

# Chapter 19


## Non-FSMA powers



## 19.1 Introduction

**19.1.1** This chapter describes many of the powers that the *FCA* 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.

**19.1.2** Where conduct may amount to a breach of more than one enactment, the *FCA* 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.



## 19.2 Friendly Societies Act 1974 (FSA74), Friendly Societies Act 1992 (FSA92), Co-operative and Community Benefit Societies Act 2014 (CCBSA14) and Co-operative and Community Benefit Societies Act (Northern Ireland) 1969 (CCBSA(NI)69)

**19.2.1** The *FCA* has certain functions in relation to what are described as “registrant-only” mutual societies including *registered societies* or *registered friendly societies*. These societies are not regulated or supervised under the *Act*. Instead, they are subject to the provisions of FSA74, FSA92, CCBSA14 and CCBSA(NI)69 which require them to register with the *FCA* and fulfil certain other obligations, such as the requirement to submit annual returns.


**19.2.1A** The Financial Services Act 2012 (Mutual Societies) Order 2018 is effective from 6 April 2018 and transfers the Northern Ireland registration function to the *FCA*. The *FCA* will be therefore registering Northern Ireland’s industrial and provident or co-operative and *community benefit societies* respectively under the CCBSA(NI)69 as modified by the Credit Unions and Co-operative and Community Benefit Societies Act (Northern Ireland) 2016 and the Financial Services Act 2012 (Mutual Societies) Order 2018.

**19.2.2** [deleted]

**19.2.3** The *FCA*’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 *FCA 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 *FCA* is committed to using in appropriate cases.

**19.2.4** [deleted]

- 19.2.5** The *FCA* 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.
- 19.2.6** The decision whether to initiate criminal and other proceedings under these Acts will be taken in accordance with the procedure described in ■ EG 12.1.7. Under these Acts, a society may appeal certain decisions of the *FCA* relating to the refusal, cancellation or suspension of a society's registration to the High Court or, in Scotland, 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.
- 19.2.7** Further information about the *FCA*'s powers under these Acts can be found on the *FCA*'s website.  
[Note: <https://www.fca.org.uk/firms/mutual-societies>]



## 19.3 Credit Unions Act 1979 (CUA79) and Credit Unions (Northern Ireland) Order 1985 (CU(NI)O85)

- 19.3.1** The CUA79 and CU(NI)O85 enable certain societies in Great Britain and Northern Ireland to be registered under CCBSA14 and CU(NI)O85 respectively. CUA79 and CU(NI)O85 also make provisions in respect of these societies. They give the *FCA* certain powers in addition to the powers that it has under the *Act* in respect of those credit unions which are *authorised persons*. The *FCA*'s powers under CUA79, CCBSA14 and CU(NI)O85 include the power to:
- (1) require the production of books, accounts and other documents in the exercise of certain functions;
  - (2) appoint an investigator or to call a special meeting of the credit union;
  - (3) cancel the registration of the credit union; and
  - (4) petition the High Court to wind up the credit union in particular circumstances.
- 19.3.1A** The Financial Services Act 2012 (Mutual Societies) Order 2018 is effective from 6 April 2018 and transfers the Northern Ireland registration function to the *FCA*. The *FCA* will be therefore registering Northern Ireland's credit unions under the CU(NI)O85 as modified by the Credit Unions and Co-operative and Community benefit Societies Act (Northern Ireland) 2016 and the Financial Services Act 2012 (Mutual Societies) Order 2018.
- 19.3.2** The *FCA* will use these powers in a manner consistent with its approach to using the same powers under the *Act*. Where the *FCA* decides to cancel or suspend a credit union's registration, the credit union may appeal that decision to the High Court or, in Scotland, the Court of Session.
- 19.3.3** The CUA79 under CCBSA14 and CU(NI)O85 also extend to credit unions some criminal offences. The *FCA* will act in accordance with ■ EG 12 when prosecuting these offences.
- 19.3.4** [deleted]

**19.3.5**

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## 19.4 Unfair Terms in Consumer Contracts Regulations 1999

### 19.4.1

The *FCA* 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 *FCA* will use its injunctive powers under these Regulations.

## 19.5 Regulation of Investigatory Powers Act 2000 (RIPA)

- 19.5.1** RIPA provides methods of surveillance and information gathering to help the FCA 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.
- 19.5.2** Under RIPA the FCA 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.
- 19.5.3** The FCA is not able to obtain warrants to intercept communications during the course of transmission.
- 19.5.4** The FCA 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.
- 19.5.5** **Encryption**  
 Under Part III RIPA the FCA 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 *FCA* 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 *FCA* of its statutory powers or statutory duties. In order to serve a notice under Part III RIPA, the *FCA* must obtain written permission from an appropriate judicial authority. The *FCA* 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

#### 19.5.6

In exercising powers under RIPA the *FCA* has regard to the relevant RIPA codes of practice. The Codes are available on the Home Office website: <https://www.gov.uk/government/collections/ripa-codes>.

### Complaints and Oversight

#### 19.5.7

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 *FCA* and other public bodies use their RIPA powers.



## 19.6 Regulated Activities Order 2001 (RAO)

### 19.6.1

The RAO sets out those activities which are regulated for the purposes of the Act. Part V of the RAO also requires the FCA to maintain a register of all those people who are not authorised by the FCA but who carry on insurance distribution activities. Under article 95 RAO, the FCA has the power to remove from the register an appointed representative who carries on insurance distribution activities if it considers that he is not fit and proper. The FCA 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*.

## 19.7 The Open-Ended Investment Companies Regulations 2001

- 19.7.1** 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 *FCA* 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).
- 19.7.2** Factors that the *FCA* 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 14.1.1 in the context of *AUTs* or *ACSs*. However, the relevant conduct will be that of the *ICVC*, the *director* or *directors* of the *ICVC* and its *depositary*. Another difference is that the *FCA* 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 *FCA* will adopt an approach which is broadly similar to that described in ■ EG 14.2 to 14.5.
- 19.7.3** The *FCA* 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*.
- 19.7.4** Under the *OEIC Regulations*, the *FCA* may also use its disqualification powers against auditors who fail to comply with a duty imposed on them under *FCA rules*. The procedure which the *FCA* will follow when exercising its disqualification powers is set out in ■ EG 15.



## 19.8 Electronic Commerce Directive (Financial Services and Markets) Regulations 2002

### 19.8.1

The *FCA* 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.



## 19.9 Electronic commerce activity directions: the FCA's policy

- 19.9.1** The *FCA* 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 *FCA* will undertake an assessment of whether the circumstances of the particular case meet the policy conditions set out in regulation 6.
- 19.9.2** 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 *FCA* will contact the relevant *EEA regulator* of the *incoming ECA provider*. The *FCA* would expect the relevant *EEA regulator* to consider the matter, investigate it where appropriate and keep the *FCA* informed about what action, if any, was being taken. The *FCA* may not need to be involved further if the action by the relevant *EEA regulator* addresses the *FCA's* concerns.
- 19.9.3** However, there are likely to be circumstances in which the *FCA* 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 *FCA* 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 *FCA* to be adequate; or

- (b) the relevant *EEA regulator* and the *FCA* agree that, having regard to the circumstances of the particular case, action against the wrong-doing would be taken more effectively by the *FCA*.

## 19.9.4

The question of whether the *FCA* 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 *FCA* 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 *FCA* 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 *FCA* 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 *FCA*, 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*.

## 19.9.5

The *FCA* 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.

## 19.9.6

The *FCA* 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 *FCA* may consider include those listed in ■ paragraph 19.9.4 of this guide. There may be other relevant factors.

**Decision making****19.9.7**

The *FCA'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 *FCA'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 *FCA*, 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.

**19.9.8**

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 *FCA* decides to issue a direction or vary it at its own initiative, or if the *FCA* refuses an application to vary or revoke a direction, the person to whom the direction applies may refer the matter to the *Tribunal*.

**Publicity****19.9.9**

Regulation 10(8) of the *ECD Regulations* provides that if the *FCA* 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 ■ 19.9.3(1) of this guide. However, under Regulation 10(9), the *FCA* may not publish information relating to a direction if publication would, in the *FCA's* opinion, be unfair to the provider to whom the direction applies or prejudicial to the interests of *consumers*.

**19.9.10**

When deciding what information, if any, to publish and the appropriate manner of publication, the *FCA* will consider the full circumstances of each case. The *FCA* 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*.

## 19.10 Enterprise Act 2002

**19.10.1** The *FCA*, 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 *FCA* will liaise with other authorities, particularly the Competition and Markets Authority (the *CMA*), to determine which authority is best placed to take enforcement action. The *FCA* would generally expect to be the most appropriate authority to deal with breaches by authorised firms in relation to regulated activities.

**19.10.2** The Enterprise Act identifies two types of breach which trigger the Part 8 enforcement powers. These are referred to as:

- (1) "domestic infringements", which are breaches of particular UK enactments or of contractual or tortious duties, in each case if they occur in the course of a business and in relation to goods or services supplied or sought to be supplied:
  - (a) to or for a person in the UK; or
  - (b) by a person with a place of business in the UK; and
- (2) "Community infringements", which are breaches of the EU legislation listed in Schedule 13 to the Enterprise Act, if directly effective, or of national laws, whether of the UK or not, giving effect to that EU legislation, even where it is directly effective, including provisions of those national laws that provide additional protections, beyond but permitted by that EU legislation.

In both cases the breach must, to trigger those powers, harm the collective interests of *consumers*.

**19.10.3** The Community legislation falling within the *FCA*'s scope under the Enterprise Act is:

the Unfair Terms in Consumer Contracts Directive;<sup>17</sup>  
 the Comparative and Misleading Advertising Directive;<sup>18</sup>  
 the E-Commerce Directive;<sup>19</sup>  
 the Distance Marketing Directive;<sup>20</sup>  
 the Unfair Commercial Practices Directive;<sup>21</sup> and  
 the Consumer Credit Directive.<sup>22</sup>

<sup>17</sup> Directive 93/13/EEC

<sup>18</sup> Directive 97/55/EC

<sup>19</sup> Directive 2000/31/EC



<sup>20</sup> Directive 2002/65/EC

<sup>21</sup> Directive 2005/29/EC

<sup>22</sup> Directive 2008/48/EC

#### 19.10.4

The *FCA* 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 *FCA* 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).

#### The *FCA*’s powers as a designated enforcer

#### 19.10.5

As a designated enforcer, the *FCA* has the power to apply to the courts for an enforcement order which requires a *person* who has committed a domestic or Community infringement or, as to the latter, is likely to commit such an infringement:

- (1) not to engage, including through a company and, as to a domestic infringement, whether or not in the course of business, in the conduct which constituted, or is likely to constitute, the infringement;
- (2) to publish the order and/or a corrective statement;
- (3) to offer compensation or other redress, including the right to terminate relevant contracts, to affected *consumers*;
- (4) where such *consumers* cannot be practically identified, to take measures in the collective interests of *consumers*;
- (5) to take measures intended to prevent or reduce the risk of the relevant conduct occurring or being repeated; and/or
- (6) to take measures intended to enable *consumers* to choose more effectively between *persons* supplying or seeking to supply goods or services;

although it should be noted that the remedies listed under (3) to (6) inclusive are only applicable to conduct taking place or likely to occur after the relevant provisions of the *CRA* came into force.

#### 19.10.6

The *FCA* may also apply, if necessary without notice, for interim enforcement orders where immediate temporary prohibition of the relevant conduct is expedient pending full consideration by the court. Such interim orders can also be sought pre-emptively in relation to Community infringements, but again only preventing conduct in the course of business.

#### 19.10.7

The *FCA*’s investigative powers in support of its Enterprise Act enforcement powers are set out in Schedule 5 to the *CRA*. The *FCA* can, under Schedule 5, 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, an interim

enforcement order or an undertaking given as described below. If the *FCA* requires a *person* to provide it with information, it must give him a notice setting out the information that it requires and specifying the relevant enforcement function and/or any such purpose.

**19.10.8**

Before the *FCA* may apply for an enforcement order, including an interim enforcement order, it must:

- (1) give notice to the CMA of its intention to apply for an enforcement order; and
- (2) unless the application relates to breach of an undertaking given to the court (other than one to provide information), consult the *person* against whom the enforcement order would be made.

**19.10.9**

The periods for notification and consultation is (both of which can be waived by the CMA) are:

- (1) 14 days before an application for an enforcement order is made unless, just as to consultation, the *person* to be consulted is a member of or represented by a body operating an approved consumer code, in which case the period is 28 days; or
- (2) 7 days in the case of an application for an interim enforcement order, unless the application relates to breach of an undertaking given to the court, in which case the CMA must be notified but not necessarily in advance.

**19.10.10**

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. The consultation period starts when the *person* receives the *FCA*'s request for consultation and runs whether or not that *person* agrees to be consulted and/or is available for consultation.

**19.10.11**

The Enterprise Act also makes provision for enforcers and courts to accept undertakings from *persons* who have committed breaches or, in respect of Community infringements, are considered likely to do so. The undertaking confirms that the *person* will not, amongst other things, commence, continue or repeat the conduct which constituted or, as to a Community infringement, would constitute the breach, although, as above, such a pre-emptive prohibition will only apply to conduct in the course of business. The undertaking may also confirm that the *person* will compensate consumers and/or take the other measures described in ■ paragraph 19.10.5, above. There is a general expectation that, if a breach of applicable legislation or of a relevant duty 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.

**19.10.12**

The *FCA* 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 FCA's powers as a CPC enforcer

- 19.10.13** In addition to its powers as a designated enforcer under the Enterprise Act, the *FCA* also has powers, in its capacity as a "CPC enforcer" and, therefore, only in respect of Community infringements, to enter commercial premises with or without a warrant. The *FCA* must give at least two working days' notice of its intention to enter such premises without a warrant unless that is not reasonably practicable. If the *FCA* 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

- 19.10.14** The *FCA* 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 *FCA* does use its powers under the Enterprise Act, it will have regard to the enforcement guidelines which are published on the CMA's website.<sup>23</sup>

<sup>23</sup> [www.gov.uk/governmentorganisations](http://www.gov.uk/governmentorganisations)

- 19.10.15** Further information about the *FCA's* powers under the CPC Regulations is provided at ■ paragraphs 19.13.1 to ■ 19.13.5 below.

### Proceeds of Crime Act 2002 (POCA)

- 19.10.16** POCA provides the legislative framework for the confiscation from criminals of the proceeds of their crime. Under POCA, the *FCA* 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.

- 19.10.17** The *FCA* 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.

- 19.10.18** 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.

- 19.10.19** 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.

**19.10.20** 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 *FCA* may request that the court make ancillary orders requiring the person to disclose his assets and/or to repatriate assets held overseas.

**19.10.21** POCA also contains various powers of investigation which the *FCA* may use in specified circumstances. However, where these powers overlap with powers under the *Act*, the *FCA* 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**  
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**19.10.22** [deleted]

**19.10.23** [deleted]

**19.10.24** [deleted]



## 19.11 Financial Services (Distance Marketing) Regulations 2004

- 19.11.1** These Regulations give effect to the Distance Marketing Directive.<sup>24</sup> Under the Regulations, the *FCA* 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.
- <sup>24</sup> Directive 2002/65/EC
- 19.11.2** The *FCA* 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 *FCA* may also accept undertakings from the person who committed the breach that he will comply with the Regulations. The *FCA* must publish details of any applications it makes for injunctions; the terms of any orders that the court subsequently makes; and the terms of any undertakings given to it or to the court.
- 19.11.3** The *FCA* may also prosecute offences under the Regulations which relate to specified contracts. It will generally be appropriate for the *FCA* 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 *FCA's rules*, the *FCA* 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.



## 19.12 Financial Conglomerates and Other Financial Groups Regulations 2004

- 19.12.1** These Regulations implement in part the Financial Conglomerates Directive,<sup>25</sup> which imposes certain procedural requirements on the *FCA* 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.
- <sup>25</sup> Directive 2002/87/EC
- 19.12.2** The *FCA*'s powers to vary a firm's *Part 4A permission* or to impose requirements under sections 55J and 55L of the *Act* have been extended under these Regulations. The *FCA* is able to use these powers 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 Capital Requirements Directive; and
  - acting in accordance with specified provisions of the *Solvency II Directive*.
- 19.12.3** The duty imposed by section 55B(3) (The threshold conditions) of the *Act* does not prevent the *FCA* from exercising its own-initiative power for these purposes. But subject to that, when exercising this power under the Regulations, the *FCA* will do so in a manner consistent with its approach generally to variation under the *Act*.



## 19.13 The Consumer Protection Co-operation Regulation<sup>26</sup>

### 19.13.1

The *FCA* 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 *FCA* is a competent authority for the purposes of specified EU consumer protection laws<sup>27</sup> 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 ■ 19.11.1 to ■ 19.11.3).

<sup>26</sup> Regulation (EC) No.2006/2004 on co-operation between national authorities responsible for enforcement of consumer protection laws.

<sup>27</sup> These are the Unfair Terms in Consumer Contracts Directive; the Comparative and Misleading Advertising Directive; the E-Commerce Directive; the Distance Marketing Directive; the Unfair Commercial Practices Directive; and the Consumer Credit Directive.

### 19.13.2

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.

### 19.13.3

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.

### 19.13.4

Under the CPC Regulation the *FCA* 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 *FCA* 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.

#### 19.13.5

The *FCA* may use its powers under the *Act* or under Part 8 of the Enterprise Act (for which, see paragraphs ■ 19.10.1 to ■ 19.10.15 above) in order to fulfil its obligations under the CPC Regulation. The *FCA* 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*.





## 19.14 The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017

- 19.14.1** The *FCA* 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.
- 19.14.2** The *FCA* is responsible for monitoring and enforcing compliance with the *Money Laundering 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<sup>28</sup>, now Annex I of the *CRD*. 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 *FCA*.
- <sup>28</sup> Money service businesses are also outside the definition of "Annex I financial institution", which is set out in Regulation 55(2) of the *Money Laundering Regulations*.
- 19.14.2A** The *FCA* is also responsible for monitoring and enforcing compliance with the Funds Transfer Regulation by payment service providers specified under regulation 62(1) of the *Money Laundering Regulations*.
- 19.14.3** The *Money Laundering Regulations* add to the range of options available to the *FCA* for dealing with anti-money laundering and anti-terrorist financing failures. These options include:
- to prosecute a relevant person, including but not limited to an authorised firm, an Annex I financial institution or an auction platform, as well as any responsible officer;
  - to fine or censure a relevant person, including but not limited to an authorised firm, an Annex I financial institution or an auction platform, as well as any officer knowingly concerned in the breach, under regulation 76 of the *Money Laundering Regulations*;

- to cancel, suspend or impose limitations or other restrictions on the authorisation or registration of an authorised person or payment service provider, under regulation 77 of the *Money Laundering Regulations*; and
- to impose a temporary or permanent prohibition on an officer knowingly concerned in a breach by a relevant person, including an authorised firm or Annex I financial institution, or a payment service provider, under regulation 78 of the *Money Laundering Regulations*.

In addition to the powers available under the *Money Laundering Regulations*, the FCA will have the power to take regulatory action against authorised firms for failures which breach the FCA's rules and requirements (for example, under *Principle 3*, ■ SYSC 3.2.6R or ■ SYSC 6.1.1R).

## 19.14.4

This means that there will be situations in which the FCA has powers to investigate and take action under both the *Act* and the *Money Laundering Regulations*. The FCA 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 FCA 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 FCA rules apply and regulatory action, as opposed to criminal proceedings, is appropriate, the FCA generally expects to continue to discipline authorised firms under the *Act*.

## 19.14.5

The *Money Laundering Regulations* also provide investigation powers that the FCA can use when investigating whether breaches have taken place. These powers include:

- the power to require information from, and attendance of, relevant persons, payment service providers and connected persons (regulation 66); and
- powers of entry and inspection without or under warrant (regulations 69 and 70).

The use of these powers will be limited to those cases in which the FCA is exercising functions under the *Money Laundering Regulations*. In addition, the FCA may use its powers to require information or attendance at the request of foreign authorities.

## 19.14.6

The FCA will adopt a risk-based approach to its enforcement under the *Money Laundering Regulations*. Failures in anti-money laundering or counter-terrorist financing 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 risks or put in place appropriate controls to mitigate those risks, and failed to take steps to ensure that controls are being effectively implemented.

## 19.14.7

However, the *Money Laundering Regulations* say little about the way in which investigation and sanctioning powers should be used, so the FCA has decided to adopt enforcement and decision making procedures which are broadly akin to those under the *Act*. Key features of the FCA's approach are described in ■ EG 19.15.



## 19.15 The conduct of investigations under the Money Laundering Regulations

- 19.15.1** The *FCA* 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 *FCA* expects to carry out a scoping visit early on in the enforcement process in most cases. The *FCA*'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*.
- 19.15.2** When the *FCA* proposes or decides to censure a person, impose a penalty on a person, suspend, cancel or restrict an authorisation or registration or impose a prohibition on a person under the *Money Laundering Regulations*, it must give the person a *warning notice* or a *decision notice*.
- 19.15.3** [deleted]
- 19.15.4** [deleted]
- 19.15.5** When imposing or determining the level of a financial penalty under regulation 76 of the *Money Laundering Regulations*, the *FCA*'s policy includes having regard, where relevant, to relevant factors in ■ DEPP 6.2.1G and ■ DEPP 6.5 to ■ DEPP 6.5D. The *FCA* 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 *FCA* must consider whether he or she followed any relevant guidance which was issued by a European Supervisory Authority in accordance with articles 17, 18.4 or 48.10 of the Fourth Money Laundering Directive, with article 25 of the Funds Transfer Regulation, or with any relevant guidance which was issued at the time by a supervisory authority or other appropriate body, including the Joint Money Laundering Steering Group.
- 19.15.5A** When cancelling, suspending or restricting an authorisation or limitation under regulation 77 of the *Money Laundering Regulations* or determining the duration of any such suspension or restriction, and when imposing or

determining the duration of a prohibition under regulation 78 of the *Money Laundering Regulations*, the FCA's policy includes having regard, where relevant, to relevant factors in ■ DEPP 6A.

**19.15.6**

As with cases under the *Act*, the FCA may settle or mediate appropriate cases involving civil breaches of the *Money Laundering Regulations* or the Funds Transfer Regulation to assist it to exercise its functions under the *Money Laundering Regulations* in the most efficient and economic way. The settlement discount scheme set out in ■ DEPP 6.7 applies to penalties, suspensions, restrictions and temporary prohibitions imposed under regulations 76, 77 and 78 of the *Money Laundering Regulations*.

**19.15.7**

The FCA will apply the approach to publicity that it has outlined in ■ EG 6, read in the light of applicable publicity provisions in regulation 84 of the *Money Laundering Regulations*.



**19.16**

**Transfer of Funds (Information on the Payer) Regulations 2007 (The Transfer of Funds Regulations) [deleted]**

**19.16.1**

[deleted]



## 19.17 Regulated Covered Bonds Regulations 2008

- 19.17.1** 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 *FCA*. The *RCB Regulations* give the *FCA* 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 *FCA* 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 *FCA* may also remove an *issuer* from the register if it fails to comply with the Regulations. In addition, the *FCA* 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 *FCA* the power to impose a financial penalty on a person for a breach of the Regulations.
- 19.17.2** The *FCA* 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*.
- 19.17.3** The *FCA*'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 *FCA*'s penalty policy includes having regard, where relevant, ■ DEPP 6.5 to ■ DEPP 6.5D and such other specific matters as the likely impact of the penalty on the interests of investors in the relevant bonds. The *FCA*'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*.
- 19.17.4** The *FCA* 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.



## 19.18 Counter-Terrorism Act 2008

- 19.18.1** The *FCA* has investigation and sanctioning powers in relation to both criminal and civil breaches of the Counter Terrorism Act 2008 (“the Counter Terrorism Act”). The Counter Terrorism Act allows the Treasury to issue directions imposing requirements on relevant persons in relation to transactions or business relationships with designated persons of a particular country. Relevant persons may be required to take the following action:
- apply enhanced customer due diligence measures;
  - apply enhanced ongoing monitoring of any business relationship with a designated person;
  - systematically report details of transactions and business relationships with designated persons; or
  - limit or cease business with a designated person.
- 19.18.2** The *FCA* is responsible for monitoring and enforcing compliance with requirements imposed by the Treasury under the Counter Terrorism Act by ‘credit institutions’ that are authorised persons and by ‘financial institutions’ (except money service businesses that are not authorised persons and consumer credit financial institutions). ‘Credit institutions’ and ‘financial institutions’ are defined in Part 2 of Schedule 7 to the Counter Terrorism Act.
- 19.18.3** The investigation and sanctioning powers given to the *FCA* by the Counter Terrorism Act are similar to those given to the *FCA* by the Money Laundering Regulations. The *FCA*'s approach to using its powers under the Counter Terrorism Act will be consistent with its approach to using its powers under the *Money Laundering Regulations*, described in paragraphs ■ 19.15.1 to ■ 19.15.7 above.



## 19.19 Insurance Accounts Directive (Lloyd's Syndicate and Aggregate Accounts) Regulations 2008

- 19.19.1** The Lloyd's Accounting Regulations implement the Audit and Accounts Directives in relation to the Lloyd's insurance market. They aim to increase the transparency of the accounts published by Lloyd's syndicates by imposing requirements in relation to the preparation and disclosure of the accounts. The Regulations give the *FCA* the power to institute criminal proceedings for an offence committed under the Regulations.
- 19.19.2** Our policy in relation to the prosecution of criminal offences and the circumstances in which we would expect to commence criminal proceedings is set out in ■ EG 12.





## 19.20 Payment Services Regulations 2017

- 19.20.1** The *FCA* has investigation and sanctioning powers in relation to both criminal and civil breaches of the *Payment Services Regulations*. The *Payment Services Regulations* impose requirements including, amongst other things, obligations on *payment service providers* to provide users with a range of information and various provisions regulating the rights and obligations of payment service users and providers.
- 19.20.2** The *FCA*'s approach to enforcing the *Payment Services Regulations* 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, 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.
- 19.20.3** The regulatory powers which the *Payment Services Regulations* provide to the *FCA* include:
- the power to require information;
  - powers of entry and inspection;
  - power of public censure;
  - the power to impose financial penalties;
  - the power to prosecute or fine unauthorised providers; and
  - the power to vary an authorisation on its own initiative.
- 19.20.4** The *FCA* also has the power to prohibit or restrict the carrying out of certain *regulated activities* by *EEA authorised payment institutions* and *EEA registered account information service providers*.
- 19.20.5** The *Payment Services Regulations*, for the most part, mirror the *FCA*'s investigative, sanctioning and regulatory powers under the *Act*. The *FCA* has decided to adopt procedures and policies in relation to the use of those powers akin to those it has under the *Act*. Key features of the *FCA*'s approach are described below.



## 19.21 The conduct of investigations under the Payment Services Regulations

**19.21.1** The *Payment Services Regulations* apply much of Part 11 of the *Act*. The effect of this is to apply the same procedures under the *Act* for appointing investigators and requiring information when investigating breaches of the *Payment Services Regulations*.

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

**19.21.3** The *Payment Services Regulations* also apply much of Part 13 of the *Act*. The effect of this is that the *FCA* has the power to deal with an *EEA authorised payment institution* or an *EEA registered account information service provider* ('incoming firm') that is likely to contravene a requirement which is imposed on it by or under the *Payment Services Regulations*. Under the *Payment Services Regulations* the *FCA* will be able to use the power of intervention to:

- (1) impose a requirement on an incoming *firm* as it considers appropriate; and
- (2) impose a variation on the permissions of an incoming *firm*.



## 19.22 Decision making under the Payment Services Regulations

- 19.22.1** The *RDC* is the *FCA's* decision maker for some of the decisions under the *Payment Services Regulations* as set out in ■ DEPP 2 Annex 1G. 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 and ■ 3.4. ■ DEPP 3.4 applies for urgent notices under regulations 12(6), 12(9), and 12(10)(b) (including as applied by regulations 15 and 19).
- 19.22.2** For decisions made by *executive procedures* the procedures to be followed will be those described in ■ DEPP 4.
- 19.22.3** The *Payment Service Regulations* do not require the *FCA* to have published procedures to launch criminal prosecutions. However, in these situations the *FCA* expects that it will normally follow its decision-making procedures for the equivalent decisions under the *Act*.
- 19.22.4** The *Payment Service Regulations* require the *FCA* to give third party rights as set out in section 393 of the *Act* and to give access to certain material as set out in section 394 of the *Act*.
- 19.22.5** Certain *FCA* decisions (for example the cancellation of an authorisation or the imposition of a financial penalty) may be referred to the *Tribunal* by an aggrieved party.
- Imposition of penalties under the Payment Services Regulations**
- 19.22.6** When imposing a financial penalty the *FCA's* policy includes having regard to the relevant factors in ■ DEPP 6.2 and ■ DEPP 6.4. The *FCA's* policy in relation to determining the level of a financial penalty includes having regard, where relevant, to ■ DEPP 6.5 to ■ DEPP 6.5D.
- 19.22.7** As with cases under the *Act*, the *FCA* may settle or mediate appropriate cases involving civil breaches of the *Payment Services Regulations* to assist it to exercise its functions under the Regulations in the most efficient and economic way. See ■ DEPP 5, ■ DEPP 6.7 and ■ EG 5 for further information on the settlement process and the settlement discount scheme.

**Statement of policy in section 169(7) interviews (as implemented by the Payment Services Regulations)**

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**19.22.8**

The *Payment Services Regulations* apply section 169 of the *Act* which requires the *FCA* to publish a statement of policy on the conduct of certain interviews in response to requests from overseas regulators. For the purposes of the *Payment Services Regulations* the *FCA* will follow the procedures described in ■ DEPP 7.



## 19.23 Electronic Money Regulations 2011

- 19.23.1** The *FCA* has investigation and sanctioning powers in relation to both criminal and civil breaches of the *Electronic Money Regulations*. The *Electronic Money Regulations* impose requirements including, amongst other things, various provisions regulating the rights and obligations of electronic money institutions.
- 19.23.2** In addition to its powers that apply to *authorised electronic money institutions*, generally the *FCA* has the power to prohibit or restrict the carrying out of certain *regulated activities* by *EEA authorised electronic money institutions*.
- 19.23.3** The *FCA's* approach to enforcing the *Electronic Money Regulations* 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, 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 electronic money issuer or relevant 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.
- 19.23.4** The *Electronic Money Regulations*, for the most part, mirror the *FCA's* investigative, sanctioning and regulatory powers under the *Act*. The *FCA* has decided to adopt procedures and policies in relation to the use of those powers akin to those it has under the *Act*. Key features of the *FCA's* approach are described below.
- The conduct of investigations under the Electronic Money Regulations**.....
- 19.23.5** The *Electronic Money Regulations* apply much of Part 11 of the *Act*. The effect of this is to apply the same procedures under the *Act* for appointing investigators and requiring information when investigating breaches of the *Electronic Money Regulations*.
- 19.23.6** The *FCA* will notify the subject of the investigation that it has appointed investigators to carry out an investigation under the *Electronic Money Regulations* and the reasons for the appointment, unless notification is likely

to prejudice the investigation or otherwise result in it being frustrated. The *FCA's* policy in civil investigations under the *Electronic Money Regulations* 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 Electronic Money Regulations

**19.23.7** The *RDC* is the *FCA's* decision maker for some of the decisions under the *Electronic Money Regulations* 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 and ■ 3.4. ■ DEPP 3.4 applies for urgent notices under regulation 11(6), (9) and (10)(b) (including as applied by regulation 15).

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

**19.23.9** The *Electronic Money Regulations* do not require the *FCA* to have published procedures to commence criminal prosecutions. However, in these situations the *FCA* expects that it will normally follow its decision-making procedures for the equivalent decisions under the *Act*.

**19.23.10** The *Electronic Money Regulations* require the *FCA* to give third party rights as set out in section 393 of the *Act* and to give access to material as set out in section 394 of the *Act* in certain cases.

**19.23.11** Certain *FCA* decisions (for example the cancellation of an authorisation or the imposition of a financial penalty) may be referred to the *Tribunal* by an aggrieved party.

### Imposition of penalties under the Electronic Money Regulations

**19.23.12** When determining whether to take action to impose a penalty the *FCA's* policy includes having regard to the relevant factors in ■ DEPP 6.2 and ■ DEPP 6.4. When determining the level of a financial penalty the *FCA's* policy includes having regard to relevant principles and factors in ■ DEPP 6.5 to ■ 6.5D.

**19.23.13** When determining whether to suspend the authorisation or, as the case may be, the registration of an electronic money institution or limit or otherwise restrict the carrying on of electronic money issuance or payments services business by an electronic money issuer the *FCA's* policy will have regard to the relevant factors in ■ DEPP 6A.

**19.23.14** As with cases under the *Act*, the *FCA* may settle or mediate appropriate cases involving civil breaches of the *Electronic Money Regulations* to assist it to exercise its functions under the Regulations in the most efficient and economic way. See ■ DEPP 5, ■ DEPP 6.7 and ■ EG 5 for further information on the settlement process and the settlement discount scheme.

**Statement of policy in section 169(7) interviews (as implemented by the Electronic Money Regulations)**

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19.23.15

The *Electronic Money Regulations* apply section 169 of the Act which requires the FCA to publish a statement of policy on the conduct of certain interviews in response to requests from overseas regulators. For the purposes of the *Electronic Money Regulations* the FCA will follow the procedures described in ■ DEPP 7.



## 19.24 Cross-Border Payments in Euro Regulations 2010

**19.24.1** The *Cross-Border Payments in Euro Regulations* lay down rules on cross-border payments in euros, to ensure that compliance with the *EU Cross-Border Regulation* is guaranteed by effective, proportionate and dissuasive sanctions. The main aim of the *EU Cross-Border Regulation* is to ensure that the charges for cross-border payments in euro are equal to the charges for identical national payments in euro within a Member State. The *Cross-Border Payments in Euro Regulations* give the FCA investigation and sanctioning powers in relation to breaches of the *EU Cross-Border Regulation*, including:

- the power to require information
- the power of public censure; and
- the power to impose financial penalties.

**19.24.2** The FCA's policy for using the powers given to it by the *Cross-Border Payments in Euro Regulations* is the same as its policy for using the equivalent powers given to it by the *Payment Services Regulations*, set out in ■ EG 19.20.1 to ■ 19.22.8, as, for the most part, these powers are very similar. As the *Payment Services Regulations*, for the most part, mirror the FCA's investigative, sanctioning and regulatory powers under the Act, the FCA will therefore adopt enforcement procedures akin to those used under the Act.





## 19.25 Recognised Auction Platforms Regulations 2011

### 19.25.1

The *FCA's* policy for using the powers given to it by the *RAP Regulations* is set out in *REC*. This includes, for example, its policy in relation to the power to impose a financial penalty on or censure an *RAP* (REC 2A.4) and its policy in relation to the power to give directions to an *RAP* (REC 4.6). The *FCA's* policy in relation to regulation 6 and Schedule 1 of the *RAP Regulations* is set out in *DEPP* and *EG*.

## 19.26 OTC Derivatives, Central Counterparties and Trade Repositories Regulations 2013

**19.26.1** The *FCA* has information gathering and sanctioning powers under the *Act* which are applicable to breaches of *EMIR requirements* by *authorised persons* or *recognised bodies*. The *OTC derivatives, CCPs and trade repositories regulation* adds to the powers available to the *FCA* for dealing with breaches of *EMIR requirements* and sets out information gathering and sanctioning powers enabling the *FCA* to investigate and take action for breaches of the *EMIR requirements* by *non- authorised counterparties* and for certain breaches of the *OTC derivatives, CCPs and trade repositories regulation* by *authorised persons*. Such powers under the *OTC derivatives, CCPs and trade repositories regulation* or the *Act* do not extend to breaches of [article 11\(3\)](#) and (4) of *EMIR* by PRA-*authorised financial counterparties*.

### Information gathering powers

**19.26.2** The *FCA* may require a *non-authorised counterparty* that is subject to obligations under *EMIR* to provide specified information or specified documents so that it can verify whether the *non-authorised counterparty* has complied with *EMIR*. The *FCA* also has the power to require a *person* to provide specified information or specified documents so that it can verify whether the *person* is subject to *EMIR*. The *FCA* may require the above information to be provided in such form, or to be verified or authenticated in such manner, as is reasonably required in connection with the exercise of the *FCA's* functions under *EMIR*.

### Sanctioning powers

**19.26.3**

- (1) The *FCA* has the power to publish a statement or impose a financial penalty of such amount as it considers appropriate on:
  - (a) a financial counterparty who is not an *authorised person*, a non-financial counterparty or any other *person* who has breached an *EMIR requirement* or regulation 7 or 8 of the *OTC derivatives, CCPs and trade repositories regulation*;
  - (b) a financial counterparty who is an *authorised person* who has breached regulation 8 of the *OTC derivatives, CCPs and trade repositories regulation*.
- (2) Where the *FCA* exercises its power to impose a financial penalty under the *OTC derivatives, CCPs and trade repositories regulation* or the *Act* for breaches in relation to *EMIR* a penalty, it must publish a statement to that effect unless such disclosure would seriously

jeopardise the financial markets or cause disproportionate damage to the parties involved.

[**Note:** article 12(2) of *EMIR* and regulation 9(3) of the *OTC derivatives, CCPs and trade repositories regulation*]

**19.26.4** As the power to impose penalties for contravention of an *EMIR requirement* or regulations ■ 7 or ■ 8 of the *OTC derivatives, CCPs and trade repositories regulation* mirrors similar powers to that the *FCA* has under the *Act*, the *FCA* will adopt procedures and policies in relation to the use of those powers akin to those it has adopted under the *Act*, subject to ■ EG 19.26.3(2).

**19.26.5** The *FCA* will use the sanctioning powers where it is appropriate to do so and with regard to the relevant factors listed in ■ DEPP 6.2.1G and ■ DEPP 6.4. In determining the appropriate level of financial penalty, the *FCA* will have regard to the principles set out in ■ DEPP 6.5, ■ DEPP 6.5A, ■ DEPP 6.5B, ■ DEPP 6.5D and ■ DEPP 6.7.

**19.26.6** Where the *FCA* proposes or decides to take action to publish a statement or impose a financial penalty referred to in ■ EG 19.26.3, it will give the *person* concerned a *warning notice* or a *decision notice* respectively. In the case of a public statement, the *warning notice* or *decision notice* will also set out the terms of the statement. In the case of a financial penalty, the *warning notice* or *decision notice* will also state the amount of the penalty. On receiving a *warning notice*, the *person* concerned has a right to make representations regarding the *FCA*'s proposed decision. A *person* that receives a *decision notice* may refer the matter to the *Tribunal*.

**19.26.7** If it is proposing to publish a statement or impose a penalty under the *OTC derivatives, CCPs and trade repositories regulation*, the *FCA*'s decision maker will be the *RDC*. The *RDC* will make its decisions following the procedure set out in ■ DEPP 3.2 or where appropriate, ■ DEPP 3.3.

**19.26.8** Sections 393 and 394 of the *Act* apply to notices referred to in this section. See ■ DEPP 2.4 (Third party rights and access to *FCA* material).

**19.26.9** In relation to the notices in this section, the *FCA* will, subject to ■ EG 19.26.3(2), apply the approach to publicity that is outlined in ■ EG 6.

**19.26.10** In relation to *authorised persons* and *recognised bodies* which are subject to obligations under *EMIR*, other information gathering powers and sanctions may also be applicable under the *Act*.

## 19.27 Alternative Investment Fund Managers Regulations 2013

- 19.27.1** The *AIFMD UK regulation* transposes *AIFMD* and makes the necessary changes to *UK* legislation in relation to the *EuSEF regulation*, the *EuVECA regulation*, the *ELTIF regulation* and the *Money Market Funds regulation*. It provides new and updated powers in relation to both existing and new managers of *AIFs*, whether authorised or registered.
- 19.27.2** The *AIFMD UK regulation* includes information gathering and sanctioning powers that enable the *FCA* to investigate and take action for breaches of the regulations and directly applicable EU regulations. Specific standalone powers are in the *AIFMD UK regulation* for *unauthorised AIFMs*, by applying relevant sections of the *Act*. Amendments to the *Act*, including those made under the *Financial Services and Markets Act (Qualifying EU Provisions) Order 2013*, extend certain *FCA* powers (e.g. disciplinary powers, injunctions and restitution) so that they apply to contraventions of requirements of the *AIFMD UK regulation* and to contraventions of directly applicable EU regulations.
- Information gathering and investigation powers**.....
- 19.27.3** The *FCA* has decided that its approach to enforcing the *AIFMD UK regulation* requirements will mirror its general approach to enforcing the *Act* in ■ EG 2. Therefore, the *FCA* will apply the same procedures and policies under the *Act* for appointing investigators and requiring information for breaches of the *AIFMD UK regulation*.
- 19.27.4** The new powers under the *AIFMD UK regulation* include powers of direction and the power to revoke the registration of *small registered UK AIFMs* (including a *EuSEF manager* or a *EuVECA manager* and, in some circumstances, EEA managers of a *qualifying social entrepreneurship fund* or a *qualifying venture capital fund*), the registration of *qualifying social entrepreneurship funds* or *qualifying venture capital funds* or the authorisation of a money market fund.
- 19.27.5** The *FCA* will respect the principle of proportionality when taking action against *EuSEF* or *EuVECA managers* for breaches identified in articles 22 and 21 of the directly applicable *EuSEF regulation* and *EuVECA regulation*, respectively. The *FCA* may take action to ensure compliance with the regulations or prohibit the use of the designation of *EuSEF manager* or *EuVECA manager* and revoke registration of such managers. The prohibition

route is more likely to apply to serious breaches of the EU regulations such as in situations where:

registration has been obtained through false statements or any other irregular means; or

there are grounds for concern over the behaviour of a *EuSEF manager* or a *EuVECA manager* in the management of a *qualifying social entrepreneurship fund* or a *qualifying venture capital fund*, respectively.

### Decision making under the AIFMD UK regulation

**19.27.6** The *RDC* is the *FCA's* decision maker for some decisions under the *AIFMD UK regulation*, as set out in ■ DEPP 2 Annex 1G. The *RDC* will make its decisions following the procedure in ■ DEPP 3.2 or, where appropriate, ■ DEPP 3.3 and ■ 3.4. For decisions made by *executive procedures*, the procedures to be followed are in ■ DEPP 4.

**19.27.7** The *AIFMD UK regulation* does not require the *FCA* to publish procedures to commence criminal prosecutions. However, the *FCA* will normally follow its equivalent decision-making procedures for similar decisions under the *Act*.

**19.27.8** The *AIFMD UK regulation* applies the procedural provisions of Part and Part 26 of the *Act* for matters that can be referred to the Tribunal and to warning and decision notices under the regulations as it applies to referrals and notices under the *Act*. The *AIFMD UK regulation* also applies sections 205 and 206 of the *Act* to *unauthorised AIFMs* and, accordingly, the *FCA* will give third party rights (section 393 of the *Act*) and access to material (section 394 of the *Act*).

### Imposition of penalties under the AIFMD UK regulation

**19.27.9** When determining whether to take action to impose a penalty under the *AIFMD UK regulation*, 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 relevant principles and factors in ■ DEPP 6.5 to ■ 6.5A, ■ DEPP 6.5B, ■ DEPP 6.5D and ■ DEPP 6.7.

**19.27.10** As with cases under the *Act*, the *FCA* may settle or mediate appropriate cases involving civil breaches of the *AIFMD UK regulation* 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.

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

### Statement of Policy in section 169(7) interviews (as applied by the AIFMD UK regulation)

**19.27.12** Regulation 71(2) of the *AIFMD UK regulation* applies section 169 of the *Act* in respect of *unauthorised AIFMs*, which requires the *FCA* to have a statement of policy on the conduct of certain interviews in response to requests from overseas regulators. The *FCA* will follow the procedures described in ■ DEPP 7.



**19.28 Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Referral Fees) Regulations 2013**

**19.28.1** The *Referral Fees Regulations* give the *FCA* investigation and sanctioning powers in relation to the contravention of the rules against referral fees contained in sections 56 to 60 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (the *LASPO Act*), as well as the contravention of requirements imposed by, or under, the *Referral Fees Regulations*.

**19.28.2** The *FCA's* approach to taking enforcement action under the *Referral Fees Regulations* 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.

**19.28.3** The *Referral Fees Regulations*, for the most part, mirror 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**.....

**19.28.4** The *Referral Fees Regulations* apply much of Part 11 of the *Act*. The effect of this is to apply the same procedures under the *Act* for appointing investigators and requiring information when investigating contraventions of the relevant provisions of the *LASPO Act* or the *Referral Fees Regulations*.

**19.28.5** The *FCA* will notify the subject of the investigation that it has appointed investigators to carry out an investigation under the *Referral Fees Regulations* 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 civil investigations under the *Referral Fees Regulations* 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 Referral Fees Regulations**

- 19.28.6** The *RDC* is the *FCA*'s decision maker for decisions which require *warning notices* or *decision notices* to be given under the *Referral Fees Regulations*, 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.
- 19.28.7** The *Referral Fees Regulations* do not require the *FCA* to publish procedures to commence criminal prosecutions. However, the *FCA* will normally follow its *equivalent* decision-making procedures for similar decisions under the *Act*, as set out in ■ EG 12.
- 19.28.8** The *Referral Fees Regulations* do not require the *FCA* to publish procedures to apply to the court for an injunction or restitution order. However, the *FCA* will normally follow its *equivalent* decision-making procedures for similar decisions under the *Act*, as set out in ■ EG 10 and ■ EG 11.
- 19.28.9** The *Referral Fees Regulations* apply sections 393 and 394 of the *Act* to *warning notices* and *decision notices* given under the *Referral Fees Regulations* and so require the *FCA* to give third party rights and to give access to material.
- 19.28.10** The *Referral Fees Regulations* apply the procedural provisions of Part 9 of the *Act*, as modified by the *Referral Fees Regulations*, in respect of matters that can be referred to the *Tribunal*. Referral to the *Tribunal* in respect of *decision notices* given under regulation 26(1) of the *Referral Fees Regulations* are treated as disciplinary referrals for the purpose of section 133 of the *Act*.

**Public censures, imposition of penalties and the impositions of suspensions or restrictions under the Referral Fees Regulations**

- 19.28.11** When determining whether to take action to impose a penalty or to issue a public censure under the *Referral Fees Regulations*, 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 to ■ 6.5B, ■ DEPP 6.5D and ■ DEPP 6.7.
- 19.28.12** As with cases under the *Act*, the *FCA* may settle or mediate appropriate cases involving civil breaches of the *Referral Fees Regulations* 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.
- 19.28.13** When determining whether to take action to impose a suspension or restriction under the *Referral Fees Regulations*, 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 or restriction, the *FCA*'s policy includes having regard to the relevant principles and factors in ■ DEPP 6A.3. However, the *FCA* does not have the power to suspend an *authorised person's permission* under the *Referral Fees Regulations*.

**19.28.14**

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



## 19.29 Immigration Act 2014 (Bank Account) Regulations 2014

- 19.29.1** The *Immigration Regulations* (as amended by the Immigration Act 2014 (Current Accounts) (Excluded Accounts and Notification Requirements) Regulations 2016) give the *FCA* investigation and sanctioning powers in relation to the contravention of sections 40, 40A, 40B and 40G of the Immigration Act 2014 (as amended by the Immigration Act 2016) (the Immigration Act), as well as the contravention of requirements imposed by, or under, the *Immigration Regulations*.
- 19.29.2** The *FCA*'s approach to taking enforcement action under the *Immigration Regulations* 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.
- 19.29.3** The *Immigration Regulations*, for the most part, mirror 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** .....
- 19.29.4** The *Immigration Regulations* apply much of Part 11 of the *Act*. The effect of this is to apply the same procedures under the *Act* for appointing investigators and requiring information when investigating contraventions of the relevant provisions of the Immigration Act or the *Immigration Regulations*.
- 19.29.5** The *FCA* will notify the subject of the investigation that it has appointed investigators to carry out an investigation under the *Immigration Regulations* 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 civil investigations under the *Immigration Regulations* 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 Immigration Regulations

- 19.29.6** The *RDC* is the *FCA's* decision maker for decisions which require *warning notices* or *decision notices* to be given under the *Immigration Regulations*, 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.
- 19.29.7** The *Immigration Regulations* do not require the *FCA* to publish procedures to commence criminal prosecutions. However, the *FCA* will normally follow its equivalent decision-making procedures for similar decisions under the *Act*, as set out in ■ EG 12.
- 19.29.8** The *Immigration Regulations* apply sections 393 and 394 of the *Act* to *warning notices* and *decision notices* given under the *Immigration Regulations* and so require the *FCA* to give third party rights and to give access to material.
- 19.29.9** The *Immigration Regulations* apply the procedural provisions of Part 9 of the *Act*, as modified by the *Immigration Regulations*, in respect of matters that can be referred to the *Tribunal*. Referral to the *Tribunal* in respect of *decision notices* given under regulation 25(1) of the *Immigration Regulations* are treated as disciplinary referrals for the purpose of section 133 of the *Act*.

### Public censures, imposition of penalties and the impositions of suspensions or restrictions under the Immigration Regulations

- 19.29.10** When determining whether to take action to impose a penalty or to issue a public censure under the *Immigration Regulations*, 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 to ■ DEPP 6.5B, ■ DEPP 6.5D and ■ DEPP 6.7.
- 19.29.11** As with cases under the *Act*, the *FCA* may settle or mediate appropriate cases involving civil breaches of the *Immigration Regulations* 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.
- 19.29.12** When determining whether to take action to impose a suspension or restriction under the *Immigration Regulations*, 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 or restriction, the *FCA's* policy includes having regard to the relevant principles and factors in ■ DEPP 6A.3.
- 19.29.13** The *FCA* will apply the approach to publicity that is outlined in ■ EG 6.



## 19.30 The Mortgage Credit Directive Order

- 19.30.1** The Mortgage Credit Directive (MCD) allows for an exemption not to apply the MCD to buy-to-let lending if there is 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 has been 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.
- 19.30.6** **Information gathering and investigation powers**.....  
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, and ■ DEPP 3.4 applies for urgent notices under article 16(1)(a).

## 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.

## 19.31 The Small and Medium Sized Business (Credit Information) Regulations

- 19.31.1** The *Small and Medium Sized Business (Credit Information) Regulations* were made under the *Small Business, Enterprise and Employment Act*. The *Small and Medium Sized Business (Credit Information) Regulations* impose a duty on *designated banks* to provide information about their small and medium sized business customers (with the consent of those businesses) to designated credit reference agencies. The Treasury is the body that has the power to designate a bank or credit reference agency and may revoke such a designation.
- 19.31.2** As the provision of credit data on companies is not a regulated activity under the *Act*, the Regulations create a separate monitoring and enforcement regime but apply, or make provision corresponding to, certain aspects of the *Act*. The FCA's approach to taking enforcement action under the Regulations will reflect 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.
- 19.31.3** **Information gathering and investigation powers**.....  
Regulation 26 of the *Small and Medium Sized Business (Credit Information) Regulations* applies many of the provisions of the *Act* regarding the FCA's investigation and information-gathering powers to *designated banks* and *designated credit reference agencies*. The effect is to apply the same procedures under the *Act* for appointing investigators and requiring information when investigating any breaches of the *Small and Medium Sized Business (Credit Information) Regulations*.
- 19.31.4** For example, the FCA will notify the subject of the investigation that it has appointed investigators to carry out an investigation and the reasons for the appointment. The FCA's policy in regulatory investigations under the *Small and Medium Sized Business (Credit Information) Regulations* 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 Small and Medium Sized Business (Credit Information) Regulations

**19.31.5** The RDC is the FCA's decision maker for some decisions which require *warning notices* or *decision notices* to be given under the *Small and Medium Sized Business (Credit Information) Regulations*, as set out in ■ DEPP 2 Annex 1G. The RDC will make its decisions following the procedure in ■ DEPP 3.2 or, where appropriate, ■ DEPP 3.3 or ■ DEPP 3.4. For decisions made by executive procedures, the procedure to be followed will be those described in ■ DEPP 4.

**19.31.6** Regulation 46 of the *Small and Medium Sized Business (Credit Information) Regulations* applies the procedural provisions of Part 9 of the *Act*, in respect of matters that can be referred to the *Tribunal*, and regulation 44 of the *Small and Medium Sized Business (Credit Information) Regulations* applies Part 26 of the *Act* to *warning* and *decision notices* given under the Regulations.

### Public censures, imposition of penalties and the impositions of restrictions under the Small and Medium Sized Business (Credit Information) Regulations

**19.31.7** When determining whether to take action to impose a penalty or to issue a public censure under the *Small and Medium Sized Business (Credit Information) Regulations*, 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.

**19.31.8** As with cases under the *Act*, the FCA may settle or mediate appropriate cases involving breaches of the *Small and Medium Sized Business (Credit Information) Regulations* 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.

**19.31.9** When determining whether to take action to impose a restriction under regulation 30 of the *Small and Medium Sized Business (Credit Information) Regulations*, the FCA's policy includes having regard to the relevant factors in ■ DEPP 6A.2 and ■ DEPP 6A.4. When determining the length of the period of restriction, the FCA's policy includes having regard to the relevant principles and factors in ■ DEPP 6A.3.

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

## 19.32 The Payment Accounts Regulations 2015

- 19.32.1** The *Payment Accounts Regulations 2015* ("the *PARs*") implement the Payment Accounts Directive. They entitle *consumers* who hold a payment account (such as a current account) to receive certain information about the fees and charges applied to that account. They also entitle *consumers* to use a switching service which meets certain minimum standards, if they wish to change their payment account to another provider.
- 19.32.2** The *PARs* impose various obligations on payment account providers, such as a duty to disclose certain information when offering a packaged account to a *consumer* (i.e. the costs and fees of the products or services included in the package). They also introduce an obligation to offer a switching service between payment accounts. The *PARs* also require *credit institutions* designated by Her Majesty's Treasury to provide eligible *consumers* with access to basic banking services.
- 19.32.3** As the requirements arise under the *PARs* and not under the *Act*, the *PARs* create a separate monitoring and enforcement regime but apply, or make provision corresponding to, certain aspects of the *Act*.
- 19.32.4** The *FCA's* approach to taking enforcement action under the *PARs* will reflect 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 of subjects under investigation when exercising its enforcement powers.
- Information gathering and investigation powers**.....
- 19.32.5** Part 1 of Schedule 7 to the *PARs* applies many of the provisions of the *Act* in relation to the *FCA's* investigation and information-gathering powers to the *FCA's* functions under the *PARs*. The effect of this is to apply the same procedures under the *Act* for appointing investigators and requiring information when investigating any breaches of the *PARs*.
- 19.32.6** For example, the *FCA* will, if appropriate, notify the subject of the investigation that it has appointed investigators to carry out an investigation and the reasons for the appointment. The *FCA's* policy in regulatory investigations under the *PARs* 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 PARs**

- 19.32.7** The *RDC* is the *FCA's* decision maker for some decisions which require *warning notices*, *decision notices* or other written notices to be given under the *PARs* as set out in ■ DEPP 2 Annex 1 and ■ DEPP 2 Annex 2. The *RDC* will make its decisions following the procedure set out in ■ DEPP 3.2 or, where appropriate, ■ DEPP 3.3 or ■ DEPP 3.4.
- 19.32.8** For decisions made by *executive procedures*, the procedures to be followed will be those described in ■ DEPP 4.
- 19.32.9** Paragraph 1 of Schedule 7 to the *PARs* applies the procedural provisions of Part 9 of the *Act* (with some modifications), in respect of matters that can be referred to the *Tribunal*, and Paragraph 4 of Schedule 7 to the *PARs* applies Part 26 of the *Act* to *warning notices* and *decision notices* given under the *PARs*.

**Public censures and the imposition of penalties**

- 19.32.10** When determining whether to take action to impose a penalty or to issue a public censure under the *PARs*, 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.
- 19.32.11** As with cases under the *Act*, the *FCA* may settle or mediate appropriate cases involving breaches of the *PARs* 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*.
- 19.32.12** The *FCA* will apply the approach to publicity that is outlined in ■ EG 6.

## 19.33 The Small and Medium Sized Business (Finance Platforms) Regulations 2015

- 19.33.1** The *Small and Medium Sized Business (Finance Platforms) Regulations* were made under the *Small Business, Enterprise and Employment Act*. The *Small and Medium Sized Business (Finance Platforms) Regulations* require *designated banks* to provide *specified information* about rejected loan applications made by small and medium sized business customers (with their consent) to *designated finance platforms* which must then provide such information to *finance providers* on request. The Treasury is the body that has the power to designate a bank or *finance platform* and may revoke such a designation.
- 19.33.2** As the provision of credit data on companies is not a *regulated activity* under the *Act*, the Regulations create a separate monitoring and enforcement regime but apply, or make provision corresponding to, certain aspects of the *Act*. The FCA's approach to taking enforcement action under the Regulations will reflect 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.
- 19.33.3** **Information gathering and investigation powers**.....  
Regulation 23 of the *Small and Medium Sized Business (Finance Platforms) Regulations* applies many of the provisions of the *Act* in relation to the FCA's investigation and information-gathering powers in respect of *designated banks* and *designated finance platforms*. The effect of this is to apply the same procedures under the *Act* for appointing investigators and requiring information when investigating any breaches of the *Small and Medium Sized Business (Finance Platforms) Regulations*.
- 19.33.4** For example, the FCA will notify the subject of the investigation that it has appointed investigators to carry out an investigation and the reasons for the appointment. The FCA's policy in regulatory investigations under the Regulations 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 Small and Medium Sized Business  
(Finance Platforms) Regulations**

**19.33.5** The RDC is the FCA's decision maker for some decisions which require *warning notices* or *decision notices* to be given under the *Small and Medium Sized Business (Finance Platforms) Regulations* as set out in ■ DEPP 2 Annex 1G. The RDC will make its decisions following the procedure in ■ DEPP 3.2 or, where appropriate, ■ DEPP 3.3 or ■ DEPP 3.4. For decisions made by *executive procedures*, the procedure to be followed will be those described in ■ DEPP 4.

**19.33.6** Regulation 43 of the *Small and Medium Sized Business (Finance Platforms) Regulations* applies to the procedural provisions of Part 9 of the *Act*, in respect of matters that can be referred to the *Tribunal*, and regulation 41 of the *Small and Medium Sized Business (Finance Platforms) Regulations* applies to Part 26 of the *Act* to *warning* and *decision notices* given under the *Small and Medium Sized Business (Finance Platforms) Regulations*.

**Public censures, imposition of penalties and the impositions of  
restrictions under the Small and Medium Sized Business  
(Finance Platforms) Regulations**

**19.33.7** When determining whether to take action to impose a penalty or to issue a public censure under the *Small and Medium Sized Business (Finance Platforms) Regulations*, 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.

**19.33.8** As with cases under the *Act*, the FCA may settle or mediate appropriate cases involving breaches of the *Small and Medium Sized Business (Finance Platforms) Regulations* 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.

**19.33.9** When determining whether to take action to impose a restriction under regulation 27 of the *Small and Medium Sized Business (Finance Platforms) Regulations*, 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 restriction, the FCA's policy includes having regard to the relevant principles and factors in ■ DEPP 6A.3.

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

## 19.34 Markets in Financial Instruments Regulations 2017

**19.34.1** The *MiFI Regulations* in part implement *MiFID*. The *FCA* has investigative and enforcement powers in relation to both criminal and non-criminal breaches of the *MiFI Regulations* (including requirements imposed on persons subject to the *MiFI Regulations* by *MiFIR* and any directly applicable EU regulation made under *MiFIR* or *MiFID*). The *MiFI Regulations* impose requirements on:

- (1) *persons* holding positions in relevant contracts for commodity derivatives trading on *trading venues* and for *economically equivalent OTC contracts*, whether or not the *persons* are authorised; and
- (2) exempt *investment firms* providing services in *algorithmic trading*, *direct electronic access* or acting as a general clearing member or in relation to the synchronisation of business clocks.

The *MiFI Regulations* also give the *FCA* the powers to investigate and enforce breaches of article 28 of *MiFIR* and any directly applicable EU regulation made under *MiFIR*.

**19.34.2** The *FCA's* approach to enforcing under the *MiFI Regulations*, whether the *person* is authorised or not, will mirror our general approach to enforcing the *Act*, as set out in ■ EG 2. We will seek to exercise our enforcement powers in a manner that is transparent, proportionate, responsive to the issue and consistent with our publicly stated policies. We will also seek to ensure fair treatment when exercising our enforcement powers. Finally, we will aim to change the behaviour of the *person* who is the subject of our 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.

**19.34.3** The regulatory powers which the *MiFI Regulations* provide to the *FCA* include:

- (1) the power to require information and appoint investigators;
- (2) powers of entry and inspection;
- (3) the power to publicly censure;
- (4) the power to impose financial penalties;
- (5) the power to apply for an injunction or restitution order;

- (4) the power to require restitution;
- (7) the power to impose limitation, restriction or requirement; and
- (8) the power to prosecute relevant offences.

**19.34.4** In addition, the *MiFI Regulations* provide the power to require the removal of persons from the management board of an *investment firm*, a *credit institution* or a *recognised investment exchange*. This is a supervisory power, rather than a disciplinary one, and it may be exercised whenever the *FCA* deems it necessary for the purpose of any of our functions under *MiFID* or *MiFIR*.

**19.34.5** The *MiFI Regulations*, for the most part, mirror the *FCA's* investigative, sanctioning and regulatory powers under the *Act*. The *FCA* has decided to adopt procedures and policies in relation to the use of those powers akin to those we have under the *Act*. Key features of the *FCA's* approach are described below.

#### **The conduct of investigations under the MiFI Regulations**

**19.34.6** The *MiFI Regulations* apply much of Part 11 of the *Act*. The effect of this is to apply the same procedures under the *Act* for appointing investigators and requiring information when investigating breaches of the *MiFI Regulations*.

**19.34.7** The *FCA* will notify the subject of the investigation that we have appointed investigators to carry out an investigation under the *MiFI Regulations* and the reasons for the appointment, unless notification is likely to prejudice the investigation or otherwise result in it being frustrated. The *FCA* expects to carry out a scoping visit early on in the enforcement process in most cases. The *FCA's* policy in non-criminal investigations under the *MiFI Regulations* is to use powers to compel the provision of information in the same way as we would in the course of an investigation under the *Act*.

#### **Decision making under the MiFI Regulations**

**19.34.8** The decision making procedures for those decisions under the *MiFI Regulations* requiring the giving of a *warning notice*, *decision notice* or a *supervisory notice* are dealt with in *DEPP*.

**19.34.9** The *MiFI Regulations* do not require the *FCA* to have published procedures for commencing criminal prosecutions. However, in these situations the *FCA* expects that we will normally follow our decision making procedures for the equivalent decisions under the *Act*, as set out in ■ EG 12.

**19.34.10** The *MiFI Regulations* do not require the *FCA* to have published procedures to apply to the court for an *injunction* or restitution order. However, the *FCA* will normally follow our decision making procedures for the equivalent decisions under the *Act*, as set out in ■ EG 10 and ■ EG 11.

- 19.34.11 The *MiFI Regulations* require the *FCA* to give third party rights as set out in section 393 of the *Act* and to give access to certain material as set out in section 394 of the *Act*.
- 19.34.12 Certain *FCA* decisions (for example a requirement to reduce the size of a position, publication of a statement and the imposition of a penalty) may be referred to the *Tribunal* by an aggrieved party.
- Imposition of penalties under the MiFI Regulations**
- 19.34.13 When determining whether to take action to impose a penalty or to issue a public censure under the *MiFI Regulations* the *FCA*'s policy includes having regard to the relevant factors in ■ DEPP 6.2 and ■ DEPP 6.4. The *FCA*'s policy in relation to determining the level of a financial penalty includes having regard, where relevant, to ■ DEPP 6.5 to ■ DEPP 6.5D.
- 19.34.14 As with cases under the *Act*, the *FCA* may settle or mediate appropriate cases involving non-criminal breaches of the *MiFI Regulations* to assist us to exercise our functions under the *MiFI Regulations* in the most efficient and economic way. See ■ DEPP 5, ■ DEPP 6.7 and ■ EG 5 for further information on the settlement process and the *settlement discount scheme*.
- 19.34.15 The *FCA* will apply the approach to publicity that is outlined in ■ EG 6, read in light of the applicable publicity provisions in section 391D of the *Act*.
- Removal of persons from management boards under the MiFI Regulations**
- 19.34.16 The power under Part 5 of the *MiFI Regulations* to remove a person from a management board may be used in respect of an *investment firm*, a *credit institution* or a *recognised investment exchange*.
- 19.34.17 This power may be used where the *FCA* considers that the removal is necessary for the purpose of exercising functions under *MiFID* or *MiFIR*. Examples of where this power may be used include, but are not limited to, ensuring that all members of the management body:
- (1) are of sufficiently good repute;
  - (2) possess sufficient knowledge, skills and experience to perform their duties;
  - (3) commit sufficient time to perform their functions;
  - (4) do not hold too many directorships;
  - (5) act with honesty, integrity and independence of mind; and
  - (6) have no conflicts of interest.
- 19.34.18 The *FCA* will have regard to all relevant circumstances, on a case-by-case basis, taking into account the specific circumstances of the *investment firm*,

*credit institution or recognised investment exchange* and the member of the management board. The *FCA* will exercise this power fairly and proportionately.

**19.34.19** It should be noted that, while the *FCA* will have regard to the range of regulatory tools at its disposal, we are not required to exhaust all other options before imposing the requirement to remove a person from the management board.

**19.34.20** The *FCA* will take into account all relevant circumstances when considering whether to require the removal to occur immediately or on a specified date.

**Statement of policy in section 169(7) (as implemented by the MiFI Regulations)**

**19.34.21** The *MiFI Regulations* apply section 169 of the *Act* which requires the *FCA* to publish a statement of policy on the conduct of certain interviews in response to requests from overseas regulators. For the purposes of the *MiFI Regulations* the *FCA* will follow the procedures described in ■ DEPP 7.



## 19.35 Data Reporting Services Regulations 2017

**19.35.1** The *DRS Regulations* implement *MiFID*. The *FCA* has investigation and enforcement powers in relation to both criminal and non-criminal breaches of the *DRS Regulations* (including requirements imposed on *persons* subject to the *DRS Regulations* by *MiFIR* and any directly applicable EU regulation made under *MiFIR* or *MiFID*). The *DRS Regulations* impose requirements on *data reporting services providers* ("DRSPs") which are entities authorised or verified to provide services of:

- (1) publishing trade reports ("APA");
- (2) reporting details of transactions ("ARM"); and
- (3) collecting trade reports ("CTP").

**19.35.2** The *FCA's* approach to enforcing the *DRS Regulations* will mirror our general approach to enforcing the *Act*, as set out in ■ EG 2. We will seek to exercise our enforcement powers in a manner that is transparent, proportionate, responsive to the issue, and consistent with our publicly stated policies. We will also seek to ensure fair treatment when exercising our enforcement powers. Finally, we will aim to change the behaviour of the *person* who is the subject of our 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.

**19.35.3** The regulatory powers which the *DRS Regulations* provide to the *FCA* include:

- (1) the power to require information and appoint investigators;
- (2) powers of entry and inspection;
- (3) the power of public censure;
- (4) the power to impose financial penalties;
- (5) the power to impose a limitation or other restrictions;
- (6) the power to apply for an *injunction*;
- (7) the power to require restitution; and
- (8) the power to prosecute unauthorised providers.



- 19.35.4 In addition, the *DRS Regulations* provide the power for the *FCA* to take criminal or non-criminal action for misleading the *FCA*.
- 19.35.5 The *DRS Regulations*, for the most part, mirror the *FCA*'s investigative, sanctioning and regulatory powers under the *Act*. The *FCA* has decided to adopt procedures and policies in relation to the use of those powers akin to those we have under the *Act*. Key features of the *FCA*'s approach are described below.
- The conduct of investigations under the DRS Regulations**.....
- 19.35.6 The *DRS Regulations* apply much of Part 11 of the *Act*. The effect of this is to apply the same procedures under the *Act* for appointing investigators and requiring information when investigating breaches of the *DRS Regulations*.
- 19.35.7 The *FCA* will notify the subject of the investigation that we have appointed investigators to carry out an investigation under the *DRS Regulations* and the reasons for the appointment, unless notification is likely to prejudice the investigation or otherwise result in it being frustrated. The *FCA* expects to carry out a scoping visit early on in the enforcement process in most cases. The *FCA*'s policy in non-criminal investigations under the *DRS Regulations* is to use powers to compel the provision of information in the same way as we would in the course of an investigation under the *Act*.
- Decision making under the DRS Regulations**.....
- 19.35.8 The decision making procedures for those decisions under the *DRS Regulations* requiring the giving of a *warning notice*, *decision notice* or a *supervisory notice* are dealt with in *DEPP*.
- 19.35.9 For decisions made by *executive procedures* the procedures to be followed will be those described in ■ *DEPP* 4.
- 19.35.10 The *DRS Regulations* do not require the *FCA* to have published procedures for commencing criminal prosecutions. However, in these situations the *FCA* expects that we will normally follow our decision making procedures for the equivalent decisions under the *Act*, as set out in ■ *EG* 12.
- 19.35.11 The *DRS Regulations* do not require the *FCA* to have published procedures to apply to the court for an *injunction* or restitution order. However, the *FCA* will normally follow our decision making procedure for the equivalent decisions under the *Act*, as set out in ■ *EG* 10 and ■ *EG* 11.
- 19.35.12 The *DRS Regulations* require the *FCA* to give third party rights as set out in section 393 of the *Act* and to give access to certain material as set out in section 394 of the *Act*.
- 19.35.13 Certain *FCA* decisions (for example the publication of a statement and the imposition of a penalty) may be referred to the *Tribunal* by an aggrieved party.

**Imposition of penalties under the DRS Regulations**

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- 19.35.14** When determining whether to take action to impose a penalty or to issue a public censure under the *DRS Regulations* the *FCA's* policy includes having regard to the relevant factors in ■ DEPP 6.2 and ■ DEPP 6.4. The *FCA's* policy in relation to determining the level of a financial penalty includes having regard, where relevant, to ■ DEPP 6.5 to ■ DEPP 6.5D.
- 19.35.15** As with cases under the *Act*, the *FCA* may settle or mediate appropriate cases involving non-criminal breaches of the *DRS Regulations* to assist us to exercise our functions under the *DRS Regulations* in the most efficient and economic way.
- [**Note:** See ■ DEPP 5, ■ DEPP 6.7 and ■ EG 5 for further information on the settlement process and the *settlement discount scheme*.]
- 19.35.16** The *FCA* will apply the approach to publicity that is outlined in ■ EG 6, read in light of applicable publicity provisions in section 391D of the *Act*.

**Statement of policy in section 169(7) (as implemented by the DRS Regulations)**

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- 19.35.17** The *DRS Regulations* apply section 169 of the *Act* which requires the *FCA* to publish a statement of policy on the conduct of certain interviews in response to requests from overseas regulators. For the purposes of the *DRS Regulations* the *FCA* will follow the procedures described in ■ DEPP 7.



## 19.36 The Packaged Retail and Insurance-based Investment Products Regulations 2017

- 19.36.1** The Packaged Retail and Insurance-based Investment Products Regulations implement the *PRIPs Regulation*. The *FCA* has investigative and enforcement powers in relation to both criminal and civil breaches of the Packaged Retail and Insurance-based Investment Products Regulations, *PRIPs Regulation* and any directly applicable *EU* regulation made under the *PRIPs Regulation*. The *PRIPs Regulation* imposes requirements on both authorised and unauthorised *persons* who manufacture, advise on, market or sell a *PRIP*.
- 19.36.2** The *FCA's* approach to enforcing the Packaged Retail and Insurance-based Investment Products Regulations, whether the *person* is authorised or not, will mirror our general approach to enforcing the *Act*, as set out in ■ EG 2. We will seek to exercise our enforcement powers in a manner that is transparent, proportionate, responsive to the issue, and consistent with our publicly stated policies. We will also seek to ensure fair treatment when exercising our enforcement powers. Finally, we will aim to change the behaviour of the *person* who is the subject of our 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.
- 19.36.3** The regulatory powers which the Packaged Retail and Insurance-based Investment Products Regulations provide to the *FCA* include:
- the power to appoint investigators and require information;
  - powers of entry and inspection;
  - the power of *public censure*;
  - the power to impose financial penalties;
  - the power to impose a limitation, restriction or requirement;
  - the power to apply for an *injunction* or restitution order;
  - the power to require restitution; and
  - the power of prohibition and suspension.

**19.36.4** In addition, the *PRIPs Regulation* imposes requirements directly on *appointed representatives* for, amongst other things, regulated activity which their *principal* may have accepted responsibility. We would expect to usually take enforcement action against the *principal*, rather than the *appointed representative*, in these circumstances.

**19.36.5** The Packaged Retail and Insurance-based Investment Products Regulations, for the most part, mirror the *FCA's* investigative, sanctioning and regulatory powers under the *Act*. The *FCA* has decided to adopt procedures and policies in relation to the use of those powers akin to those it has under the *Act*. Key features of the *FCA's* approach are described below.

### **Conduct of investigations under the Packaged Retail and Insurance-based Investment Products Regulations**

**19.36.6** The Packaged Retail and Insurance-based Investment Products Regulations apply to much of Part 11 of the *Act*. The effect of this is to apply the same procedures under the *Act* for appointing investigators and requiring information when investigating breaches of the Packaged Retail and Insurance-based Investment Products Regulations.

**19.36.7** For example, the *FCA* will notify the subject of the investigation that we have appointed investigators to carry out an investigation under the Packaged Retail and Insurance-based Investment Products Regulations and the reasons for the appointment, unless notification is likely to prejudice the investigation or otherwise result in it being frustrated. The *FCA* expects to carry out a scoping visit early on in the enforcement process in most cases. The *FCA's* policy in civil investigations under the Packaged Retail and Insurance-based Investment Products Regulations 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 Packaged Retail and Insurance-based Investment Products Regulations**

**19.36.8** The decision making procedure for those decisions under the Packaged Retail and Insurance-based Investment Products Regulations requiring the giving of a *warning notice*, *decision notice* or a *supervisory notice* are dealt with in *DEPP*.

**19.36.9** The Packaged Retail and Insurance-based Investment Products Regulations do not require the *FCA* to have published procedures for commencing criminal prosecutions. However, in these situations the *FCA* expects that it will normally follow its decision-making procedures for the equivalent decisions under the *Act*, as set out in ■ EG 12.

**19.36.10** The Packaged Retail and Insurance-based Investment Products Regulations do not require the *FCA* to have published procedures to apply to the court for an *injunction* or restitution order. However, the *FCA* will normally follow its decision-making procedure for the equivalent decisions under the *Act*, as set out in ■ EG 10 and ■ EG 11.

**19.36.11** The Packaged Retail and Insurance-based Investment Products Regulations require the *FCA* to give third party rights as set out in section 393 of the *Act* and to give access to certain material as set out in section 394 of the *Act*.

**19.36.12** Certain *FCA* decisions (for example making an order prohibiting a *person* from marketing a *PRIP*; making an order requiring a *person* to suspend the marketing of a *PRIP*) may be referred to the *Tribunal* by an aggrieved party.

### **Imposition of penalties under the Packaged Retail and Insurance-based Investment Products Regulations**

**19.36.13** When determining whether to take action to impose a penalty or to issue a public censure under the Packaged Retail and Insurance-based Investment Products Regulations the *FCA* will have regard to the relevant factors in ■ DEPP 6.2 and ■ DEPP 6.4. The *FCA*'s policy in relation to determining the level of financial penalty includes having regard, where relevant, to ■ DEPP 6.5 to ■ DEPP 6.5D.

**19.36.14** As with cases under the *Act*, the *FCA* may settle or mediate appropriate cases involving civil breaches of the Packaged Retail and Insurance-based Investment Products Regulations to assist it exercise its functions under the Packaged Retail and Insurance-based Investment Products Regulations in the most efficient and economic way.

[**Note:** See ■ DEPP 5, ■ DEPP 6.7 and ■ EG 5 for further information on the settlement process and the *settlement discount scheme*.]

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

### **Statement of policy in section 169(9) (as implemented by the Packaged Retail and Insurance-based Investment Products Regulations)**

**19.36.16** The Packaged Retail and Insurance-based Investment Products Regulations apply section 169 of the *Act* which requires the *FCA* to publish a statement of policy on the conduct of certain interviews in response to requests from overseas regulators. For the purposes of the Packaged Retail and Insurance-based Investment Products Regulations the *FCA* will follow the procedures described in ■ DEPP 7.



## 19.37 UK Benchmarks Regulations 2018

**19.37.1** The *UK Benchmarks Regulations 2018* in part implement the *benchmarks regulation*. The *FCA* has investigative and enforcement powers in relation to both criminal and non-criminal breaches of the *UK Benchmarks Regulations 2018* (including requirements imposed on *persons* subject to the *UK Benchmarks Regulations 2018* by the *benchmarks regulation* and any directly applicable EU regulation made under the *benchmarks regulation*). Our powers in relation to Miscellaneous BM *persons* are set in the *UK Benchmarks Regulations 2018*.

**19.37.2** The *FCA's* approach to enforcing the *UK Benchmarks Regulations 2018* will mirror our general approach to enforcing the *Act*, as set out in ■ EG 2. We will seek to exercise our enforcement powers in a manner that is transparent, proportionate, responsive to the issue and consistent with our publicly stated policies. We will also seek to ensure fair treatment when exercising our enforcement powers. Finally, we will aim to change the behaviour of the *person* who is the subject of our 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.

**19.37.3** The powers which the *UK Benchmarks Regulations 2018* provide to the *FCA* include:

- the power to require information and appoint investigators;
- powers of entry and inspection;
- the power to publicly censure;
- the power to impose financial penalties;
- the power to apply for an injunction or restitution order;
- the power to require restitution;
- the power to impose and vary requirements; and
- the power to prosecute relevant offences.

**19.37.4** The *UK Benchmarks Regulations 2018*, for the most part, mirror the *FCA's* investigative, sanctioning and regulatory powers under the *Act*. The *FCA* has

decided to adopt procedures and policies in relation to the use of those powers akin to those we have under the *Act*. Key features of the *FCA's* approach are described below and in ■ SUP 15B.5.

### The conduct of investigations under the UK Benchmarks Regulations 2018

**19.37.5** The *UK Benchmarks Regulations 2018* apply much of Part 11 of the *Act*. The effect of this is to apply the same procedures under the *Act* for appointing investigators and requiring information when investigating breaches of the *UK Benchmarks Regulations 2018*.

**19.37.6** The *FCA* will notify the subject of the investigation that we have appointed investigators to carry out an investigation under the *UK Benchmarks Regulations 2018* and the reasons for the appointment, unless notification is likely to prejudice the investigation or otherwise result in it being frustrated. The *FCA* expects to carry out a scoping visit early on in the enforcement process in most cases. The *FCA's* policy in non-criminal investigations under the *UK Benchmarks Regulations 2018* is to use powers to compel the provision of information in the same way as we would in the course of an investigation under the *Act*.

### Decision making under the UK Benchmarks Regulations 2018

**19.37.7** The decision making procedures for those decisions under the *UK Benchmarks Regulations 2018* requiring the giving of a *warning notice*, *decision notice* or a *supervisory notice* are dealt with within *DEPP*.

**19.37.8** The *UK Benchmarks Regulations 2018* do not require the *FCA* to have published procedures for commencing criminal prosecutions. However, in these situations the *FCA* expects that we will normally follow our decision making procedures for the equivalent decisions under the *Act*, as set out in ■ EG 12.

**19.37.9** The *UK Benchmarks Regulations 2018* do not require the *FCA* to have published procedures to apply to the court for an *injunction* or restitution order. However, the *FCA* will normally follow our decision making procedures for the equivalent decisions under the *Act*, as set out in ■ EG 10 and ■ EG 11.

**19.37.10** The *UK Benchmarks Regulations 2018* require the *FCA* to give third party rights as set out in section 393 of the *Act* and to give access to certain material as set out in section 394 of the *Act* as applied by the *UK Benchmarks Regulations 2018*.

**19.37.11** Certain *FCA* decisions (for example an imposition of a requirement) may be referred to the *Tribunal* by an aggrieved party.

**Imposition of penalties under the UK Benchmarks Regulations 2018**

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- 19.37.12** When determining whether to take action to impose a penalty or to issue a *public censure* under the *UK Benchmarks Regulations 2018* the *FCA's* policy includes having regard to the relevant factors in ■ DEPP 6.2 and ■ DEPP 6.4. The *FCA's* policy in relation to determining the level of a financial penalty includes having regard, where relevant, to ■ DEPP 6.5 to ■ DEPP 6.5D.
- 19.37.13** As with cases under the *Act*, the *FCA* may settle or mediate appropriate cases involving non-criminal breaches of the *UK Benchmarks Regulations 2018* to assist us to exercise our functions under the *UK Benchmarks Regulations 2018* in the most efficient and economic way. See ■ DEPP 5, ■ DEPP 6.7 and ■ EG 5 for further information on the settlement process and the *settlement discount scheme*.
- 19.37.14** The *FCA* will apply the approach to publicity that is outlined in ■ EG 6, read in light of Article 45 of the *benchmarks regulation*.
- Statement of policy in section 169(7) (as applied by the UK Benchmarks Regulations 2018)**

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- 19.37.15** The *UK Benchmarks Regulations 2018* apply section 169 of the *Act* which requires the *FCA* to publish a statement of policy on the conduct of certain interviews in response to requests from *overseas regulators*. For the purposes of the *UK Benchmarks Regulations 2018* the *FCA* will follow the procedures described in ■ DEPP 7.