the *FSA's* policy with respect to the imposition and amount of penalties under the *Act* (see *DEPP*)(see *DEC*), ~~for the various statements of policy regarding use of the *FSA's* enforcement powers (see *ENF*)~~, and to indicate the arrangements made by the *FSA* under paragraph 7 of Schedule 1 to the *Act* for the investigation of complaints arising in connection with its exercise of its non-legislative functions (see *COAF*).
- 3.3.2 G ... The full provisions of how the *FSA* will use its powers in support of its enforcement functions under the *Act* are set out in ~~*ENF 2EG*~~. The *FSA* will be proportionate in the use of its powers.
- 5.1.5 G The *threshold conditions* must be met on a continuing basis by *credit unions*. Failure to meet one of the conditions is sufficient grounds for the exercise by the *FSA* of its powers (see *EG*). ~~*ENF 1* provides an overview of the range and purpose of these powers, the *FSA's* approach to enforcement and the structure of the Enforcement manual.~~
- 5.2.3 G Where a *credit union* may no longer meet the *threshold conditions* (see ~~*ENF EG*~~) the *FSA* will make further enquiries. ...
- 5.2.4 G The *FSA* has the power to vary a *credit union's Part IV permission* on its own initiative(see ~~*ENF 3.2*~~), if it appears to the *FSA* that the *credit union* is failing, or is likely to fail, to satisfy the *threshold conditions* (see ~~*ENF 3.2 EG*~~).
- 6.1.3 G The full provisions are to be found in the following sourcebooks or manuals of the *Handbook*:

...

(5) Enforcement manual (ENF) [deleted]

Enforcement procedures

- 6.2.9 G Details of the disciplinary measures which may be taken against *approved persons* are located in ~~ENF 11~~ ~~ENF 13~~ DEPP. ...
- 13.6.8 G ... If the *FSA* consider it appropriate to vary or cancel a *credit union's Part IV permission* (see ~~ENF 3~~ and ~~ENF 5~~ EG), it will discuss the proposed action with the *credit union* and ascertain its reasons for not commencing or carrying out the *regulated activity*, or activities, concerned as described in its application.

Common bond

CRED 13
Annex 1A.2 G ...

Handbook material 4 ~~DEC 1.2.8~~ ~~DEC 1.2.10~~ G provide guidance on who within the *FSA* makes decisions under section 1 of the Credit Unions Act 1979. It is possible for such decisions to be taken to judicial review. ~~CRED 13~~ (Registration and authorisation) is concerned with provides guidance on the registration and authorisation of credit unions.

...

- 14.10.4 G General provisions on reporting
- 14.10.4D G ... Failure to submit a report in accordance with the *rules* in *SUP* 16.7 may also lead to the imposition of a financial penalty and other disciplinary sanctions (see ~~ENF 13.5~~ and ~~CRED 15.5~~ DEPP).

15 Decision procedure, penalties and Enforcement

...

- 15.1.1 G This chapter contains ~~guidance on the investigation and enforcement powers available to the *FSA*, and its approach to the use of those powers, in respect of~~ applies to *credit unions* and is intended to draw their attention to:
- (1) ~~{Deleted}~~ the investigation and enforcement powers available to the *FSA* under Industrial and Provident Societies legislation;
 - (2) ~~*credit unions*, with respect to their activities of accepting deposits~~ the

Decision Procedure and Penalties manual (DEPP); and

- (3) ~~approved persons of credit unions, as set out in CRED 6 the Enforcement Guide (EG).~~

CRED 15.2 Investigation and enforcement powers Industrial and Provident Societies legislation

...

15.2.2 G For ease of reference:

- (1) Annex 1 to this chapter (CRED 15 Annex 1) contains a table of the FSA's investigation and enforcement powers under the Industrial and Provident Societies Act 1965, the Friendly and Industrial and Provident Societies Act 1968 and the Credit Unions Act 1979; and

(2) [deleted]

15.2.3 G [deleted]

15.2.4 G [deleted]

15.2.5 G [deleted]

15.3 ~~The FSA's approach to the use of its investigation and enforcement powers~~Decision Procedure and Penalties manual

15.3.1 G ~~There are a number of principles underlying the FSA's approach to the exercise of its investigation and enforcement powers in relation to credit unions~~The Decision Procedure and Penalties manual (DEPP) is relevant to credit unions because it sets out:

- (1) ~~the effectiveness of the regulatory regime depends to a significant extent on the maintenance of an open and cooperative relationship between the FSA and the management of credit unions; the FSA's decision making procedure for giving statutory notices (warning notices, decision notices and supervisory notices); and~~
the FSA's decision making procedure for giving statutory notices (warning notices, decision notices and supervisory notices); and
- (2) ~~the FSA will seek to exercise its investigation and enforcement powers in a manner that is transparent, proportionate and consistent with its publicly stated policies; and the FSA's policy with respect to the imposition and amount of penalties under the Act.~~
the FSA will seek to exercise its investigation and enforcement powers in a manner that is transparent, proportionate and consistent with its publicly stated policies; and the FSA's policy with respect to the imposition and amount of penalties under the Act.
- (3) [deleted]

- 15.3.2 G [deleted]
- 15.3.3 G [deleted]
- 15.3.4 G [deleted]

- 15.4 ~~The FSA's policies and procedures for taking enforcement action~~ Enforcement Guide

- 15.4.1 G ~~[Deleted]~~ The Enforcement Guide (EG) describes the FSA's approach to exercising the main enforcement powers given to it by the Act and by regulation 12 of the *Unfair Terms Regulations*. EG is a Regulatory Guide and does not form part of the *FSA Handbook*.
- 15.4.2 G [deleted]
- 15.4.3 G [deleted]
- 15.4.4 G [deleted]
- 15.4.5 G [deleted]
- 15.5 [deleted]

CRED 15 Annex 2G [is deleted in its entirety]

CRED 15 Annex 3G [is deleted in its entirety]

CRED 16 [is deleted in its entirety]

CRED Appendix 1

Table

| | Sourcebook or manual | Reference code |
|----------------------|--|----------------|
| ... | | |
| Regulatory Processes | ... | ... |
| | Supervision | <i>SUP</i> |
| | Enforcement <u>Decision Procedure and Penalties</u> | <i>ENFDEPP</i> |
| | Decision making | <i>DEC</i> |

CRED Appendix 2

CRED App 2.1.1

Table

| | | |
|-----|---|---|
| ... | | |
| 15 | Decision procedure, penalties and Enforcement | |
| | 15.1 | Application and purpose |
| | 15.2 | Investigation and enforcement powers <u>Industrial and Provident Societies legislation</u> |
| | 15.3 | The FSA's approach to the use of its investigation and enforcement powers <u>Decision Procedure and Penalties manual</u> |
| | 15.4 | The FSA's policies and procedures for taking enforcement action <u>Enforcement Guide</u> |
| | 15.5 | [deleted] |
| | Ann 1 | Enforcement Powers [table - powers available under Industrial and Provident Societies legislation and the Credit Unions Act 1979] |
| | Ann 2 | [deleted] |
| | Ann 3 | [deleted] |
| 16 | [deleted] | |

Part 2 (comes into force on 1 January 2008)

| | | |
|----------|---|---|
| 14.10.4D | G | If a <i>credit union</i> fails to submit a complete annual report by the date on which it is due in accordance with the <i>rules</i> under SUP 16.12 and any prescribed submission procedures, the <i>credit union</i> must pay an administrative fee of £250 (see SUP 16.3.14R). Failure to submit the report in accordance with the <i>rules</i> in SUP 16.12 may also lead to the imposition of a financial penalty and other disciplinary sanctions (see ENF 13.5 and CRED 15.5 <u>DEPP</u>). |
|----------|---|---|

Annex Q

Amendments to the Electronic Commerce Directive sourcebook (ECO)

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

- 1.1.5 G The *E-Commerce Directive* also allows the *EEA State* where the recipient is based to restrict the freedom to provide an *electronic commerce activity* from another *EEA State* on a case by case basis, where certain conditions are met. This derogation is implemented in the *United Kingdom* through provisions of the *ECD Regulations*. ~~ENF 19~~EG 19 outlines the derogation power and the *FSA's* policy on its use in relation to *incoming ECA providers*.
- ...
- 1.1.8 G The *FSA* has a range of investigation and enforcement powers available to it where an *incoming ECA provider* appears to be in breach of rules to which it is subject under ECO 1. These include powers to seek *injunctions* ~~(see ENF 6)~~, to apply to a court for restitution ~~(see ENF 9)~~ and, in the case of *authorised persons*, to order restitution ~~(see ENF 9)~~ and take disciplinary action ~~(see ENF 11 to ENF 13)~~ (see EG and DEPP).
- 1.1.9 G The *market abuse regime* and *misleading statements and practices offences* are not affected by the *E-Commerce Directive*. The *FSA's* enforcement powers in this regard are described in EG ~~ENF 14 and ENF 15~~. The *FSA's Code of Market Conduct* (MAR 1) contains *guidance* on whether or not *behaviour* amounts to *market abuse*.
- 1.1.10 R Handbook provisions applicable to, or relevant for, incoming ECA providers. This Table belongs to ECO 1.1.6 R

| Provision | Description |
|---|--|
| <i>ECO 1</i> | E-Commerce Directive sourcebook |
| <i>MAR 1</i> | The Code of Market Conduct |
| DEC DEPP (if the <i>incoming ECA provider</i> is authorised) | Decision making by the FSA <u>Decision making, procedures and penalties</u> |
| ... | ... |
| ENF | Enforcement guidance |
| <i>GEN 2</i> | Interpreting the Handbook |
| <i>COAF</i> | Complaints against the FSA |
| <i>SUP 8</i> | Waivers and modification of rules |
| <i>SUP 9</i> | Individual guidance |
| <i>SUP 13A.1.1G - SUP 13A.1.2G, SUP 13A.6.5G, SUP 13A Annex 1G</i> | Authorisation guidance |
| <i>SUP 14</i> (if the | EEA firms change of details |

| | |
|---|--|
| <i>incoming ECA provider is authorised)</i> | |
| Any reference in <i>SUP 8</i> to a <i>firm</i> should be taken to include a reference to an unauthorised <i>incoming ECA provider</i> . | |

In addition to the Handbook modules listed above these Regulatory Guides may also be relevant:

1. The Enforcement Guide (EG)
2. [intentionally blank]

Annex R

Amendments to the Electronic Money sourcebook (ELM)

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

1.5.2 G

| Block | Module | Application |
|----------------------|--|--|
| Regulatory processes | ... | ... |
| | Supervision manual (<i>SUP</i>) | The following chapters of <i>SUP</i> apply to every <i>ELMI</i> : 1, 2, 3, 5, 6, 7, 8, 9, 10, 11, 13, 15, 16 and 20. The following chapters of <i>SUP</i> do not apply to an <i>ELMI</i> : 4, 12, 14, 17, 18 and 19. |
| | Enforcement manual (<i>ENF</i>) | Applies to every <i>ELMI</i>. |
| | Decision making manual (<i>DEC</i>) <u>Decision, Procedure and Penalties Manual (<i>DEPP</i>)</u> | Applies to every <i>ELMI</i> . |

- 8.3.9 G The application for a *small e-money issuer certificate* must be determined by the *FSA* within six *months* from when it receives the completed application or, if the application is incomplete, within 12 *months*. The applicant may withdraw his application by written notice. The *FSA* must give the applicant written notice of the grant of the application or a *warning notice* if it proposes to refuse the application. ~~*Guidance on the decision making procedures is given in DEC 2 (Statutory notice procedure: warning notice and decision notice procedure).*~~
- 8.3.10 G An applicant who is aggrieved by the determination of the application may refer the matter to the *Tribunal* (see *EG 2.39 DEC 5.1 (The Tribunal)*).
- 8.3.12 G ~~*ENF 15 EG 12 (Prosecution of criminal offences) and DEC 4.6 (Decisions to apply to the civil courts and to prosecute criminal offences)*~~ contain sets out guidance on the *FSA*'s policy and procedures relating to the exercise of its powers to prosecute criminal offences, including offences under section 24 of the *Act*.

Procedure

- 8.6.5 G If the *FSA* proposes to revoke a *small e-money issuer certificate* otherwise than at the request of the *small e-money issuer*, it must give him a *warning notice* ~~(see DEC 2.2 (Warning notice procedure))~~. Similarly, if it decides to revoke the certificate, it must give him a *decision notice* ~~(see DEC 2.3 (Decision notice procedure))~~. (See *DEPP 2*)
- 8.6.6 G A *small e-money issuer* who is aggrieved at the decision to revoke the *small e-money issuer certificate* may refer the matter to the *Tribunal* (see *EG 2.39* ~~DEC 5.1 (The Tribunal)~~).
- 8.7.11 G The *FSA* may appoint one or more competent *persons* to carry out an investigation if it appears to it that there are circumstances suggesting that a *small e-money issuer* may not meet any of the conditions referred to in *ELM 8.4*. The *FSA* may also use this power if the *small e-money issuer* may not have met any of these conditions at any time since the *small e-money issuer certificate* was given. ~~ENF 2 (Use of Information gathering and investigation powers) contains~~ See *EG 3* for *guidance* on the *FSA's* policies relating to the use of its investigation powers.

...

Administrative and civil enforcement powers

- 8.7.17 G Where a *small e-money issuer* contravenes a *rule* in *ELM 8.7* (Provision of information), or a requirement imposed under the powers referred to in *ELM 8.7.6 G* to *ELM 8.7.11 G*, the *FSA* may, among its other enforcement powers:
- (1) apply to the courts for an *injunction* (see ~~ENF 6~~ *EG 10* (Injunctions));
 - (2) apply to the courts for a restitution order (see ~~ENF 9~~ *EG 11* (Restitution and redress)); and
 - (3) revoke the *small e-money issuer certificate* (see *ELM 8.6*).

...

- 8.7.20 G ~~ENF 15 (Prosecution of criminal offences) and DEC 4.6 (Decisions to apply to the civil courts and to prosecute criminal offences) contain~~ For *guidance* on the *FSA's* policy and procedures relating to the exercise of its powers to prosecute criminal offences), including offences under section 398 and 400 of the *Act*, see *EG 12*.

Annex S

Amendments to the Professional Firms sourcebook (PROF)

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

Exempt regulated activities

- 2.1.3 G Section 327 of the *Act* (Exemption from the general prohibition) sets out the conditions which must be met for a *person* to be treated as an *exempt professional firm*, and for the *person's regulated activities* to be treated as *exempt regulated activities*. If the exemption in section 327 does not apply to a *person* and the *person* carries on a *regulated activity*, the *person* may contravene the *general prohibition* and be committing a criminal offence. The *FSA's* approach to the use of its powers in respect of alleged contraventions of the *general prohibition* is explained in ~~ENF 15~~EG 12.
- 2.1.4 G If the *FSA* has made a direction under section 328 of the *Act* (Directions in relation to the general prohibition) (see *PROF* 3.2) in relation to classes of *person* (or *regulated activity*), then a *person* within the class (or carrying on the *regulated activity*) specified will not be an *exempt professional firm*. In addition, section 329 of the *Act* (Orders in relation to the general prohibition) gives the *FSA* power to make an order disapplying the Part XX exemption from a *person* named in the Order. The *FSA's* general approach to the use of this power is explained in ~~ENF 18~~EG 16.

Annex T

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.

4.2C Control over a UK RIE

...

4.2C.7 G If the *FSA* refuses to approve a change of control or objects to an existing control, the *person* concerned may refer the matter to the *Tribunal* (see *EG 2.39*). ~~More information on the process for referrals to the *Tribunal* is set out in *DEC 5.1*.~~

...

4.2D.2 G The procedure the *FSA* will follow if it exercises its power to require a *UK RIE* to suspend or remove a financial instrument from trading is set out in section 313B of the *Act*. The *FSA*'s internal arrangements provide for decisions to exercise this power to be taken at an appropriately senior level. If the *FSA* exercises this power, the *UK RIE* concerned and the issuer (if any) of the relevant *financial instrument* may refer the matter to the *Tribunal* (see *EG 2.39*). ~~More information on the process for referrals to the *Tribunal* is set out in *DEC 5.1*.~~

Annex U

Amendments to the Listing Rules (LR)

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

Application

- 1.1.1 R LR applies as follows:
- (1) all of LR (other than LR 8.3, LR 8.4, LR 8.6 and LR 8.7) applies to an *issuer*; and
 - (2) LR 1, LR 8.1, LR 8.3, LR 8.4, LR 8.6 and LR 8.7 apply to a *sponsor* and a *person* applying for approval as a *sponsor*.

FSA performing functions as competent authority

Note: In relation to the *listing rules*, the *FSA* is performing functions as the competent authority under Part VI of the *Act* (see section 72(1) of the *Act*).

Note: when exercising functions as the competent authority under Part VI of the *Act*, the *FSA* may use the name: the UK Listing Authority.

Other relevant parts of Handbook

Note: Other parts of the *Handbook* that may also be relevant to *issuers* or *sponsors* include *DTR* (the Disclosure Rules and Transparency Rules sourcebook), *PR* (the Prospectus Rules sourcebook), *COB* (the Conduct of Business sourcebook), ~~*DEC* (the Decision Making manual)~~ *DEPP* (Decision Procedure and Penalties Manual), Chapter 9 of *SUP* (the Supervision manual) and ~~Chapter 21 of *ENF* (the Enforcement manual)~~ and *GEN* (General Provisions).

The following Regulatory Guides may also be relevant to *issuers* or *sponsors*:

1. The Enforcement Guide (*EG*)
2. [intentionally blank]

Decision-making procedures for suspension, cancellation etc

- 5.5.1 G The decision-making procedures that the *FSA* will follow when it cancels, suspends or ~~to~~ refuses a request to restore *listing* are set out in *DEPP* (Decision Procedure and Penalties) ~~*DEC* (the Decision Making manual)~~.
- 7.1.4 G ~~*ENF* 21 (Official listing—investigation powers and discipline)~~ *DEPP* 6 (Penalties) and *EG* 7 sets out *guidance* on the

consequences of breaching the Listing Principles.

- 8.6.4 G When considering an application for approval as a *sponsor* the *FSA* may:
- (1) carry out any enquiries and request any further information which it considers appropriate, including consulting other regulators;
 - (2) request that the applicant or its specified representative answer questions and explain any matter the *FSA* considers relevant to the application;
 - (3) take into account any information which it considers appropriate in relation to the application.

Note: The decision-making procedures that the *FSA* will follow when it considers whether to refuse an application for approval as a *sponsor* are set out in DEPPDEC.

8.7.20 G ~~*ENF 21 (Official listing—investigation powers and discipline)*~~EG sets out the *FSA's* policy on when and how it will use its disciplinary powers, including in relation to a *sponsor*.

- 8.7.24 G
- (1) The decision-making procedures that the *FSA* will follow when it cancels a *sponsor's* approval at the *sponsor's* request are set out in DEPPDEC.
 - (2) Under the statutory notice procedure set out in DEPPDEC a request for cancellation of approval will take a minimum of 8 weeks to take effect.

LR Appendix 1.1 Relevant definitions

| | |
|----------------------------|--|
| ... | |
| <i>DEC-DEPP</i> | the Decision-making manual <u>the Decision Procedure and Penalties manual</u> |
| ... | |
| <i>ENF EG</i> | the Enforcement manual <u>the Enforcement Guide</u> |
| ... | |

...

Annex V

Amendments to the Prospectus Rules (PR)

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

PR 3.1 Approval of prospectus

Decision-making procedures

PR 3.1.9 R The FSA will follow the *executive procedures* for *statutory notice decisions* and *statutory notice associated decisions* if it:

- (1) proposes to refuse to approve a *prospectus*; or
- (2) decides to refuse to approve a *prospectus* after having given the *applicant* a written notice.

Note: ~~DEC 4.3~~DEPP 4 sets out the *executive procedures* for *statutory notice decisions* and *statutory notice associated decisions*.

PR Appendix 1 R Relevant definitions

App 1.1 R **Note:** The following definitions relevant to the *prospectus rules* are extracted from the *Glossary*.

| | |
|-----------------------------|--|
| ... | |
| <i>executive procedures</i> | the procedures relating to the giving of <i>warning notices</i> , <i>decision notices</i> and <i>supervisory notices</i> that the FSA proposes to follow in the circumstances specified in DEC 4.1.6 G (Decisions to be taken by executive procedures), and that are described in DEC 4.3 (Executive procedures for statutory notice decisions and statutory notice associated decisions) <u>DEPP 4 (Decision by FSA staff under executive procedures)</u> . |
| ... | |

Annex W

Amendments to the Disclosure Rules and Transparency Rules (DTR)

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

FSA performing functions as competent authority

- 1.1.3 G In relation to the *disclosure rules*, the *FSA* is exercising its functions as the competent authority under Part VI of the *Act* (see section 72(1) of the *Act*).

Other relevant parts of Handbook

Note: Other parts of the *Handbook* that may also be relevant to persons to whom the *disclosure rules* apply include *DEPP* (*Decision Procedure and Penalties Manual*) ~~*DEC*~~ (~~the *Decision making manual*~~), and Chapter 9 of *SUP* (the *Supervision manual*) and Chapter 21 of *ENF* (the *Enforcement manual*).

The following Regulatory Guides are also relevant:

1. The Enforcement Guide (*EG*)
2. [intentionally blank]

Note: A list of *regulated markets* can be found on the *FSA* website at the following address: www.fsa.gov.uk/register-res/html/prof_exchanges_fram.html

FSA performing functions as competent authority

- 1A.1.4 G In relation to the *transparency rules*, the *FSA* is exercising its functions as the competent authority under Part VI of the *Act* (see section 72(1) of the *Act*).

Other relevant parts of Handbook

Note: Other parts of the *Handbook* that may also be relevant to persons to whom the *transparency rules* apply include *DEPP* (*Decision Procedure and Penalties Manual*) ~~*DEC*~~ (~~the *Decision making manual*~~), and Chapter 9 of *SUP* (the *Supervision manual*) and Chapter 21 of *ENF* (the *Enforcement manual*).

The following Regulatory Guides are also relevant:

1. The Enforcement Guide (*EG*)
2. [intentionally blank]

Note: A list of *regulated markets* can be found on the *FSA* website at the following address: http://www.fsa.gov.uk/register-res/html/prof_exchanges_fram.html

1.4 Suspension of trading

...

- 1.4.5 G The decision-making procedures to be followed by the *FSA* when it:
- (1) requires the suspension of trading of a *financial instrument*;
or
 - (2) refuses an application by an *issuer* to lift a suspension made under section 96C;
- are set out in *DEPPDEC*.

Non-Handbook Consequential Amendments

Annex 1

Amendments to the Energy Markets Participants Handbook Guide (EMPS)

In this Appendix, underlining indicates new text and striking through indicates deleted text. These amendments come into force on 28 August 2007 (these stem from "FSA 2007/47 Decision Procedure and Penalties Manual (Consequential Amendments) Instrument 2007"),

Amend EMPS 1.2.3 as follows:

| | | | | |
|------------|---|---|---|--|
| EMPS 1.2.3 | G | Applicability of parts of Handbook to energy market participants | | |
| | | This table belongs to EMPS 1.2.1 G | | |
| | | | Part of Handbook | Applicability to energy market participants |
| | | Regulatory processes | Authorisation manual (<i>AUTH</i>) | This applies in relation to an application by a prospective <i>energy market participant</i> for a <i>Part IV permission</i> . |
| | | | Supervision manual (<i>SUP</i>) | |
| | | | Enforcement manual (<i>ENF</i>) | This applies. |
| | | | Decision making manual (<i>DEC</i>) <u>Decision Procedures and Penalties Manual (<i>DEPP</i>)</u> | This applies. |
| | | ... | | |

The following Regulatory Guides may also be relevant to *energy market participants*:

1. The Enforcement Guide (*EG*)

Annex 2

Amendments to the Oil Markets Participants Handbook Guide (OMPS)

In this Appendix, underlining indicates new text and striking through indicates deleted text. These amendments come into force on 28 August 2007 (these stem from "FSA 2007/47 Decision Procedure and Penalties Manual (Consequential Amendments) Instrument 2007"),

Amend OMPS 1.2.2 as follows:

| | | | | |
|------------|---|--|--|---|
| OMPS 1.2.2 | G | Parts of the Handbook applicable to oil market participants | | |
| | | This table belongs to <i>OMPS 1.2.1G</i> | | |
| | | | Part of Handbook | Applicability to oil market participants |
| | | ... | | |
| | | Regulatory processes | Authorisation manual (<i>AUTH</i>) | This applies in relation to an application by a prospective <i>oil market participant</i> for a <i>Part IV permission</i> . |
| | | | Supervision manual (<i>SUP</i>) | ... |
| | | | Enforcement manual (<i>ENF</i>) | This applies. |
| | | | Decision making manual (<i>DEC</i>) <u>Decision Procedure and Penalties manual (<i>DEPP</i>)</u> | This applies. |
| | | ... | | |

The following Regulatory Guides may also be relevant to *oil market participants*:

1. The Enforcement Guide (*EG*)

Annex 3

Amendments to the Service Companies Handbook Guide (SERV)

In this Appendix, underlining indicates new text and striking through indicates deleted text. These amendments come into force on 28 August 2007 (these stem from "FSA 2007/47 Decision Procedure and Penalties Manual (Consequential Amendments) Instrument 2007"),

| | | | | |
|------------|---|--|--|--|
| SERV 1.2.2 | G | Parts of the Handbook applicable to service companies | | |
| | | This table belongs to SERV 1.2.1 G | | |
| | | | Part of Handbook | Applicability to service companies |
| | | ... | | |
| | | Regulatory processes | Authorisation manual (<i>AUTH</i>) | This applies in relation to an application by a prospective <i>service company</i> for a <i>Part IV permission</i> . |
| | | | Supervision manual (<i>SUP</i>) | ... |
| | | | Enforcement manual (<i>ENF</i>) | This applies. |
| | | | Decision making manual (<i>DEC</i>) <u>Decision Procedure and Penalties Manual (<i>DEPP</i>)</u> | This applies. |
| | | | Dispute resolution: the Complaints sourcebook (<i>DISP</i>) | ... |
| | | ... | | |

The following Regulatory Guides may also be relevant to *service companies*:

1. Enforcement Guide (*EG*)

Annex 4

Amendments to the Collective Investment Scheme Information Guide (COLLG)

In this Appendix, underlining indicates new text and striking through indicates deleted text. These amendments come into force on 28 August 2007 (these stem from "FSA 2007/47 Decision Procedure and Penalties Manual (Consequential Amendments) Instrument 2007"),

| | | | |
|-------------|---|---------------------|---|
| COLLG 5.1.4 | G | Related Sourcebooks | |
| | | ... | |
| | | (2) | There are a number of other parts of the <i>FSA's Handbook</i> that are particularly relevant to those having a responsibility in relation to <i>authorised funds</i> . These include: |
| | | ... | |
| | | (f) | <i>DEC (The Decision-making manual)</i> <u><i>DEPP (The Decision Procedure and Penalties Manual)</i></u> ; and |
| | | ... | |
| | | (3) | <i>ENF 16</i> <u>In addition to the listed sourcebooks, Regulatory Guides may also be of relevance. For example <i>EG 14</i> sets out the <i>FSA's</i> policies and procedures concerning the use of its enforcement powers in relation to <i>regulated collective investment schemes</i>.</u> |

Annex 5

Amendments to the Readers Guide

In this Appendix, underlining indicates new text and striking through indicates deleted text. These amendments come into force on 28 August 2007 (these stem from "FSA 2007/47 Decision Procedure and Penalties Manual (Consequential Amendments) Instrument 2007"),

Title page:

At foot of title page add: v.3.1 (August 2007)

Amend the section entitled 'Structure and Contents of the Handbook' as follows:

The Handbook is divided into Blocks and each Block is subdivided into modules. Additionally, the Handbook contains a **Glossary** of all the definitions used in the Handbook. The only exception to this is that the IPRU sourcebooks have their own glossaries.

High Level Standards (Block 1)

...

Regulatory Processes (Block 4)

...

| | |
|----------------------------|--|
| ENF | ENF (Enforcement) describes the FSA's enforcement powers and sets out its policies for using these powers. The FSA's enforcement powers include powers to: 1. vary the terms of or cancel a firm's permission; 2. withdraw approval of approved persons; 3. impose financial penalties and issue public censures; and 4. take court proceedings against firms and individuals. |
| DEC <u>DEPP</u> | DEC (Decision Making) <u>DEPP (Decision Procedure and Penalties) gives guidance on the FSA's decision making procedures and other procedures for giving statutory notices. Statutory notices include warning and decision notices. is principally concerned with and sets out the FSA's decision making procedures that involve the giving of statutory notices; the FSA's policy in respect to the imposition and amount of penalties; and the conduct of interviews to which a direction under section 169(7) of the Act has been given or the FSA is considering giving.</u> |

...

Amend the section entitled 'Other FSA materials relating to the Handbook' as follows:

Tailored handbooks

...
Guides

...
Regulatory guides are guides to particular regulatory topics ~~in the Handbook~~:

| | |
|------------------|--|
| COLLG | COLLG contains some key facts on the regulation of collective investment schemes in the United Kingdom. It is of interest primarily to those who wish to gain a general understanding of the regulatory regime governing these schemes. |
| PERG | PERG (Perimeter Guidance manual) contains guidance about circumstances in which authorisation is required, or exempt person status is available, including guidance on the activities regulated under the Act and the exclusions which are available. |
| <u>EG</u> | <u>EG</u> (Enforcement Guide) describes the FSA's approach to using <u>the main enforcement powers given to it by the Act and by regulation 12 of the Unfair Terms Regulations.</u> |

Amend the section entitled 'Status of Provisions' as follows:

The Handbook contains the following types of provision, whose status is indicated by icons containing the letters below.

| Icon | What it means |
|-------------|---|
| R | The letter R is used to indicate general rules made under section 138 of the Act, specialised rules made under sections 140 to 147, listing rules made under section 73A and rules made under other powers. It is not used for evidential provisions (see E , below). Most of the rules in the Handbook create binding obligations on firms. If a firm contravenes such a rule, it may be subject to enforcement action (see <u>DEPP and EG ENF</u>) and, in certain circumstances, to an action for damages. For the avoidance of doubt, the FSA's Principles for Businesses are rules. |

...

| | |
|----------|---|
| G | 1. The letter G is normally used to indicate guidance given under section 157. The guidance in the Handbook relates to the operation of the Act, the rules in the Handbook and other matters. ... 2. G is also used for the FSA's statement of the procedure for giving statutory notices under section 395 of the Act, <u>the FSA's statements of policies on penalties as required by the Act and the conduct of interviews to which a direction under section 169(7) of the Act has been given or the FSA is considering giving (see DEPP) (see DEC), for the various statements of policy regarding use of the FSA's enforcement powers (see ENF).</u> |
|----------|---|

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