

**DECISION PROCEDURE AND PENALTIES MANUAL AND ENFORCEMENT
GUIDE (AMENDMENT) INSTRUMENT 2008**

Powers exercised

- A. The Financial Services Authority makes this instrument in the exercise of the powers and related provisions in or under:
- (1) the following sections of the Financial Services and Markets Act 2000:
 - (a) section 157(1) (Guidance); and
 - (b) section 395 (The Authority's procedures); and
 - (2) the following provisions in the Regulated Covered Bonds Regulations 2008 (SI 2008/346):
 - (a) regulation 42 (Guidance); and
 - (b) regulation 44 (Warning notices and decision notices).

Commencement

- B. This instrument comes into force on 11 December 2008.

Amendments to the Handbook

- C. 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
Decision Procedure and Penalties manual (DEPP)	Annex B
Regulated Covered Bonds sourcebook (RCB)	Annex C

Amendments to the Enforcement Guide

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

Citation

- E. This instrument may be cited as the Decision Procedure and Penalties Manual and Enforcement Guide (Amendment) Instrument 2008.

By order of the Board
4 December 2008

Annex A

Amendments to the Glossary of definitions

In this Annex, striking through indicates deleted text.

statutory notice associated decision a decision which is made by the *FSA* and which is associated with a decision to give a *statutory notice*, including a decision:

...

- (c) to refuse access to FSA material;
- ~~(d) as to the information which it is appropriate to publish about the matter to which a *final notice* or an effective *supervisory notice* relates.~~

Annex B

Amendments to the Decision Procedure and Penalties manual (DEPP)

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

Decisions relating to listing of securities

2.5.9 G *FSA staff under executive procedures will take the following statutory notice decisions:*

...

(2) the suspension of *listing* on the *FSA's* own initiative or at the request of the issuer;

(3) ~~the suspension of trading in a financial instrument;~~ [deleted]

...

(5) the exercise of any of the powers in sections 87K or 87L of the *Act* in respect of a breach of any applicable provision; and

(6) ~~the cancellation of a person's approval as a sponsor at the sponsor's request;~~ and [deleted]

(7) ...

...

2.5.15 G A decision to give a *warning notice* or *decision notice* refusing an application for an *authorisation order* declaring a unit trust scheme to be an *AUT* or *ICVC* will be taken by the *RDC* only if the application is by an *authorised fund manager* who is not the *operator* of an existing *AUT* or *ICVC*. Otherwise, the decision to give the *warning notice* or *decision notice* will be taken by *FSA* staff under ~~executive procedures~~ executive procedures.

...

2 Annex 1G Warning notices and decision notices under the Act and certain other enactments

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

Section of the Act	Description	Handbook reference	Decision maker
...			

88(4)/(6)	when the <i>FSA</i> is proposing or deciding to cancel a <i>person's</i> approval as a <i>sponsor</i> at the <i>sponsor's</i> request		<i>Executive procedures</i>
89(2)/(3)	when the <i>FSA</i> is proposing or deciding to publish a statement censuring a <i>sponsor</i> *		<i>RDC</i>
92(1)/(4)	when the <i>FSA</i> is proposing or deciding to take action against any person under section 91 for breach of Part 6 rules*		<i>RDC</i>
...			
313B(9)	when the <i>FSA</i> has required an institution to suspend a financial instrument from trading and it is proposing or deciding to refuse an application by the institution or the issuer for the cancellation of the suspension	<i>REC</i> 4.2.4G <u>4.2D</u>	<i>Executive procedures</i>
...			

Section of the Building Societies Act 1986	Description	Handbook reference	Decision maker
...	
46A(1)(a)/(3)(a)	when the <i>FSA</i> is proposing or deciding to give a direction under section 36(3), (5), (6), (7) or (10) requiring a <i>building society</i> to submit for its approval a restructuring plan or to submit to the society's members the requisite transfer resolutions for a transfer of the society's business to a company or (if such a direction is given) imposing limitations on the issue of shares, acceptance of deposits or making of loans or requiring the society to take certain steps or refrain from certain action or requiring the		<i>RDC</i>

	removal of a director or other officer*		
--	---	--	--

...

Regulated Activities Order	Description	Handbook reference	Decision maker
...

<u>Regulated Covered Bonds Regulations 2008</u>	<u>Description</u>	<u>Handbook reference</u>	<u>Decision maker</u>
<u>Regulation 13(4)/(5)(a)</u>	<u>when the FSA is proposing or deciding to refuse an application under regulation 8</u>	<u>RCB 6</u>	<u>Executive procedures</u>
<u>Regulation 20(5)/(6)(a)</u>	<u>when the FSA is proposing or deciding not to approve a material change</u>	<u>RCB 6</u>	<u>Executive procedures</u>
<u>Regulation 25(5)/(6)(a)</u>	<u>when the FSA is proposing or deciding not to approve a change of ownership</u>	<u>RCB 6</u>	<u>Executive procedures</u>
<u>Regulation 32(1)(a)/(2)(a)</u>	<u>before the FSA gives a direction under regulation 30 or when it decides to make the direction</u>	<u>RCB 6</u>	<u>Executive procedures</u>
<u>Regulation 32(1)(b)/(2)(b)</u>	<u>before the FSA removes an issuer from the register of issuers under regulation 31 or when it decides to remove the issuer from the register of issuers*</u>	<u>RCB 6</u>	<u>Executive procedures</u>
<u>Regulation 35(1)/(3)</u>	<u>when the FSA is proposing or deciding to impose a penalty on a person under regulation 34*</u>	<u>RCB 6</u>	<u>RDC</u>

2 Annex 2G	Supervisory notices		
Section of the Act	Description	Handbook reference	Decision maker

53(4)/(7)/ (8)(b)	when the <i>FSA</i> is exercising its <i>own-initiative power</i> to vary a firm's <i>Part IV permission</i>	<i>SUP 67</i>	<i>RDC</i> or <i>executive procedures</i> See <i>DEPP 2.5.7G</i>
...			

...

6.2.2A G The factors to which the *FSA* will have regard when deciding whether to impose a penalty under regulation 34 of the *RCB Regulations* are set out in *RCB 4.2.3G*.

...

6.2.28 G ~~*DEPP 6.2.26G* and *DEPP 6.2.27G* do not apply to a person who has no responsibilities under the *Takeover Code*. [deleted]~~

...

6.5.2A G The factors to which the *FSA* will have regard when determining the appropriate level of financial penalty to be imposed under regulation 34 of the *RCB Regulations* are set out in *RCB 4.2.5G*.

Annex C

Amendments to the Regulated Covered Bonds sourcebook (RCB)

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

6 Warning and decision notices

6.1 Application and purpose

Application

- 6.1.1 G This chapter contains guidance for *issuers* and *owners* and other persons subject to the *RCB Regulations*.

Purpose

- 6.1.2 G The purpose of this chapter is to set out the *FSA*'s statement of the procedure which it proposes to follow on giving *warning notices* and *decision notices* in relation to *regulated covered bonds*.

6.2 Policy on decision and warning notices

Decision and warning notices

- 6.2.1 G When making a decision on an application for registration under the *RCB Regulations*, or in relation to material changes to the contractual terms of the *regulated covered bond*, or in relation to a change of *owner*, or when seeking to use direction, revocation or penalty powers, the *RCB Regulations* require the *FSA* to give the subject of the intended action a *warning notice* and a *decision notice*. The recipient of a *warning notice* has the right to make representations to the decision maker, and may refer the decision to give a *decision notice* to the *Tribunal*.
- 6.2.2 G Regulation 44 of the *RCB Regulations* (Warning notices and decision notices) applies Part XXVI of the *Act* (Notices) in respect of notices that we give under the *RCB Regulations*. This means that the provisions of section 393 of the *Act* (Third party rights) and section 394 of the *Act* (Access to Authority material) apply to penalty procedures under the *RCB Regulations* and that, if the matter is not referred to the *Tribunal*, then upon taking the action to which a *decision notice* relates, the *FSA* will issue the subject of the decision notice a *final notice*. The *FSA* is required to publish such details about the matter to which a *final notice* relates as it considers appropriate.

FSA decision maker

- 6.2.3 G *DEPP 2* Annex 1G identifies the relevant decision maker in relation to *warning notices* and *decision notices* issued by the *FSA* under the *RCB Regulations*.
- 6.2.4 G Decisions on applications for registration, in relation to material changes to contractual terms of the *regulated covered bond*, or in relation to a change of owner, or decisions to issue a direction under the *RCB Regulations* or to revoke an *issuer's* registration, will be taken under *executive procedures* following the process set out in *DEPP 4*.
- 6.2.5 G Decisions to impose a financial penalty under regulation 34 of the *RCB Regulations* will be taken by the *RDC* under the procedure set out in *DEPP 3.2* or, where relevant, *DEPP 3.3*.

Annex D

Amendments to the Enforcement Guide (EG)

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

Contents list

...

18. Cancellation of approval as a sponsor

19. Non-FSMA powers

Annex 1: ~~Table of other enforcement powers~~ [deleted]

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

...

1. Introduction

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

...

1.6 ~~The FSA has further enforcement powers and information gathering and investigation powers, including those listed in annex 1, which are not discussed in this guide. The FSA will use the powers where it considers this is appropriate in all the circumstances. [deleted]~~

...

6. Publicity

...

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

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

Directions against ECA providers

- 6.13 This is discussed in ~~chapter 17~~ paragraphs 19.37 and 19.38 of this guide.

...

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

- 8.1 The FSA has powers under section 45 of the Act to vary or cancel an *authorised person's Part IV permission*. The FSA may use these powers where:
- (1) the person is failing or is likely to fail to satisfy the threshold conditions;
 - (2) the person has not carried on any *regulated activity* for a period of at least 12 months; or

(3) it is desirable to vary or cancel the person's *Part IV permission* in order to protect the interests of consumers or potential consumers.

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

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

8.1B When it considers how it should deal with a concern about a *firm*, the FSA will have regard to its *regulatory objectives* and the range of regulatory tools that are available to it. It will also have regard to:

(1) ...

...

8.2 The FSA will proceed on the basis that a *firm* (together with its directors and senior management) is primarily responsible for ensuring the *firm* conducts its business in compliance with the *Act*, the *Principles* and other *rules*. ~~In the context of its enforcement activities, the FSA will take formal action affecting the conduct of a *firm's* commercial business only if that business is being or has been conducted in such a way that the FSA judges it necessary to act in order to secure compliance with those requirements and/or address the consequences of non-compliance. In the context of its supervision activities, the FSA may take formal action in the circumstances described in *SUP 7.3*.~~

8.3 In the course of its supervision and monitoring of a *firm* or as part of an enforcement action, the FSA may make it clear that it expects the *firm* to take certain steps to ensure it continues to meet regulatory requirements. These steps might include the correction of financial, conduct of business or control weaknesses. The FSA envisages that *firms* will normally take these steps without the need for it to use its *own initiative powers*. In the vast majority of cases the FSA will seek to agree with a *firm* those steps the *firm* must take to address the FSA's concerns. However, where the FSA considers it appropriate to do so, it will exercise its formal powers under section 45 of the *Act* to vary a *firm's* permission to ensure such requirements are met. This may include where:

(1) the FSA has serious concerns about a *firm*, or about the way its business is being or has been conducted;

(2) the FSA is concerned that the consequences of a *firm* not taking the desired steps may be serious;

- (3) the imposition of a formal statutory requirement reflects the importance the FSA attaches to the need for the firm to address its concerns;
- (4) the imposition of a formal statutory requirement may assist the *firm* to take steps which would otherwise be difficult because of legal obligations owed to third parties.

8.3A SUP 7 provides more information about the situations in which the FSA may decide to take formal action in the context of its supervision activities.

8.4 ~~Where the FSA considers that it cannot rely on a *firm* taking effective action, or if the *firm* fails to comply with the FSA's reasonable request for it to take remedial steps, the FSA will consider exercising its formal powers under section 45 of the *Act* to vary a *firm's* permission. This may include instances where the FSA is concerned that the consequences of a *firm* not taking the desired steps may be serious and:~~

- (1) ~~the *firm* appears unwilling or unable to take adequate and timely steps to address the FSA's concerns; or~~
- (2) ~~the imposition of a formal statutory requirement may assist the *firm* to take steps which would otherwise be difficult because of legal obligations owed to third parties. [deleted]~~

8.5 ~~Circumstances~~Examples of circumstances in which the FSA will consider varying a *firm's* Part IV permission ~~in support of its enforcement function include those where~~ because it has serious concerns about a *firm*, or about the way its business is being or has been conducted ~~include where. Examples of these circumstances are:~~

- (1) in relation to the grounds for exercising the power under section 45(1)(a) of the *Act*, the firm appears to be failing, or appears likely to fail, to satisfy the *threshold conditions* relating to one or more, or all, of its *regulated activities*, because for instance:
 - (a) the *firm's* material and financial resources appear inadequate for the scale or type of *regulated activity* it is carrying on, for example, where it has failed to maintain professional indemnity insurance or where it is unable to meet its liabilities as they have fallen due; or
 - (b) ...

...

~~Exercising the power to cancel~~ **Cancelling a firm's Part IV permission on the FSA's own initiative under section 45 of the Act: the FSA's policy**

...

8.14 The grounds on which the FSA may exercise its power to cancel an authorised person's permission under section 45 of the *Act* are the same as the grounds for

variation. They are set out in section 45(1) and described in *EG 8.1*. Examples of the types of circumstances in which the FSA may cancel a *firm's Part IV permission* include:

- (1) non-compliance with a *Financial Ombudsman Service* award against the *firm*;
- (2) material non-disclosure in an application for authorisation or approval or material non-notification after authorisation or approval has been granted. The information which is the subject of the non-disclosure or non-notification may also be grounds for cancellation;
- (3) failure to have or maintain ~~professional indemnity insurance, or other~~ adequate financial resources, or a failure to comply with regulatory capital requirements;
- (4) non-submission of, or provision of false information in, regulatory returns, or repeated failure to submit such returns in a timely fashion;
- (5) non-payment of FSA fees or repeated failure to pay FSA fees except under threat of enforcement action;
- (6) failure to provide the FSA with valid contact details or failure to maintain the details provided, such that the FSA is unable to communicate with the *firm*;
- (7) repeated failures to comply with rules or requirements;
- (8) a failure to co-operate with the FSA which is of sufficient seriousness that the FSA ceases to be satisfied that the *firm* is fit and proper, for example failing without reasonable excuse to:
 - (a) comply with the material terms of a formal agreement made with the FSA to conclude or avoid disciplinary or other enforcement action; or
 - (b) provide material information or take remedial action reasonably required by the FSA.

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

...

8.20 The FSA views this cooperation and collaboration as essential to effective regulation of the international market in financial services. It will therefore exercise its *own-initiative power* wherever:

- (1) ...
- (2) it is satisfied that the use of the power is appropriate (having regard to the considerations set out at paragraphs 8.1B to 8.5) to enforce effectively the

regulatory requirements imposed under the *Single Market Directives* or other Community obligations.

...

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

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

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

...

10 Injunctions

...

- 10.1A Decisions about whether to apply to the civil courts for injunctions under the Act will be made by the RDC Chairman or, in an urgent case and if the Chairman is not available, by an RDC Deputy Chairman. In an exceptionally urgent case the matter will be decided by the director of Enforcement or, in his or her absence, another member of the FSA's executive of at least director of division level.

- 10.1B An exceptionally urgent case in these circumstances is one where the FSA staff believe that a decision to begin proceedings

- (1) should be taken before it is possible to follow the procedure described in paragraph 10.1A; and
- (2) it is necessary to protect the interests of consumers or potential consumers.

...

11 Restitution and redress

...

- 11.1A Decisions about whether to apply to the civil courts for restitution orders under the Act will be made by the RDC Chairman or, in an urgent case and if the Chairman is not available, by an RDC Deputy Chairman. In an exceptionally urgent case the

matter will be decided by the director of Enforcement or, in his or her absence, another member of the FSA's executive of at least director of division level.

11.1B An exceptionally urgent case in these circumstances is one where the FSA staff believe that a decision to begin proceedings

(1) should be taken before it is possible to follow the procedure described in paragraph 11.1A; and

(2) it is necessary to protect the interests of consumers or potential consumers.

...

12 Prosecution of Criminal Offences

...

12.2 The FSA's general policy is to pursue through the criminal justice system all those cases where criminal prosecution is appropriate. When it decides whether to bring criminal proceedings in England, Wales or Northern Ireland, or to refer the matter to another prosecuting authority in England, Wales or Northern Ireland (see paragraph 12.11), it will apply the basic principles set out in the Code for Crown Prosecutors.... When considering whether to prosecute a breach of the *Money Laundering Regulations*, the FSA will also have regard to whether the person concerned has followed the *Guidance for the UK financial sector issued by the Joint Money Laundering Steering Group* Guidance for the UK financial sector issued by the Joint Money Laundering Steering Group.

...

Commencing criminal proceedings

12.4 ...

12.4A Subject to 12.4C, a decision to commence criminal proceedings will be made by the RDC Chairman or, in an urgent case and if the Chairman is not available, by an RDC Deputy Chairman. In an exceptionally urgent case the matter will be decided by the director of Enforcement or, in his or her absence, another member of the FSA's executive of at least director of division level.

12.4B An exceptionally urgent case in these circumstances is one where the FSA staff believe that a decision to begin proceedings

(1) should be taken before it is possible to follow the procedure described in paragraph 12.4A; and

(2) it is necessary to protect the interests of consumers or potential consumers.

12.4C Decisions about whether to initiate criminal proceedings under the Building Societies Act 1986, the Friendly Societies Acts 1974 and 1992, the Credit Unions Act 1979, the

Industrial and Provident Societies Act 1965 and the Friendly and Industrial and Provident Societies Act 1968 may either be taken by the procedure described in paragraph 12.4A above or under *executive procedures*. The less serious the offence or its impact and the less complex the issues raised, the more likely that the FSA will take the decision to prosecute under *executive procedures*.

...

Criminal prosecutions in cases of market abuse

...

- 12.8 The factors which the FSA may consider when deciding whether to commence a criminal prosecution for market misconduct rather than impose a sanction for *market abuse* include, but are not limited to, the following:

...

(12) ...

(12A) where the misconduct in question was carried out by two or more individuals acting together and one of the individuals provides information and gives full assistance in the FSA's prosecution of the other(s), the FSA will take this co-operation into account when deciding whether to prosecute the individual who has assisted the FSA or bring market abuse proceedings against him;

...

Prosecution of Friendly Societies

- 12.12 The FSA's power to prosecute friendly societies is discussed in EG 19.3 to 19.9 and in an article on the FSA web-site entitled 'Prosecuting Friendly Societies'.

13 Insolvency

...

13.3 ...

13.3A Decisions about whether to apply to the civil courts for insolvency orders under the Act will be made by the RDC Chairman or, in an urgent case and if the Chairman is not available, by an RDC Deputy Chairman. In an exceptionally urgent case the matter will be decided by the director of Enforcement or, in his or her absence, another member of the FSA's executive of at least director of division level.

13.3B An exceptionally urgent case in these circumstances is one where the FSA staff believe that a decision to begin proceedings

- (1) should be taken before it is possible to follow the procedure described in paragraph 13.3A; and
- (2) it is necessary to protect the interests of consumers or potential consumers.

...

14 Collective Investment Schemes-

...

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

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

...

- 14.10A Decisions about whether to apply to the civil courts for *collective investment scheme* related orders under the *Act* will be made by the *RDC* Chairman or, in an urgent case and if the Chairman is not available, by an *RDC* Deputy Chairman. In an exceptionally urgent case the matter will be decided by the director of Enforcement or, in his or her absence, another member of the FSA's executive of at least director of division level.

- 14.10B An exceptionally urgent case in these circumstances is one where the FSA staff believe that a decision to begin proceedings

- (1) should be taken before it is possible to follow the procedure described in paragraph 14.10A; and
- (2) it is necessary to protect the interests of consumers or potential consumers.

...

17 ~~Directions against incoming ECA providers [deleted]~~

- 17.1 Under regulation 6 of the *E-Commerce Directive Regulations*, provided certain policy and procedural conditions are met, the FSA may direct that an *incoming ECA*

~~provider may no longer carry on a specified *incoming electronic commerce activity*, or may only carry it on subject to specified requirements.~~

Electronic commerce activity directions: the FSA's policy

- ~~17.2 The FSA will exercise the power to make an *electronic commerce activity direction* on a case-by-case basis. When deciding whether to make a direction, the FSA will undertake an assessment of whether the circumstances of the particular case meet the policy conditions set out in regulation 6.~~
- ~~17.3 The FSA envisages that its approach to the use of the direction power will be as follows. On obtaining information concerning possible *financial crime* facilitated through or involving an *incoming ECA provider*, or detriment to United Kingdom markets or UK *ECA recipients* caused by the activities of an *incoming ECA provider*, the FSA would contact the relevant *EEA regulator* of the *incoming ECA provider*. The FSA would expect the relevant *EEA regulator* to consider the matter, investigate it where appropriate and keep the FSA informed about what action, if any, was being taken. The FSA may not need to be involved further if the action by the relevant *EEA regulator* addresses the FSA's concerns.~~
- ~~17.4 However, there are likely to be circumstances in which the FSA will need to use the *electronic commerce activity direction* power. Examples could include where it was necessary to stop the behaviour complained of, or to make the continued provision of services by the *incoming ECA provider* conditional upon compliance with specified requirements. Overall, the FSA may use the direction power:~~
- ~~(1) Where:~~
 - ~~(a) the behaviour complained of was causing, or had the potential to cause, major detriment to *consumers* in the United Kingdom; or~~
 - ~~(b) the *incoming ECA provider's* activities have been used, or have the potential to be used, to facilitate serious *financial crime* or to launder the proceeds of a crime; or~~
 - ~~(c) the making of the direction is considered to be necessary for other reasons of public policy relevant to the *regulatory objectives*; and~~
 - ~~(2) Either:~~
 - ~~(a) the relevant *EEA regulator* is unable to take action, or has not within a reasonable time taken action which appears to the FSA to be adequate; or~~
 - ~~(b) the relevant *EEA regulator* and the FSA agree that, having regard to the circumstances of the particular case, action against the wrong-doing would be taken more effectively by the FSA.~~
- ~~17.5 The question of whether the FSA decided to prevent or prohibit the *incoming electronic commerce activity*, or to make it subject to certain requirements (for example, compliance with specified rules), will depend on the overall circumstance of the case. A relevant consideration will be whether the FSA is satisfied that its~~

concerns over the *incoming electronic commerce activity* can be adequately addressed through the imposition of a requirement, rather than a complete prohibition on the activity. Set out below is a list of factors the FSA may consider. The list is not exhaustive.

- (1) ~~The extent of any loss, or risk of loss, or other adverse effect on UK ECA recipients: The more serious the loss or potential loss or other adverse effect on them, the more likely it is that the FSA's exercise of its powers to prohibit the activity altogether will be appropriate, to protect the interests of UK ECA recipients.~~
- (2) ~~The extent to which customer assets appear to be at risk.~~
- (3) ~~The risk that the *incoming ECA provider's* activities may be used or have been used to facilitate *financial crime* or to launder the proceeds of a crime: Information available to the FSA, including information supplied by other law enforcement agencies, may suggest that the *incoming ECA provider* is being used for, or is itself involved in, *financial crime*. Where this appears to be the case, a direction that the *incoming electronic commerce activity* should cease may be appropriate.~~
- (4) ~~The risk that the *incoming ECA provider's* activities present to the *financial system* and to confidence in the *financial system*.~~
- (5) ~~The impact that a complete prohibition on the activity would have on UK ECA recipients.~~

17.6 The FSA may consider that a case is urgent, in particular, where:

- (1) ~~the information available to it indicates serious concerns about the *incoming electronic commerce activity* that need to be addressed immediately; and~~
- (2) ~~circumstances indicate that it is appropriate to use the direction power immediately to prohibit the *incoming electronic commerce activity*, or to make the carrying on of the activity subject to specified requirements.~~

17.7 ~~The FSA will consider the full circumstances of the case when deciding whether exercising the direction power without first taking the procedural steps set out in Regulation 6 is an appropriate response to such concerns. The factors the FSA may consider include those listed in paragraph 17.5 (1) to (5) of this guide. There may be other relevant factors.~~

Decision making

17.8 ~~The FSA's decision to make, revoke or vary an *electronic commerce activity direction* will generally be taken by the RDC Chairman. However, this is subject to two exceptions.~~

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

17.9 ~~Where a provider must be given the opportunity to make representations to the FSA in relation to a proposed direction or variation of a direction, the *RDC* Chairman will determine in each case the manner and the period within which those representations should be made.~~

Publicity

17.10 ~~Regulation 10(8) of the *ECD Regulations* provides that if the FSA makes a direction, it may publish, in such manner as it considers appropriate, such information about the matter to which the direction relates as it considers appropriate in furtherance of any of the objectives referred to in [paragraph 17.4\(1\)](#) of this guide. However, under regulation 10(9), the FSA may not publish information relating to a direction if publication would, in the FSA's opinion, be unfair to the provider to whom the direction applies or prejudicial to the interests of *consumers*.~~

17.11 ~~When deciding what information, if any, to publish and the appropriate manner of publication, the FSA will consider the full circumstances of each case. The FSA anticipates that it will generally be appropriate to publish relevant details of a direction, in order to protect and inform *consumers*. However, in accordance with the regulation 10(9) prohibition, it will not publish information if it considers that publication would be unfair to the provider or prejudicial to the interests of *consumers*.~~

After EG 18, insert the following new chapter. The text is not underlined.

19 Non-FSMA powers

Introduction

19.1 This chapter describes many of the powers that the FSA has to enforce requirements imposed under legislation other than the *Act*. The chapter is ordered chronologically, ending with the most recent legislation. Where powers under different pieces of legislation are broadly the same, or apply to the same class of person, we have set out the relevant statements of policy in one section to avoid duplication.

- 19.2 Where conduct may amount to a breach of more than one enactment, the FSA may need to consider which enforcement powers to use and whether to use powers from one or more of the Acts. Which power or powers are appropriate will vary according to the circumstances of the case. However, where appropriate, we have tried to adopt procedures in respect of our use of powers under legislation other than the *Act* which are akin to those used under the *Act*. We expect, for example, to provide the subject of an investigation with confirmation of the reasons for the investigation and the legislative provisions under which it is conducted unless notification would be likely to prejudice the investigation or otherwise result in it being frustrated.

Industrial and Provident Societies Act 1965 (IPSA65)

Friendly and Industrial and Provident Societies Act 1968 (FIPSA68)

Friendly Societies Act 1974 (FSA74)

Friendly Societies Act 1992 (FSA92)

- 19.3 The FSA has certain functions in relation to what are described as “registrant-only” mutual societies. These societies are not regulated or supervised under the *Act*. Instead, they are subject to the provisions of IPSA65, FIPSA68, FSA74 and FSA92, which require them to register with the FSA and fulfil certain other obligations, such as the requirement to submit annual returns.
- 19.4 IPSA65, FIPSA68, FSA74 and FSA92 provide the FSA with certain powers to ensure that registrant-only societies meet the requirements imposed on them. These include the power to:
- cancel or suspend the society’s registration (ss.16 and 17 IPSA65, s.91 FSA74);
 - dissolve the society (ss.95 and 95A FSA74);
 - appoint an accountant or actuary to inspect the society’s books (s.47 IPSA65);
 - require the production of documents and provision of information for certain purposes (s.48 IPSA65, s.90 FSA74);
 - appoint inspectors and call special meetings (s.49 IPSA65, s.90 FSA74);
 - present petitions for winding up (s.56 IPSA65; ss.22 and 52 FSA92); and
 - prosecute failures to comply with requirements (s.61 IPSA65, s.18 FIPSA68 s.98 FSA74).
- 19.5 The FSA’s enforcement activities in respect of registrant-only societies focus on prosecuting societies that fail to submit annual returns. As registrant-only societies are not subject to the rules imposed by the *Act* and by the FSA Handbook, the requirement that they submit annual returns provides an important check that the interests and investments of members, potential members, creditors and other interested parties are being safeguarded. The power to prosecute registrant-only societies who fail to meet this requirement is therefore an important tool and one which the FSA is committed to using in appropriate cases.

- 19.6 The FSA considers a variety of factors when deciding whether to prosecute a society for failing to submit its annual return. The FSA is more likely to prosecute a society which has previously failed to submit returns, or which poses a greater risk to the FSA's statutory objectives, for example, because of the size of its financial resources or its number of members.
- 19.7 The FSA may also use its power to petition for the society's winding up where it has prosecuted a society but the society continues to fail to submit the outstanding annual returns or defaults on submitting further returns.
- 19.8 The decision whether to initiate criminal and other proceedings under these Acts will be taken in accordance with the procedure described in *EG 12.4C*. Under section 18 IP65, a society may appeal certain decisions of the FSA relating to the refusal, cancellation or suspension of a society's registration to the High Court or, in Scotland, the Court of Session. Refusals to register a branch or to register the amendment of a society's rules and cancellations or suspensions of a society's listing under the Friendly Societies Act 1974 are also appealable in certain circumstances to the High Court or the Court of Session. Distinguishing features of the procedure for giving statutory notices under the FSA92, including available rights of reference to the *Tribunal*, are set out in *DEPP 2.5.18G*.
- 19.9 Further information about the FSA's powers under IP65 and FSA74 can be found on the FSA's website.¹³

Credit Unions Act 1979

- 19.10 The Credit Unions Act enables certain societies in Great Britain to be registered under IP65 and makes provisions in respect of these societies. It gives the FSA certain powers in addition to the powers that it has under the *Act* in respect of those credit unions which are *authorised persons*. The FSA's powers under the Credit Unions Act include the power to:
- require the production of books, accounts and other documents in the exercise of certain functions (section 17);
 - appoint an investigator or to call a special meeting of the credit union (section 18);
 - cancel the registration of the credit union (section 20); and
 - petition the High Court to wind up the credit union in particular circumstances (section 20).
- 19.11 The FSA will use these powers in a manner consistent with its approach to using the same powers under the *Act*. Where the FSA decides to cancel or suspend a credit

¹³ <http://www.fsa.gov.uk/Pages/doing/regulated/law/focus/friendly.shtml>

union's registration under section 20(1) of the Credit Unions Act, the credit union may appeal that decision to the High Court or, in Scotland, the Court of Session.

- 19.12 The Credit Unions Act also extends to credit unions some criminal offences under IP65. The FSA will act in accordance with *EG 12* when prosecuting these offences.

Buildings Societies Act 1986

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

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

- 19.14 The FSA will use these powers in a manner consistent with its approach to using them under the *Act*. Distinguishing features of the procedure for giving statutory notices under the Building Societies Act are set out in *DEPP 2.5.18G*. Decisions of the FSA made under the Building Societies Act may not be referred to the *Tribunal*.

Unfair Terms in Consumer Contracts Regulations 1999

- 19.15 The FSA has published a separate regulatory guide, *UNFCOG*, which describes how it will use the general powers under the *Unfair Terms Regulations*, including its powers to obtain undertakings and seek information from firms. In addition, *EG 10* describes how the FSA will use its injunctive powers under these Regulations.

Regulation of Investigatory Powers Act 2000 (RIPA)

- 19.16 RIPA provides methods of surveillance and information gathering to help the FSA in the prevention and detection of crime. RIPA ensures that, where these methods are used, an individual's rights to privacy under Article 8 of the European Convention of Human Rights are considered and protected.

- 19.17 Under RIPA the FSA is able to:

- acquire data relating to communications;

- carry out covert surveillance;
- make use of covert human intelligence sources (CHIS); and
- access electronic data protected by encryption or passwords.

19.18 The FSA is not able to obtain warrants to intercept communications during the course of transmission.

19.19 The FSA is only able to exercise powers available to it under Parts I and II of RIPA where it is necessary for the purpose of preventing or detecting crime. All RIPA authorisations for the acquisition of communications data, the carrying out of directed surveillance and the use of CHIS must be approved by a Head of Department in the Enforcement Division. Authorisation will only be given where the authorising officer believes that the proposed action is necessary and proportionate in the specific circumstances set out in the application. Consideration will be given to any actual or potential infringement of the privacy of individuals who are not the subjects of the investigation or operation (collateral intrusion) and to the steps taken to avoid or minimise any such intrusion. When considering whether the proposed action is necessary and proportionate the following non-exhaustive list of factors is likely to be relevant:

- the seriousness of the offence;
- the amount of material that might be gathered;
- the nature of the material that might be gathered;
- whether there are other less intrusive ways of obtaining the same result;
- whether the proposed activity is likely to satisfy the objective; and
- where surveillance is proposed, the location of the surveillance operation.

Encryption

19.20 Under Part III RIPA the FSA is able to require a person who holds “protected” electronic information (that is, information which is encrypted) to put that information into an intelligible form and, where the person has a key to the encrypted information, to require the person to disclose the key so that the data may be put into an intelligible form. The FSA may impose such a requirement where it is necessary for the purpose of preventing or detecting crime or where it is necessary for the purpose of securing the effective exercise or proper performance by the FSA of its statutory powers or statutory duties. In order to serve a notice under Part III RIPA, the FSA must obtain written permission from an appropriate judicial authority. The FSA does not anticipate using powers under Part III very often as it expects firms and individuals to provide information in intelligible format pursuant to requirements to provide information under the *Act*.

Home Office Codes of Practice

- 19.21 In exercising powers under RIPA the FSA has regard to the relevant RIPA codes of practice. The Codes are available on the Home Office website: security.homeoffice.gov.uk/ripa/publication-search/ripa-cop/.

Complaints and Oversight

- 19.22 RIPA provides for the appointment of Commissioners to oversee the compliance of designated authorities with RIPA requirements, and the establishment of a tribunal with jurisdiction to consider and determine, amongst other things, complaints and referrals about the way in which the FSA and other public bodies use their RIPA powers.

Regulated Activities Order 2001 (RAO)

- 19.23 The RAO sets out those activities which are regulated for the purposes of the *Act*. Part V of the RAO also requires the FSA to maintain a register of all those people who are not authorised by the FSA but who carry on insurance mediation activities. Under article 95 RAO, the FSA has the power to remove from the register an appointed representative who carries on insurance mediation activities if it considers that he is not fit and proper. The FSA will give the person a *warning notice* informing him that it proposes to remove his registration and a *decision notice* if the decision to remove his registration is taken. The decisions to give a *warning notice* or a *decision notice* will be taken by the *RDC* following the procedures set out in *DEPP* 3.2 or, where appropriate, *DEPP* 3.3. A person who receives a decision notice under article 95 RAO may refer the matter to the *Tribunal*.

The Open-Ended Investment Companies Regulations 2001

- 19.24 The *OEIC Regulations* set out requirements relating to the way in which collective investment may be carried on by open-ended investment companies. Under the *OEIC Regulations*, the FSA has the power, amongst other things, to:
- revoke an open-ended investment company's authorisation in several situations, including where the firm breaches relevant requirements or provides us with false or misleading information (regulation 23);
 - give, vary and revoke certain directions, including that the affairs of the company be wound up (regulations 25 and 28);
 - apply to court for an order that a depositary or director of a company be removed and replaced (regulation 26);
 - appoint one or more competent persons to investigate and report on the affairs of the company and specified others (regulation 30).

- 19.25 Factors that the FSA may take into account when it decides whether to use one or more of these powers include, but are not limited to, factors which are broadly similar to those in *EG* 14.1 in the context of *AUTs*. However, the relevant conduct will be that of the *ICVC*, the *director* or *directors* of the *ICVC* and its *depository*. Another difference is that the FSA is also able to take disciplinary action against the *ICVC* itself since the *ICVC* will be an *authorised person*. When choosing which powers to use, the FSA will adopt an approach which is broadly similar to that described in *EG* 14.2 to 14.5.
- 19.26 The FSA will give a company a *warning notice* if it proposes to revoke the company's authorisation and a *decision notice* if the decision to revoke the company's authorisation is subsequently taken. The decisions to give a *warning notice* or a *decision notice* will be taken by the *RDC* following the procedures set out in *DEPP* 3.2 or, where appropriate, *DEPP* 3.3. A person who receives a decision notice under the *OEIC Regulations* may refer the matter to the *Tribunal*.
- 19.27 Under the *OEIC Regulations*, the FSA may also use its disqualification powers against auditors who fail to comply with a duty imposed on them under FSA rules. The procedure which the FSA will follow when exercising its disqualification powers is set out in *EG* 15.

Electronic Commerce Directive (Financial Services and Markets) Regulations 2002

- 19.28 The FSA has powers under regulation 6 of the *ECD Regulations*, provided certain policy and procedural conditions are met, to direct that an *incoming ECA provider* may no longer carry on a specified *incoming electronic commerce activity*, or may only carry it on subject to specified requirements.

Electronic commerce activity directions: the FSA's policy

- 19.29 The FSA will exercise the power to make an *electronic commerce activity direction* on a case-by-case basis. When deciding whether to make a direction, the FSA will undertake an assessment of whether the circumstances of the particular case meet the policy conditions set out in regulation 6.
- 19.30 On obtaining information concerning possible *financial crime* facilitated through or involving an *incoming ECA provider*, or detriment to UK markets or UK *ECA recipients* caused by the activities of an *incoming ECA provider*, the FSA will contact the relevant *EEA regulator* of the *incoming ECA provider*. The FSA would expect the relevant *EEA regulator* to consider the matter, investigate it where appropriate and keep the FSA informed about what action, if any, was being taken. The FSA may not need to be involved further if the action by the relevant *EEA regulator* addresses the FSA's concerns.
- 19.31 However, there are likely to be circumstances in which the FSA will need to use the *electronic commerce activity direction* power. Examples could include where it was necessary to stop the behaviour complained of, or to make the continued provision of

services by the *incoming ECA provider* conditional upon compliance with specified requirements. Overall, the FSA may use the direction power:

- (1) where:
 - (a) the behaviour complained of was causing, or had the potential to cause, major detriment to *consumers* in the United Kingdom; or
 - (b) the *incoming ECA provider's* activities have been used, or have the potential to be used, to facilitate serious *financial crime* or to launder the proceeds of a crime; or
 - (c) the making of the direction is considered to be necessary for other reasons of public policy relevant to the *regulatory objectives*; and
- (2) either:
 - (a) the relevant *EEA regulator* is unable to take action, or has not within a reasonable time taken action which appears to the FSA to be adequate; or
 - (b) the relevant *EEA regulator* and the FSA agree that, having regard to the circumstances of the particular case, action against the wrong-doing would be taken more effectively by the FSA.

19.32 The question of whether the FSA decides to prevent or prohibit the *incoming electronic commerce activity*, or to make it subject to certain requirements (for example, compliance with specified rules), will depend on the overall circumstance of the case. A relevant consideration will be whether the FSA is satisfied that its concerns over the *incoming electronic commerce activity* can be adequately addressed through the imposition of a requirement, rather than a complete prohibition on the activity. Set out below is a list of factors the FSA may consider. The list is not exhaustive.

- (1) The extent of any loss, or risk of loss, or other adverse effect on UK *ECA recipients*: The more serious the loss or potential loss or other adverse effect on them, the more likely it is to be appropriate for the FSA to use its powers to prohibit the activity altogether, to protect the interests of UK *ECA recipients*.
- (2) The extent to which customer assets appear to be at risk.
- (3) The risk that the *incoming ECA provider's* activities may be used or have been used to facilitate *financial crime* or to launder the proceeds of a crime: Information available to the FSA, including information supplied by other law enforcement agencies, may suggest that the *incoming ECA provider* is being used for, or is itself involved in, *financial crime*. Where this appears to be the case, a direction that the *incoming electronic commerce activity* should cease may be appropriate.
- (4) The risk that the *incoming ECA provider's* activities present to the *financial system* and to confidence in the *financial system*.

- (5) The impact that a complete prohibition on the activity would have on UK *ECA recipients*.

19.33 The FSA may consider that a case is urgent, in particular, where:

- (1) the information available to it indicates serious concerns about the *incoming electronic commerce activity* that need to be addressed immediately; and
- (2) circumstances indicate that it is appropriate to use the direction power immediately to prohibit the *incoming electronic commerce activity*, or to make the carrying on of the activity subject to specified requirements.

19.34 The FSA will consider the full circumstances of the case when deciding whether exercising the direction power, without first taking the procedural steps set out in regulation 6, is an appropriate response to such concerns. The factors the FSA may consider include those listed in paragraph 19.32 of this guide. There may be other relevant factors.

Decision making

19.35 The FSA's decision to make, revoke or vary an *electronic commerce activity direction* will generally be taken by the *RDC* Chairman. However, this is subject to two exceptions.

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

19.36 Where a provider must be given the opportunity to make representations in relation to a proposed direction or variation of a direction, the *RDC* Chairman will determine in each case the manner and the period within which those representations should be made. If the FSA decides to issue a direction or vary it at its own initiative, or if the FSA refuses an application to vary or revoke a direction, the person to whom the direction applies may refer the matter to the *Tribunal*.

Publicity

19.37 Regulation 10(8) of the *ECD Regulations* provides that if the FSA makes a direction, it may publish, in such manner as it considers appropriate, such information about the matter to which the direction relates as it considers appropriate in furtherance of any of the objectives referred to in paragraph 19.31(1) of this guide. However, under regulation 10(9), the FSA may not publish information relating to a direction if publication would, in the FSA's opinion, be unfair to the provider to whom the direction applies or prejudicial to the interests of *consumers*.

19.38 When deciding what information, if any, to publish and the appropriate manner of publication, the FSA will consider the full circumstances of each case. The FSA anticipates that it will generally be appropriate to publish relevant details of a direction, in order to protect and inform *consumers*. However, in accordance with the regulation 10(9) prohibition, it will not publish information if it considers that publication would be unfair to the provider or prejudicial to the interests of *consumers*.

Enterprise Act 2002

19.39 The FSA, together with several other UK authorities, has powers under Part 8 of the Enterprise Act to enforce breaches of consumer protection law. Where a breach has been committed, the FSA will liaise with other authorities, particularly the Office of Fair Trading (the OFT), to determine which authority is best placed to take enforcement action. The FSA would generally expect to be the most appropriate authority to deal with breaches by authorised firms in relation to regulated activities.

19.40 The Enterprise Act identifies two main types of breach which trigger the Part 8 enforcement powers. These are referred to as “domestic infringements”, which are breaches of UK law, and “Community infringements” which are breaches of the EU legislation listed in Schedule 13 of the Enterprise Act. In both cases the breach must be regarded as harming the collective interests of consumers.

19.41 The Community legislation falling within the FSA's scope under the Enterprise Act is:

- the Unfair Terms in Consumer Contracts Directive;¹⁴
- the Comparative and Misleading Advertising Directive;¹⁵
- the E-Commerce Directive;¹⁶
- the Distance Marketing Directive;¹⁷ and
- the Unfair Commercial Practices Directive.¹⁸

19.42 The FSA has powers under Part 8 of the Enterprise Act both as a “designated enforcer” in relation to domestic and Community infringements and as a “CPC enforcer” which gives the FSA and other CPC enforcers additional powers in relation to Community infringements so that they can meet their obligations as “competent authorities” under Regulation (EC) No.2006/2004 on co-operation between national authorities responsible for enforcement of consumer protection laws (the CPC Regulation).

¹⁴ Directive 93/13/EEC

¹⁵ Directive 97/55/EC

¹⁶ Directive 2000/31/EC

¹⁷ Directive 2002/65/EC

¹⁸ Directive 2005/29/EC

The FSA's powers as a designated enforcer

19.43 As a designated enforcer, the FSA has the power to apply to the courts for an enforcement order or an interim enforcement order which requires a person who has committed a breach of applicable legislation not to engage in the conduct which constituted the breach. The FSA may also apply for orders where it thinks that a person is likely to commit a Community infringement.

19.44 The FSA has the power under the Enterprise Act to require any person to provide it with information which will enable it to (i) exercise or consider exercising its functions as an enforcer; or (ii) determine whether a person is complying with an enforcement order or an interim enforcement order. If the FSA requires a person to provide it with information, it must give him a notice setting out the information that it requires and confirming for which of purposes (i) and (ii) above the information is required.

19.45 Before the FSA may apply for an enforcement order, it must consult with:

- the OFT; and
- the person against whom the enforcement order would be made.

The period for consultation is 14 days before an application for an enforcement order can be made, or 7 days in the case of an application for an interim enforcement award. The aim of consultation is to ensure that any action taken is necessary and proportionate, and to ensure that businesses are given a reasonable opportunity to put things right before the courts become involved.

19.46 The Enterprise Act also makes provision for enforcers to accept undertakings from a person who has committed a breach. The undertaking confirms that the person will not, amongst other things, commence, continue or repeat the conduct which constituted or would constitute the breach. There is a general expectation that, if a breach of applicable legislation is committed, or if a Community infringement is likely to be committed, enforcers will seek an undertaking from the person in question before applying to court for an enforcement order against him.

19.47 The FSA may take steps to publish the undertakings it receives, and may apply to the court for an enforcement order if a person fails to comply with an undertaking that he has given.

The FSA's powers as a CPC enforcer

19.48 In addition to its powers as a designated enforcer under the Enterprise Act, the FSA also has powers, in its capacity as a "CPC enforcer", to enter premises with or without a warrant. The FSA must give at least two working days' notice of its intention to enter premises without a warrant unless it has not been possible to serve such notice despite all reasonably practicable steps having been taken. If the FSA cannot give a notice in advance, it must produce the notice on the day the premises are entered.

Use of enforcement powers under Enterprise Act

- 19.49 The FSA anticipates that its powers under the *Act* will be adequate to address the majority of breaches which it would also be able to enforce under the Enterprise Act and that there will therefore be limited cases in which it would seek to use its powers as an Enterprise Act enforcer. Where the FSA does use its powers under the Enterprise Act, it will have regard to the enforcement guidelines which are published on the OFT's website.¹⁹
- 19.50 Further information about the FSA's powers under the CPC Regulations is provided at paragraphs 19.66 to 19.70 below.

Proceeds of Crime Act 2002 (POCA)

- 19.51 POCA provides the legislative framework for the confiscation from criminals of the proceeds of their crime. Under POCA, the FSA can apply to the Crown Court for a restraint order when it is investigating or prosecuting criminal cases. A restraint order prevents the person(s) named in the order from dealing with the assets it covers for the duration of the order.
- 19.52 The FSA may apply for such an order where a criminal investigation has been started or where proceedings have started but not concluded; in either case there must be reasonable cause to believe that the defendant has benefited from criminal conduct. In this context, a person benefits from criminal conduct if he obtains property or a pecuniary advantage as a result of or in connection with conduct that would be an offence if it took place in England or Wales, regardless of whether he also obtains it in some other connection. The court is required to exercise its powers with a view to securing that the value of realisable assets is not diminished.
- 19.53 Once an order is made, the applicant or anyone affected by the order can apply to the court for it to be varied or discharged. The court must discharge the order if the condition for granting it is no longer satisfied, that is, if the criminal investigation has not led to criminal proceedings being started within a reasonable time or the criminal proceedings have concluded.
- 19.54 A restraint order may apply to any realisable property held by the specified person whether or not described in the order, or to any such property transferred to him after the order is made. The order may contain exceptions for reasonable living and business expenses, but not for legal expenses relating to the offences from which he is suspected to have benefited for the order to be made.
- 19.55 The order can apply to assets wherever they are held, and anyone breaching the order would be guilty of contempt of court in this country. The FSA may request that the court make ancillary orders requiring the person to disclose his assets and/or to repatriate assets held overseas.

¹⁹ www.ofc.gov.uk/advice_and_resources/resource_base/legal/enterprise-act/part8/

19.56 POCA also contains various powers of investigation which the FSA may use in specified circumstances. However, where these powers overlap with powers under the *Act*, the FSA will in most cases consider it more appropriate to rely on its investigation powers under the *Act*.

Credit Institutions (Reorganisation and Winding Up) Regulations 2004

19.57 These Regulations implement Directive 2001/24/EC on the reorganisation and winding up of credit institutions. The Regulations only allow winding-up proceedings or reorganisation measures in respect of EEA credit institutions in certain circumstances.

19.58 Under these Regulations, the FSA is required to exercise its powers under section 45 of the *Act* to vary or cancel the UK credit institution's permission to accept deposits or to issue electronic money as soon as reasonably practicable after it is notified of any of the following:

- a decision which approves a voluntary arrangement where it includes a realisation of some or all of the assets of the credit institution with a view to terminating the whole or any part of the business of that credit institution;
- a winding-up order or an administration order in the prescribed circumstances; or
- the appointment of a provisional liquidator or the appointment of a liquidator.

19.59 This power is mandatory rather than discretionary. The FSA will follow its procedure for varying and cancelling *Part IV permission* under the *Act* when exercising its powers under these Regulations.

Financial Services (Distance Marketing) Regulations 2004

19.60 These Regulations give effect to the Distance Marketing Directive.²⁰ Under the Regulations, the FSA can enforce breaches of the Regulations concerning “specified contracts”. Specified contracts are certain contracts for the provision of financial services which are made at a distance and do not require the simultaneous physical presence of the parties to the contract.

19.61 The FSA may apply to the courts for an injunction or interim injunction against a person who appears to it to be responsible for a breach of the Regulations. The FSA must consult with the OFT before exercising this power. The FSA may also accept undertakings from the person who committed the breach that he will comply with the Regulations. The FSA must publish details of any applications it makes for

²⁰ Directive 2002/65/EC

injunctions; the terms of any orders that the court subsequently makes; and the terms of any undertakings given to it or to the court.

19.62 The FSA may also prosecute offences under the Regulations which relate to specified contracts. It will generally be appropriate for the FSA to seek to resolve the breach by obtaining an undertaking before it applies for an injunction or initiates a prosecution. Where a failure by a firm to meet the requirements of the Regulations also amounts to a breach of the FSA's rules, the FSA will consider all the circumstances of the case when deciding whether to take action for a breach of its rules or under the Regulations. This will include, amongst other things, having regard to appropriate factors set out in *DEPP* 6 and the considerations in *EG* 12.

Financial Conglomerates and Other Financial Groups Regulations 2004

19.63 These Regulations implement in part the Financial Conglomerates Directive,²¹ which imposes certain procedural requirements on the FSA as a competent authority under the Directive. These Regulations also make specific provision about the exercise of certain supervisory powers in relation to financial conglomerates.

19.64 The FSA's power to vary a firm's *Part IV permission* under section 45 of the *Act* has been extended under these Regulations. The FSA is able to use this power where it is desirable to do so for the purpose of:

- supervision in accordance with the Financial Conglomerates Directive;
- acting in accordance with specified provisions of the Banking Consolidation Directive; and
- acting in accordance with specified provisions of the Insurance Groups Directive.

19.65 The duty imposed by section 41(2) (The threshold conditions) of the *Act* does not prevent the FSA from exercising its own-initiative power for these purposes. But subject to that, when exercising this power under the Regulations, the FSA will do so in a manner consistent with its approach generally to variation under the *Act*.

The Consumer Protection Co-operation Regulation²²

19.66 The FSA is a competent authority under the CPC Regulation, which aims to encourage and facilitate co-operation between competent authorities across the EU in consumer protection matters. The FSA is a competent authority for the purposes of

²¹ Directive 2002/87/EC

²² Regulation (EC) No.2006/2004 on co-operation between national authorities responsible for enforcement of consumer protection laws.

specified EU consumer protection laws²³ in the context of the regulated activities of authorised firms and of breaches by UK firms concerning “specified contracts” as defined in the Financial Services (Distance Marketing) Regulations 2004 (for which see paragraphs 19.60 to 19.62).

- 19.67 All CPC competent authorities have a minimum set of enforcement and investigatory powers available to them to ensure that across the EU there is a robust toolkit to protect consumers. These are powers to:
- access any relevant document related to the breach;
 - require the supply by any person of relevant information related to the breach;
 - carry out necessary on-site inspections;
 - request in writing that a person cease the breach;
 - obtain from the person responsible for the breach an undertaking to cease the breach; and, where appropriate, to publish the resulting undertaking;
 - require the cessation or prohibition of any breach and where appropriate, to publish resulting decisions; and
 - require the losing defendant to make payments in the event of failure to comply with the decision.
- 19.68 The powers are engaged when a person breaches one of the EU consumer protection laws which are scheduled to the CPC Regulation and the breach is one which harms, or is likely to harm, the collective interests of consumers who live in a member state other than the member state in which the breach was committed; where the person who committed the breach is established; or where evidence or assets relating to the breach are located.
- 19.69 Under the CPC Regulation the FSA can request information from competent authorities in other member states to help it determine whether a relevant breach has taken, or may take, place. The FSA can also request that competent authorities in the relevant member states take action without delay to stop or prohibit the breach. All competent authorities are required to notify their counterparts in relevant member states when they become aware of actual or possible breaches of European consumer protection law.
- 19.70 The FSA may use its powers under the *Act* or under Part 8 of the Enterprise Act (for which, see paragraphs 19.39 to 19.50 above) in order to fulfil its obligations under the CPC Regulation. The FSA will decide on a case-by-case basis which powers will enable it to obtain its desired outcomes in the most effective and efficient way. In the majority of cases this is more likely to be by using its powers under the *Act*.

²³ These are the Unfair Terms in Consumer Contracts Directive; the Comparative and Misleading Advertising Directive; the E-Commerce Directive; the Distance Marketing Directive; and the Unfair Commercial Practices Directive.

Money Laundering Regulations 2007

- 19.71 The FSA has investigation and sanctioning powers in relation to both criminal and civil breaches of the *Money Laundering Regulations*. The *Money Laundering Regulations* impose requirements including, amongst other things, obligations to apply customer due diligence measures and conduct ongoing monitoring of business relationships on designated types of business.
- 19.72 The FSA is responsible for monitoring and enforcing compliance with the Regulations not only by authorised firms who are within the *Money Laundering Regulations*' scope, but also by what the Regulations describe as "Annex I financial institutions". These are businesses which are not otherwise authorised by us but which carry out certain of the activities listed in Annex I of the Banking Consolidation Directive.²⁴ The activities include lending (e.g. forfaiters and trade financiers), financial leasing, and safe custody services. Annex I financial institutions are required to register with the FSA.
- 19.73 The *Money Laundering Regulations* add to the range of options available to the FSA for dealing with anti-money laundering failures. These options are:
- to prosecute both authorised firms and Annex I financial institutions;
 - to take regulatory action against authorised firms for failures which breach the FSA's rules and requirements (for example, under Principle 3 or SYSC 3.2.6R); and
 - to impose civil penalties on both authorised firms and Annex I financial institutions under regulation 42 of the *Money Laundering Regulations*.
- 19.74 This means that there will be situations in which the FSA has powers to investigate and take action under both the *Act* and the *Money Laundering Regulations*. The FSA will consider all the circumstances of the case when deciding what action to take and, if it is appropriate to notify the subject about the investigation, will in doing so inform them about the basis upon which the investigation is being conducted and what powers it is using. The FSA will adopt the approach outlined in EG 12 when prosecuting *Money Laundering Regulations* offences. In the majority of cases where both the Regulations and the FSA rules apply and regulatory action, as opposed to criminal proceedings, is appropriate, the FSA generally expects to continue to discipline authorised firms under the *Act*.
- 19.75 The *Money Laundering Regulations* also provide investigation powers that the FSA can use when investigating whether breaches of the Regulations have taken place. These powers include:

²⁴ Credit financial institutions and money service businesses are also outside the definition of "Annex I financial institution", which is set out in Regulation 22(1).

- the power to require information from, and attendance of, relevant and connected persons (regulation 37); and
- powers of entry and inspection without or under warrant (regulations 38 and 39).

The use of these powers will be limited to those cases in which the FSA expects to take action under the Regulations.

19.76 The FSA will adopt a risk-based approach to its enforcement of the *Money Laundering Regulations*. Failures in anti-money laundering controls will not automatically result in disciplinary sanctions, although enforcement action is more likely where a firm has not taken adequate steps to identify its money laundering risks or put in place appropriate controls to mitigate those risks, and failed to take steps to ensure that controls are being effectively implemented.

19.77 However, the *Money Laundering Regulations* say little about the way in which investigation and sanctioning powers should be used, so the FSA has decided to adopt enforcement and decision making procedures which are broadly akin to those under the *Act*. Key features of the FSA's approach are described below.

The conduct of investigations under the Money Laundering Regulations

19.78 The FSA will notify the subject of the investigation that it has appointed officers to carry out an investigation under the *Money Laundering Regulations* and the reasons for the appointment, unless notification is likely to prejudice the investigation or otherwise result in it being frustrated. The FSA expects to carry out a scoping visit early on in the enforcement process in most cases. The FSA's policy in civil investigations is to use powers to compel information in the same way as it would in the course of an investigation under the *Act*.

19.79 When the FSA proposes or decides to impose a penalty under the *Money Laundering Regulations*, it must give the person on whom the penalty is to be imposed a notice. These notices are akin to *warning notices* and *decision notices* given under the *Act*, although Part XXVI (Notices) of the *Act* does not apply to notices given under the Regulations.

19.80 The *RDC* is the FSA's decision maker for contested cases in which the FSA decides to impose a penalty under the *Money Laundering Regulations*. This builds a layer of separation into the process to help ensure not only that decisions are fair but that they are seen to be fair. The *RDC* will make its decisions following the procedure set out in *DEPP* 3.2 or, where appropriate, *DEPP* 3.3. Where the FSA imposes a penalty on a person under the *Money Laundering Regulations*, that person may appeal the decision to the *Tribunal*.

19.81 Although the *Money Laundering Regulations* do not require it, the FSA will involve third parties and provide access to Authority material when it gives notices under the Regulations, in a manner consistent with the provisions of sections 393 and 394 of the *Act*. However, there is no formal mechanism under the *Money Laundering Regulations* for third parties to make representations in respect of proposed money laundering actions. If a third party asks to make representations, it will be a matter for

the FSA's decision makers to decide whether this is appropriate and, if so, how best to ensure that these representations are taken into consideration. In general it is expected that decision makers would agree to consider any representations made. Third parties may not refer cases to the *Tribunal* as the *Money Laundering Regulations* give the *Tribunal* no power to hear such referrals.

- 19.82 When imposing or determining the level of a financial penalty under the Regulations, the FSA's policy includes having regard to relevant factors in *DEPP* 6.2.1G and *DEPP* 6.5. The FSA may not impose a penalty where there are reasonable grounds for it to be satisfied that the subject of the proposed action took all reasonable steps and exercised all due diligence to ensure that the relevant requirement of the *Money Laundering Regulations* would be met. In deciding whether a person has failed to comply with a requirement of the *Money Laundering Regulations*, the FSA must consider whether he followed any relevant guidance which was issued by a supervisory authority or other appropriate body; approved by the Treasury; and published in a manner approved by the Treasury. The Joint Money Laundering Steering Group Guidance satisfies this requirement.
- 19.83 As with cases under the *Act*, the FSA may settle or mediate appropriate cases involving civil breaches of the *Money Laundering Regulations* to assist it to exercise its functions under the Regulations in the most efficient and economic way. The settlement discount scheme set out in *DEPP* 6.7 applies to penalties imposed under the *Money Laundering Regulations*.
- 19.84 The FSA will apply the approach to publicity that it has outlined in *EG* 6. However, as the *Money Laundering Regulations* do not require the FSA to issue final notices, the FSA will publish such information about the matter to which the decision notice relates as it considers appropriate. This will generally involve publishing the decision notice on the FSA's website, with or without an accompanying press release, and updating the Public Register. The timing of publicity will be consistent with the FSA's approach in comparable cases under the *Act*.

Transfer of Funds (Information on the Payer) Regulations 2007 (The Transfer of Funds Regulations)

- 19.85 The FSA is required, under EU Regulation 1781/2006 (on information on the payer accompanying transfers of funds), to monitor the compliance of payment services providers which are *authorised firms* with the requirements imposed by the Regulation. The Transfer of Funds Regulations set out the FSA's powers to investigate and impose sanctions for breaches of Regulation 1781/2006. The powers are identical to those given under the *Money Laundering Regulations*. The FSA's policy in respect of the use of its powers under the Regulations is the same as the policy it has adopted for the use of *Money Laundering Regulations* powers; the FSA will adopt enforcement procedures broadly akin to those used under the *Act*, with the modifications described in paragraphs 19.78 to 19.84 above.

Regulated Covered Bonds Regulations 2008

- 19.86 The *RCB Regulations* provide a framework for issuing covered bonds in the UK. Covered bonds issued under the *RCB Regulations* are subject to strict quality controls and both bonds and issuers must be registered with the FSA. The *RCB Regulations* give the FSA powers to enforce these Regulations. Where a person has failed, or is likely to fail, to comply with any obligation under the *RCB Regulations*, the FSA may make a direction that the person take steps to ensure compliance with the Regulations or it may make a direction for the winding up of the owner of the asset pool. The FSA may also remove an *issuer* from the register if it fails to comply with the Regulations. In addition, the FSA may apply to court for an order restraining a person from committing a breach of the Regulations or requiring the person to take steps to remedy the breach. The *RCB Regulations* also give the FSA the power to impose a financial penalty on a person for a breach of the Regulations.
- 19.87 The FSA may use the information gathering powers set out in section 165 of the *Act* when monitoring and enforcing compliance with the *RCB Regulations*, and may appoint skilled persons as provided in section 166 of the *Act*.
- 19.88 The FSA's approach to the use of its enforcement powers, and its statement of policy in relation to imposing and determining financial penalties under the *RCB Regulations*, are set out in *RCB 4.2*. The FSA's penalty policy includes having regard to the relevant factors in *DEPP 6.2.1G* and *DEPP 6.5* and such other specific matters as the likely impact of the penalty on the interests of investors in the relevant bonds. The FSA's statement of procedure in relation to giving *warning notices* or *decision notices* under the *RCB Regulations* is set out in *RCB 6*. It confirms that the *RDC* will be the decision maker in relation to the imposition of financial penalties under the *RCB Regulations*, following the procedure outlined in *DEPP 3.2* or, where appropriate, *DEPP 3.3* and that decision notices given under the Regulations may be referred to the *Tribunal*.
- 19.89 The FSA may agree to settle cases in which it proposes to impose a financial penalty under the *RCB Regulations* if the right regulatory outcome can be achieved. The settlement discount scheme set out in *DEPP 6.7* applies to penalties imposed under the *RCB Regulations*. See *DEPP 5* and *EG 5* for further information about the settlement process.

Amend the following, as shown.

Annex 1 – ~~Table of investigation and enforcement powers not discussed in this guide (see paragraph 1.6) [deleted]~~

Legislation	Nature of investigation or enforcement power
Friendly Societies Act 1992	Power to present petitions for the winding up by the court of incorporated friendly societies (section 22)

Friendly Societies Act 1974	Powers to carry out inspections of books and to prosecute friendly societies for failure to submit annual return to the FSA (section 98)
Buildings Societies Act 1986	Functions under the <i>Act</i> for example to investigate a firm's business or suspected breaches by a firm, to vary or cancel a firm's permission, to take disciplinary action against a firm, to apply to court for injunctions
Industrial and Provident Societies Act 1965	Functions under the <i>Act</i> (e.g. Power to cancel registration of society (section 16), Inspection of books (section 47), Production of documents and provision of information for certain purposes (section 48); appointment of inspectors and calling of special meetings (section 49), power of registrar a petition for winding up (section 56) power to prosecute IPS for failure to submit annual return to the FSA (section 61)
Enterprise Act and Enterprise Act 2002 (Part 8)	FSA designated as a designated enforcer and a CPC enforcer under Part 8 of this Act
Proceeds of Crime Act 2002	FSA staff may be designated as an accredited financial investigator for purpose of applying for restraining orders and confiscations investigations (Proceeds of Crime Act 2002 (References to Financial Investigators) Order 2003) s. 42(2)(c), 68(3)(c), 191(2)(e), 216(3)(e), 378(1)(b), 378(2)(d)
Insurance Accounts Directive (Lloyd's Syndicate and Aggregate Accounts) Regulations 2004	Power to institute proceedings for an offence under these Regulations 2004 (section 16)
Credit Institutions (Reorganisation and Winding Up) Regulations 2004	Power under section 45 of the <i>Act</i> to vary or cancel the UK credit institution's permission under Part IV of the <i>Act</i> to accept deposits or to issue electronic money as the case may be. (Reg 11(3))
Financial Services (Distance Marketing) Regulations 2004	FSA is an enforcement authority, in respect of 'specified contracts' for the purposes of reg. 18, 19, 22 (power to consider any complaint made to it about a breach (s. 18), power to apply for an injunction (including an interim injunction) against any person who appears to be responsible for a breach (s. 19); power to institute proceedings for an offence under these Regulations (s. 22)).
Financial Conglomerates Directive and Other Financial Groups Regulations 2004 Reg. 15	Extension of power to vary <i>Part IV permission</i>
Regulated Activities Order Art. 95	Power directly to de-register insurance intermediaries if not fit and proper

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

Purpose, status and application of the guidelines

1. These guidelines have been agreed by the following bodies (the agencies):

- the Financial Services Authority (the FSA);
- the Serious Fraud Office (the SFO);
- the Department ~~of~~ for Business, Enterprise and Regulatory Reform Trade and Industry (the DTI BERR);
- the Crown Prosecution Service (the CPS);
- the Association of Chief Police Officers in England, Wales and Northern Ireland (ACPO);
- the Crown Office and Procurator Fiscal Service (COPFS);
- the ~~Department of the Director of Public Prosecutions~~ Prosecution Service for Northern Ireland (the ~~DPP(NI) PPS~~);
- the Association of Chief Police Officers in Scotland (ACPO(S)).

...

6. The guidelines are relevant to ACPO and ACPO(S) only in so far as they relate to investigations. Similarly, they are relevant to the CPS, COPFS and the ~~DPP(NI) PPS~~ only in so far as they relate to prosecutions.

...

Indicators for deciding which agency should take action

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

...

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

...

- Where the suspected conduct in question would be best dealt

with by:

- criminal proceedings for which the FSA is not the statutory prosecutor;
 - proceedings for disqualification of directors under the Company Directors Disqualification Act 1986 (normally appropriate for ~~DTI~~ BERR action);
 - winding up proceedings which FSA does not have statutory powers to bring (normally appropriate for ~~DTI~~ BERR action); or
 - criminal proceedings in Scotland.
- Where the conduct in question concerns the abuse of limited liability status under the Companies Acts (normally appropriate for ~~DTI~~ BERR action).
 - Where powers of arrest are likely to be necessary.

...

Deciding to bring proceedings

13. The agencies will consider, as necessary, and keep under review whether an investigation has reached the point where it is appropriate to commence proceedings. Where agencies are deciding whether to institute criminal proceedings, they will have regard to the usual codes or guidance relevant to that decision. For example, agencies other than the ~~DPP(NI) PPS~~ or the Crown Office COPFS will have regard to the Code for Crown Prosecutors (Note: Different guidance applies to the ~~DPP(NI) PPS~~ and the Crown Office COPFS. All criminal proceedings in Scotland are the responsibility of the Lord Advocate. Separate arrangements have been agreed between the FSA and the Crown Office for the prosecution of offences in Scotland arising out of FSA investigations). Where they are considering whether to bring non-criminal proceedings, they will take into account whatever factors they consider relevant (for example, in the case of market abuse proceedings brought by the FSA, these are set out in paragraph 14.4 6.2 of the FSA ~~Enforcement~~ Decision Procedure and Penalties manual).

...

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

...

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

- ...
- (~~in England and Wales~~ except in Scotland) prosecute certain offences, including under the Money Laundering Regulations ~~1993~~ 2007, the Transfer of Funds (Information on the Payer) Regulations 2007, Part V Criminal Justice Act 1993 (insider dealing) and various offences under the 2000 Act including (**Note:** The FSA may also prosecute any other offences which are incidental to those which it has express statutory power to prosecute):

...

2. ~~DTI~~ BERR

2.1 The Secretary of State for ~~Trade & Industry~~ Business, Enterprise and Regulatory Reform exercises concurrently with the FSA those powers and functions marked with an asterisk in paragraphs 1.3 above. The investigation functions are undertaken by Companies Investigation Branch (CIB) and the prosecution functions by the ~~Solicitors Office~~ Legal Services Directorate.

2.2 The principal activities of CIB are, however, the investigations into the conduct of companies under the Companies Acts ~~and the Fair Trading Act~~. These are fact-finding investigations but may lead to follow-up action by CIB such as petitioning for the winding up of a company, disqualification of directors of the company or referring the matter to the Solicitors Office for prosecution. CIB may also disclose information to other prosecution or regulatory authorities to enable them to take appropriate action under their own powers and functions. Such disclosure is, however, strictly controlled under a gateway disclosure regime.

2.3 The Solicitors Office advises on investigation work carried out by CIB and undertakes criminal investigations and prosecutions in respect of matters referred to it by CIB, the Insolvency Service or other ~~divisions~~ directorates of ~~the DTI~~ BERR or its agencies.

...

5. ~~ACPO and ACPO(S)~~

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

6. ~~The Crown Office~~ COPFS

6.1 The investigation and prosecution of crime in Scotland is the responsibility of the Lord Advocate, who is the head of the COPFS ~~Procurator Fiscal Service~~, which comprises Procurators Fiscal and their Deputes, who are answerable to the Lord Advocate. The Procurator Fiscal is the sole public prosecutor in Scotland, prosecuting cases reported not only by the police but all regulatory departments and agencies. All prosecutions before a jury, both in the High

Court of Justiciary and in the Sheriff Court, run in the name of the Lord Advocate; all other prosecutions run in the name of the local Procurator Fiscal. The Head Office of the Procurator Fiscal Service is the Crown Office and the Unit within the Crown Office which deals with serious and complex fraud cases and with the investigation of cases of interest or concern to the Financial Services Authority is the National Casework Division ~~Fraud and Specialist Services Unit~~: the remit of this Unit is directly comparable to that of the Serious Fraud Office.

7. ~~The DPP(NI)~~ PPS

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