

PS12/12

Financial Services Authority

Regulating bidding for emissions allowances under Phase Three of the EU Emissions Trading Scheme:

Feedback to CP12/6

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This Policy Statement reports on the main issues arising from Consultation Paper 12/6 (*Regulating bidding for emissions allowances under Phase Three of the EU Emissions Trading Scheme*). It also presents our near-final rules.

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

Abbreviations used in this paper

| | |
|------------|---|
| CAR | EU Commission Regulation 1031/2010 of 12 November 2010 as amended by the EU Commission Regulation 1210/2011 of 23 November 2011 |
| CP | Consultation Paper |
| EU | European Union |
| PS | Policy Statement |
| RAO | Regulated Activities Order |
| RAP | Recognised Auction Platform |
| REC | Recognised Investment Exchanges and Recognised Clearing Houses sourcebook |
| RIE | Recognised Investment Exchange |

1

Overview

Introduction

- 1.1 This Policy Statement (PS) summarises the responses we received to our consultation on authorising and supervising firms that intend to bid for emissions auction products across the EU on auction platforms operating under the EU Commission Auction Regulation (CAR). We go on to set out changes to our Handbook that we intend to make at our July Board meeting on 26 July in light of these responses and to accommodate changes in the underlying legislative order which the Treasury will make beforehand.¹
- 1.2 We have published this PS ahead of the FSA's July Board meeting to provide potential bidders advance opportunity to see the planned changes to the FSA rules, particularly in case they intend to apply for authorisation in time for any early auctions taking place this year.

Background

- 1.3 In CP12/6, *Regulating bidding for Emissions Allowances under Phase Three of the EU Emissions Trading Scheme*, (15 March 2012), we consulted on measures to implement this new regulatory regime for bidding in emissions auctions.
- 1.4 The new regime is being put in place ahead of the start of auctions on both a common EU auction platform and a number of national auction platforms. One of these national platforms will be based in the UK. The platforms are being set up to service an upcoming requirement for Member States to auction a large part of their emissions allowance allocations.

Who should read this paper?

- 1.5 This PS is relevant to all firms that intend to bid in emissions auctions, their clients and the auction platforms on which bids will be made.

¹ The Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2012 (SI 2012/xx).

Next steps

- 1.6 Our rules and guidance will come into force on 27 July 2012. From that date, we will be accepting applications to undertake the new regulated activity of 'bidding in emissions auctions'. Authorised firms can find the relevant variation of permission form, along with some explanatory notes, at Appendix 2. This can also be found on our website.

2

Summary of responses to CP12/6

2.1 In CP12/6, we asked the following:

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

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

- 2.2 We received two responses. Respondents were broadly content with our approach but did raise two issues, as described in this chapter.

Compliance buying

- 2.3 A respondent in the energy generation and supply business highlighted the importance placed on being able to trade and hedge positions in emissions allowances within its group of companies. In some cases, the respondent was concerned that the rule changes could broaden the FSA's perimeter to require explicit authorisation of its intra-group activities.
- 2.4 The trading arms of energy companies typically carry on activities covered by the Markets in Financial Instruments Directive (MiFID) Framework themselves, but may be exempt from its provisions under MiFID article 2(1)(i).² Under CAR, where a '2(1)(i)' firm is seeking to bid for emissions allowances on an auction platform, unless it benefits from a specific exclusion, it will require authorisation to do so. Energy generation and supply businesses were concerned that they would therefore require authorisation in this way.

Our response

These concerns relate primarily to the scope of the regulated activity of bidding in emissions auctions that the Treasury has made through its legislative order, rather than the authorisation regime that we have proposed to apply to those carrying on that activity.

However, we note that where a firm falls under the MiFID article 2(1)(i) exemption, in our view it is still possible for it to fall within another exclusion in the RAO. Specifically, an exclusion from the new regulated activity of bidding in emissions auctions is provided in article 24B and applies to:

'an operator or an aircraft operator having an operator holding account, in either case bidding on its own account, including any parent undertaking, subsidiary undertaking or affiliate undertaking forming part of the same group of undertakings as the operator or the aircraft operator'

A company that is a group member of an energy company is likely to benefit from this exclusion. However, where it does not and where it is a '2(1)(i) firm', in accordance with CAR, it must be authorised to apply for admission to bid on an auction platform.

² That article provides that MiFID shall not apply to 'persons dealing on own account in financial instruments, or providing investment services in commodity derivatives or derivative contracts...to the clients of their main business, provided this is an ancillary activity to their main business, when considered on a group basis, and that main business is not the provision of investment services...'

- 2.5 Firms should note that in all cases, authorisation to bid is distinct from the auction platform's decisions on whether to admit firms to bid against clear criteria in CAR.

Disparity between authorisation regimes

- 2.6 It was noted that while a MiFID firm bidding for a five-day futures product would be considered to be conducting MiFID Business (and therefore subject to existing regulatory standards applicable to MiFID), a firm exempt from MiFID under article 2(1)(i) could also bid for the same product but would be carrying on auction regulation bidding and authorised primarily according to the requirements in CAR rather than MiFID.
- 2.7 This situation arises directly through the CAR deeming one activity as MiFID business without deeming the other as such. The respondents were concerned that this disparity could lead to a situation whereby it was the type of firm, rather than the nature of the activity, which determined the regulatory approach.
- 2.8 While respondents accepted that this is a consequence of the requirements in the EU regulation, they suggested mitigation under which we might strengthen the requirements placed on auction regulation bidding by requiring additional approved persons or imposing our rules on the protection of client assets.
- 2.9 One specific example given was that a person approved to perform a governing function would not be required to be separately approved to also perform the specific part of the customer function which is acting as a 'bidder's representative' (this part of the customer function is our means of ensuring firms have an appropriate 'bidder's representative'³).

Our response

The new regulated activity is split into MiFID business bidding and auction regulation bidding as a consequence of CAR. While it is true to say that firms which currently benefit from the article 2(1)(i) exemption under MiFID – as well as investment firms and credit institutions bidding in relation to two day spots – will be subject to a different set of requirements than those conducting MiFID business; this is merely a reflection of the specific and clear requirements in CAR itself.

Nevertheless, we noted in paragraph 2.10 and 2.11 of CP12/6 that we have the right, under articles 59(5) and 59(6) of CAR to require bidders to comply with **'... any other measures deemed necessary having regard to the nature of the bidding services being offered and the level of sophistication of the**

3 CAR requires every bidder to have a 'bidders representative' who must be, in accordance with article 6(3), 'a natural person established in the Union appointed pursuant to [CAR] and authorised to bind a bidder for all purposes relating to the auctions including the submission of a bid'.

clients in question in terms of their investor or trading profile as well as any risk-based assessment of the likelihood of money laundering, terrorist financing or criminal activity' and to ensure that we have **'...at [our] disposal the necessary investigative powers and sanctions that are effective, proportionate and dissuasive...'**. We are also required by article 59(5)(c) to ensure that bidders comply with the requirements of national legislation transposing the Third Money Laundering Directive (2005/60/EC).

There is strong support for imposing the additional requirements proposed in our CP, in particular the financial crime and approved persons requirements. Indeed article 59(6) requires that sufficient enforcement powers are provided. Specifically in relation to our proposal to deem the 'bidder's representative' limb of the customer function as forming part of certain governing functions, we consider that this provides an efficient and proportionate means of ensuring firms comply with the provisions of CAR.

As stated in CP12/6, treating auction regulation bidding such that we would require firms to apply MiFID equivalent requirements would, in our view, introduce disproportionate compliance costs. This is also in view of the fact that CAR specifically and deliberately did not apply MiFID requirements to auction regulation bidding. We therefore see no need to impose any additional rules at this stage, but we will keep the market under review, and reserve the right to apply new rules in the future.

3

Other changes to the consultation draft instrument

Appointed representatives

- 3.1 Following consultation on its draft order, the Treasury has made a small number of amendments, including adding a sub-set of the regulated activity of ‘bidding in emissions auctions’ within the Appointed Representatives Regulations (SI 2001/1217). The added activity is limited, in part, to comply with restrictions in MiFID on the activities that appointed representatives are permitted to carry on. We will make a minor amendment to SUP 12 (Appointed Representatives) to note this change.

Passporting

- 3.2 The Treasury has made amendments to its order to clarify the passporting arrangements for the new activity. To reflect these changes and to ensure we receive information that enables us to adequately supervise passported activities of firms carrying on auction regulation bidding, we will amend the instrument that we consulted on in the following ways.
- 3.3 A UK firm seeking to provide auction regulation bidding through establishing a branch in an EEA state must notify us with a form that provides us with information that assists our supervision of that branch (e.g. address of EEA branches, name and contact details of branch managers).
- 3.4 Where a UK firm is seeking to provide auction regulation bidding remotely by way of services in another EEA state, a UK firm must notify the FSA by email of: (a) its name and firm reference number; (b) the EEA state in which the service is or will be provided; and (c)

the start date of the service. In this case, given the limited amount of information, there is no form and instead the firm need only send the FSA an email with this information.

- 3.5** An incoming EEA firm may undertake auction regulation bidding in the UK provided it has been appropriately authorised in its Home Member State. This can be done either by providing services remotely or by setting up a branch in the UK. Where it carries on this activity by setting up a branch in the UK, as proposed in CP12/6, certain requirements will apply to it (e.g. it must have a person approved by the FSA to carry out the role of a Money Laundering Reporting Officer). We have therefore included a notification rule for incoming EEA firm branches, the sole purpose of which is to enable us to supervise its compliance with the applicable provisions. We can only supervise a branch if we know it is here, and under CAR a branch's own competent authority is not expressly required to inform us.
- 3.6** This notification rule requires an incoming EEA firm seeking to establish a branch in the UK to submit a form to us which provides basic information about the branch (e.g. name of the firm, address of any UK branch it has, name and contact details of any branch manager). The form also requires the incoming EEA firm to provide evidence of the authorisation provided by its Home Member State⁴ and the identity of the Money Laundering Reporting Officer.
- 3.7** Two separate notification rules also ensure that an incoming EEA firm updates us if the information provided on that form changes, or if it ceases to carry on auction regulation bidding from a branch in the UK. In providing these notifications, the firm does not need to submit a form but must instead inform us by email.
- 3.8** The compliance costs of submitting these notifications should be marginal. Incoming EEA firms seeking to establish a branch in the UK are also advised to submit an application for approval of a Money Laundering Reporting Officer in good time before they intend to establish a branch in the UK to avoid any unnecessary delay.
- 3.9** In each case, we are requesting a limited amount of information to assist us to discharge our supervisory responsibilities. As stated above, we need to be informed of branches so they can be supervised appropriately. Equally it is helpful for our broader supervisory duties and enables us to assist other EEA competent authorities if we know when UK firms 'passport' out. For outgoing and incoming branches, we consider that a form provides the simplest possible format. The information required will already be held by any firm compliant with UK law and CAR. Submission of the forms, and the other notification requirements described above, is through email. We therefore consider the associated costs to be negligible.
- 3.10** Where a firm is seeking to passport MiFID business bidding, the existing architecture for passporting under MiFID applies.

⁴ A letter from the Home Member State confirming the firm's authorisation under CAR should normally be sufficient evidence of this.

Administrative changes

- 3.11** A number of other administrative changes will be made to the instrument to clarify its meaning in places or otherwise refine the drafting. The full text of the near-final instrument is provided in Appendix 1.
- 3.12** It is worth noting that the minor changes proposed in the CP relating to the rules on the voluntary jurisdiction of the Financial Ombudsman Service (FOS) will not be made at this time, but the FOS intends to make them over the summer through its own procedures.
- 3.13** Finally, we have clarified our proposed rules on fees to incorporate appropriate discounts. In brief, as stated in CP12/6, we plan to offer a 20% discount to the fee normally charged, where a trader in a UK firm only carries on auction regulation bidding.
- 3.14** We have also considered the position of incoming EEA firms passporting into the UK and plan to offer a 100% discount initially in relation to a trader that only carries on auction regulation bidding. This is because we only expect a nominal increase in our supervisory workload given the expected number of firms passporting this activity into the UK and because it will form part of our wider supervision strategy in relation to incoming EEA firms. However, we will keep this discount under review and reserve the right to increase it as soon as 1 April 2013 if our assumption proves incorrect.

4

Implementation

Applications

- 4.1 From 27 July, we will be in a position to accept applications from firms wishing to carry on the new regulated activity of bidding in emissions auctions.
- 4.2 Firms seeking to apply for a Variation of Permission (VOP) to undertake MiFID business bidding separately, or together with auction regulation bidding should use the application form in Annex 2.
- 4.3 Firms should make it clear which activity they intend to carry on. Firms applying to undertake auction regulation bidding exclusively should also fill in the form at Annex 2 but will be assessed primarily against the criteria in CAR rather than the MiFID standards that do not apply to auction regulation bidding. If for any reason a firm that applied to carry on auction regulation bidding exclusively subsequently decides that it would like to carry on MiFID business bidding, it should notify the Authorisation team, as this represents a material change in its business profile and will require consideration.
- 4.4 Firms not currently authorised by the FSA should contact our Authorisations team, who will consider how the firm should be brought into our regulatory perimeter.
- 4.5 There is a possibility that a limited number of auctions might take place on the central EU platform before auctions commence on the UK platform.⁵ In the event that a firm wishes to take part in these auctions, it should make a note to that effect on its application form. Where an application is appropriately straightforward, and provided that the application is received early enough, it may be possible to vary the firm's permission in time for it to take part in those auctions. However, this statement should not be taken to prejudice our normal, agreed service level targets.

⁵ We expect UK auctions to begin in November 2012.

Complaints

- 4.6 We are implementing the proposal in our CP for the FSA to receive complaints about bidders' non-compliance with the conduct rules or the conditions of authorisation set out in CAR. Complaints should be addressed to our emissions auctioning inbox at (emissionstrading@fsa.gov.uk). It should also be noted that we would normally expect a complainant to have received a final response from the bidder in accordance with its internal complaints procedure before considering such a complaint ourselves.

Annex 1

List of non-confidential respondents

Global Financial Markets Association (GFMA) commodities working group

SSE plc

Appendix 1

Near-final rules

EMISSIONS ALLOWANCE AUCTION BIDDERS INSTRUMENT 2012**Powers exercised**

A. The Financial Services Authority makes this instrument in the exercise of the following powers and related provisions in the Financial Services and Markets Act 2000 (“the Act”):

- (1) section 59 (Approval for particular arrangements);
- (2) section 60 (Applications for approval);
- (3) section 64 (Conduct: statements and codes);
- (4) section 119 (The code);
- (5) section 121 (Codes: procedure);
- (6) section 138 (General rule-making power);
- (7) section 139 (Miscellaneous ancillary matters);
- (8) section 156 (General supplementary powers);
- (9) section 157(1) (Guidance);
- (10) section 213 (The compensation scheme);
- (11) section 214 (General);
- (12) section 223 (Management expenses);
- (13) section 226 (Compulsory jurisdiction);
- (14) section 340 (Appointment);
- (15) section 293(1) (Notification requirements); and
- (16) paragraph 17(1) (Fees) of Schedule 1 (The Financial Services Authority).

B. The rule-making powers listed above are specified for the purpose of section 153(2) (Rule-making instruments) of the Act.

Commencement

C. This instrument comes into force on *[date]*.

Amendments to the Handbook

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

| (1) | (2) |
|--|---------|
| Glossary of definitions | Annex A |
| Principles for Businesses (PRIN) | Annex B |
| Senior Management Arrangements, Systems and Controls sourcebook (SYSC) | Annex C |
| Statements of Principle and Code of Practice for Approved Persons (APER) | Annex D |
| Training and Competence sourcebook (TC) | Annex E |
| Fees manual (FEES) | Annex F |
| Interim Prudential sourcebook for Investment Businesses (IPRU(INV)) | Annex G |
| Conduct of Business sourcebook (COBS) | Annex H |

| | |
|---|---------|
| Client Assets sourcebook (CASS) | Annex I |
| Market Conduct sourcebook (MAR) | Annex J |
| Supervision manual (SUP) | Annex K |
| Dispute Resolution: Complaints sourcebook (DISP) | Annex L |
| Recognised Investment Exchanges and Recognised Clearing Houses sourcebook (REC) | Annex M |
| Listing Rules sourcebook (LR) | Annex N |

Amendments to material outside the Handbook

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

Notes

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

Citation

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

By order of the Board
[*date*]

Annex A

Amendments to the Glossary of definitions

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

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

| | |
|--------------------------------------|---|
| <i>auction regulation bidding</i> | the <i>regulated activity</i> of <i>bidding in emissions auctions</i> where it is carried on by: <ul style="list-style-type: none"> (a) a <i>firm</i> that is exempt from <i>MiFID</i> under article 2(1)(i); or (b) a <i>MiFID investment firm</i> (other than a <i>UCITS investment firm</i>) on behalf of its <i>clients</i> in relation to a <i>two-day emissions spot</i>. |
| <i>bidding in emissions auctions</i> | the <i>regulated activity</i> , specified in article 24A of the <i>Regulated Activities Order</i> (Bidding in emissions auctions), which is in summary the reception, transmission or submission of a bid at an auction of an <i>emissions auction product</i> conducted on an <i>auction platform</i> . |
| <i>MiFID business bidding</i> | the <i>regulated activity</i> of <i>bidding in emissions auctions</i> where it is carried on by a <i>MiFID investment firm</i> (other than a <i>UCITS investment firm</i>) in relation to a <i>financial instrument</i> . |
| <i>prescribed auction platform</i> | an auction platform which has been prescribed by the Treasury in the <i>Prescribed Markets and Qualifying Investments Order</i> . |
| <i>two-day emissions spot</i> | an <i>emissions allowance</i> where delivery is to be made at an agreed date no later than the second trading day from the day of an auction on an <i>auction platform</i> (within the meaning of article 3(3) of the <i>auction regulation</i>). |

Amend the following definitions as shown.

| | |
|-------------------------|--|
| <i>auction platform</i> | a platform on which auctions of greenhouse gas emission allowances <u>emissions allowances</u> are held in accordance with the <i>auction regulation</i> . |
| <i>branch</i> | ... [Note: article 4(29) of the <i>Payment Services Directive</i>] <u>(h) (in relation to a person carrying on <i>auction regulation bidding</i>) a branch.</u> |

| | |
|---------------------------------------|---|
| <i>competent authority</i> | <p>...</p> <p>(2) (in relation to the exercise of an <i>EEA right</i> and the exercise of the <i>overseas financial stability information power</i>) a competent authority for the purposes of the relevant <i>Single Market Directive</i> <u>or the auction regulation</u>.</p> <p>...</p> |
| <i>designated investment</i> | <p>a <i>security</i> or a contractually-based investment (other than a <i>funeral plan contract</i> and a right to or interest in a funeral plan contract <i>funeral plan contract</i>), that is, any of the following <i>investments</i>, specified in Part III of the <i>Regulated Activities Order</i> (Specified Investments), and a <i>long-term care insurance contract</i> which is a <i>pure protection contract</i>:</p> <p>...</p> <p>(ha) ...</p> <p>(hb) <u><i>emissions auction product</i> (article 82A) where it is a <i>financial instrument</i></u>.</p> <p>...</p> |
| <i>designated investment business</i> | <p>any of the following activities, specified in Part II of the <i>Regulated Activities Order</i> (Specified Activities), which is carried on by way of business:</p> <p>(b) ...</p> <p>(ba) <u><i>MiFID business bidding</i> (part of <i>bidding in emissions auctions</i>) (article 24A)</u>;</p> <p>...</p> |
| <i>EEA authorisation</i> | <p>(in accordance with paragraph 6 of Schedule 3 to the <i>Act</i> (EEA Passport Rights));</p> <p>...</p> <p>(b) in relation to any other <i>EEA firm</i>, authorisation granted to an <i>EEA firm</i> by its <i>Home State regulator</i> for the purpose of the relevant <i>Single Market Directive</i> <u>or the auction regulation</u>.</p> |
| <i>EEA firm</i> | <p>(in accordance with paragraph 5 of Schedule 3 to the <i>Act</i> (EEA Passport Rights)) any of the following, if it does not have its relevant office in the <i>United Kingdom</i>:</p> <p>...</p> |

- (g) an *undertaking* pursuing the activity of reinsurance (within the meaning of article 1 of the *Reinsurance Directive*) which has received authorisation under article 3 of the *Reinsurance Directive* from its *Home State Regulator*;
- (h) a person who has received authorisation under article 18 of the auction regulation;
- ...
- EEA regulator* a *competent authority* for the purposes of any of the *Single Market Directives* or the auction regulation.
- EEA right* (in accordance with paragraph 7 of Schedule 3 to the *Act* (EEA Passport Rights)) the entitlement of a *person* to establish a *branch* or provide services in an *EEA State* other than that in which he has his relevant office:
- ...
- (b) subject to the conditions of the relevant *Single Market Directive* or the auction regulation.
- emissions auction products product* the investment specified in article 82A of the Regulated Activities Order (Greenhouse gas emissions allowances), which is in summary an ~~greenhouse gas emission allowances~~ emissions allowance which are offered for sale on an auction platform as a financial instrument or a two-day emissions spot.
- greenhouse gas emission emissions allowance* an 'allowance', ~~licence, permit, right, note, unit, credit, asset, certificate or instrument (the "allowance")~~ where:
- (a) ~~the allowance confers or may result in a benefit or advantage to its holder or another person; and~~
- (b) ~~the allowance, or the benefit or advantage in (a), is linked to the emission or non-emission of quantities of carbon dioxide or other greenhouse gases into the environment by the holder of the allowance or another person~~
- within the meaning of article 3(a) of Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC.
- energy collective investment scheme* a *collective investment scheme*, the property of which consists only of energy, energy investments, ~~greenhouse gas emissions allowances~~ emissions allowances, *tradable renewable energy credits* or cash awaiting investment.
- energy investment* any of the following:

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

energy market activity

(a) any *regulated activity* other than *bidding in emissions auctions* in relation to an *energy investment* or to *energy*, or in relation to a *biomass investment* or *biomass* that is ancillary to activities related to *energy investments* or *energy*, which:

(i) is the *executing* of *own account transactions* on any *recognised investment exchange* or *designated investment exchange*; or

(ii) if it is not the *executing* of *transactions* on such exchanges, is performed in connection with or for persons who are not *retail clients*;

(b) *establishing, operating or winding up a collective investment scheme* which is an *energy collective investment scheme* in which *retail clients* do not participate.

Home State

...

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

| | | |
|--|-----|---|
| | | <u>regulation.</u> |
| <i>Home State regulator</i> | (1) | (in relation to an <i>EEA firm</i>) (as defined in paragraph 9 of Schedule 3 to the <i>Act</i> (EEA Passport Rights)) the <i>competent authority</i> (under the relevant <i>Single Market Directive</i> <u>or the <i>auction regulation</i></u>) of an <i>EEA State</i> (other than the <i>United Kingdom</i>) in relation to the <i>EEA firm</i> concerned. |
| | ... | |
| <i>Host State regulator</i> | ... | |
| | (2) | (in relation to a <i>UK firm</i>) (as defined in paragraph 11 of Schedule 3 to the <i>Act</i> (EEA Passport Rights)) the <i>competent authority</i> (under the relevant <i>Single Market Directive</i> <u>or the <i>auction regulation</i></u>) of an <i>EEA State</i> (other than the <i>United Kingdom</i>) in relation to a UK firm's <u><i>UK firm's</i></u> exercise of <i>EEA rights</i> there. |
| | ... | |
| <i>investment service</i> | | any of the following involving the provision of a service in relation to a <i>financial instrument</i> , that is: |
| | ... | |
| | | Note: article 4(1)(2) of, and section A of Annex 1 to, <i>MiFID</i> <u>and article 6(5) of the <i>auction regulation</i></u> |
| <i>investment services and/or activities</i> | | any of the services and activities listed in Section A of Annex I to <i>MiFID</i> relating to any <i>financial instrument</i> , that is: |
| | ... | |
| | | Note: article 4(1)(2) of, and section A of Annex 1 to, <i>MiFID</i> <u>and article 6(5) of the <i>auction regulation</i></u> |
| <i>investment services or activities</i> | | any of the services and activities listed in Section A of Annex I to <i>MiFID</i> relating to any <i>financial instrument</i> , that is: |
| | ... | |
| | | Note: article 4(1)(2) of, and section A of Annex 1 to, <i>MiFID</i> <u>and article 6(5) of the <i>auction regulation</i></u> |
| <i>market abuse</i> | (1) | (in accordance with section 118 of the <i>Act</i> (Market abuse)) <i>behaviour</i> (whether by one <i>person</i> alone or by two or more <i>persons</i> jointly or in concert) which: |

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

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

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

market abuse
(*distortion*)

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

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

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

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

- market abuse (manipulating devices)*
- (1) (in accordance with section 118(6) of the Act (Market abuse)) the behaviour described in section 118(6) of the Act, which is effecting transactions or orders to trade which employ fictitious devices or any other form of deception or contrivance.
- (2) (in accordance with section 118(6) of the Act (Market abuse) as modified by the RAP Regulations)) the behaviour described in section 118(6) of the Act, which is effecting transactions, bids or orders to trade which employ fictitious devices or any other form of deception or contrivance.
- market abuse (manipulating transactions)*
- (1) (in accordance with section 118(5) of the Act (Market abuse)) the behaviour described in section 118(5) of the Act, which is behaviour effecting transactions or orders to trade (otherwise than for legitimate reasons and in conformity with accepted market practices on the relevant market) which:
- (a) give, or are likely to give a false or misleading impression as to the supply of, or demand for, or as to the price of, one or more *qualifying investments*; or
- (b) secure the price of one or more such investments at an abnormal or artificial level.
- (2) (in accordance with section 118(5) of the Act (Market abuse) as modified by the RAP Regulations) the behaviour described in section 118(5) of the Act as modified by the RAP Regulations, which is behaviour effecting transactions, bids or orders to trade (otherwise than for legitimate reasons and in conformity with accepted market practices on the relevant auction platform) which:
- (a) give, or are likely to give a false or misleading impression as to the supply of, or demand for, or as to the price of, one or more *qualifying investments*; or
- (b) secure the price of one or more such investments at an abnormal or artificial level.
- market abuse (misleading behaviour)*
- (1) (in accordance with section 118(8) of the Act (Market abuse)) the behaviour described in section 118(8) of the Act which satisfies the condition in section 118(8)(a) and is behaviour (not falling within sections 118(5), (6) or (7)) which:
- (a) is likely to give a *regular user* of the market a false or misleading impression as to the supply of, demand for or price or value of, *qualifying investments*, and
- (b) is likely to be regarded by a *regular user* of the market as a failure on the part of the *person* concerned to observe the standard of *behaviour* reasonably expected of a

person in his position in relation to the market.

- (2) (in accordance with section 118(8) of the Act (Market abuse) as modified by the RAP Regulations) the behaviour described in section 118(8) of the Act which satisfies the condition in section 118(8)(a) and is behaviour (not falling within sections 118(5), (6) or (7)) which:
- (a) is likely to give a regular user of the auction platform a false or misleading impression as to the supply of, demand for or price or value of, qualifying investments, or
 - (b) and is likely to be regarded by a regular user of the auction platform as a failure on the part of the person concerned to observe the standard of behaviour reasonably expected of a person in his position in relation to the market.

*market abuse
(misuse of
information)*

- (1) (in accordance with section 118(4) of the Act (Market abuse)) the behaviour described in section 118(4) of the Act, which is behaviour (not falling within sections 118 (2) or (3) of the Act):
- (a) based on information which is not generally available to those using the market but which, if available to a *regular user* of the market, would be, or would be likely to be, regarded by him as relevant when deciding the terms on which transactions in *qualifying investments* should be effected; and
 - (b) likely to be regarded by a *regular user* of the market as a failure on the part of the *person* concerned to observe the standard of *behaviour* reasonably expected of a *person* in his position in relation to the market
- (2) (in accordance with section 118(4) of the Act (Market abuse) as modified by the RAP Regulations) the behaviour described in section 118(4) of the Act as modified by the RAP Regulations, which is behaviour (not falling within sections 118 (2) or (3) of the Act):
- (a) based on information which is not generally available to those using the auction platform but which, if available to a regular user of the auction platform, would be, or would be likely to be, regarded by him as relevant when deciding the terms on which transactions in qualifying investments should be effected, and
 - (b) is likely to be regarded by a regular user of the auction platform as a failure on the part of the person concerned to observe the standard of behaviour reasonably expected of a person in his position in relation to the auction

platform.

notice of intention a notice of intention (as described in SUP 13.5) given by a *UK firm* to:

- (a) establish a *branch* in an *EEA State* under paragraph 19(2) of Part III of Schedule 3 to the *Act* (Exercise of passport rights by UK firms); or
- (b) provide services in an *EEA State* under paragraph 20(1) of Part III of Schedule 3 to the *Act* (Exercise of passport rights by UK firms)- or
- (c) establish a *branch* or provide services in an *EEA state* in the exercise of its *EEA right* under the *auction regulation*.

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

...

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

...

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

...

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

...

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

- (2) (in accordance with section 130A(3) of the *Act* (Market abuse) as modified by the *RAP Regulations*) a *person* who is, in relation to a particular auction platform, a reasonable *person* who regularly makes bids on that market for *investments* of the kind in question.

regulated activity (in accordance with section 22 of the *Act* (The classes of activity and categories of investment)) any of the following activities specified in Part II of the *Regulated Activities Order* (Specified Activities):

...

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

Annex B

Amendments to the Principles for Businesses (PRIN)

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

3.1. Who?

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

...

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

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

Annex C

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

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

1.4 Application of SYSC 11 to SYSC 21

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

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

1.4.1B G Apart from SYSC 12, SYSC 19A, SYSC 20 and SYSC 21 which are disapplied by SYSC 1.4.1AR, the other chapters of SYSC 11 to SYSC 17 do not apply in relation to a firm's carrying on of auction regulation bidding because they only apply to an insurer. SYSC 18 provides guidance on the Public Interest Disclosure Act.

...

1 Annex 1 Detailed application of SYSC

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

Annex D

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

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

2.1 The Statements of Principle

...

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

...

Annex E

Amendments to the Training and Competence sourcebook (TC)

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

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

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

Annex F

Amendments to the Fees manual (FEES)

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

Application

1.1.2 R This manual applies in the following way:

...

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

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

...

...

...

3 Annex 1R Authorisation fees payable

...

Part 2 – Complexity Grouping Straightforward Cases

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

...

| Moderately complex cases | |
|--------------------------|-------------|
| Activity Grouping | Description |
| | |

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

...

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

...

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

...

Part 2

This table indicates the tariff base for each fee-block. The tariff base is the means by which we measure the ‘amount of business’ conducted by a *firm*. Note that where the tariff base is the number of *approved persons* it may be that a particular *firm* has *permission* for relevant activities as described in Part 1 but the type of activity that the *firm* undertakes is not one requiring a *person* to be approved to undertake a relevant *customer function* (for example *firms* only giving *basic advice on stakeholder products*). In these circumstances, the firm will be required to pay a minimum fee only (see FEES 4 Annex 2R Part 1).

| Activity Group | Tariff base |
|----------------|-------------|
| A.1 | ... |

| | |
|------|---|
| ... | |
| A.10 | <p>NUMBER OF TRADERS</p> <p>Any <i>employee</i> or agent, who:</p> <ul style="list-style-type: none"> • ordinarily acts within the <i>United Kingdom</i> on behalf of an <i>authorised person</i> liable to pay fees to the <i>FSA</i> in its fee-block A.10 (firms dealing as principal); and who, • as part of their duties in relation to those activities of the <i>authorised person</i>, commits the <i>firm</i> in market dealings or in transactions in <i>securities</i> or in other <i>specified investments</i> in the course of <i>regulated activities</i>. <p>But not any <i>employees</i> or agents who work solely in the <i>firm's MTF</i> operation.</p> <p>A <i>firm</i> may, as an option, report <i>employees</i> or agents as full-time equivalents (FTE), taking account of any part-time staff. In calculating the FTE, <i>firms</i> must take into account the total hours <i>employees</i> or agents have contracted to work for the <i>firm</i> and not the time <i>employees</i> or agents devote to the <u><i>dealing in investments as principal and bidding in emissions auctions functions</i></u> function of dealing as principal set out in fee-block A.10. Any figures using the FTE calculation to be recorded to one decimal place, rounded down to the nearest decimal place.</p> |
| ... | |

...

4 Annex 2R Fee tariff rates, permitted deductions and EEA/Treaty firm modifications for the period from 1 April 2012 to 31 March 2013

Part 1

This table shows the tariff rates applicable to each fee block

...

| Activity group | Fee payable | |
|----------------|---|----------------|
| ... | | |
| A.10 | Band Width (No. of traders) | Fee (£/trader) |
| | ... | |
| | > 180 | 5,133.71 |
| | <u>For firms carrying on auction regulation bidding, the fee in A.10 is calculated as above less 20% for each trader that carries on auction regulation bidding</u> | |

| | |
|-----|--|
| | <u>but not <i>MiFID business bidding or dealing in investments as principal.</i></u> |
| ... | |

...

Part 3

This table shows the modification to fee tariffs that apply to *incoming EEA firms* and *incoming Treaty firms* which have established branches in the UK

| Activity Group | Percentage deducted from the tariff payable under Part 1 applicable to the firm |
|----------------|--|
| ... | |
| A.10 | <u>In relation to each trader that carries on <i>auction regulation bidding</i> but not <i>MiFID business bidding or dealing in investments as principal</i>, 100%.</u> <u>In relation to all other traders, 10%.</u> |
| ... | |

...

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

...

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

Annex G

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

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

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

Broad scope firms

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

...

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

...

(ea) for a *dematerialised instruction transmitter*: £50,000; ~~€~~

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

(f) for a *broad scope firm* other than one within (b) to ~~(ea)~~ (eb) above: £100,000.

...

APPENDIX 1 GLOSSARY OF TERMS FOR IPRU(INV) 3

...

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

...

(b) ...

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

...

...

Annex H

Amendments to the Conduct of Business sourcebook (COBS)

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

1.1 The general application rule

...

- 1.1.1C R The following rules in COBS apply to a firm in relation to its carrying on of auction regulation bidding:
- (1) COBS 5 (Distance communications);
 - (2) (for a firm that has exercised an opt-in to CASS in accordance with CASS 1.4.9R in relation only to those clients for which it holds client money or safe custody assets in accordance with CASS) COBS 3 (Client categorisation), COBS 6.1.7R (Information concerning safeguarding of designated investments belonging to clients and client money), COBS 6.1.11R (Timing of disclosure) and COBS 16.4 (Statements of client designated investments or client money).

Annex I

Amendments to the Client Assets sourcebook (CASS)

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

1.4 Application: particular activities

...

Auction regulation bidding

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

and

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

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

- (a) COBS 3 (Client categorisation);
- (b) COBS 6.1.7R (Information concerning safeguarding of designated investments belonging to clients and client money);
- (c) COBS 6.1.11R (Timing of disclosure);
- (d) COBS 16.4 (Statements of client designated investments or client money);
- (e) SUP 3 (Auditors);
- (f) SUP 10.4.5R (the table of controlled functions) and SUP 10.7.9R (CASS operational oversight function (CF10a));
and
- (g) SUP 16.14 (Client money and asset return).

1.4.12 G The option to elect to comply with CASS set out in CASS 1.4.9R only applies to the extent the firm is carrying on auction regulation bidding. Where a firm is carrying on MiFID business bidding, CASS applies to it in accordance with the general application rules in CASS for a firm that is carrying on MiFID business.

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

- (1) make a written record of the election, including the date from which the election is to be effective, on the date it makes the election;
- (2) keep that record from the date that it is made for a period of five years after ceasing to use the opt in.

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

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

- (2) keep that record from the date that it is made for a period of five years after the date it is to be effective; and
- (3) discharge any outstanding fiduciary obligations that had arisen because the *firm* had elected to comply with CASS.

...

6.2.3 ...

6.2.3A R If:

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

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

...

Schedule 1 Record keeping requirements

...

Sch 1.3G

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

Annex J

Amendments to the Market Conduct sourcebook (MAR)

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

1.1 Application and interpretation

Application and purpose

1.1.1 ...

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

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

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

...

Using MAR 1

...

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

...

1.2 Market Abuse: general

...

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

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

...

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

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

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

...

Insiders: factors to be taken into account

...

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

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

...

Inside information: factors to be taken into account

...

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

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

...

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

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

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

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

...

The regular user

- 1.2.20 G In section 118 of the *Act*, the *regular user* decides:
- (1) ...
 - (2) whether *behaviour*:
 - (a) based on information meeting the criteria in section 118(4)(a) is below the expected standard (section 118(4)(b)); or
 - (b) creates or is likely to create a false or misleading impression or distorts the market or the auction of investments of the kind in question (section 118(8)); or
 - (c) which creates or is likely to create a false or misleading impression or distorts the market or the auction of investments of the kind in question is below the expected standard (section 118(8)).
- 1.2.21 G The *regular user* is a hypothetical reasonable *person* who regularly deals on the market and in the investments of the kind in question or bids on the auction platform in relation to investments of the kind in question. The presence of the *regular user* imports an objective element into the elements listed in *MAR* 1.2.15UK while retaining some subjective features of the markets for, or the auction of, the investments in question.

...

1.3 Market abuse (insider dealing)

...

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

order on the market or auction clearing price;

...

...

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

...

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

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

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

...

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

...

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

...

1.4 Market abuse (improper disclosure)

...

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

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

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

...

...

1.5 Market abuse (misuse of information)

...

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

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

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

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

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

...

...

Factors to be taken into account: standards of behaviour

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

...

...

1.6 Market abuse (manipulating transactions)

...

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

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

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

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

...

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

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

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

...

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

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

...

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

Factors to be taken into account: “legitimate reasons”

- 1.6.5 E In the opinion of the *FSA* the following factors are to be taken into account when considering whether *behaviour* is for “legitimate reasons”, and are indications that it is:
- (1) if the *person* has an actuating purpose behind the transaction to induce others to trade in, bid for or to position or move the price of, a

qualifying investment;

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

...

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

...

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

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

...

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

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

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

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

...

...

1.7 Market abuse (manipulation devices)

...

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

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

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

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

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

...

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

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

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

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

...

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

...

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

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

...

Factors to be taken into account: false or misleading impressions

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

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

...

Factors to be taken into account: standards of behaviour

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

...

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

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

(4) ...

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

...

Annex K

Amendments to the Supervision manual (SUP)

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

1 The FSA’s approach to supervision

1.1 Application and purpose

...

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

...

2 Information gathering by the FSA on its own initiative

2.1 Application and purpose

...

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

...

3 Auditors

3.1 Application

...

- 3.1.2R Applicable sections (see SUP 3.1.1R)

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

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

...

10 Approved persons

10.1 Application

...

10.1.9 R This chapter does not apply to:

- (1) an *incoming EEA firm*; or
- (2) an *incoming Treaty firm*; or
- (3) a *UCITS qualifier*;

if and in so far as the question of whether a *person* is fit and proper to perform a particular *function* in relation to that *firm* is reserved, under any of the *Single Market Directives*, the *Treaty*, ~~or~~ the *UCITS Directive* or the *auction regulation* to an authority in a country or territory outside the *United Kingdom*.

...

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

...

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

...

Bidders in emissions auctions

10.1.27 G For a firm that is exempt from MiFID under article 2(1)(i) and whose only permission is bidding in emissions auctions, the only controlled functions that apply to it are the governing functions, the money laundering reporting function, the customer function and (where it has exercised an opt-in to CASS in accordance with CASS 1.4.9R and is a CASS medium firm or a CASS large firm) the CASS operational oversight function. This is because the approved persons regime specifies a number of functions by incorporation of

requirements in SYSC; however, a *firm* carrying on *auction regulation bidding* is only subject to SYSC to a limited extent in relation to that activity. This means that the *required functions* do not apply to *auction regulation bidding*, except for the *money laundering reporting function*. Similarly, the *significant management function* does not apply in relation to *auction regulation bidding* because in carrying on that activity, a *firm* is not subject to SYSC 2.1.1R or SYSC 4.1.1R and is not undertaking *proprietary trading*.

...

10.6 Governing functions

...

What the governing functions include

...

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

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

...

10.8 Systems and ~~control functions~~ controls function

Application

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

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

10.8.1 R ...

...

10.10 Customer functions

...

- 10.10.7A R The *customer function* is the function of:
- ...
- (6) acting in the capacity of an *investment manager* and carrying on functions connected to this;
- (7) in relation to *bidding in emissions auctions*, acting as a ‘bidder’s representative’ within the meaning of subparagraph 3 of article 6(3) of the *auction regulation*.

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

...

12 Appointed representatives

...

Business for which an appointed representative is exempt

- 12.2.7 G (1) The *Appointed Representatives Regulations* are made by the Treasury under section 39(1) of the *Act*. These regulations describe, among other things, the business for which an *appointed representative* may be exempt, which is business which comprises any of:
- (a) ...
- (aa) *bidding in emissions auctions* (article 24A of the *Regulated Activities Order*) where that activity does not consist either of *dealing on own account* or the *execution of orders on behalf of clients*;

...

...

13 Exercise of passport rights by UK firms

13.1 Application and purpose

Application

...

- 13.1.3A G Other than the notification requirements in SUP 13.5.1AAR and SUP 13.5.2-AR and the related guidance in SUP 13.5.1BG, SUP 13.5.2AG and SUP

13.5.7G, this chapter does not apply to a UK firm in relation to its exercise of an EEA right under the auction regulation to provide services or establish a branch in another EEA state. This is because a UK firm is not subject to the requirements in Schedule 3 to the Act in respect of its exercise of that EEA right.

...

13.5 Notices of intention

Specified contents: notice of intention to establish a branch

13.5.1 R A UK firm, other than a UK pure reinsurer, wishing to establish a branch in a particular EEA State for the first time under an EEA right other than under the auction regulation must submit a notice of intention in the form set out in SUP 13 Annex 1R.

...

...

13.5.1AA R A UK firm establishing a branch in a particular EEA state for the first time under the auction regulation must submit a notice of intention in the form set out in SUP 13 Annex 7R prior to its establishment of that branch or whenever possible thereafter.

13.5.1B G SUP 13.5.1R does not apply to UK pure reinsurers or a UK firm exercising an EEA right under the auction regulation as they have automatic passport rights on the basis of their Home State authorisation under the Reinsurance Directive or the auction regulation. However, the information required by SUP 13.5.1AR and SUP 13.5.1AAR assists the FSA's supervision of a branch in another EEA state.

Specified contents: notice of intention to provide cross border services

13.5.2 R A UK firm wishing to provide cross border services into a particular EEA State for the first time under an EEA right other than under the auction regulation must submit a notice in the form set out in:

...

13.5.2-A R (1) A UK firm wishing to provide a service into a particular EEA State for the first time under the auction regulation must inform the FSA of the information in (2) by email to emissionstrading@fsa.gov.uk prior to its provision of that service or whenever possible thereafter.

(2) The information required by (1) is:

(a) name of the firm and the FSA firm reference number;

(b) EEA state in which the service is or will be provided; and

- (c) the proposed commencement date of the service or the date on which the service commenced.

13.5.2A G SUP 13.5.2R does not apply to UK pure reinsurers or a UK firm exercising an EEA right under the auction regulation as they have automatic passport rights on the basis of their Home State authorisation under the Reinsurance Directive or the auction regulation. However, the information required by SUP 13.5.2-AR assists the FSA's supervision of a UK firm's provision of a service in another EEA state under the auction regulation.

...

Unregulated activities

13.5.5 G A notice of intention (other than one to establish a branch or provide services in another EEA state under the auction regulation) may include activities within the scope of the relevant Single Market Directive which are not regulated activities (paragraphs 19(3) and 20(2) of Part III of Schedule 3 to the Act), although in the case of a MiFID investment firm a notice of intention may only include ancillary services which are to be carried on with one or more investment services and activities (paragraphs 19(5B) and 20(2A) of Part III of Schedule 3 to the Act). Regulation 19 of the EEA Passport Rights Regulations states that where a UK firm is able to carry on such an unregulated activity in the EEA State in question without contravening any law of the United Kingdom (or any part of the United Kingdom) the UK firm is treated, for the purposes of the exercise of its EEA right, as being authorised to carry on that activity.

...

After SUP 13 Annex 6R insert the following new form. The text is not underlined.

13 Annex 7R Passporting: Emissions Trading. Notice of intention from a UK firm to exercise the right of establishment in another EEA Member State

(see form on next page)

Passporting

Emissions Trading

Notice of intention from a UK firm to exercise the right of establishment in another EEA Member State



Firm name:

FSA firm reference number:

Intended EEA state(s) of establishment:

Purpose of this form

- *auction regulation* to establish a branch and/or use agents located in another *EEA state*.
- This form assists the *FSA's* supervision of a branch in another *EEA state* and its cooperation with regulators in other *EEA states*.

For general guidance on the exercise of passport rights by *UK firms*, please refer to *SUP 13*.

Filling in the form

1. When completing the notification, use the TAB key to move from question to question and press SHIFT TAB to move back to the previous question. Once completed send to the email address below.
2. All relevant questions must be answered in full and all relevant documents attached.

If you have any questions in connection with Auction regulation, please call the Firm Contact Centre on: 0845 606 9966 (Call rates may vary) Overseas call +44 20 7066 1000 or E-mail: EmissionsTrading@fsa.gov.uk

Emissions Trading team
The Financial Services Authority
25 The North Colonnade
Canary Wharf
London, E14 5HS
Telephone: +44 (0)20 7066 1000

E-mail: EmissionsTrading@fsa.gov.uk

1. Contact details of the firm in the UK

1.1 Details of the person we can contact about this notification.

| | |
|------------------|-------|
| Contact name | █ |
| Position at firm | █ |
| Telephone number | + █ |
| Email address | █@ |
| Web address | www █ |

2. Details about the establishment (branch and/or agents)

2.1 Branch details

Please provide the address of the proposed EEA branch(es)

| | | | |
|-------------------------|---|--|--|
| Address | | | |
| Country | | | |
| Telephone number | | | |
| Email address at branch | @ | | |

2.2 Please provide details of the branch manager(s)

| <i>Title</i> | <i>Forename</i> | <i>Surname</i> | <i>Direct E-mail:</i> | <i>Direct dial telephone</i> |
|--------------|-----------------|----------------|-----------------------|------------------------------|
| █ | █ | █ | █ | █ |
| █ | █ | █ | █ | █ |
| █ | █ | █ | █ | █ |
| █ | █ | █ | █ | █ |
| █ | █ | █ | █ | █ |

2.3 Please give the proposed date for the business to start at the branch or the date on which business started at the branch (dd/mm/yyyy).



2.4 Do you intend to use an agent located in another *EEA state* to carry on *auction regulation bidding* in that *EEA state*?

Yes No

If 'Yes' please complete sections 2.5 – 2.7.

2.5 Agent details

| | | |
|------------------|----------------------|--------|
| Name of agent | <input type="text"/> | |
| Contact name | <input type="text"/> | |
| Address | <input type="text"/> | |
| Postcode | | |
| Telephone number | <input type="text"/> | +44(0) |
| Email address | <input type="text"/> | @ |

2.6 If you are using more than one agent, please attach their details to this form using the format above.

2.7 Please give the proposed date the agent is to commence business on the firm's behalf or the date on which business commenced (*dd/mm/yyyy*).



3. Declaration

Note to declaration

If you are submitting this notification electronically you do not need to provide a signature here. However, you still need to have the authority to make this notification on behalf of the firm.

It is a criminal offence to knowingly or recklessly give us information that is false or misleading. If necessary, please take appropriate professional advice before supplying information to us.

There will be a delay in processing the application if any information is inaccurate or incomplete. Failure to notify us immediately of any significant change to the information provided may result in a serious delay in the application process.

- I understand it is a criminal offence to knowingly or recklessly give the FSA information that is false or misleading.
- I confirm that the information in this form is accurate and complete to the best of my knowledge and belief.
- I confirm that I am authorised to sign on behalf of the firm.

| | |
|-----------|----------------------|
| Name | <input type="text"/> |
| Position | <input type="text"/> |
| Telephone | <input type="text"/> |
| E-mail | <input type="text"/> |
| Signature | <input type="text"/> |
| Date | dd/mm/yy |

Data protection

For the purposes of complying with the Data Protection Act 1998, the personal information in this form will be used by the FSA to discharge its statutory functions under the *auction regulation* and other relevant legislation and may be disclosed to third parties for those purposes.

Where to send this form

Please email the completed form, together with any required documentation to the Emissions Trading team at: EmissionsTrading@fsa.gov.uk

Amend the following as shown.

13A Qualifying for authorisation under the Act

13A.1 Application and purpose

Application

- 13A.1.1 G (1) This chapter applies to an *EEA firm* that wishes to exercise an entitlement to establish a *branch* in, or provide *cross border services* into, the *United Kingdom* under a *Single Market Directive* or the *auction regulation*. (The *Act* refers to such an entitlement as an *EEA right* and its exercise is referred to in the *Handbook* as “passporting”.) (See *SUP* App 3 (Guidance on passporting issues) for further *guidance* on passporting.)

...

...

- 13A.1.5 G (1) ...
- (2) The *guidance* in this chapter represents the *FSA's* interpretation of the *Single Market Directives*, the *auction regulation*, the *Act* and the secondary legislation made under the *Act*. The *guidance* is not exhaustive and should not be seen as a substitute for a *person* consulting the legislation or taking legal advice.

13A.2 EEA firms and Treaty firms

- 13A.2.1 G A *person* will only be an *EEA firm* or a *Treaty firm* if it has its head office in an *EEA State* other than the *United Kingdom*. *EEA firms* and *Treaty firms* are entitled to exercise both the right of establishment and the freedom to provide services under the *Treaty*. The difference, however, is that an *EEA firm* has a right to passport under a *Single Market Directive* or the *auction regulation*, whereas a *Treaty firm* carries on activities for which the right to carry on those activities does not fall within the scope of a *Single Market Directive* or the *auction regulation*. An *EEA firm* may also be a *Treaty firm* if it carries on such activities. A *person* may be a *Treaty firm*, where, for example, it carries on business that includes *regulated activities*, the right to carry on which does not fall within the scope of the *Single Market Directive* or the *auction regulation* under which it is entitled to exercise an *EEA right*, for example, *reinsurance* in the case of a direct insurer to which the *Insurance Directives* apply.
- 13A.2.2 G An *EEA firm* may passport those activities which fall within the scope of the relevant *Single Market Directive* or the *auction regulation* as long as they are

included in its *Home State authorisation*.

13A.3 Qualifications for authorisation under the Act

EEA firms

- 13A.3.1 G Section 31 of the *Act* (Authorised persons) states that an *EEA firm* is *authorised* for the purposes of the *Act* if it qualifies for *authorisation* under Schedule 3 to the *Act* (EEA Passport Rights). Under paragraph 12 of Part II of that Schedule, an *EEA firm* that is an *EEA pure reinsurer*, or an *EEA firm* that has received authorisation under article 18 of the *auction regulation*, qualifies for *authorisation* without condition. ~~At~~ Other than those two types of *EEA firm*, an *EEA firm* that is not an *EEA pure reinsurer* qualifies for *authorisation* if:
- (1) ...
 - (2) ...
- ...
- 13A.3.2 G (1) On qualifying for *authorisation*, subject to SUP 13A.3.1CG(1), an *EEA firm* (except for an *EEA firm* that has received authorisation under article 18 of the *auction regulation*) will have *permission* to carry on each *permitted activity* (see (3) below) which is a *regulated activity*.
- (2) ...
 - (3) The *permitted activities* of an *EEA firm* (except for an *EEA firm* that has received authorisation under article 18 of the *auction regulation*) are those activities identified in the consent notice, regulator's notice or notice of intention. ~~Permitted~~ Those *permitted activities* may include activities that are within the scope of a *Single Market Directive* but which are *unregulated activities* in the *United Kingdom*.
 - (3A) An *EEA firm* that received authorisation under article 18 of the *auction regulation* has *permission* to carry on *bidding in emissions auctions*.
 - (4) The *permission* will be treated as being on terms equivalent to those appearing in the consent notice, regulator's notice, ~~or~~ notice of intention or (in respect of an *EEA firm* that has received authorisation under article 18 of the *auction regulation*) to those appearing in the authorisation granted to the *EEA firm* under article 18 of the *auction regulation*. For example, it will reflect any limitations or requirements which are included in the *firm's Home State* authorisation.

13A.4 EEA firms establishing a branch in the United Kingdom

The conditions for establishing a branch

- 13A.4.1 G (1) Before an *EEA firm* (other than an *EEA pure reinsurer* or an *EEA firm that has received authorisation under article 18 of the auction regulation*) exercises an *EEA right* to establish a branch in the *United Kingdom* other than under the *Insurance Mediation Directive*, the *Act* requires it to satisfy the *establishment conditions*, as set out in paragraph 13(1) of Part II of Schedule 3 to the *Act*.
- (2) ...

...

Auction regulation bidding: notification rule and applicable provisions

- 13A.4.5 R An incoming EEA firm that is exercising an EEA right under the auction regulation to establish a branch in the United Kingdom must submit the form in SUP 13A Annex 4R prior to its establishment of that branch or whenever possible thereafter.
- 13A.4.6 G The sole purpose of the notification in SUP 13A.4.5R is to enable the FSA to supervise the UK branch of the incoming EEA firm's compliance with the applicable provisions on an ongoing basis. The applicable provisions that apply to that branch are set out in SUP 13A Annex 1G (Application of the Handbook to Incoming EEA Firms).

13A.5 EEA firms providing cross border services into the United Kingdom

...

- 13A.5.2 G An *EEA firm* (other than an *EEA pure reinsurer* or an *EEA firm that received authorisation under article 18 of the auction regulation*) should note that the requirement under the *Single Market Directives* to give a notice of intention to provide *cross border services* applies whether or not:
- (1) ...
- (2) ...

The conditions for providing cross border services into the United Kingdom

- 13A.5.3 G (1) Before an *EEA firm* (other than an *EEA pure reinsurer* or an *EEA firm that has received authorisation under article 18 of the auction regulation*) exercises an *EEA right* to provide *cross border services* into the *United Kingdom*, the *Act* requires it to satisfy the *service conditions*, as set out in paragraph 14 of Part II of Schedule 3 to the *Act*.

...

- (4) An EEA firm that has received authorisation under article 18 of the auction regulation is not subject to the service conditions in its exercise of an EEA right under the auction regulation to provide services in the United Kingdom. The notification procedure in SUP 13A.5.4G does not apply to it and it does not need to notify the FSA prior to providing services into the United Kingdom because there are presently no applicable provisions that apply in these circumstances. Instead, its provision of these services is supervised by its Home State regulator.

The notification procedure

- 13A.5.4 G (1) Unless the *EEA firm* (other than an *EEA pure reinsurer* or an *EEA firm that received authorisation under article 18 of the auction regulation*) is passporting under the *Insurance Mediation Directive*, if the *FSA* receives a regulator's notice or, where no notice is required (in the case of an *EEA firm* passporting under the *Banking Consolidation Directive*), is informed of the *EEA firm's* intention to provide *cross border services* into the *United Kingdom*, the *FSA* will, under paragraphs 14(2)(b) and 14(3) of Part II of Schedule 3 to the *Act*, notify the *EEA firm* of the *applicable provisions* (if any) within two *months* of the *day* on which the *FSA* received the regulator's notice or was informed of the *EEA firm's* intention.

...

...

13A.6 Which rules will an incoming EEA firm be subject to?

...

- 13A.6.2 G An *incoming EEA firm* (other than an *EEA pure reinsurer* or an *EEA firm that has received authorisation under article 18 of the auction regulation and only provides services in the United Kingdom*) or *incoming Treaty firm* carrying on business in the *United Kingdom* must comply with the *applicable provisions* (see SUP 13A.4.4G, SUP 13A.4.6G, and SUP 13A.5.4G) and other relevant *UK* legislation. For example where the business includes:

...

(1) ...

(2) ...

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

| |
|---|
| <p>1. The table below summarises the application of the <i>Handbook</i> to an <i>incoming EEA firm</i>. Where the table indicates that a particular module of the <i>Handbook</i> may</p> |
|---|

apply, its application in relation to any particular activity is dependent on the detailed application provisions in that module. The table does not apply to *incoming ECA providers*. These should refer to *COBS 1 Annex 1 Part 3 section 7 for guidance* on how *COBS* applies to them. The table does not apply to *EEA pure reinsurers* as ~~these firms have automatic passport rights on the basis of their Home State authorisation~~ or to an *EEA firm* in relation to its exercise of an *EEA right* under the *auction regulation* to provide services in the *United Kingdom*.

...

4. An EEA firm that exercises an EEA right under the auction regulation to establish a branch in the United Kingdom to provide auction regulation bidding is subject to a limited set of requirements in the Handbook that apply to that activity. These are the rules listed in paragraph 2.6A of SYSC 1 Annex 1, GEN 4 and SUP (in particular, the money laundering reporting function in SUP 10 and requirements to notify the FSA). Aside from this note, the table does not apply to those firms.

5. An EEA firm that exercises an EEA right under MiFID to carry on MiFID business bidding is subject to the applicable provisions relating to its carrying on of MiFID business.

...

13A Annex 2G Matters reserved to a Home State regulator

| | |
|-------------------------------|---|
| ... | |
| <u>The auction regulation</u> | |
| <u>11E</u> | <u>Where an <i>incoming EEA firm</i> exercises an <i>EEA right</i> under the <i>auction regulation</i> to provide services or establish a branch in the <i>United Kingdom</i>, it is carrying on <i>auction regulation bidding</i>. Authorisation and supervision of a <i>firm</i> under the <i>auction regulation</i> are almost exclusively matters reserved to the <i>Home State regulator</i>. The only requirements which the <i>FSA</i> has applied as <i>Host State regulator</i> under the <i>auction regulation</i> in respect of <i>auction regulation bidding</i> is on a <i>UK branch</i> in relation to safeguards against money laundering and financial crime as well as a statutory status disclosure obligation and requirements to notify the <i>FSA</i> (see Note 4 of <i>SUP 13A Annex 1G</i>).</u> |
| <u>11F</u> | <u>An <i>incoming EEA firm</i> that carries on <i>MiFID business bidding</i> is exercising an <i>EEA right</i> under <i>MiFID</i> and is subject to the <i>applicable provisions</i> relating to its carrying on of <i>MiFID business</i>. The respective responsibilities of the <i>Home State regulator</i> and <i>Host State regulator</i> are the same as under <i>MiFID</i>.</u> |
| ... | |

...

After SUP 13A Annex 3R insert the following new annex. The text is not underlined.

13A Annex 4R **Passporting: Emissions Trading. Notice of intention to exercise the right of establishment in the United Kingdom**

(see form on next page)

Passporting

Emissions Trading

Notice of intention to exercise the right of establishment in the United Kingdom



Firm name:

EEA state of authorisation (home member state):

Purpose of this form

- You must complete this notification if you are an *incoming EEA firm* that is seeking to exercise an *EEA right* under the *auction regulation* to establish a branch and/or use agents located in the United Kingdom.
- This form enables the FSA to supervise a UK establishment of an *incoming EEA firm's* compliance with the *applicable provisions* that apply to that establishment as set out in the FSA Handbook at SUP 13A Annex 1G (Application of the Handbook to Incoming EEA Firms).
- Please note that we require an *incoming EEA firm* with an establishment in the UK to have an approved *Money Laundering Reporting Officer*.
- For general guidance on the exercise of passport rights in the UK by *incoming EEA firms*, please refer to SUP 13A (Qualifying for authorisation under the Act).

Filling in the form

1. When completing the notification, use the TAB key to move from question to question and press SHIFT TAB to move back to the previous question. Once completed send to the email address below.
2. All relevant questions must be answered in full and all relevant documents attached.

If you have any questions in connection with Auction regulation, please call the Firm Contact Centre on: 0845 606 9966 (Call rates may vary) Overseas call +44 20 7066 1000 or E-mail: EmissionsTrading@fsa.gov.uk

Emissions Trading team
The Financial Services Authority
25 The North Colonnade
Canary Wharf
London, E14 5HS
Telephone: +44 (0)20 7066 1000

E-mail: EmissionsTrading@fsa.gov.uk

1. Contact details of the firm in the home state

1.1 Details of the person we can contact about this notification in the *home state*.

| | |
|------------------|-------|
| Contact name | █ |
| Position at firm | █ |
| Telephone number | + █ |
| Email address | █ |
| Web address | www █ |

2. Details about the establishment (branch and/or agents)

2.1 Branch details

Please provide the address of the UK branch from which we can obtain information about the business.

| | | | |
|-------------------------|---|--------|---|
| Address | █ | | |
| Postcode | █ | | |
| Telephone number | █ | +44(0) | █ |
| Email address at branch | █ | @ | █ |

2.2 Please provide details of the branch manager(s) and (if different) the Money Laundering Reporting Officer

| <i>Title</i> | <i>Forename</i> | <i>Surname</i> | <i>Direct E-mail:</i> | <i>Direct dial telephone</i> |
|--------------|-----------------|----------------|-----------------------|------------------------------|
| █ | █ | █ | █ | █ |
| █ | █ | █ | █ | █ |
| █ | █ | █ | █ | █ |
| █ | █ | █ | █ | █ |

The Money Laundering Reporting Officer (CF11) is required to be registered as an [approved person](#) with the FSA and an incoming EEA firm should submit the appropriate form in application for this if it has not done so at the time of submitting this form.

2.3 Please give the proposed date for the business to start at the branch or the date on which business started at the branch (dd/mm/yyyy)

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| █ | █ | █ | █ | █ | █ | █ | █ | █ | █ |
|---|---|---|---|---|---|---|---|---|---|

2.4 Do you intend to use an agent located in the UK to carry on *auction regulation bidding* in the UK?

Yes No

If 'Yes' please complete sections 2.5 – 2.7

2.5 Agent details

| | |
|------------------|--------|
| Name of agent | █ |
| Contact name | █ |
| Address | |
| Postcode | |
| Telephone number | +44(0) |
| Email address | @ |

2.6 If you are using more than one agent, please attach their details to this form using the format above.

2.7 Please give the proposed date the agent is to commence business on the firm's behalf or the date on which business commenced (dd/mm/yyyy).

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| █ | █ | █ | █ | █ | █ | █ | █ | █ | █ |
|---|---|---|---|---|---|---|---|---|---|

3. Details about your authorisation

| Requirement | Response |
|--|----------|
| <p><u>Permission to Conduct the Activity</u> Please provide evidence of your authorisation under the <i>auction regulation</i>, including the date on which authorisation was granted by your Home State Regulator</p> <p>NOTE: a copy of the authorisation letter from your Home State Regulator should normally be sufficient evidence of this.</p> | █ |

4. Declaration

Note to declaration

If you are submitting this notification electronically you do not need to provide a signature here. However, you still need to have the authority to make this notification on behalf of the firm.

It is a criminal offence to knowingly or recklessly give us information that is false or misleading. If necessary, please take appropriate professional advice before supplying information to us.

There will be a delay in processing the application if any information is inaccurate or incomplete. Failure to notify us immediately of any significant change to the information provided may result in a serious delay in the application process.

- I understand it is a criminal offence to knowingly or recklessly give the FSA information that is false or misleading.
- I confirm that the information in this form is accurate and complete to the best of my knowledge and belief.
- I confirm that I am authorised to sign on behalf of the firm.

| | |
|-----------|---------------------------------------|
| Name | <input type="text"/> |
| Position | <input type="text"/> |
| Telephone | <input type="text"/> |
| E-mail | <input type="text"/> |
| Signature | <input type="text"/> |
| Date | <input type="text" value="dd/mm/yy"/> |

Data protection

For the purposes of complying with the Data Protection Act 1998, the personal information in this form will be used by the FSA to discharge its statutory functions under the *auction regulation* and other relevant legislation, and may be disclosed to third parties for those purposes.

Where to send this form

Please email the completed form, together with any required documentation to the Emissions Trading team at: EmissionsTrading@fsa.gov.uk

Amend the following as shown.

14 Incoming EEA firms changing details, and cancelling qualification for authorisation

14.1 Application and purpose

Application

14.1.1 G This chapter applies to an *incoming EEA firm* other than an *EEA pure reinsurer* which has established a *branch* in, or is providing *cross border services* into, the *United Kingdom* under one of the *Single Market Directives* or the *auction regulation* and, therefore, qualifies for *authorisation* under Schedule 3 to the *Act*.

14.1.1A G The guidance in SUP 14.2 and SUP 14.3 covers the EEA Passport Rights Regulations. It is not, however, relevant to an EEA firm exercising an EEA right under the auction regulation, except for SUP 14.2.14R which applies a separate notification requirement. Additionally, where an EEA firm is carrying on MiFID business bidding, that firm is exercising an EEA right under MiFID and so this chapter applies to that activity because it is MiFID business.

...

14.2 Changes to branch details

...

Firms passporting under the auction regulation

14.2.14 R An EEA firm that is exercising an EEA right to provide auction regulation bidding from a branch in the United Kingdom must notify the FSA of any change to the information submitted under SUP 13A.4.5R by email to emissionstrading@fsa.gov.uk prior to the change or whenever possible thereafter.

...

14.5 Variation of a top-up permission to carry on regulated activities outside the scope of the Single Market Directives or the auction regulation

...

14.6 Cancelling qualification for authorisation

...

Auction regulation bidding: notification rule

14.6.3A R An EEA firm that has exercised an EEA right under the auction regulation to establish a branch in the United Kingdom must notify the FSA by email to emissionstrading@fsa.gov.uk when it ceases to carry on regulated activities through a branch passport in the United Kingdom or whenever possible thereafter.

14.6.3B G The sole purpose of the notification in SUP 14.6.3AR is to inform the FSA that it may discontinue its supervision of the UK branch of the incoming EEA firm's compliance with the applicable provisions. The applicable provisions that apply to that branch are set out in SUP 13A Annex 1G (Application of the Handbook to Incoming EEA Firms).

Financial institutions giving up right to authorisation

14.6.4 G ...

...

14.7 Cancellation of a top-up permission to carry on regulated activities outside the scope of the Single Market Directives or the auction regulation

...

15.3 General notification requirements

...

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

...

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

...

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

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

...

...

...

16 Reporting requirements

...

16.12 Integrated regulatory reporting

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

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

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

...

...

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

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

...

Regulated Activity Group 11

16.12.29A R A *firm* must submit the form contained in SUP 16 Annex 32R (Bidding in emissions auctions return) annually within 30 *business days* from its *accounting reference date* unless the *firm* did not carry on any *auction regulation bidding* during the year to which that form relates.

...

After SUP 16 Annex 31BG insert the following new appendix. The text is not underlined.

16 Annex 32R Bidding in emissions auctions return

FSA060**Bidding in emissions auctions return****A**

1 Are you meeting your minimum capital requirement?

yes - no

2 In carrying on *bidding in emissions auctions*, have you complied throughout the reporting period, and are you currently compliant, with directly applicable requirements under the *auction regulation* and related *rules* in the *Handbook*?

yes - no

Amend the following as shown.

Appendix 3 Guidance on passporting issues

3.1 Application

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

...

Annex L

Amendments to the Dispute Resolution: Complaints sourcebook (DISP)

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

1.1 Purpose and application

...

Application to firms

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

...

...

1.1.5 R This chapter does not apply to:

...

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

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

...

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

...

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

| | | | | | | |
|----------------|--|--|--|--|--|--|
| <u>bidding</u> | | | | | | |
|----------------|--|--|--|--|--|--|

...

2.3 To which activities does the Compulsory Jurisdiction apply?

Activities by firms

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

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

...

...

Schedule 6 Rules that can be waived

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

Annex M

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

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

2A.3 Guidance on RAP recognition requirements

...

2A.3.2 G ...

Table: Guidance on RAP recognition requirements

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

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

3 Notification rules for UK recognised bodies

...

3.18 Membership

...

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

...

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

...

...

5 Applications for Recognition (UK recognised bodies)

...

5.2 Application process

...

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

| | |
|-----|--|
| ... | |
|-----|--|

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

...

Annex N

Amendments to the Listing Rules sourcebook (LR)

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

Appendix 1.1 Relevant definitions

...

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

... ..

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

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

...

...

Annex O

Amendments to the Perimeter Guidance manual (PERG)

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

2.4 Link between activities and the United Kingdom

...

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

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

...

...

2.6 Specified investments: a broad outline

...

Greenhouse gas emissions allowances

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

2.6.19E G It relates only to the *regulated activity* of *bidding in emissions auctions* (whereby a bid is received, transmitted and submitted on an *auction platform*) and captures the two forms of allowance products that may be auctioned under article 4(2) of the *auction regulation*: a ‘two-day spot’ or a ‘five-day future’.

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

2.6.19G G This *specified investment* incorporates definitions from other *EU directives* or regulations which can be summarised as follows:

- (1) “Emissions allowance” means an ‘allowance’ as defined in article 3(a) of Directive 2003/87/EC which established the scheme for greenhouse gas emissions allowance trading within the EU. That article provides that an ‘allowance’ is an allowance to emit one tonne of carbon dioxide equivalent during a specified period, only valid for the purpose of meeting the requirements of Directive 2003/87/EC and only transferable in accordance with the provisions of that directive (emissions allowance).
- (2) A ‘two-day spot’ is defined by reference to article 3(3) of the auction regulation. That article provides that a ‘two-day spot’ is an allowance auctioned for delivery at an agreed date no later than the second trading day from the day of the auction (two-day emissions spot).
- (3) A financial instrument is defined as any instrument listed in Section C of Annex I to MiFID. Recital 14 of the auction regulation explains that a ‘two-day spot’ is not a financial instrument whereas a ‘five-day future’ is (see PERG 13.4, Q34). A ‘five-day future’ is defined in article 3(4) of the auction regulation as an allowance auctioned as a financial instrument for delivery at an agreed date no later than the fifth trading day from the day of the auction.

...

2.7 Activities: a broad outline

...

Bidding in emissions auctions

2.7.6B G The *RAO* and the *auction regulation* together generate three broad categories of *person* in relation to bidding for *emissions allowances* on an *auction platform*:

- (1) The first category consists of an investment firm to which MiFID applies and a BCD credit institution where either firm is bidding on behalf of its clients for emissions auction products or bidding on its own account for emissions auction products that are financial instruments. This category also consists of a person that is exempt from MiFID under article 2(1)(i) where it is bidding on behalf of a client of its main business or bidding on its own account (further information on the article 2(1)(i) exemption from MiFID is in PERG 13.5, Q44). A person in this category is entitled to bid on an auction platform but requires permission from the FSA for bidding in emissions auctions to do so.

- (2) The second category consists of an *investment firm* to which *MiFID* applies and a *BCD credit institution* where either is bidding on its own account for *two day emissions spots*. This category also consists of operators or aircraft operators bidding on their own account as well as group entities or business groupings of those operators or public bodies or state-owned entities of *Member States* that control any of those operators (as set out in article 18 of the *auction regulation*). A *person* or entity in this category is entitled to bid on an *auction platform* but does not require *permission* from the *FSA* to do so as a result of an exclusion from the *regulated activity of bidding in emissions auctions* in article 24B of the *RAO*.
- (3) The third category consists of all other *persons*. The *auction regulation* prevents an *auction platform* from granting these *persons* admission to bid. A *person* in this category is not entitled to bid on an *auction platform* and the *FSA* is not able to grant such a *person* *permission* to do so.

2.7.6C G A *person* may fall into both the first and the second category. For example, a *person* might be both exempt from *MiFID* under article 2(1)(i) (within the first category) and be a group entity of an operator (within the second category). In this case, that *person* does not require *permission* for activities that cause that *person* to fall into the second category because those activities are excluded from the activity of *bidding in emissions auctions*.

2.7.6D G Article 24A(2) of the *RAO* provides that *bidding in emissions auctions* does not form part of any other *regulated activity* and so, although in the *FSA*'s view this activity broadly equates to the *regulated activities of dealing in investments as principal, dealing in investments as agent, arranging (bringing about) deals in investments or making arrangements with a view to transactions in investments*, a *person* seeking to carry on this activity will only require *permission* for *bidding in emissions auctions* to do so.

...

2.8 Regulated activities: exclusions applicable in certain circumstances

...

Dealing in investments as principal

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

...

- (7) An activity that might otherwise be both *dealing in investments as principal* and *bidding in emissions auctions* is specifically excluded from *dealing in investments as principal* as a result of article 24A(2) of the RAO which provides that the activity of *bidding in emissions auctions* does not form part of any other *regulated activity* (see PERG 2.7.6DG).

...

Dealing in investments as agent

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

...

- (4) An activity that might otherwise be both *dealing in investments as agent* and *bidding in emissions auctions* is specifically excluded from *dealing in investments as agent* as a result of article 24A(2) of the RAO which provides that the activity of *bidding in emissions auctions* does not form part of any other *regulated activity* (see PERG 2.7.6EG).

...

...

Arranging deals in investments and arranging a home finance transaction

...

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

- (-1) Under Article 24A(2), an activity that would otherwise be both *arranging* and *bidding in emissions auctions* is specifically excluded from *arranging* because the activity of *bidding in emissions auctions* does not form part of any other *regulated activity* (see PERG 2.7.6EG).

- (1) ...

...

...

2.9 Exclusions applicable to particular regulated activities

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

...

...

2.10 Persons carrying on regulated activities who do not need authorisation

...

Members of the professions

...

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

...

- (3) ...

(3A) *bidding in emissions auctions*;

...

...

2 Annex 2G Regulated activities and the permission regime

...

2 Table

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

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

...

...

Bidding in emissions auctions(ac) bidding in emissions auctionsemissions auction products

...

...

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

...

...

...

Note 1C:

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

...

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

...

13.3 Investment services and activities

...

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

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

As a result of some of bidding in emissions auctions being MiFID business, the regulated activity of bidding in emissions auctions is divided for the purposes of

the Handbook, and the different requirements that apply, into two parts: *MiFID business bidding* and *auction regulation bidding*.

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

...

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

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

...

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

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

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

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

...

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

...

13.4 Financial instruments

...

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

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

...

- ~~emission~~ emissions allowances;

...

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

...

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

...

13 Annex 2

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

| MiFID Investment Services and Activities | Part IV permission | Comments |
|--|--------------------|----------|
|--|--------------------|----------|

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

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

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

| MiFID financial instrument | Part IV permission category | Commentary |
|----------------------------|-----------------------------|------------|
| ... | ... | ... |

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

...

13 Annex 4 Principal Statutory Instruments relating to MiFID scope issues

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

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

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

Annex P

Amendments to the Enforcement Guide (EG)

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

Prohibition orders and withdrawal of approval – approved persons

...

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

...

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

(a) ...

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

...

...

10 Injunctions

...

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

...

The FSA's choice of powers

...

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

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

...

...

Other relevant powers

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

Appendix 2

Variation of permission application: bidding in emissions auctions

Variation of Permission (VoP) Application

Bidding in emissions auctions

Full name and FSA reference number of firm

Purpose of this form

This form is **only** for firms seeking to vary their permissions to include the regulated activity of 'bidding in emissions auctions'. **Only** three categories of firm are eligible:

- a) an investment firm authorised under the Markets in Financial Instruments Directive (2004/39/EC) (MiFID);
- b) a credit institution authorised under the Banking Consolidation Directive(2006/48/EC) (BCD); and
- c) a firm that is exempt from MiFID under article 2(1)(i).

We take the view that bidding in emissions auctions is comparable to the existing regulated activities of 'dealing in investments as principal', 'dealing in investments as agent' and 'arranging deals in investments'. Consequently, for a firm with existing permission to carry on one or more of these activities, unless its bidding activities would materially alter the risks posed to its business, we envisage the variation of permission process to be relatively straightforward. For more detailed information on bidding in emissions auctions you should consult the FSA Handbook.

Firms must answer all sections. It is important that you provide accurate and complete information and disclose all relevant information. If you do not, you may be committing a criminal offence, it may increase the time taken to assess your application and may call into question your suitability to be authorised.

Submit your application by post to:

Permissions Department
The Financial Services Authority
25 The North Colonnade
Canary Wharf
LONDON E14 5HS

Contents of this form

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1

Contact details and timings for this application

We need this information in case we need to contact you when assessing this application.

Contact for this application**1.1 Details of the person we should contact about this application.**

This must be someone who works for the applicant firm, and not a professional adviser.

| | |
|---|--|
| Title | |
| First names | |
| Surname | |
| Job title | |
| Business address | |
| | |
| | |
| | |
| Postcode | |
| Phone number (including STD code) | |
| Email address | |

Timings for this application**1.2 Does the applicant firm have any timing factors that it would like us to consider?**

We will attempt to process your application as quickly as possible. Please note however that applications can take a number of months to be assessed. If you wish your application to be granted by a specific date, we will try to do so. If we cannot, we will contact you with the reason why. However, please note that we are committed to determining an application for a variation of permission once we have received it and deemed it to be complete within six months.

2

Variation of Permission

Confirmation that you are seeking to change your firm's permission.

It is important to note that this form concerns itself with new requirements to be placed upon a firm that wishes to conduct the new activity. This does not prejudice the fact that our full set of threshold conditions are still the minimum conditions a firm is required to satisfy, and continue to satisfy, to be given and retain any Part IV Permission. The firm must satisfy us these conditions will continue to be met if we grant the application. **You may therefore be asked to provide documentary evidence of this fact above and beyond the questions below if you answers to these questions lead us to doubt if the Threshold conditions will continue to be met or if our supervisors otherwise have reason to doubt.**

2.1 Please confirm that you are seeking to become authorised for bidding in emissions auctions by ticking the box below.

I am seeking to bid in emissions auctions and require authorisation to do so.

2.2 Which of the following categories will your firm fall into? Please provide evidence of your firm type.

An investment firm authorised under MiFID bidding on your own account for financial instruments or on behalf of your clients for two days spots and/or financial instruments.

A credit institution authorised under the BCD bidding on your own account for financial instruments or on behalf of your clients for two days spots and/or financial instruments.

A firm that is exempt from MiFID under article 2(1)(i) bidding for two day spots and/or financial instruments on behalf of the clients of your main business or on your own account.

2.3 Will you be undertaking MiFID business bidding, auction regulation bidding or both? (Note: See the Handbook Glossary for definitions of these terms. All firms holding client money, that conduct MiFID business, will be subject to the Client Assets Sourcebook (CASS) in that context).

MiFID business bidding only > Continue to section 3.

Auction regulation bidding only.

Both.

- 2.4 For those firms undertaking auction regulation bidding, our regulation of this activity is designed such that you may choose whether or not to 'opt in' to the provisions of CASS in respect of auction regulation bidding. If you do, you must comply with the provisions of CASS, and certain other provisions of the Handbook, as modified by the opt in rules (see CASS 1.4.9R to 1.4.14R). Do you intend to 'opt in'?**

Yes > Continue to next question.

No > Continue to section 3.

- 2.5 You must describe what procedures will be in place for holding client money. This should include details of what reconciliations will be performed and how often they will be undertaken.**

- 2.6 What type of account will your firm use to hold client money? (tick one)**

Statutory trust > Continue to next question.

Other > Provide further details below.

- 2.7 Is the account held at an institution which satisfies the requirements of CASS 7.4.1R?**

Yes > Continue to next question.

No > Explain why below.

- 2.8 Please confirm the firm is ready and willing to comply with the provisions of CASS and other related requirements that apply when a firm exercises the auction regulation bidding CASS opt in.**

Yes > Continue to next question.

No > Explain why below.

3

Reason for Variation

Tell us why you are applying to change your firm's permission.

3.1 We need to know why your firm is applying to change its permission. You should give as much information as possible, including:

- **whether this change will affect your firm and the long-term strategy for your business;**
- **any new operational, legal, market risks that you have identified and will need to consider; and**
- **details on any outsourcing.**

4 Threshold Conditions

The threshold conditions are the minimum conditions a firm is required to satisfy, and continue to satisfy, to be given and retain Part IV Permission. The firm must satisfy us these conditions will continue to be met if we grant the application. You may be asked to provide documentary evidence to support your answers, either during the application process or at a later point.

Legal Status

4.1 Confirm that after this application your firm will retain its existing legal status.

- Yes > Continue to next question.
- No > Give details of how the legal status will change below.

Location of Offices

4.2 Confirm the following:

- if you are a body corporate constituted under the law of any part of the United Kingdom, that your firm's Head Office (and also if you have a Registered Office, your Registered Office) is located within the United Kingdom; or
- if you are not a body corporate and your Head Office is in the United Kingdom, that you carry on business in the United Kingdom.

- Yes > Continue to next question.
- No > Give further details below.

Close Links

4.3 As a result of this application, will your firm have any new close links with another person or firm?

- No > Continue to next question.
- Yes > Give further details below.

Adequate Resources

4.4 What is your firm's current prudential category?

4.5 Will the firm's prudential category change as a result of this application?

- No > Continue to section 5.
- Yes > What prudential category will your firm be in?

4.6 What will be the firm's new capital resource requirement?

4.7 Is the firm currently able to meet this new capital requirement?

- Yes > Continue to next question.
- No > Explain why below.

5

Auction Regulation Bidding Conditions

We need to know whether the firm will satisfy the requirements in CAR and other requirements applied by the FSA for auction regulation bidding.

- 5.1 What process will you have in place to assure compliance with article 18(4) of the EU Commission Auction Regulation (No 1031/2010) (CAR) which requires you to ensure that your clients are themselves eligible to bid under CAR or are bidding on behalf of clients that are themselves eligible?**

- 5.2 Are you ready, willing and organised to comply with the requirements listed under article 59 of CAR?**

Yes > Are you able to supply documentary evidence to support this upon request?

Yes > Continue to next section.

No > Explain why below.

No > Explain why below.

6 Approved Persons

If a firm changes its permission it may need to have new Approved Persons and/or additional Controlled Functions or it may no longer need some existing Controlled Functions.

You should consider the effect of this change on approved persons before submitting your application. If you require help, please call the Firm Contact Centre on 0845 606 9966 or email iva@fsa.gov.uk.

6.1 Will the new permission require new approved persons or additional controlled functions for existing approved persons in relation to the application?

- No > Continue to question 6.2.
- Yes > Have you submitted the required individual application form?
 - Yes > Provide the names of applicant(s) and new controlled functions below.
 - No > Explain why below.

6.2 Have any individual(s) proposed to perform a new role (whether an approved person or not) been assessed as competent to apply the knowledge and skills necessary to engage in or oversee the activities? And do they have the necessary qualifications (where relevant) and experience?

- No > Explain why below.
- Yes > Has this individual carried on this role before (e.g. at another firm)?
 - Yes > Continue to section 7.
 - No > Provide information below on how they have been assessed as competent.

7

Fees

Changing your firm's permission can generate an application fee and vary your periodic fee.

You must pay your application fee in full at the same time as submitting your application (by cheque or credit card). If the fee is not paid in full within **five working days** of the date that you submit this form, your application will be returned to you. This fee is non-refundable; and we do not issue invoices for it.

If the proposed application will move the firm into a new fee block (A10), the correct fee will be £750. We charge a fee of £250 for applications that will increase a firm's permitted business activities but which do not change the firm's fee blocks.

7.1 Please confirm whether you are approved for the regulated activity of “Dealing in investments as principal”

- Yes > Continue to next question.
- No > Fee is £750 to move into fee block A10. Continue to question 7.3.

7.2 Please confirm whether you currently fall into any of the exclusions in FEES 4 Annex 1 and are as a result currently exempt from fee block A10

- Yes > Fee is £750 to move into fee block A10.
- No > Fee is £250.

7.3 Please confirm that you have enclosed a cheque for the correct application fee.

- Yes.
- No, I will pay using a credit card.

Cheques should be made payable to the Financial Services Authority, with the firm name and reference number written on the back and enclosed with this form. To make a payment using a credit card, please do not enter the details on this form. We will contact you to ask for the details.

8 Declaration and Signature

Warning

Knowingly or recklessly giving us information, which is false or misleading in a material particular, may be a criminal offence (sections 398 and 400 of the Financial Services and Markets Act 2000). Our rules (SUP 15.6.4R) require an authorised person to take reasonable steps to ensure the accuracy and completeness of information given to us and to tell us immediately if materially inaccurate information has been provided. Contravening these requirements may lead to disciplinary sanctions or other enforcement action by us. It should not be assumed that information is known to us just because it is in the public domain or has previously been disclosed to us or another regulatory body. If you are not sure whether a piece of information is relevant, please include it anyway.

Data Protection

For the purposes of complying with the Data Protection Act, the personal information in this form will be used by the Financial Services Authority to discharge its statutory functions under the Financial Services and Markets Act 2000 and other relevant legislation. It will not be disclosed for any other purposes without the permission of the applicant.

Declaration

By submitting this application form

- ✓ I confirm that the information in this application is accurate and complete to the best of my/our knowledge and belief and that I/we have taken all reasonable steps to ensure that this is the case.
- ✓ I am aware that it is a criminal offence knowingly or recklessly to give the FSA information that is false or misleading in a material particular.
- ✓ Some questions do not require supporting evidence. However, the records, which demonstrate the applicant firm's compliance with the rules in relation to the questions, must be available to the FSA on request.
- ✓ I will notify the FSA immediately if there is a significant change to the information given in the application pack. If I fail to do so, this may result in a delay in the application process or enforcement action.

| | |
|---|----------------------|
| Date | <input type="text"/> |
| Name of signatory¹ | <input type="text"/> |
| Position² of signatory | <input type="text"/> |
| Individual Registration Number (if applicable) | <input type="text"/> |
| Signature | <input type="text"/> |

¹ The signatory must be a suitable person of appropriate seniority at the firm.

² e.g. Chair of the Management Committee, member of the Board, Compliance Officer, etc.

PUB REF: 002981

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