

UKLA Technical Note

Additional powers to supervise and discipline sponsors

Ref: UKLA / TN / 712.12 – Guidance Consultation

FSMA s88;
FSMA s88A;
LR 8.6;
LR 8.6.5AR;
LR 8.6.5BG;
LR 8.7.2AR;
LR 8.7.2BG;
R 8.7.20G;
LR 8.7.25R;
LR 8.7.26G;
LR 8.7.27G;
DEPP
2.5.11A G;
DEPP
2.5.11B G;
DEPP 2
Annex 1G;
DEPP 2 Annex
2G; DEPP 4

Section 88 FSMA and Chapter 8 of the Listing Rules have been amended to reflect our additional statutory powers regarding the supervision and discipline of sponsors.

These additional powers allow:

- the restriction or limitation of services performed by sponsors, both on and post-approval (s 88(3) FSMA)
- a sponsor to request its approval to be suspended (s 88(3) FSMA)
- the suspension of a sponsor's approval or the imposition of a limitation or restriction on the services a sponsor may perform, for such a period as the FCA considers appropriate, in order to advance one or more of the FCA's operational objectives (s 88E FSMA) and
- the FCA to fine, suspend, restrict or limit the services performed by a sponsor for a maximum period of 12 months and/or publicly censure a sponsor if it has contravened the Listing Rules relating to sponsors (s 88A FSMA).

A. Restrictions or limitations on sponsor services (s 88(3) FSMA)

General

We have the power to restrict or limit the services a sponsor provides both at the time of a sponsor's approval or at any time thereafter (s 88(3)(e) FSMA, LR 8.6.5AR and LR 8.7.2AR).

The ability to restrict or limit sponsor services adds flexibility to the sponsor regime by allowing us to approve a new applicant or maintain a sponsor's approval where previously it might not have met the sponsor approval criteria under LR 8.6. For example, where we consider that a new applicant or sponsor does not have the relevant experience or appropriate systems and controls to provide the complete range of sponsor services it wishes to undertake, rather than refusing a sponsor application or seeking a sponsor's cancellation, we can limit or restrict the scope of sponsor services that it provides. For the sake of clarity, we do not intend to restrict a sponsor's ability to provide sponsor services on a transaction-by-transaction basis but on a more generic basis, such as, but not limited to, by type of issuer (eg, premium listed investment companies).

The FCA must follow a statutory notice procedure for a restriction or limitation of sponsor services to take effect, which is set out in the Decision Procedures and Penalties Manual (DEPP) (DEPP 2.5.11AG and DEPP 2 Annex 1F). For new applicants, the statutory notice procedure will be undertaken alongside the sponsor approval process.

Where a restriction or limitation of a sponsor's services is requested or otherwise agreed by a new applicant or sponsor, the statutory notice procedure will be undertaken by FCA staff under executive procedures (as set out in DEPP 2 Annex 1G and DEPP 4). Where a new applicant or sponsor does not consent to the restriction or limitation, the statutory notice procedure will be undertaken by the FCA's Regulatory Decisions Committee (RDC).

On approval

LR 8.6.5AR is supplemented by guidance under LR 8.6.5BG regarding the circumstances that the FCA will have regard to when considering whether to impose restrictions or limitations on a sponsor's services at the time of a sponsor's approval.

We may seek to impose a restriction or limitation where the FCA considers that an applicant does not demonstrate the relevant experience and expertise in relation to the provision of the complete range of sponsor services.

We are most likely to consider these types of restrictions or limitations appropriate where an applicant has employees that can demonstrate relevant experience and expertise of providing sponsor services solely to premium listed investment companies. The applicant may request, or have imposed on its approval, a limitation that enables it to provide sponsor services to premium listed investment companies subject to LR 15 and LR 16, but restricts it from providing sponsor services to premium listed commercial companies.

Post-approval

Guidance is provided at LR 8.7.2BG, in relation to LR 8.7.2AR, describing the circumstances that we will have regard to when considering whether to impose restrictions or limitations on the services a sponsor can provide at any time after its approval.

We are most likely to consider restricting or limiting the services a sponsor may provide when concerns come to our attention, via the usual supervisory processes, that a sponsor does not demonstrate the relevant experience and expertise in relation to the provision of the complete range of sponsor services it is seeking to provide.

For example, we may seek to restrict a sponsor that has predominantly provided sponsor services solely to premium listed investment companies from providing sponsor services to other premium listed companies.

Further, we may seek to restrict or limit the services a sponsor provides where we consider the sponsor's systems and controls are not appropriate in light of the factors set out in LR 8.6.13G. It is possible that, where we believe that a sponsor is not able to comply with LR 8.6.5R(3), in light of guidance set out in LR 8.6.12G and LR 8.6.13G, we may seek to restrict or limit the services it may provide.

Withdrawing a restriction or limitation

Under section 88(8)(d) FSMA, a sponsor may apply for the withdrawal or variation of a limitation or restriction to its sponsor services after it has been applied.

We are required to follow a statutory notice procedure in this regard (as set out in DEPP 2.5.11B G and DEPP 2 Annex 1G). This statutory notice procedure will be carried out by FCA staff under executive procedures or by the RDC depending on who undertook to impose the limitation or restriction initially.

B. Suspension of a sponsor's approval at the sponsor's request (s88(3) FSMA)

General

Where a sponsor is unable to meet the sponsor approval criteria (~~s 88(3)(f) FSMA, LR 8.6~~), the sponsor may request a cancellation of its approval (s 88(3)(f) FSMA, LR 8.6). However, where a sponsor considers that this is a short-term concern and, given the irrevocable nature of a cancellation and the associated administrative and financial costs of re-applying for approval, a sponsor may prefer to request a suspension of its approval instead. This may provide the sponsor with the necessary time to take remedial action to ensure that it can comply with the sponsor approval criteria in the future.

Requesting a suspension

A suspension request must be in writing and include the information set out in LR 8.7.25R. The suspension request will be considered by FCA staff and where the FCA accepts the request, the sponsor will be notified accordingly. Where we are proposing to refuse the request, FCA staff are required to undertake a statutory notice procedure under executive procedures (DEPP 2 Annex 1G).

Circumstances where a sponsor might choose to request a suspension of its approval include, but are not limited to, where it is unable to meet the sponsor approval criteria (set out in LR 8.6.5R) because it is undergoing a re-organisation or other corporate event that introduces uncertainty about its future or where there is an unplanned, temporary or permanent loss of experienced members of staff impacting the sponsor's systems and controls for ability to meet the criteria under LR 8.6 and/or appropriately resourcesponsor services.¹

We provide guidance at LR 8.7.26AG in relation to requests for suspension. A sponsor may consider making such a request where it is having ongoing discussion with us about the relevant concern and is undertaking remedial action to be able to satisfy the ongoing criteria for approval. Given that a sponsor which is suspended will be working towards having the suspension lifted following remedial action, we will typically place a time limit on the period of suspension; this will take into account the concern, the likelihood of remedying it and how long it will take to do this. As an example, where a sponsor decides to recruit staff to ensure it is able to meet the competence criteria in LR 8.6.5R (2), we will expect to discuss with the sponsor what steps it will take, and what would be a reasonable period of time within which, to achieve this. LR 8.7.26AG does not specify a maximum period for a suspension at a sponsor's request but, in practice, we are likely to consider a period of no more than six months to be appropriate, although this depends on the circumstances.

Requesting a suspension of its approval can give a sponsor a useful grace period in which to carry out remedial action to ensure it is now compliant with the sponsor approval criteria. Of course, while suspended, a sponsor will be unable to provide sponsor services. So, before making such a request, sponsors should carefully consider the impact of a period of suspension on their ability to comply with the approval criteria and, in particular, the competence criteria in LR 8.6.7R (2). To satisfy LR 8.6.7R (2), sponsors must have submitted a sponsor declaration within the previous three years and to be able to comply with the key contact requirements in LR 8.6.19R (noting that, under LR 8.6.20G, the FCA expects a key contact to have provided a sponsor service in the previous three years) (LR 8.6.7R).

¹ TN/709.1 highlights the need for sponsors to consider whether their resources are sufficient to carry out sponsor services in accordance with LR 8.

Nonetheless, sponsors should be aware that, over time, a suspension of approval may result in a sponsor being unable to comply with the sponsor approval criteria on an ongoing basis. For example, we consider that, to comply with the competence requirement (LR 8.6) at all times, sponsor experience needs to be sufficiently up to date to be relevant. However, a sponsor cannot undertake sponsor services for the duration of a suspension, increasing the risk that its sponsor experience becomes less relevant over time as the listing regime and the market in which sponsors operate is subject to change. We may therefore still seek to cancel the approval of a suspended sponsor should it be unable to take remedial steps to address its ability to comply with the sponsor approval criteria within a reasonable timeframe.

Withdrawing a suspension

Should a sponsor decide not to progress with an application for a suspension of its approval, it may apply to withdraw a suspension request at any time before the suspension takes effect (LR 8.7.26G). A sponsor may also apply to withdraw the suspension, under section 88(8)(c) FSMA, in circumstances where a suspension has previously been agreed. In considering whether to apply, we suggest that the sponsor is comfortable it has taken all necessary remedial steps to comply with the sponsor approval criteria. Should we propose to refuse a sponsor's application to withdraw an existing suspension, FCA staff, under executive procedures, must follow a statutory notice procedure (DEPP 2 Annex 1G).

C. Suspensions, limitations and restrictions of sponsor services to advance the FCA's operational objectives (s 88E FSMA)

The FCA may suspend a sponsor's approval or impose restrictions or limitations on the services a sponsor can provide, for such a time that it considers appropriate, if we consider it desirable to do so to advance one or more of its operational objectives (under section 88E FSMA and as explained in LR 8.7.27G). Our operational objectives are set out in sections 1B(3) and 1C-1E FSMA. For example, we may intervene on the basis that we consider that consumer protection or the integrity of the UK financial system may be jeopardised if the sponsor continues to provide sponsor services in a particular set of circumstances.

Before using our section 88E powers, we must consider, under our statutory primacy obligation in section 234K FSMA, whether it would be more appropriate to use our powers under the Competition Act 1998 (CA98). If we consider that it would be more appropriate to proceed under CA98, we must do so rather than exercise our powers under section 88E.

We expect to use this section 88E power in circumstances where we need to act urgently to prevent a sponsor from either agreeing or continuing to provide sponsor services on a particular transaction (or, potentially, all transactions). Before using this power, we are likely to have made our concerns clear to the sponsor already, through our usual supervisory processes.

Whilst situations where we might intervene in this way are likely to be rare, circumstances where we might do so include, but are not limited to, where:

- a sponsor seeks to accept a mandate for which we consider they are unable to meet the sponsor competence requirements
- we have serious concerns that a sponsor's systems and controls are not appropriate to support the proposed sponsor service
- there is an unplanned, temporary or permanent loss of experienced member(s) of staff

- we take the view that the sponsor is unable to manage an actual or perceived conflict of interest, or
- the sponsor is in financial distress and about to enter insolvency proceedings

To effect a suspension, limitation or restriction in such circumstances, FCA staff, under executive procedures, must follow a statutory notice procedure (DEPP 2 Annex 2G). FSMA does not currently limit the length of time the restriction, limitation or suspension can be imposed. However, as with all of the additional sponsor powers the subject of this note, the FCA is required to act reasonably and proportionately in the circumstances. Under section 88E FSMA, the FCA may also withdraw or vary a limitation, restriction or suspension of this nature after it has taken effect.

D. Disciplinary Powers (s 88A FSMA)

Section 88A FSMA gives us the power to impose a range of disciplinary sanctions on sponsors, in the event of a breach of the Listing Rules, including:

- public censure
- suspending the approval of a sponsor (for a period not exceeding 12 months)
- imposing limitations or restrictions on the provision of sponsor services (for a period not exceeding 12 months), and
- imposing financial penalties.

Guidance on this is included in LR 8.7.20G and DEPP 2 Annex 1G.