

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

- 8.1 The FSA has powers under section 45 of the *Act* to vary or cancel an *authorised person's Part IV permission*. The FSA may use these powers where:
- (1) the person is failing or is likely to fail to satisfy the threshold conditions;
 - (2) the person has not carried on any *regulated activity* for a period of at least 12 months; or
 - (3) it is desirable to exercise the power in order to meet any of its regulatory objectives.
- 8.1A The powers to vary and cancel a person's *Part IV permission* are exercisable in the same circumstances. However, the statutory procedure for the exercise of each power is different and this may determine how the FSA acts in a given case. Certain types of behaviour which may cause the FSA to cancel permission in one case, may lead it to vary, or vary and cancel, permission in another, depending on the circumstances. The non-exhaustive examples provided below are therefore illustrative but not conclusive of which action the FSA will take in a given case.
- Varying a firm's Part IV permission on the FSA's own initiative**
- 8.1B When it considers how it should deal with a concern about a *firm*, the FSA will have regard to its *regulatory objectives* and the range of regulatory tools that are available to it. It will also have regard to:
- (1) 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 FSA is seeking to achieve.
- 8.2 The FSA will proceed on the basis that a *firm* (together with its directors and senior management) is primarily responsible for ensuring the *firm* conducts its business in compliance with the *Act*, the *Principles* and other *rules*.
- 8.3 In the course of its supervision and monitoring of a *firm* or as part of an enforcement action, the FSA may make it clear that it expects the *firm* to take certain steps to meet regulatory requirements. In the vast majority of cases the FSA will seek to agree with a *firm* those steps the *firm* must take to address the FSA's concerns. In the vast majority of cases the FSA will seek to agree with a *firm* those steps the *firm* must take to address the FSA's concerns. However, where the FSA considers it appropriate to do so, it will exercise its formal

powers under section 45 of the *Act* to vary a *firm's* permission to ensure such requirements are met. This may include where:

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

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

8.4 [deleted]

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

Use of the own-initiative power in urgent cases

- 8.6 The FSA may impose a variation of permission so that it takes effect immediately or on a specified date if it reasonably considers it necessary for the variation to take effect immediately (or on the date specified), having regard to the ground on which it is exercising its *own-initiative power*.
- 8.7 The FSA 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.
- 8.8 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 FSA inaccurate or misleading information so that the FSA 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*.

- 8.9 The FSA will consider the full circumstances of each case when it decides whether an urgent variation of *Part IV permission* is appropriate. The following is a non-exhaustive list of factors the FSA 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 FSA'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 FSA's *own-initiative power* may be appropriate where the information available to the FSA 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 FSA's urgent exercise of its *own-initiative powers* will depend on matters such as:
 - (a) the impact of the information on the FSA'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 FSA, 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 FSA's decision about whether exercise of the FSA's *own-initiative power* is appropriate to preserve the *firm's* assets, in the interests of the *consumers*. The FSA 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 FSA's intervention, and whether the exercise of the FSA's power to petition for the winding up of the *firm* is more

appropriate than the use of its *own-initiative power* (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 FSA, 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 FSA'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 FSA 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 FSA'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 FSA's *own-initiative powers* will have on the *firm's* business and on its *customers*. The FSA 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 FSA 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 *regulatory objectives*.

Limitations and requirements that the FSA may impose when exercising its section 45 power

- 8.10 When varying *Part IV permission* at its own-initiative under its section 45 power (or section 47 power), the FSA may include in the *Part IV 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 40 of the Act.
- 8.11 Examples of the *limitations* that the FSA may impose when exercising its *own-initiative 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, locals, corporate finance advisory firms* and service providers are permitted only to carry on those types of activities).

- 8.12 Examples of *requirements* that the FSA may consider including in a *firm's Part IV permission* 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 FSA.

Cancelling a firm's Part IV permission on its own initiative

- 8.13 The FSA will consider cancelling a *firm's Part IV permission* using its *own-initiative powers* contained in sections 45 and 47 respectively of the *Act* in two main circumstances:
- (1) where the FSA 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 IV permission*.
- 8.14 The grounds on which the FSA may exercise its power to cancel an authorised person's permission under section 45 of the *Act* are the same as the grounds for variation. They are set out in section 45(1) and described in *EG* 8.1. Examples of the types of circumstances in which the FSA may cancel a *firm's Part IV permission* include:
- (1) non-compliance with a *Financial Ombudsman Service* award against the *firm*;
 - (2) material non-disclosure in an application for authorisation or approval or material non-notification after authorisation or approval has been granted. The information which is the subject of the non-disclosure or non-notification may also be grounds for cancellation;
 - (3) failure to have or maintain adequate financial resources, or a failure to comply with regulatory capital requirements;
 - (4) non-submission of, or provision of false information in, regulatory returns, or repeated failure to submit such returns in a timely fashion;

- (5) non-payment of FSA fees or repeated failure to pay FSA fees except under threat of enforcement action; and
- (6) failure to provide the FSA with valid contact details or failure to maintain the details provided, such that the FSA is unable to communicate with the *firm*;
- (7) repeated failures to comply with *rules* or requirements;
- (8) a failure to co-operate with the FSA which is of sufficient seriousness that the FSA ceases to be satisfied that the *firm* is fit and proper, for example failing without reasonable excuse to:
 - (a) comply with the material terms of a formal agreement made with the FSA to conclude or avoid disciplinary or other enforcement action; or
 - (b) provide material information or take remedial action reasonably required by the FSA.

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

- 8.15 Depending on the circumstances, the FSA may need to consider whether it should first use its *own-initiative powers* to vary a *firm's Part IV permission* before going on to cancel it. Amongst other circumstances, the FSA 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.
- 8.16 Where the situation appears so urgent and serious that the *firm* should immediately cease to carry on all *regulated activities*, the FSA may first vary the *firm's Part IV permission* so that there is no longer any *regulated activity* for which the *firm* has a *Part IV permission*. If it does this, the FSA will then have a duty to cancel the *firm's Part IV permission* - once it is satisfied that it is no longer necessary to keep the *Part IV permission* in force.
- 8.17 However, where the FSA has cancelled a *firm's Part IV permission*, it is required by section 33 of the *Act* to go on to give a direction withdrawing the *firm's authorisation*. Accordingly, the FSA may decide to keep a *firm's Part IV permission* in force to maintain the *firm's* status as an *authorised person* and enable it (the FSA) to monitor the *firm's* activities. An example is where the FSA needs to supervise an orderly winding down of the *firm's* regulated business (see SUP 6.4.22 (When will the FSA grant an application for cancellation of *permission*)). Alternatively, the FSA may decide to keep a *firm's Part IV permission* in force to maintain the *firm's* status as an *authorised person* to use administrative enforcement powers against the *firm*.

Exercising the power under section 47 to vary or cancel a firm's part IV permission in support of an overseas regulator: the FSA's policy

- 8.18 The FSA has a power under section 47 to vary, or alternatively cancel, a *firm's Part IV permission*, in support of an *overseas regulator*. Section 47(3), (4) and (5) set out matters the FSA may, or must, take into account when it considers whether to exercise these powers. The circumstances in which the FSA may consider varying a *firm's Part IV permission* in support of an *overseas regulator* depend on whether the FSA is required to consider exercising the power in order to comply with a Community obligation. This reflects the fact that under section 47, if a relevant *overseas regulator* acting under prescribed provisions has made a request to the FSA for the exercise of its *own-initiative power* to vary or cancel a *Part IV permission*, the FSA must consider whether it must exercise the power in order to comply with a Community obligation.
- 8.19 Relevant Community obligations which the FSA may need to consider include those under the Banking Consolidation Directive, the Insurance Directives, the Investment Services Directive/Markets in Financial Instruments Directive; and the Insurance Mediation Directive. Each of these Directives imposes general obligations on the relevant *EEA competent authority* to cooperate and collaborate closely in discharging their functions under the Directives.
- 8.20 The FSA views this cooperation and collaboration as essential to effective regulation of the international market in financial services. It will therefore exercise its *own-initiative power* wherever:
- (1) an *EEA Competent authority* requests it to do so; and
 - (2) it is satisfied that the use of the power is appropriate (having regard to the considerations set out at [paragraphs 8.1B to 8.5](#)) to enforce effectively the regulatory requirements imposed under the *Single Market Directives* or other Community obligations.
- 8.21 The FSA will actively consider any other requests for assistance from relevant *overseas regulators* (that is requests in relation to which it is not obliged to act under a Community obligation). Section 47(4), which sets out matters the FSA may take into account when it decides whether to vary or cancel a *firm's Part IV permission* in support of the *overseas regulator*, applies in these circumstances.
- 8.22 Where section 47(4) applies and the FSA is considering whether to vary a *firm's Part IV permission*, it may take account of all the factors described in [paragraphs 8.18 to 8.25](#) but may give particular weight to:
- (1) the matters set out in paragraphs (c) and (d) of section 47(4) (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 vary, rather than cancel, the *firm's Part IV permission*.

- 8.23 The FSA will give careful consideration to whether the relevant authority's concerns would provide grounds for the FSA to exercise its *own-initiative power* to vary or cancel if they related to a UK *firm*. It is not necessary for the FSA to be satisfied that the overseas provisions being enforced mirror precisely those which apply to UK *firms*. However, the FSA will not assist in the enforcement of regulatory requirements or other provisions that appear to extend significantly beyond the purposes of *UK regulatory provisions*.
- 8.24 Similarly, the FSA 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 FSA may decide, under section 47(5), not to exercise its *own-initiative power* 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 FSA considers appropriate.
- 8.25 [Paragraphs 8.10 and 8.12](#) set out some examples of *limitations* and *requirements* the FSA may impose when exercising its section 47 power to vary a *firm's Part IV permission*.

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

- 8.26 The FSA adopts a similar approach to the exercise of its *power of intervention* under section 196 as it does to its *own-initiative powers* to vary *Part IV permission*, but with suitable modification for the differences in the statutory grounds for exercising the powers. Consequently the factors and considerations set out in paragraphs [8.1B to 8.12](#) and [8.18 to 8.25](#) may also be relevant when the FSA is considering regulatory concerns about *incoming firms*.
- 8.27 When it is considering action against an *incoming firm*, the FSA will cooperate with the *firm's Home State regulator* as appropriate, including notifying and informing the *firm's Home State regulator* as required by the relevant section of the *Act*.