

Chapter 8

Variation and cancellation of permission and imposition of requirements on the FCA's own initiative and intervention against incoming firms

8.1 Introduction

8.1.1

The *FCA* has powers under section 55J of the *Act* to vary or cancel an *authorised person's Part 4A permission* and a power under section 55L to impose requirements on an authorised person. The *FCA* may use these powers where:

- (1) the person is failing or is likely to fail to satisfy the *threshold conditions* for which the *FCA* is responsible;
- (2) the person has not carried on a *regulated activity* to which the *Part 4A permission* relates for a period of at least 12 months (or six months in the case of a *full-scope UK AIFM*);
- (3) it is desirable to exercise the power in order to advance one or more of its operational objectives; or
- (4) the person has failed to comply with a requirement in Part 5 of the *AIFMD UK regulation* (AIFs which acquire *control* of non-listed companies and issuers), or it is for some other reason desirable to exercise the power for the purposes of ensuring compliance with such a requirement.

8.1.2

The powers to vary and cancel a person's *Part 4A permission* and to impose requirements are exercisable in the same circumstances. However, the statutory procedure for the exercise of the *own-initiative powers* is different to the statutory procedure for the exercise of the cancellation power and this may determine how the *FCA* acts in a given case. Certain types of behaviour which may cause the *FCA* to cancel permission in one case, may lead it to impose requirements, vary, or vary and cancel, permission in another, depending on the circumstances. The non-exhaustive examples provided below are therefore illustrative but not conclusive of which action the *FCA* will take in a given case.



8.2 Varying a firm's Part 4A permission or imposing requirements on the FCA's own initiative

8.2.1

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

- (1) the responsibilities of a *firm's* management to deal with concerns about the *firm* or about the way its business is being or has been run; and
- (2) the principle that a restriction imposed on a *firm* should be proportionate to the objectives the *FCA* is seeking to achieve.

8.2.2

The *FCA* will proceed on the basis that a *firm* (together with its directors and senior management) is primarily responsible for ensuring the *firm* conducts its business in compliance with the *Act*, the *Principles* and other *rules*.

8.2.3

In the course of its supervision and monitoring of a *firm* or as part of an enforcement action, the *FCA* may make it clear that it expects the *firm* to take certain steps to meet regulatory requirements. In the vast majority of cases the *FCA* will seek to agree with a *firm* those steps the *firm* must take to address the *FCA's* concerns. However, where the *FCA* considers it appropriate to do so, it will exercise its formal powers under sections 55J or 55L of the *Act* to vary a *firm's* permission or to impose a requirement to ensure such requirements are met. This may include where:

- (1) the *FCA* has serious concerns about a *firm*, or about the way its business is being or has been conducted;
- (2) the *FCA* is concerned that the consequences of a *firm* not taking the desired steps may be serious;
- (3) the imposition of a formal statutory requirement reflects the importance the *FCA* attaches to the need for the *firm* to address its concerns;
- (4) the imposition of a formal statutory requirement may assist the *firm* to take steps which would otherwise be difficult because of legal obligations owed to third parties.

- 8.2.4** ■ SUP 7 provides more information about the situations in which the *FCA* may decide to take formal action in the context of its supervision activities.
- 8.2.5** [deleted]
- 8.2.6** Examples of circumstances in which the *FCA* will consider varying a *firm's Part 4A permission* because it has serious concerns about a *firm*, or about the way its business is being or has been conducted include where:
- (1) in relation to the grounds for exercising the power under section 55J(1)(a) or section 55L(2)(a) of the *Act*, the *firm* appears to be failing, or appears likely to fail, to satisfy the *threshold conditions* relating to one or more, or all, of its *regulated activities*, because for instance:
 - (a) the *firm's* material and financial resources appear inappropriate for the scale or type of *regulated activity* it is carrying on, for example, where it has failed to take *account* of the need to manage risk professional indemnity insurance or where it is unable to meet its liabilities as they have fallen due; or
 - (b) the *firm* appears not to be a fit and proper *person* to carry on a regulated activity because:
 - (i) it has not conducted its business in compliance with high standards which may include putting itself at risk of being used for the purposes of *financial crime* or being otherwise involved in such crime;
 - (ii) it has not been managed soundly and prudently and has not exercised due skill, care, and diligence in carrying on one or more, or all, of its *regulated activities*;
 - (iii) it has breached requirements imposed on it by or under the *Act* (including the *Principles* and the *rules*), for example in respect of its disclosure or notification requirements, and the breaches are material in number or in individual seriousness;
 - (c) the *firm's* business model is not suited to its *regulated activities*, for example, where the *firm's* business model is not compatible with its affairs being conducted in a sound and prudent manner;
 - (d) the *firm* is not capable of effective supervision by the *FCA*, for example, where the way in which its business is organised or its membership of a group is likely to prevent effective supervision;
 - (2) in relation to the grounds for exercising the power under section 55J(1)(c)(i) or section 55L(2)(c), it appears that the interests of *consumers* are at risk because the *firm* appears to have breached any of *Principles* 6 to 10 of the *FCA's Principles* (see ■ PRIN 2.1.1R) to such an extent that it is desirable that *limitations*, restrictions, or prohibitions are placed on the *firm's regulated activity*.



8.3 Use of the own-initiative powers in urgent cases

- 8.3.1** The *FCA* may impose a variation of permission or a requirement so that it takes effect immediately or on a specified date if it reasonably considers it necessary for the variation or *requirement* to take effect immediately (or on the date specified), having regard to the ground on which it is exercising its *own-initiative powers*.
- 8.3.2** The *FCA* will consider exercising its *own-initiative power* as a matter of urgency where:
- (1) the information available to it indicates serious concerns about the *firm* or its business that need to be addressed immediately; and
 - (2) circumstances indicate that it is appropriate to use statutory powers immediately to require and/or prohibit certain actions by the *firm* in order to ensure the *firm* addresses these concerns.
- 8.3.3** It is not possible to provide an exhaustive list of the situations that will give rise to such serious concerns, but they are likely to include one or more of the following characteristics:
- (1) information indicating significant loss, risk of loss or other adverse effects for *consumers*, where action is necessary to protect their interests;
 - (2) information indicating that a *firm's* conduct has put it at risk of being used for the purposes of *financial crime*, or of being otherwise involved in crime;
 - (3) evidence that the *firm* has submitted to the *FCA* inaccurate or misleading information so that the *FCA* becomes seriously concerned about the *firm's* ability to meet its regulatory obligations;
 - (4) circumstances suggesting a serious problem within a *firm* or with a *firm's controllers* that calls into question the *firm's* ability to continue to meet the *threshold conditions*.
- 8.3.4** The *FCA* will consider the full circumstances of each case when it decides whether an urgent variation of *Part 4A permission* or an imposition of a requirement is appropriate. The following is a non-exhaustive list of factors the *FCA* may consider.

- (1) The extent of any loss, or risk of loss, or other adverse effect on *consumers*. The more serious the loss or potential loss or other adverse effect, the more likely it is that the *FCA's* urgent exercise of *own-initiative powers* will be appropriate, to protect the *consumers'* interests.
- (2) The extent to which *customer* assets appear to be at risk. Urgent exercise of the *FCA's own-initiative power* may be appropriate where the information available to the *FCA* suggests that *customer* assets held by, or to the order of, the *firm* may be at risk.
- (3) The nature and extent of any false or inaccurate information provided by the *firm*. Whether false or inaccurate information warrants the *FCA's* urgent exercise of its *own-initiative powers* will depend on matters such as:
 - (a) the impact of the information on the *FCA's* view of the *firm's* compliance with the regulatory *requirements* to which it is subject, the *firm's* suitability to conduct *regulated activities*, or the likelihood that the *firm's* business may be being used in connection with *financial crime*;
 - (b) whether the information appears to have been provided in an attempt knowingly to mislead the *FCA*, rather than through inadvertence;
 - (c) whether the matters to which false or inaccurate information relates indicate there is a risk to *customer* assets or to the other interests of the *firm's* actual or potential *customers*.
- (4) The seriousness of any suspected breach of the requirements of the legislation or the *rules* and the steps that need to be taken to correct that breach.
- (5) The financial resources of the *firm*. Serious concerns may arise where it appears the *firm* may be required to pay significant amounts of compensation to *consumers*. In those cases, the extent to which the *firm* has the financial resources to do so will affect the *FCA's* decision about whether exercise of the *FCA's own-initiative powers* is appropriate to preserve the *firm's* assets, in the interests of the *consumers*. The *FCA* will take account of any insurance cover held by the *firm*. It will also consider the likelihood of the *firm's* assets being dissipated without the *FCA's* intervention, and whether the exercise of the *FCA's* power to petition for the winding up of the *firm* is more appropriate than the use of its *own-initiative powers* (see ■ chapter 13 of this guide).
- (6) The risk that the *firm's* business may be used or has been used to facilitate *financial crime*, including *money laundering*. The information available to the *FCA*, including information supplied by other law enforcement agencies, may suggest the *firm* is being used for, or is itself involved in, *financial crime*. Where this appears to be the case, and the *firm* appears to be failing to meet the *threshold conditions* or has put its *customers'* interests at risk, the *FCA's* urgent use of its *own-initiative powers* may well be appropriate.
- (7) The risk that the *firm's* conduct or business presents to the *financial system* and to confidence in the *financial system*.

- (8) The *firm's* conduct. The *FCA* will take into account:
 - (a) whether the *firm* identified the issue (and if so whether this was by chance or as a result of the *firm's* normal *controls* and monitoring);
 - (b) whether the *firm* brought the issue promptly to the *FCA's* attention;
 - (c) the *firm's* past history, management ethos and compliance culture;
 - (d) steps that the *firm* has taken or is taking to address the issue.
- (9) The impact that use of the *FCA's own-initiative powers* will have on the *firm's* business and on its *customers*. The *FCA* will take into account the (sometimes significant) impact that a variation of *permission* may have on a *firm's* business and on its *customers'* interests, including the effect of variation on the *firm's* reputation and on market confidence. The *FCA* will need to be satisfied that the impact of any use of the own-initiative power is likely to be proportionate to the concerns being addressed, in the context of the overall aim of achieving its *statutory objectives*.

8.4 Limitations and requirements that the FCA may impose when exercising its section 55J and 55L powers

- 8.4.1** When varying *Part 4A permission* at its own-initiative under its section 55J power (or section 55Q power), the *FCA* may include in the *Part 4A permission* as varied any *limitation* or restriction which it could have imposed if a fresh *permission* were being given in response to an application under section 55A of the *Act*.
- 8.4.2** Examples of the *limitations* that the *FCA* may impose when exercising its *own-initiative variation power* in support of its enforcement function include *limitations* on: the number, or category, of *customers* that a *firm* can deal with; the number of specified investments that a *firm* can deal in; and the activities of the *firm* so that they fall within specific regulatory regimes (for example, so that *oil market participants*, *corporate finance advisory firms* and service providers are permitted only to carry on those types of activities).
- 8.4.3** Under its section 55L power (or section 55Q power), the *FCA* may, at any time and of its own initiative, impose on an *authorised person* such requirements as it considers appropriate.
- 8.4.4** Examples of *requirements* that the *FCA* may consider imposing when exercising its *own-initiative power* in support of its enforcement function are: a *requirement* not to take on new business; a *requirement* not to hold or control *client money*; a *requirement* not to trade in certain categories of *specified investment*; a *requirement* that prohibits the disposal of, or other dealing with, any of the *firm's* assets (whether in the United Kingdom or elsewhere) or restricts those disposals or dealings; and a *requirement* that all or any of the *firm's* assets, or all or any assets belonging to investors but held by the *firm* to its order, must be transferred to a *trustee* approved by the *FCA*.

8.5 Cancelling a firm's Part 4A permission on its own initiative

8.5.1

The *FCA* will consider cancelling a *firm's Part 4A permission* using its *own-initiative powers* contained in sections 55J and 55Q respectively of the *Act* in two main circumstances:

- (1) where the *FCA* has very serious concerns about a *firm*, or the way its business is or has been conducted;
- (2) where the *firm's regulated activities* have come to an end and it has not applied for *cancellation* of its *Part 4A permission*.

8.5.2

The grounds on which the *FCA* may exercise its power to cancel an authorised person's permission under section 55J of the *Act* are the same as the grounds for variation and for imposition of requirements. They are set out in section 55J(1) and section 55L(2) and described in ■ EG 8.1.1. Examples of the types of circumstances in which the *FCA* may cancel a *firm's Part 4A permission* include:

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

- (a) comply with the material terms of a formal agreement made with the *FCA* to conclude or avoid disciplinary or other enforcement action; or
- (b) provide material information or take remedial action reasonably required by the *FCA*.

Sections 55J(6) and 55K of the *Act* sets out further grounds on which the *FCA* may cancel the permission of *authorised persons* which are *investment firms* and section 55J(6A) of the *Act* set out further grounds on which the *FCA* may cancel the permission of *authorised persons* who are *full-scope UK AIFMs*.

8.5.3

Depending on the circumstances, the *FCA* may need to consider whether it should first use its *own-initiative powers* to impose requirements on a *firm* or to vary a *firm's Part 4A permission* before going on to cancel it. Amongst other circumstances, the *FCA* may use this power where it considers it needs to take immediate action against a *firm* because of the urgency and seriousness of the situation.

8.5.4

Where the situation appears so urgent and serious that the *firm* should immediately cease to carry on all *regulated activities*, the *FCA* may first vary the *firm's Part 4A permission* so that there is no longer any *regulated activity* for which the *firm* has a *Part 4A permission*. If it does this, the *FCA* will then have a duty to cancel the *firm's Part 4A permission* - once it is satisfied that it is no longer necessary to keep the *Part 4A permission* in force.

8.5.5

However, where the *FCA* has cancelled a *firm's Part 4A permission*, it is required by section 33 of the *Act* to go on to give a direction withdrawing the *firm's authorisation*. Accordingly, the *FCA* may decide to keep a *firm's Part 4A permission* in force to maintain the *firm's* status as an *authorised person* and enable it (the *FCA*) to monitor the *firm's* activities. An example is where the *FCA* needs to supervise an orderly winding down of the *firm's* regulated business (see ■ SUP 6.4.22 (When will the relevant regulator grant an application for *cancellation of permission*)). Alternatively, the *FCA* may decide to keep a *firm's Part 4A permission* in force to maintain the *firm's* status as an *authorised person* to use administrative enforcement powers against the *firm*.



8.6 Exercising the power under section 55Q to vary or cancel a firm's Part 4A permission or to impose requirements on a firm in support of an overseas regulator: the FCA's policy

8.6.1 The *FCA* has a power under section 55Q to vary, or alternatively cancel, a *firm's Part 4A permission*, or to impose requirements on a *firm*, in support of an *overseas regulator*. Section 55Q, (5) and (6) sets out matters the *FCA* may, or must, take into account when it considers whether to exercise these powers.

8.6.2 [deleted]

8.6.3 [deleted]

8.6.4 The *FCA* will actively consider requests for assistance from *overseas regulators* Section 55Q, which sets out matters the *FCA* may take into account when it decides whether to vary or cancel a *firm's Part 4A permission* or to impose *requirements* on a *firm* in support of the *overseas regulator*, applies in these circumstances.

8.6.5 Where section 55Q(5) applies and the *FCA* is considering whether to vary a *firm's Part 4A permission* or to impose requirements on a *firm*, it may take account of all the factors described in paragraphs ■ 8.6.1 to ■ 8.6.8 but may give particular weight to:

- (1) the matters set out in paragraphs (c) and (d) of section 55Q(5) (seriousness, importance to persons in the United Kingdom, and the public interest); and
- (2) any specific request made to it by the *overseas regulator* to impose requirements or to vary, rather than cancel, the *firm's Part 4A permission*.

8.6.6 The *FCA* will give careful consideration to whether the relevant authority's concerns would provide grounds for the *FCA* to exercise its *own-initiative powers* to vary, impose *requirements* or cancel if they related to a UK *firm*. It is not necessary for the *FCA* to be satisfied that the overseas provisions being

enforced mirror precisely those which apply to UK *firms*. However, the *FCA* will not assist in the enforcement of regulatory *requirements* or other provisions that appear to extend significantly beyond the purposes of *UK regulatory provisions*.

8.6.7

Similarly, the *FCA* will not need to be satisfied that precisely the same assistance would be provided to the United Kingdom in precisely the same situation. However, it will wish to be confident that the relevant authorities in the jurisdiction concerned would have powers available to them to provide broadly similar assistance in aid of *UK authorities*, and would be willing properly to consider exercising those powers. The *FCA* may decide, under section 55Q(6), not to exercise its *own-initiative powers* to vary or cancel in response to a request unless the regulator concerned undertakes to make whatever contribution towards the cost of its exercise the *FCA* considers appropriate.

8.6.8

Paragraphs ■ 8.4.2 and ■ 8.4.4 set out some examples of *limitations* and *requirements* the *FCA* may impose when exercising its section 55Q powers.



8.8 Other relevant powers

Removal of directors and senior executives and appointment of temporary managers

8.8.1

The Bank Recovery and Resolution Order 2016 amended the *Act* by adding sections 71B to 71I. The *FCA* has powers to remove directors and senior executives and to appoint temporary managers of relevant firms or parent undertakings, as defined by section 71I of the *Act*. Where a temporary manager has been appointed, the *FCA* also has powers to require the directors not to exercise specified functions during the period of appointment and to consult the temporary manager, or obtain the consent of the temporary manager, before taking specified decisions or specified action. The *FCA* will exercise these powers in accordance with the conditions and procedures set out in the relevant sections of the *Act*.

