

Chapter 19

Non-FSMA powers

19.30 The Mortgage Credit Directive Order

19.30.1 The Mortgage Credit Directive (MCD) allowed for an exemption not to apply the MCD to buy-to-let lending if there was in place an appropriate framework for the regulation of these mortgages. The Mortgage Credit Directive Order 2015 (MCDO) is the vehicle through which the framework for “consumer buy-to-let” (CBTL) mortgages was established in order to comply with the MCD.

19.30.2 The MCDO requires that a firm acting as a lender, intermediary or carrying out advisory services in relation to CBTL from 21 March 2016 must be registered by the *FCA* to do so. It provides for the *FCA* to determine applications to be registered, as well as powers to suspend or revoke registration.

19.30.3 It also imposes obligations on registered firms to comply with conduct requirements set out in the Schedule to the MCDO, retain relevant information and to deal with the *FCA* in an open and co-operative manner. The *FCA* also has the power to give directions to a registered firm to secure compliance with the requirements set out in the Schedule. In addition, the *FCA* has investigation and sanctioning powers in relation to the framework.

19.30.4 The *FCA*'s approach to taking enforcement action under the MCDO will mirror its general approach to enforcing the *Act*, as set out in ■ EG 2. It will seek to exercise its enforcement powers in a manner that is transparent, proportionate and responsive to the issue and consistent with its publicly stated policies. It will also seek to ensure fair treatment when exercising its enforcement powers. Finally, it will aim to change the behaviour of the person who is the subject of its action, to deter future non-compliance by others, to eliminate any financial gain or benefit from non-compliance and, where appropriate, to remedy the harm caused by the non-compliance.

19.30.5 The MCDO, for the most part, applies or mirrors the *FCA*'s investigative and sanctioning powers under the *Act*. The *FCA* has adopted procedures and policies for the use of those powers that are akin to those it has under the *Act*. Key features of the *FCA*'s approach are described below.

Information gathering and investigation powers

19.30.6 Article 23 of the MCDO applies many of the provisions of the *Act* in relation to the *FCA*'s investigation and information-gathering powers in respect of a

registered firm. The effect of this is to apply the same procedures under the Act for appointing investigators and requiring information when investigating contraventions of the MCDO.

19.30.7

For example, the FCA will notify the subject of the investigation that it has appointed investigators to carry out an investigation under the MCDO and the reasons for the appointment, unless notification is likely to result in the investigation being frustrated. In most cases, the FCA expects to carry out a scoping visit early on in the enforcement process. The FCA's policy in regulatory investigations under the MCDO is to use powers to compel information, in the same way as it would in the course of an investigation under the Act.

Decision making under the MCDO

19.30.8

The RDC is the FCA's decision maker for some decisions which require *warning notices* or *decision notices* to be given under the MCDO as set out in ■ DEPP 2 Annex 1G. The RDC will make its decisions following the procedure set out in ■ DEPP 3.2 or, where appropriate, ■ DEPP 3.3.

19.30.9

For decisions made by *executive procedures*, the procedure to be followed will be those described in ■ DEPP 4.

19.30.10

Article 18(3) applies sections 393 and 394 of the Act to *warning notices* and *decision notices* given under the MCDO and so require the FCA to give third party rights and to give access to material as set out under the Act. Article 24(1) applies the procedural provisions of Part 9 of the Act, in respect of matters that can be referred to the Tribunal, and article 24(2) applies Part 26 of the Act to warning and decision notices given under the MCDO.

Public censures, imposition of penalties and the impositions of suspensions under the MCDO

19.30.11

When determining whether to take action to impose a penalty or to issue a public censure under the MCDO, the FCA's policy includes having regard to the relevant factors in ■ DEPP 6.2 and ■ DEPP 6.4. When determining the level of financial penalty, the FCA's policy includes having regard to the relevant principles and factors in ■ DEPP 6.5, ■ DEPP 6.5A, ■ DEPP 6.5D and ■ DEPP 6.7.

19.30.12

As with cases under the Act, the FCA may settle or mediate appropriate cases involving breaches of the MCDO to assist it to exercise its functions. ■ DEPP 5, ■ DEPP 6.7 and ■ EG 5 set out information on the FCA's settlement process and the settlement discount scheme.

19.30.13

When determining whether to take action to impose a suspension under the MCDO, the FCA's policy includes having regard to the relevant factors in ■ DEPP 6A.2 and ■ 6A.4. When determining the length of the period of suspension, the FCA's policy includes having regard to the relevant principles and factors in ■ DEPP 6A.3.

19.30.14

The FCA will apply the approach to publicity that is outlined in ■ EG 6.