PASSPORTING (MIFID) INSTRUMENT 2007

Powers exercised
A. The Financial Services Authority makes this instrument in the exercise of the following powers and related provisions in the Financial Services and Markets Act 2000 ("the Act"): 

(1) section 138 (General rule-making power);
(2) section 156 (General supplementary power); and
(3) section 157(1) (Guidance).

B. The rule-making powers listed above are specified for the purpose of section 153(2) (Rule-making instruments) of the Act.

Commencement
C. (1) Annex B of this instrument comes into force on 14 February 2007;
(2) Annex E of this instrument comes into force on 1 November 2007;
(3) otherwise this instrument comes into force on 6 February 2007.

Amendments to the Handbook
D. The modules of the FSA's Handbook of rules and guidance listed in column (1) below are amended in accordance with the Annexes to this instrument listed in column (2) below.

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Citation
E. This instrument may be cited as the Passporting (MiFID) Instrument 2007.

By order of the Board
25 January 2007
Annex A

Amendments to the Glossary

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

**consent notice**
a notice given by the FSA to a Host State regulator under:
(a) paragraph 19(4) (Establishment) of Part III of Schedule 3 to the Act (Exercise of Passport Rights by UK firms); or
(b) paragraph 20(3A) (Services) of Part III of Schedule 3 to the Act (Exercise of Passport Rights by UK firms).

**notice of intention**
a notice of intention (as described in SUP 13.5) given by a UK firm to:
(a) establish a branch in an EEA State given by a UK firm under paragraph 19(2) of Part III of Schedule 3 to the Act (Exercise of passport rights by UK firms); or
(b) provide services in an EEA State under paragraph 20(1) of Part III of Schedule 3 to the Act (Exercise of passport rights by UK firms).

**relevant EEA details**
the details listed in regulation 14 of the EEA Passport Rights Regulations and set out in SUP 13 Ann 1R (Requisite details or relevant details: branches).

**relevant UK details**
the details required in regulation 15 of the EEA Passport Rights Regulations and set out in SUP 13 Ann 2R (Relevant UK details: branches of insurance undertakings).

**requisite details**
the details required in regulation 1 of the EEA Passport Rights Regulations and set out in SUP 13 Ann 1R (Requisite details: branches and SUP 13 Ann 1R (Requisite details: cross border services)).
Annex B

Amendments to the Glossary

In this Annex, underlining indicates new text.

**EEA State**

[delete existing definition and replace with the following]

(in accordance with Schedule 1 to the Interpretation Act 1978), in relation to any time -

(a) a state which at that time is a member State; or
(b) any other state which is at that time a party to the EEA agreement.

[Note: Current non-member State parties to the EEA agreement are Norway, Iceland and Lichtenstein. Where the context requires, references to an EEA State include references to Gibraltar as appropriate].
Annex C

Amendments to the Supervision Manual (SUP) (changes of a general nature)

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

Where entire sections of the text are being deleted or inserted, the place where the change will be made is indicated and the text is not struck through or underlined.

13.3.2 G A UK firm cannot establish a branch in another EEA State for the first time under an EEA right unless the conditions in paragraphs 19(2), (4) and (5) of Part III of Schedule 3 to the Act are satisfied. It is an offence for a UK firm which is not an authorised person to contravene this prohibition (paragraph 21 of Part III of Schedule 3 to the Act). These conditions are that:

(1) the UK firm has given the FSA, in accordance with the FSA rules (see SUP 13.5.1R), notice of its intention to establish a branch (known as a notice of intention) which:

(3) (a) if the UK firm's EEA right derives from the Insurance Mediation Directive, one month has elapsed beginning on the date on which the UK firm received notice that the FSA had given a consent notice as described in SUP 13.3.6G (1) (see SUP 13.3.2AG);

13.3.2A G … Accordingly, the UK firm may establish the branch to which its notice of intention relates as soon as the conditions referred to in SUP 13.3.2G(1) are satisfied. The list of EEA States that have notified the European Commission of their wish to be informed in accordance with article 6(2) of the Insurance Mediation Directive is published on the FSA's website at www.fsa.gov.uk.

13.3.2B G An appointed representative appointed by a firm to carry on insurance mediation activity on its behalf may establish a branch in another EEA State under the Insurance Mediation Directive. In this case, the notice of intention in SUP 13.3.2G(1) should be given to the FSA by the firm on behalf of the appointed representative.

How long will the process take?

13.3.4 G [deleted]

13.3.4A G [deleted]
Issue of a consent notice to the Host State regulator

13.3.5 G (1) If a UK firm has given the FSA a notice of intention in the required form, then:

(a) If the UK firm's EEA right derives from the Banking Consolidation Directive, the Investment Services Directive, or the UCITS Directive, the FSA will give the Host State regulator a consent notice within three months unless it has reason to doubt the adequacy of a UK firm's resources or its administrative structure;

(b) If the UK firm's EEA right derives from the Insurance Directives, the FSA will give the Host State regulator a consent notice within three months unless it has reason to:

(i) doubt the adequacy of the UK firm's resources or its administrative structure; or

(ii) question the reputation, qualifications or experience of the directors or managers of the UK firm or its proposed authorised agent in relation to the business the UK firm intends to conduct through the proposed branch. The Host State regulator then has a further two months to notify the applicable provisions (if any) and prepare for the supervision, as appropriate, of the UK firm.

(b) In assessing the matters in (2)(a), the FSA may, in particular, seek further information from the firm or require a report from a skilled person (see SUP 5 (skilled persons)).

(c) If the FSA has required a financial recovery plan of a UK firm of the kind mentioned in paragraph 1 of article 38 of the Consolidated Life Directive or paragraph 1 of article 20a of the First Non-Life Directive, the FSA will not give a consent notice for so long as it considers that policyholders are threatened within the meaning of those provisions.
(d) If the UK firm's EEA right derives from the Insurance Mediation Directive and SUP 13.3.2G(2) applies, the FSA will give the Host State regulator a consent notice within one month of the date on which it received the UK firm's UK firm's notice of intention notice of intention. In cases where SUP 13.3.2 G-(2) does not apply (see SUP 13.3.2 AG), the UK firm may establish a branch as soon as it satisfies the conditions referred to in SUP 13.3.2G.

(2) in assessing the matters in SUP 13.3.5 G (1)(b) the FSA may, in particular, seek further information from the firm or require a report from a skilled person (see SUP 5 (Skilled Persons)).

(3) If the FSA has required a financial recovery plan of a UK firm of the kind mentioned in paragraph 1 of article 38 of the Life Directive (2002/83/EC) or paragraph 1 of article 20a of the First Non-Life Directive, the FSA will not give a consent notice for so long as it considers that policyholders' are threatened within the meaning of paragraph 1.

13.3.6 G (1) …

(2) The consent notice will contain, among other matters, the requisite details (see SUP 13 Annex 1) or, if the firm is passporting under the Insurance Directives), the EEA relevant details relevant EEA details (see SUP 13 Annex 21) provided by the UK firm in its notice of intention notice of intention (see SUP 13.5 (Notices of intention)).

13.3.7 G (1) …

(2) If the FSA decides to refuse to give a consent notice, then paragraph 19(12) of Part III of Schedule 3 to the Act requires the FSA to give the UK firm a decision notice within three months months of the date on which it received the UK firm's notice of intention notice of intention (two months months in the case of a UK firm which is a UCITS management company)…

…

13.4.2 G A UK firm cannot start providing cross border services into another EEA State under an EEA right unless it satisfies the conditions in paragraphs 20(1) of Part III of Schedule 3 to the Act and, if it derives its EEA right from the Insurance Directives, paragraph 20(4B) of Part III of Schedule 3 to the Act. It is an offence for a UK firm which is not an authorised person to breach this prohibition (paragraph 21 of Part III of Schedule 3 to the Act). The conditions are that:
(1) the UK firm has given the FSA, in the way specified by FSA rules (see SUP 13.5.2R), notice of its intention to provide cross border services (known as a notice of intention) which:

13.4.2A G An appointed representative appointed by a firm to carry on insurance mediation activity on its behalf may provide cross border services in another EEA State under the Insurance Mediation Directive. In this case the notice of intention in SUP 13.4.2G(1) should be given to the FSA by the firm on behalf of the appointed representative.

Issuing a consent notice or notifying the Host State regulator

13.4.4 G If a UK firm has given the FSA a notice of intention in the required form, then:

(1) If the UK firm's EEA right derives from the Investment Services Directive, the Banking Consolidation Directive or the UCITS Directive, paragraph 20(3) of Part III of Schedule 3 to the Act requires the FSA to send a copy of the notice of intention to the Host State regulator within one month of receipt; or

(2) (a) If the UK firm's EEA right derives from the Insurance Directives, paragraph 20(3A) of Part III of Schedule 3 to the Act requires the FSA, within one month of receiving the notice of intention, to:

(b) …

(c) If the FSA has required of a UK firm a financial recovery plan of the kind mentioned in paragraph 1 of article 38 of the Consolidated Life Directive or paragraph 1 of article 20a of the First Non-Life Directive, the FSA will not give a consent notice for so long as it considers that policyholders' rights are threatened within the meaning of those provisions.
(2A) (a) If the UK firm's EEA right derives from the Insurance Mediation Directive, and the EEA State in which the UK firm is seeking to provide services has notified the European Commission of its wish to be informed of the intention of persons to provide cross border services in its territory in accordance with article 6(2) of that directive, paragraph 20(3B)(a) of Part III of Schedule 3 to the Act requires the FSA to send a copy of the notice of intention to the Host State regulator within one month of receipt, or. Otherwise, the UK firm may start providing cross border services as soon as it satisfies the relevant conditions (see SUP 13.4.2G).

(b) The list of the EEA States that have notified the European Commission of their wish to be informed in accordance with article 6(2) of the Insurance Mediation Directive is published on the FSA's website at www.fsa.gov.uk.

(3) If the FSA has required of a UK firm a financial recovery plan of the kind mentioned in paragraph 1 of article 38 of the Life Directive (2002/83/EC) or paragraph 1 of article 20a of the First Non-Life Directive, the FSA will not give a consent notice for so long as it considers that policyholders' rights are threatened within the meaning of paragraph 1.

13.4.5 G When the FSA sends a copy of a notice of intention, or if it gives a consent notice to the Host State regulator, it must inform the UK firm in writing that it has done so (paragraphs 20 (3B)(b) and (4) of Schedule 3 to the Act).

13.4.6 G (1) If the UK firm is passporting under the Investment Services Directive or UCITS Directive, then when the Host State regulator receives the notice of intention, it should inform the UK firm of any applicable provisions.

...
13.5.2 R A UK firm wishing to provide cross border services into a particular EEA State for the first time under an EEA right must include, in its notice of intention given to the FSA:

...
13.5.7 G If a UK firm wishes to establish branches in, or provide cross border services into, more than one EEA State, a single notification may be provided but the requisite details or relevant details information for each EEA State should be clearly identifiable.

13.6.2 G UK firms should note that if a branch in another EEA State ceases to provide services, this may represent a change in requisite details or, if the firm is passporting under the Insurance Directives, the relevant EEA details or relevant UK details relevant details.

13.6.5 G Where the change arises from circumstances within the control of the UK firm, the requirements in regulation 11(2) are that:

(3) either the Host State regulator has informed the UK firm that it may make the change, or the period of one month beginning with the day on which the UK firm gave the Host State regulator the notice in (1) has elapsed.

13.6.6 G If a UK firm has exercised an EEA right under the Insurance Directives and established a branch in another EEA State, regulation 13(1) states that the UK firm must not make a change in the relevant EEA details relevant EEA details (see SUP 13 Ann 1R), unless it has satisfied the requirements of regulation 13(2), or, where the change arises from circumstances beyond the UK firm's control, regulation 13(3) (see SUP 13.6.10G).

13.6.7 G Where the change arises from circumstances within the control of the UK firm, the requirements in regulation 13(2) are that:

(3) the period of at least one month beginning on the day on which the UK firm gave the FSA the notice in (1) has elapsed; and

(4) either:

(a) a further period of one month has elapsed; or

...
If a UK firm has exercised an EEA right under the Insurance Directives and established a branch in another EEA State, regulation 15(1) states that the UK firm cannot make a change in any of the UK relevant details relevant UK details (see SUP 13 Ann 21R) unless the UK firm has given a notice to the FSA stating the details of the proposed change at least one month before the change is effected.

Where a UK firm with Part IV permission to carry on both long-term and general insurance business, is passporting under the Insurance Directives and wishes to extend its insurance business to include long term insurance business (or vice versa), it should complete a new notice of intention (see SUP 13.5 (Notices of intention)) and not a change in requisite details notification.

A UK firm exercising its EEA right under the Insurance Mediation Directive to establish a branch in another EEA State is not required to supply a change to the details of branches notice requisite details or relevant details. Therefore there are no requisite details or relevant details for changes to a branch established in another EEA State under the Insurance Mediation Directive.

If the change arises from circumstances beyond the UK firm's control, the UK firm;

(a) …

(b) may, if it is passporting under the Insurance Directives, make a change to its UK relevant details relevant UK details under regulation 15(1) if it has, as soon as practicable (whether before or after the change), given notice to the FSA stating the details of the change.

The FSA believes that for a change to arise from circumstances beyond the control of a UK firm, the circumstances should be outside the control of the firm as a whole and not just the branch in the EEA State.

When the FSA receives a notice from a UK firm (see SUP 13.6.5G-(1) and SUP 13.6.7G-(1)) it is required by regulations 11(4) and 13(4) to either refuse, or consent to the change within a period of one month from the day on which it received the notice.

If a UK firm has exercised an EEA right under the Insurance Directives and is providing cross border services into another EEA State, regulation 16(1) states that the UK firm must not make a change in the relevant details (as defined in regulation 17 – see also SUP 13 Ann 3R) unless the relevant requirements in regulation 16(3) or, where the change arises from circumstances beyond the UK firm's control, regulation 16(4), have been complied with.
UK firms may wish to use the standard form available from the Passport Notifications Unit (see SUP 13.12 (Sources of further information)) to give the notices to the FSA as described in SUP 13.7.5G(1) and SUP 13.7.6G.

When the FSA receives a notice from a UK firm (see SUP 13.7.3G(1), and SUP 13.7.5G(1) and SUP 13.7.6G), it is required by regulations 16(5) to either refuse or consent to the change within one month of receipt.

Where a UK firm with Part IV permission to carry on both long-term and general insurance business is passporting under the Insurance Directives - and wishes to extend its general insurance business to include long-term insurance business (or vice versa), it should complete a new notice of intention (see SUP 13.5 (Notices of intention)) and not a change in requisite details notification.

A UK firm providing cross border services under the Banking Consolidation Directive or Insurance Mediation Directive is not required to supply a change to the details of cross border services or relevant details. Therefore, there are no requisite details or relevant details for changes to cross border services provided under the Banking Consolidation Directive or Insurance Mediation Directive.

A notice of a change to a branch referred to in under SUP 13.6.5G(1), SUP 13.6.7G(1), SUP 13.6.8G and SUP 13.6.10G(1) and a notice of a change to cross border services referred to in under SUP 13.7.3G(1), SUP 13.7.5G(1) and SUP 13.7.6G must be:

The notice of intention may be delivered by:

(c) hand delivery to a member of the Corporate Authorisation department (if submitted with an application for Part IV permission) or the Passport Notifications Unit; or

(d) electronic mail to the address in (4) if not submitted with an application for Part IV permission and obtaining an electronic confirmation of receipt; or
(e) fax to the Passport Notifications Unit on 020 7066 XXXX 9798 if not submitted with an application for Part IV permission provided that the FSA receives a copy by one of the methods (a) to (d) above within five business days after the date of the faxed notification; or

(f) online submission via the FSA’s website at www.fsa.gov.uk (when available).

(3) The address for notices of intention is: The Financial Services Authority, 25 The North Colonnade, Canary Wharf, London E14 5HS.

13.8.2 G UK firms passporting under the Banking Consolidation Directive or the Insurance Directives may be required to submit the changes to the requisite details or relevant details change to details notice in the language of the Host State as well as in English. See SUP 13.5.6G.

13.11.1 R (1) A UK firm which is exercising an EEA right must make and retain a record of:

(a) …

(b) the requisite details or relevant details relating to those services or activities (if applicable) (as set out in SUP 13.6 and SUP 13.7).

13.11.2 G The record in SUP 13.11.1R need not relate to the level of business carried on. A UK firm may comply with SUP 13.11.1R by, for example, keeping copies of all notices of intention and notices of changes of requisite details or relevant details change to details notices.

13.11.3 G A UK firm should monitor the business carried on under an EEA right to ensure that any changes to requisite details or relevant details are notified as required by SUP 13.6 (Changes to branches) and SUP 13.7 (Changes to cross border services).
(2) An applicant for Part IV permission which is submitting a notice of intention with its application for such permission (see AUTH 3.20 (Specific obligations: applicants seeking to establish a branch in, or provide services, into another EEA State)) should contact the Corporate Authorisation department in the first instance (see AUTH 1.9 (Next Steps)).

13.12.2 G To contact the Passport Notifications Unit, from which a standard form of notice of intention can be obtained:

(1) telephone on 020 7066 1000; fax on 020 7066 9798; or

... 

14.1.4 G This chapter gives guidance on the Act and the EEA Passport Rights Regulations made under the Act, for an incoming EEA firm which has established a branch in, or is providing cross border services into, the United Kingdom and wishes to change the details of the branch or cross border services. These are known as requisite details, or for firms' passporting under the Insurance Directives relevant details.

...
Annex D

Amendments to the Professional Firms sourcebook (PROF)

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

7.2.3 G ...SUP 13.3.2G to SUP 13.3.5G detail the procedure to be followed once such a notice of intention has been received by the FSA...
Annex E

Amendments to the Supervision manual (SUP) (MiFID-related changes)

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

Where entire sections of the text are being deleted or inserted, the place where the change will be made is indicated and the text is not struck through or underlined.

13.3.1 G What constitutes a branch

Guidance on what constitutes a branch is given in SUP App 3. Note that if a UK MiFID investment firm is seeking to use a tied agent established in another EEA State, the rules in SUP 13 will apply as if that firm were seeking to establish a branch in that EEA State unless the firm has already established a branch in that EEA State (paragraph 20A of Schedule 3 to the Act).

13.3.2 G A UK firm cannot establish a branch in another EEA State for the first time under an EEA right unless the conditions in paragraphs 19(2), (4) and (5) of Part III of Schedule 3 to the Act are satisfied. It is an offence for a UK firm which is not an authorised person to contravene this prohibition (paragraph 21 of Part III of Schedule 3 to the Act). These conditions are that:

... 

(3) (a) ... 

(b) in any other case:

(i) the Host State regulator has notified the UK firm (or, where the UK firm is passporting under the Insurance Directives, the FSA) of the applicable provisions or, in the case of a UK firm passporting under MiFID, that the branch may be established; or

... 

... 

13.3.2D G A tied agent appointed by a MiFID investment firm to carry on investment services and activities (and ancillary services where relevant) does not have its own passporting right to establish a branch in another EEA State. However, a MiFID investment firm remains free to appoint a tied agent to do business in another EEA State and where it does so, the tied agent will
benefit from its passport.

Issue of a consent notice to the Host State regulator

13.3.5  G   (1)  If the UK firm's EEA right derives from the Banking Consolidation Directive, the MiFID Investment Services Directive, or the UCITS Directive, the FSA will give the Host State regulator a consent notice within three months unless it has reason to doubt the adequacy of a UK firm's resources or its administrative structure. The Host State regulator then has a further two months to notify the applicable provisions (if any) and prepare for the supervision, as appropriate, of the UK firm, or in the case of a MiFID investment firm, to inform the UK firm that a branch can be established.

13.4.2C  G   A tied agent appointed by a MiFID investment firm to carry on investment services and activities (and ancillary services where relevant) does not have its own passporting right to provide cross border services in another EEA State. However, a MiFID investment firm remains free to appoint a tied agent to do business in another EEA State and where it does so, the tied agent will benefit from its passport.

13.4.2D  G   A MiFID investment firm that wishes to obtain a passport for the activity of operating an MTF should follow the procedures described in this chapter. A UK market operator that operates a recognised investment exchange or an MTF and wishes to provide cross border services into another EEA State should follow the procedure described in REC 4.2BG.

How long will the process take?

13.4.3  G   [deleted]

13.4.3A  G   [deleted]

Issuing a consent notice or notifying the Host State regulator
13.4.4 G (1)  If the UK firm's EEA right derives from the MiFID Investment Services Directive, the Banking Consolidation Directive or the UCITS Directive, paragraph 20(3) of Part III of Schedule 3 to the Act requires the FSA to send a copy of the notice of intention to the Host State regulator within one month of receipt; or. However, a UK firm passporting under the Banking Consolidation Directive or MiFID Investment Services Directive may start providing cross border services as soon as it satisfies the relevant conditions (see SUP 13.4.2G).

(2) (a)  If the UK firm's EEA right derives from the Insurance Directives, paragraph 20(3A) of Part III of Schedule 3 to the Act requires the FSA, within one month of receiving the notice of intention, to:

... 

13.4.6 G (1)  If the UK firm is passporting under the Investment Services Directive or UCITS Directive, then when the Host State regulator receives the notice of intention, it should inform the UK firm of any applicable provisions.

... 

13.5.2 R  A UK firm wishing to provide cross border services into a particular EEA State for the first time under an EEA right must include in its notice of intention given to the FSA:

(1)  if the UK firm is passporting under the Investment Services Directive MiFID or the Insurance Directives, the information specified in SUP 13 Ann 3;

... 

... 

Unregulated activities

13.5.5 G  A notice of intention may include activities within the scope of the relevant Single Market Directive which are not regulated activities (paragraphs 19(3) and 20(2) of Part III of Schedule 3 to the Act), although in the case of a MiFID investment firm a notice of intention may only include ancillary services which are to be carried on with one or more investment services and activities (paragraphs 19(5B) and 20(2A) of Part III of Schedule 3 to the Act). Regulation 19 ...
Firms passporting under the Investment Services Directive, the Banking Consolidation Directive and the UCITS Directive

13.6.4  G If a UK firm has exercised an EEA right, under the Investment Services Directive, the Banking Consolidation Directive or the UCITS Directive, and established a branch in another EEA State, regulation 11(1) …

…

Firms passporting under MiFID

13.6.5A  G If a UK firm has exercised an EEA right to establish a branch under MiFID, it must not make a change in the requisite details of the branch (see SUP 13 Annex 1), use, for the first time, a tied agent established in the EEA State in which the branch is established, or cease to use a tied agent established in the EEA State in which the branch is established, unless it has satisfied the requirements of regulation 11A(2) (see SUP 13.6.5BG).

13.6.5B  G The requirements of regulation 11A(2) are that:

(1) the UK firm has given a notice to the FSA stating the details of the proposed change; and

(2) the period of one month beginning with the day on which the UK firm gave the notice has elapsed.

…

13.6.10  G (1) …

(3) Neither this guidance nor that set out at SUP 13.6.4G or SUP 13.6.5G is applicable to MiFID investment firms.

13.6.11  G When the FSA receives a notice from a UK firm other than a MiFID investment firm (see SUP 13.6.5G-(1) and SUP 13.6.7G-(1)) it is required by regulations 11(4) and 13(4) to either refuse, or consent to the change within a period of one month from the day on which it received the notice.

…

13.6.13  G If a UK firm is passporting under the Investment Services Directive or Banking Consolidation Directive, then …

…

13.6.16  G UK firms may wish to use the standard form available from the Passport Notifications Unit (see SUP 13.12 (Sources of further information)) to give the notices to the FSA described in SUP 13.6.5G(1), SUP 13.6.5BG, SUP 13.6.7G(1), SUP 13.6.8G and SUP 13.6.10G(1).
The process: MiFID investment firms

13.6.17 G When the FSA receives a notice from a UK MiFID investment firm (see SUP 13.6.5BG(1)), it is required by regulation 11A(3) to inform the relevant Host State regulator of the proposed change as soon as reasonably practicable. The firm in question may make the change once the period of one month beginning with the day on which it gave notice has elapsed.

Changes to cross border services

13.7.1 G Where a UK firm is exercising an EEA right under the UCITS Directive, Investment Services Directive MiFID or the Insurance Directives and is providing cross border services into another EEA State, any changes to the details of the services are governed by the EEA Passport Rights Regulations. References to regulations in this section are to the EEA Passport Rights Regulations. A UK firm which is not an authorised person should note that contravention of the prohibition imposed by regulation 12(1), 12A(1) or 16(1) is an offence. If it a defence, however, for the UK firm to show that it took all reasonable precautions and exercised due diligence to avoid committing the offence.

Firms passporting under the Investment Services Directive and the UCITS Directive

13.7.3 G If a UK firm is passporting under the Investment Services Directive or the UCITS Directive, regulation 12(1) states that …

…

(2) if the change arises as a result of circumstances beyond the UK firm’s control, the UK firm has as soon as practicable (whether before or after the change) given a notice to the FSA and to the Host State regulator, stating the details of the change.

UK firms may wish to use the standard form available from the Passport Notifications Unit (see SUP 13.12 (Sources of further information)) to give the notices to the FSA required by SUP 13.7.3G(1) and SUP 13.7.3AG.

Firms passporting under MiFID

13.7.3A G If a UK firm is providing cross border services in a particular EEA State in exercise of an EEA right deriving from MiFID, the UK firm must comply with the requirements of regulation 12A(2) before it makes a change to its programme of operations, including:

(1) changing the activities to be carried on in exercise that EEA right;
(2) using, for the first time, any tied agent to provide services in the territory of that EEA State; or

(3) ceasing to use any tied agent to provide services in the territory of that EEA State.

13.7.3B G The requirements of regulation 12A(2) are that:

(1) the UK firm has given notice to the FSA stating the details of the proposed change; and

(2) the period of one month beginning with the day on which the UK firm gave the notice mentioned in (1) has elapsed.

...

13.7.6A G UK firms may wish to use the standard form available from the Passport Notifications Unit (see SUP 13.12 (Sources of further information)) to give the notices to the FSA required by SUP 13.7.3(1)G, SUP 13.7.3AG, SUP 13.7.3BG, SUP 13.7.5G-(1) and SUP 13.7.6G.

13.7.7 G When the FSA receives a notice from a UK firm (see SUP 13.7.3G(1), SUP 13.7.5G(1) and SUP 13.7.6G), it is required by regulations 16(5) to either refuse or consent to the change within one month of receipt.

...

13.8.1 R (1) A notice of a change to a branch referred to in SUP 13.6.5G(1), SUP 13.6.5BG(1), SUP 13.6.7G-(1), SUP 13.6.8G and SUP 13.6.10G(1) and a notice of a change to cross border services as described in SUP 13.7.3G(1), SUP 13.7.3AG(1), or SUP 13.7.5G-(1) and SUP 13.7.6G must be:

...

...

13.11.1 R (1) ...

(2) The record in (1) must be kept for five years (for firms passporting under MiFID) or three years (for other firms)...

[Note: article 13(6) of MiFID and article 51(1) of the MiFID implementing Directive]

...

SUP 13 Annex 1R

| Type of firm | Requisite details (see notes 1 & 2) |
1. **Credit institution**
   **Credit Institution or Investment Firm**
   (a) particulars of the programme of operations carried on, or to be carried on, from the *branch*, including a description of the particular *EEA* activities to be carried on, and of the structural organisation of the *branch*;
   (b) the address in the *EEA State* in which the *branch* is, or is to be, established from which information about the business may be obtained; and
   (c) the names of the managers of the *branch*.

1A. **MiFID investment firm**
   (a) The *EEA States* within the territory of which the UK firm plans to establish a *branch*;
   [Note: Article 32(2)]
   (b) the programme of operations to be carried on from the *branch*, including a description of the *investment services* and *activities* and *ancillary activities* to be carried on and of the structural organisation of the *branch*;
   (c) the address in the *EEA State* in which the branch is to be established from which information about the business may be obtained;
   (d) the names of the managers of the *branch*; and
   (e) whether the *branch* intends to use *tied agents*.

"Note 1: The *requisite details* requisite details or relevant details specified in this annex are those in the *EEA Passport Rights Regulations*; that is, those in regulation 1 for *credit institutions* and *MiFID investment firms*, and those in regulation 14 for *insurance undertakings*.

---

**SUP 13 Annex 3R**

<table>
<thead>
<tr>
<th>Type of Firm</th>
<th>Specified Information</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Investment firm</td>
<td>+ Details of the programme of operations, stating in particular the service or services the UK firm intends to provide.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Type of Firm</th>
<th>Specified Information</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. MiFID investment firm</td>
<td>(a) The <em>EEA State</em> in which the UK firm intends to operate,</td>
</tr>
<tr>
<td></td>
<td>(b) Details of the programme of operations, stating in particular the investment services and activities and the ancillary services which it intends to perform,</td>
</tr>
<tr>
<td></td>
<td>(c) Whether the UK firm intends to use tied agents in the territory of the <em>EEA State</em> in which the UK firm intends to operate,</td>
</tr>
<tr>
<td>4. MiFID investment firm wishing to operate an MTF</td>
<td>(a) The <em>EEA State</em> in which arrangements are to be made,</td>
</tr>
<tr>
<td></td>
<td>(b) A description of the arrangements the</td>
</tr>
</tbody>
</table>
firm wishes to make. 

[Note: Article 31(2) and 31(6)]

... 13A.1.2 G This chapter does not apply to: ...

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>(3)</td>
<td>a Treaty firm that wishes to provide electronic commerce activities into the United Kingdom; or</td>
</tr>
<tr>
<td>(4)</td>
<td>a market operator that operates a regulated market or an MTF in an EEA State other than the UK and wishes to make appropriate arrangements so as to facilitate access to and use of its system by remote users or participants in the UK. See SUP App 3.6.25G for guidance.</td>
</tr>
</tbody>
</table>

....

13A.3 Qualifications for authorisation under the Act

13A.3.1 A If an EEA MiFID investment firm seeks to use a tied agent established in the UK, the EEA MiFID investment firm will be treated as if it were seeking to establish a branch and must satisfy the establishment conditions (see SUP 13A.4.1-G).

....

13A.4.4 G The notification procedure

(1) When the FSA receives a consent notice from the EEA firm's Home State regulator, it will, under paragraphs 13(2)(b), (c) and 13(3) of Part II of Schedule 3 to the Act, notify the applicable provisions (if any) to:

(a) the EEA firm; and

(b) in the case of an EEA firm passporting under the Insurance Directives, the Home State regulator;

within two months of the notice date.

(1A) The notice date is:

(a) for a MiFID investment firm, the date on which the Home State gave the consent notice; and

(b) in any other case, the date on which the FSA received the consent notice.

...
Under the EEA Passport Rights Regulations, references in section 60 of the Act (applications for approval for persons to perform controlled functions) to "the authorised person concerned" include:

1. An EEA MiFID investment firm whose Home State regulator has given a consent notice under paragraph 13 of Schedule 3 to the Act (see SUP 13A.4.1G(1) and SUP 13A.4.2G) or a regulator's notice under paragraph 14 of that Schedule (see SUP 13A.5.3G(1)), and which will be the authorised person concerned if the EEA firm qualifies for authorisation under that Schedule; and

2. Any other EEA firm with respect to which the FSA has received a consent notice or regulator's notice under paragraph 13 of Schedule 3 to the Act (see SUP 13A.4.1G(1) and SUP 13A.4.2G) or a regulator's notice under paragraph 14 of that Schedule (see SUP 13A.5.3G(1)), and which will be the authorised person concerned if the EEA firm qualifies for authorisation under that Schedule.

Top-up permission will be required, for example, for designated investment business activities carried on in relation to commodity derivatives. [deleted]

Firms passporting under the Investment Services Directive and Banking Consolidation Directive and the UCITS Directive

1. Where an incoming EEA firm passporting under the Investment Services Directive, Banking Consolidation Directive or the UCITS Directive has established a branch in the United Kingdom, regulation 4 states that it must not make a change in the requisite details of the branch unless it has complied with the relevant requirements.

2. The relevant requirements are set out in regulation 4(4) or, where the change arises from circumstances beyond the incoming EEA firm's control, in regulation 4(5) (see SUP 14.2.8-G).

Changes arising from circumstances beyond the control of an incoming EEA firm passporting under the Banking Consolidation Directive, UCITS Directive or Insurance Directive

If the change arises from circumstances beyond the incoming EEA firm's control, the firm is required by regulation 4(5) (see SUP 14.2.2-G) or
regulation 6(5) (see SUP 14.2.5-G(2)) to give a notice to the FSA (see SUP 14.4.1-G) and to its Home State regulator stating the details of the change as soon as reasonably practicable.

**Firms passporting under MiFID**

14.2.10 G Where an EEA MiFID investment firm has established a branch in the UK, regulation 4A states that it must not make a change in the requisite details of the branch unless it has complied with the relevant requirements.

14.2.11 G The relevant requirements in regulation 4A(3) are that:

1. the EEA MiFID investment firm has given notice to its Home State regulator stating the details of the proposed change; and
2. the period of one month beginning with the date on which the EEA MiFID investment firm gave the notice mentioned in (1) has elapsed.

14.2.12 G Changes to the requisite details may lead to changes to the applicable provisions to which the EEA MiFID investment firm is subject. The FSA will, as soon as practicable after receiving a notice in SUP 14.2.11-G inform the EEA MiFID investment firm of any consequential changes in the applicable provisions.

14.3 Changes to cross border services

14.3.1 G Where an incoming EEA firm passporting under the Investment Services Directive, MiFID, UCITS Directive or Insurance Directives is exercising an EEA right and is providing cross border services into the United Kingdom, the EEA Passport Rights Regulations govern any changes to the details of those services. Where an incoming EEA firm has complied with the relevant requirements in the EEA Passport Rights Regulations, then the firm's permission given under Schedule 3 to the Act is to be treated as varied accordingly.

**Firms passporting under the Investment Services Directive and UCITS Directive**

14.3.2 G Where an incoming EEA firm passporting under the Investment Services Directive or UCITS Directive is providing cross border services into the United Kingdom, it must not make a change in the details referred to in regulation 5(1A) unless it has complied with the relevant requirements in regulation 5(3).
Firms passporting under MiFID

14.3.3B G The requirement in regulation 5(3A) is that the incoming EEA firm has.

14.3.4 G Under regulation 5(4), the FSA is required, as soon as practicable after receiving the notice in SUP 14.3.3G to inform the incoming EEA firm of any consequential changes in the applicable provisions.

14.3.4A G Where an incoming EEA firm passporting under MiFID is providing cross border services into the United Kingdom, it must not make a change in the details referred to in regulation 5(1) unless it has given at least one month’s notice to its Home State regulator stating the details of the proposed change.

App 3.3 Background

App 3.3.6 G (1) The European Commission has not produced an interpretative communication on MiFID the Investment Services Directive. It is arguable, however, that the principles in the communication on the Second Banking Directive can be applied to investment services and activities. This is because Chapter II of Title II article 11 of the Investment Services Directive MiFID (containing provisions relating to conduct of business rules operating conditions for investment firms) also applies to the investment services and activities of firms operating under the Banking Consolidation Directive.

(2) …

App 3.3.13 G Notification of establishing a branch or of providing cross border services

The Single Market Directives require credit institutions, insurance undertakings, MiFID investment firms, UCITS management companies and insurance intermediaries to make a notification to the Home State before establishing a branch or providing cross border services.

App 3.6.3 G Under the Single Market Directives, however, EEA rights for the provision of services are concerned only with services provided in one of the ways referred to in SUP App 3.6.2G-(1) and (2) (How services may be provided).

App G The FSA is of the opinion that UK firms that are credit institutions and ISO
3.6.8 MiFID investment firms should apply the 'characteristic performance' test (as referred to in SUP App 3.6.7-G, SUP App 3.6.7-G,) when considering whether prior notification is required for services business. Firms should note that other EEA States may take a different view. Some EEA States may apply a solicitation test. This is a test as to whether it is the consumer or the provider that initiates the business relationship.

App 3.6.10 G Where, however, a credit institution or ISD MiFID investment firm:

(1) intends to send a member of staff or a temporarily authorised intermediary to the territory of another EEA State on a temporary basis to provide financial services; or

(2) provides advice, of the type that requires notification under either the Investment Services Directive MiFID or the Banking Consolidation Directive Banking Coordination Directive, to customers in another EEA State;

the firm should make a prior notification under the freedom to provide services.

App 3.6.25 G Membership of regulated markets

(1) The FSA is of the opinion that where a UK firm becomes a member of:

(a) a regulated market that has its registered office or, if it has no registered office, its head office, in another EEA State; or

(b) an MTF operated by a MiFID investment firm or a market operator in another EEA State,

the same principles as in the 'characteristic performance' test should apply. Under this test, the fact that a UK firm has a screen displaying the regulated market's or the MTF's prices in its UK office does not mean that it is dealing within the territory of the Home State of the regulated market or of the MTF.

(2) In such a case, we would consider that:

(a) the market operator operating the regulated market or the MTF is providing a cross-border service into the UK and so, provided it has given notice to its Home State regulator in accordance with articles 42(6) or 31(5) MiFID, it will be exempt from the general prohibition in respect of any regulated activity carried on as part of the business of the
regulated market or of operating an MTF (see section 312A of the Act); (b) the MiFID investment firm operating the MTF is providing a cross-border service into the UK and so needs to comply with SUP 13A.

App 3.6.26 G Firms are reminded of their rights, under article 45(1)-33 of the Investment Services Directive MiFID, to become members of, or have access to, the regulated markets in other Member States.

... 


App 3.9.1 G The following Tables 1, 2, 2A and 2B, provide an outline of the regulated activities and specified investments that may be of relevance to firms considering undertaking passported activities under the Banking Consolidation Directive, the Investment Services Directive MiFID, the UCITS Directive and the Insurance Mediation Directive. The tables may be of assistance to UK firms that are thinking of offering financial services in another EEA State and to EEA firms that may offer those services in the United Kingdom.

App 3.9.2 G The tables provide a general indication of the investments and activities specified in the Regulated Activities Order that may correspond to categories provided for in, the Banking Consolidation Directive, the Investment Services Directive MiFID, the UCITS Directive or the Insurance Mediation Directive. The tables do not provide definitive guidance as to whether a firm is carrying on an activity that is capable of being passported, nor do the tables take account of exceptions that remove the effect of articles. Whether a firm is carrying on a passported activity will depend on the particular circumstances of the firm. If a firm's activities give rise to potential passporting issues, it should obtain specialist advice on the relevant issues.

... 

App 3.9.4 G ... Note 2: The services and activities provided for in Sections A and B of Annex I of MiFID when referring to the financial instruments provided for in Section C of Annex I of that Directive are subject to mutual recognition according to the BCD from 1 November 2007. Please refer to the table at SUP App 3.9.5 below for mapping of MiFID investment services and activities.
Delete the existing table and substitute it with the one below (which, although composed entirely of new text, is not underlined)

<table>
<thead>
<tr>
<th>Table 2: MifID investment services and activities</th>
<th>Part II RAO Activities</th>
<th>Part III RAO Investments</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>A MifID investment services and activities</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1. Reception and transmission of orders in relation to one or more financial instruments</td>
<td>Article 25 (see Note 1)</td>
<td>Article 76-81, 83-85, 89</td>
</tr>
<tr>
<td>2. Execution of orders on behalf of clients</td>
<td>Article 14, 21</td>
<td>A Article 76-81, 83-85, 89</td>
</tr>
<tr>
<td>3. Dealing on own account</td>
<td>Article 14</td>
<td>Article 76-81, 83-85, 89</td>
</tr>
<tr>
<td>4. Portfolio management</td>
<td>Article 37</td>
<td>Article 76-81, 83-85, 89</td>
</tr>
<tr>
<td>5. Investment advice</td>
<td>Article 53</td>
<td>Article 76-81, 83-85, 89</td>
</tr>
<tr>
<td>6. Underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis</td>
<td>Article 14, 21</td>
<td>Article 76-81, 83-85, 89</td>
</tr>
<tr>
<td>7. Placing of financial instruments without a firm commitment basis</td>
<td>Article 21, 25</td>
<td>Article 76-81, 83-85, 89</td>
</tr>
<tr>
<td>8. Operation of Multilateral Trading Facilities</td>
<td>Article 25B (see Note 2)</td>
<td>Article 76-81, 83-85, 89</td>
</tr>
<tr>
<td>Ancillary services</td>
<td>Part II RAO Activities</td>
<td>Part III RAO Investments</td>
</tr>
<tr>
<td>1. Safekeeping and administration of financial instruments for the account of clients, including custodianship and related services such as</td>
<td>Article 40, 45, 64</td>
<td>Article 76-81, 83-85, 89</td>
</tr>
<tr>
<td></td>
<td>cash/collateral management</td>
<td></td>
</tr>
<tr>
<td>---</td>
<td>---------------------------</td>
<td></td>
</tr>
<tr>
<td>2.</td>
<td>Granting credits or loans to an investor to allow him to carry out a transaction in one or more of the relevant instruments where the firm granting the credit or loan is involved</td>
<td>Article 14, 21, 25, 53, 64</td>
</tr>
<tr>
<td>3.</td>
<td>Advice to undertakings on capital structure, industrial strategy and related matters and advice and services relating to mergers and the purchase of undertakings</td>
<td>Article 53, 64</td>
</tr>
<tr>
<td>4.</td>
<td>Foreign exchange services where these are connected with the provision of investment services</td>
<td>Article 14, 21, 25, 53, 64</td>
</tr>
<tr>
<td>5.</td>
<td>Investment research and financial analysis or other forms of general recommendation relating to transactions in financial instruments</td>
<td>Article 14, 21, 25, 25B, 37, 53, 64</td>
</tr>
<tr>
<td>6.</td>
<td>Services related to underwriting</td>
<td>Article 25, 53, 64</td>
</tr>
<tr>
<td>7.</td>
<td>Investment services and activities as well as ancillary services of the type included under Section A or B of Annex I related to the underlying of the derivatives included under Section C 5, 6, 7 and 10-where these are connected to the provision of investment or ancillary services.</td>
<td>Article 14, 21, 25, 25B, 37, 53, 64</td>
</tr>
</tbody>
</table>

Note 1. The MiFID service of receiving and transmitting orders does not extend to the regulated activity of making arrangements with a view to transactions in investments under article 25(2) of the Regulated Activities Order unless the arrangements bring about or would bring about particular transactions. This is the case, whether or not the bringing about arises or would arise as a result of the person who makes the arrangements receiving and transmitting orders in relation to particular transactions or in any other way.

Note 2. A firm operating an MTF under article 25B does not need to have a permission covering other regulated activities, unless it performs other regulated activities in addition to operating an MTF.
Activities set out in Article 5(2) and (3) of the UCITS Directive

### Table 2A: UCITS Directive activities

<table>
<thead>
<tr>
<th>Activities</th>
<th>Part II RAO Activities</th>
<th>Part III RAO Investments</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. The management of UCITS in the form of unit trusts / common funds or of investment companies; this includes the function mentioned in Annex II of the <em>UCITS Directive</em> (see Note 2).</td>
<td>Articles 14, 21, 25, 37, 51, 53, 64</td>
<td>Articles 76-81, 83-85, 89</td>
</tr>
<tr>
<td>2. Managing portfolios of investments, including those owned by pension funds, in accordance with mandates given by investors on a discretionary, client-by-client basis, where such portfolios include one or more of the instruments listed in Section BC of the Annex I to MiFID the ISD.</td>
<td>Articles 14, 21, 25, 37, 53, 64</td>
<td>Articles 76-81, 83-85, 89</td>
</tr>
<tr>
<td>3. Investment advice concerning one or more of the instruments listed in Section BC of the Annex I to MiFID the ISD.</td>
<td>Articles 53, 64</td>
<td>Articles 76-81, 83-85, 89</td>
</tr>
<tr>
<td>4. Safekeeping and administration services in relation to units of collective investment undertakings.</td>
<td>Articles 40, 45, 64</td>
<td>Articles 76-81, 83-85, 89</td>
</tr>
</tbody>
</table>

**Note 1.** A *UCITS management company* can only exercise passport rights under the *UCITS Directive* (article 2(21)(h) of MiFID the ISD). A *UCITS management company* can only be authorised to carry on the non-core services set out in rows (3) and (4) of Table 2A if it is also authorised to carry on the activity set out in row (2) of the table.

**Note 2.** The functions set out in Annex 2 to the *UCITS Directive* are:

1. Investment management.
2. Administration:
   a. legal and fund management accounting services;
   b. customer inquiries;
   c. valuation and pricing (including tax returns);
   d. regulatory compliance monitoring;
<table>
<thead>
<tr>
<th>Handbook Reference</th>
<th>Subject of record</th>
<th>Contents of record</th>
<th>When record must be made</th>
<th>Retention period</th>
</tr>
</thead>
</table>
| SUP 13.11.1R       | Exercise of passport rights by UK firms | (1) Services or activities carried on from a branch in, or provided cross-border into, another EEA State under an EEA right.  
(2) The requisite details of relevant details (if applicable), the requisite details or relevant details relating to those services | Not specified            | Five years (for firms passporting under MiFID) or three years (for other firms) from earlier of:  
(1) record being superseded;  
(2) firm ceasing to have any EEA branches or cross border services. |
or activities (as set out in SUP 13.6 and SUP 13.7).

**SUP Sch 2.2 G**

<table>
<thead>
<tr>
<th>Handbook Reference</th>
<th>Matter to be notified</th>
<th>Contents of notification</th>
<th>Trigger event</th>
<th>Time allowed</th>
</tr>
</thead>
<tbody>
<tr>
<td>...</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>SUP 13.6.5G(1)</strong></td>
<td>Changes to <em>branches</em> (Firms passporting under the Investment Services Directive, the UCITS Directive and Banking Consolidation Directive)</td>
<td>Details of proposed change</td>
<td>Change in circumstances within control of UK firm</td>
<td>Before making change</td>
</tr>
<tr>
<td><strong>SUP 13.6.5BG</strong></td>
<td>Changes to <em>branches</em> (Firms passporting under MiFID)</td>
<td>Details of proposed change</td>
<td>Change in circumstances, including using for the first time or ceasing to use a tied agent established in the EEA State in which the branch is established</td>
<td>Before making change</td>
</tr>
<tr>
<td>...</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>SUP 13.6.10G</strong></td>
<td>Changes to <em>branches</em> (not firms passporting)</td>
<td>Details of change</td>
<td>Changes to branch arising from circumstances</td>
<td>As soon as reasonably practicable</td>
</tr>
</tbody>
</table>
| SUP 13.7.3G | **Firms** passporting under the **UCITS Directive** and **Investment Services Directive**: Change in programme of operations, or activities to be carried on under its **EEA right** | Details of proposed change | Change in programme of operations, or activities to be carried on under its **EEA right** | (a) change arises from circumstances within control of firm: before making change.  
(b) change arises from circumstances beyond UK firm's control: as soon as practicable (whether before or after change) |
| SUP 13.7.3BG | **Firms** passporting under **MiFID (cross-border services)**: Change in programme of operations, or activities to be carried on under its **EEA right** | Details of proposed change | Change in activities to be carried on, using for the first time or ceasing to use a tied agent | Before making change. |
| ... | | | | |
| **SUP 14.2.3 G** | Change to branch details in circumstances within control of the firm (firms passporting under the **Investment Services Directive**). | Details of proposed change | Change to branch details | Before making the change |
... Directive, the UCITS Directive and Banking Consolidation Directive)  

<table>
<thead>
<tr>
<th>Rule</th>
<th>Details of proposed change</th>
<th>Changes to branch details</th>
<th>Before making the change</th>
</tr>
</thead>
<tbody>
<tr>
<td>SUP 14.2.11 G</td>
<td>Changes to UK branch details for EEA MiFID investment firms</td>
<td>Details of proposed change</td>
<td>Changes to branch details</td>
</tr>
<tr>
<td>SUP 14.3.3 G</td>
<td>Changes to cross border services (firms passporting under the Investment Services UCITS Directive)</td>
<td>Details of proposed change</td>
<td>Changes to cross border services</td>
</tr>
<tr>
<td>SUP 14.3.3BG</td>
<td>Incoming EEA firm passporting under MiFID</td>
<td>Details of the proposed change to cross-border services</td>
<td>Change in details</td>
</tr>
</tbody>
</table>

SUP Sch 6.1 G