SLAUGHTER AND MAY/

A GUIDE TO THE FINANCIAL SERVICES AND MARKETS ACT 2000

Produced by Slaughter and May

2021 Edition

Welcome

Welcome to the fourth edition of our Guide to the Financial Services and Markets Act 2000. The Guide has been prepared by members of Slaughter and May's Financial Regulation Group.

The regulatory regime introduced by this legislation is over 20 years in the making and continues to develop at a pace. Since the previous edition, we have seen the final departure of the United Kingdom (UK) from the European Union (EU) single market and the onshoring of EU-derived financial services rules into UK sta`tute.

At the time of writing there are proposals to move EU-originating financial services regulations that are in scope of the regulators' rule-making powers under the Act out of the statute, and onto the regulators' rulebooks. Although the regulators' detailed rules may well form the substance of firms' regulatory obligations in the future, the existing overarching legal framework set by the Act seems likely to remain in place, albeit with some adaptations.

Our intention in publishing this Guide is to provide a user-friendly tool to assist readers to navigate this large and detailed piece of legislation, the modifications and enhancements that have been made to it, and the increasingly complex regulatory regime for which it provides a legal framework.

We have included in this edition a new chapter on the Financial Services Act 2021, the first major piece of UK primary legislation intended to address issues relating to financial services and financial regulation arising from Brexit. We have also referred, where relevant, to the government's Financial Services Future Regulatory Framework Review, announced in 2019, and still in relatively nascent form.

We very much hope you continue to find our Guide informative. If you have any feedback on this new edition, we would be delighted to hear from you.

Jan Putnis
jan.putnis@slaughterandmay.com

Ben Kingsley
ben.kingsley@slaughterandmay.com

Nick Bonsall
nick.bonsall@slaughterandmay.com

Contributors

Jan Putnis
Partner

Ben Kingsley
Partner

Nick Bonsall
Partner

Tim Fosh
Senior Counsel

Kristina Locmele
Senior Counsel

Natalie Barnes
Associate

Emily Bradley
Professional Support Lawyer

Alex Clothier
Associate

Elizabeth George
Associate

Ben Goldstein
Associate

Selmin Hakki
Snr Professional Support Lawyer

Tom Hilton-Stevens
Associate

Chris Hurn
Associate

David Kasal
Associate

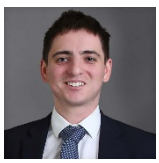
Kilian McConnell
Associate

Tamara Raoufi
Associate

Sarah Redlich
Practice Development Lawyer

David Shone
Associate

Matthew Silfee
Associate



Connor Williamson
Associate

Introduction

When the Financial Services and Markets Act 2000 (the Act) came into effect on 1 December 2001, it was described as providing the framework for a sweeping rationalisation and modernisation of UK financial services legislation. The creation of the Financial Services Authority (the **FSA**) as the single statutory regulator for the entire UK financial services sector was regarded by the then government as central to maintaining and enhancing the success of the sector.

Over 20 years on, the financial services landscape in the UK looks very different. The modifications made to the UK statute book during the Brexit 'onshoring' process have made the legislative framework for the sector more complex than ever. The Financial Services Act 2021 (the **FS Act 2021**) marked the first milestone in re-shaping the regime following the end of the Brexit transition period. At the time of writing, the proposals for reform in the Government's Future Regulatory Framework Review are a sign of additional important changes to come.

In addition to the Act itself, the UK's statutory framework for the regulation of financial services includes a number of other important pieces of primary and secondary legislation, as well as the contents of the regulators' rulebooks. The prospect of a recalibration of the UK regulatory architecture towards a more regulator-led approach in the medium to longer term is trailed in the Review. As we continue to monitor the direction of travel of future regulatory and legislative initiatives, it is perhaps no understatement to say that the UK is now on the cusp of a new era in financial services regulation.

As with previous editions, this edition of the Guide seeks to provide a manual for the legislative framework for the UK's regulatory regime as it now stands and an explanation of the changes and enhancements to that framework. In this way, the intention and aim of the Guide is to assist both the new reader, and those already familiar with the regime, to navigate what is an increasingly detailed statute and the increasingly complex regulatory regime it underpins. Each chapter covers a discrete area of the regulatory regime and addresses both the position under the Act, and the changes effected by related legislative mechanisms in relation to that area.

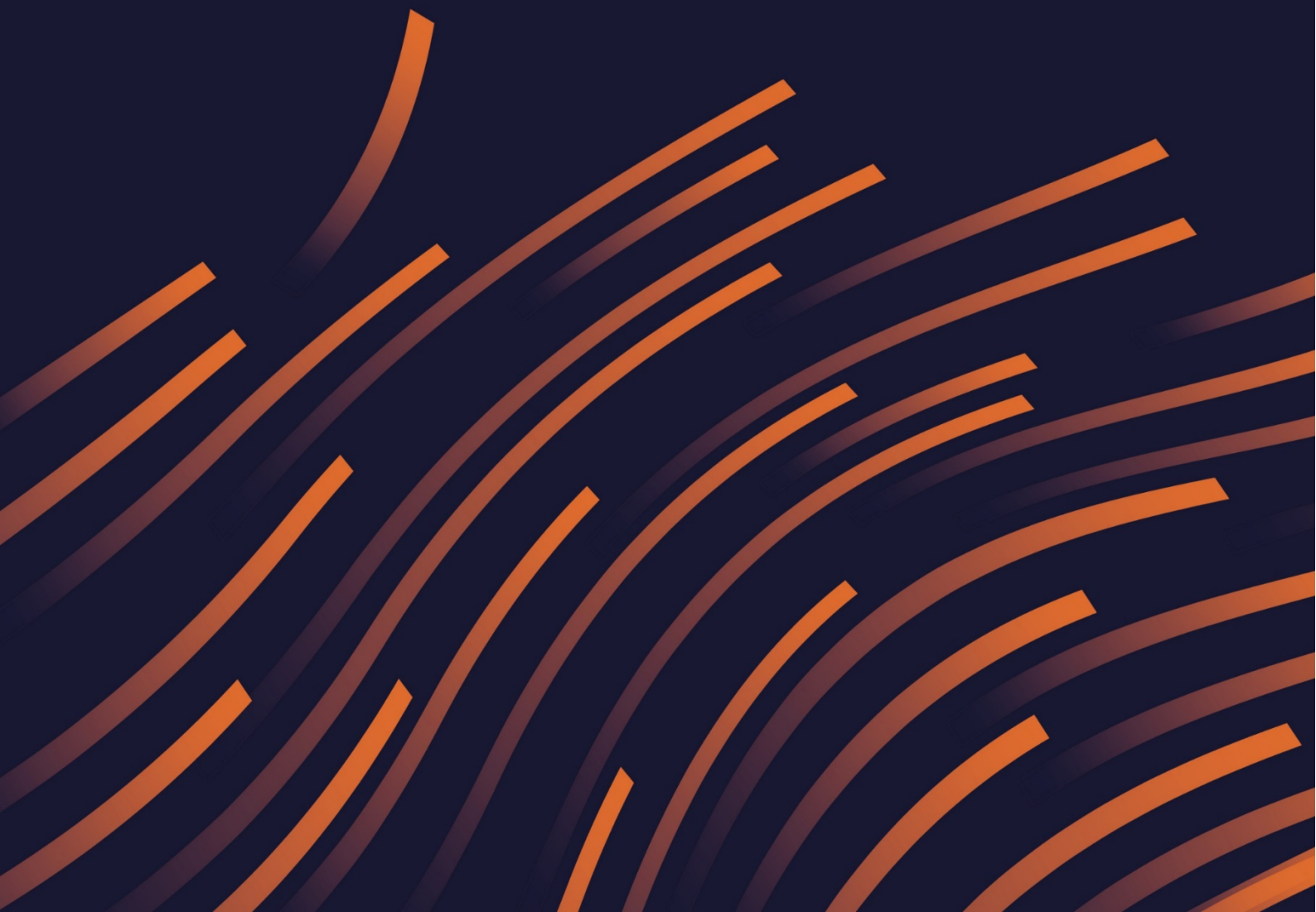
In the Guide, references to the Act are to the Financial Services and Markets Act 2000 as in effect on 7 December 2021, and references to sections and schedules are, unless otherwise indicated, references to sections of and schedules to the Act.

Contents

SLAUGHTER AND MAY/

Beyond Brexit

Back to contents



Beyond Brexit

1. BREXIT, ONSHORING AND THE FUTURE REGULATORY FRAMEWORK

1.1 Introduction

1.1.1 Following the UK's formal departure from the EU on 31 January 2020 and a transition period that expired at 11pm on 31 December 2020, EU law ceased to apply directly in the UK.

1.1.2 The UK's withdrawal from the EU has necessitated major changes to the financial services regulatory framework, including to the Act. A number of these changes have sought to address the status of EEA firms that had, before the end of the transition period, operated in the UK on the basis of passporting rights. Other changes were made in preparation for the end of the transition period (also referred to as **IP completion day**) to ensure that the UK regulatory framework remained legally operative once EU law ceased to apply.

1.1.3 The European Union (Withdrawal) Act 2018 (the **EUWA**), as amended by the European Union (Withdrawal Agreement) Act 2020, contains the basic legislative framework set out in preparation for the UK's withdrawal from the EU. Among other things, the EUWA repealed the European Communities Act 1972 (the **ECA**) and converted into UK domestic law the existing body of directly applicable EU law, including EU Regulations, at the end of the transition period. The EUWA also preserved UK secondary legislation made under the ECA, including legislation implementing EU Directives[1]. This EU-derived body of law is referred to as "retained EU law".

1.1.4 Under the EUWA, government ministers were given the power to prevent, remedy or mitigate any failure of EU law to operate effectively, or any other deficiency in retained EU law, through secondary legislation[2]. We refer to the process of replicating and making revisions to retained EU law so that it operates effectively after the UK's withdrawal from the EU as "onshoring".

1 Sections 2(2) and 3, EUWA.
2 Section 8, EUWA.

1.1.5 Through onshoring, most directly applicable EU legislation now resides on the UK statute book, including in the Act, with modifications to make it workable for the UK outside the EU. The immediate aim of this process was to prepare for a scenario in which the UK left the EU with no agreement and potentially no implementation period.

1.2 Onshoring and fixing deficiencies

1.2.1 On 27 June 2018, HM Treasury published a document[3] setting out its approach to the onshoring of retained EU law relating to financial services by laying statutory instruments (SIs) under the EUWA. It notes that this process involved: "*a thorough review of EU and UK domestic financial services legislation to identify deficiencies that will arise when the UK leaves the EU and existing EU law is transferred to UK law*".

1.2.2 HM Treasury stated:

"*These SIs are not intended to make policy changes, other than to reflect the UK's new position outside the EU, and to smooth the transition to this situation… Wherever practicable, our approach is that the same laws and rules that are currently in place in the UK would continue to apply at the point of exit, providing continuity and certainty as we leave the EU. However, some changes would be required to reflect the UK's new position outside the EU.*"

1.2.3 Examples of deficiencies that were identified during this process included:

(a) Functions that were carried out by EU authorities, including ESMA, EIOPA or the EBA, that would no longer apply to the UK (for example, supervision of trade repositories, which HM Treasury transferred to the FCA);

(b) Provisions in retained EU law that would become redundant (for example, references to European Consumer Credit Information and Member States);

(c) Provisions that would be inconsistent with ensuring a functioning regulatory framework — for example, requirements

[3] HM Treasury's approach to financial services legislation under the European Union (Withdrawal) Act, dated June 2018 available at: https://www.gov.uk/government/publications/financial-services-legislation-under-the-eu-withdrawal-act.

regarding automatic recognition of an action by an EU body by the relevant UK body — where alternative arrangements for cooperating with EU bodies would be more appropriate;

(d) Provisions that would lead to significant disruption for firms, or customers of firms, unless action is taken to avoid that disruption (for example, to prevent the market disruption that would result from the sudden inoperability of passporting rights);

(e) Provisions requiring participation in EU institutions, bodies, offices and agencies (for example, joint decision making in supervisory and resolution colleges) which would no longer work after exit.

1.2.4 Over 50 SIs amending UK and domesticated EU legislation relating to financial services were made as part of the wider work undertaken to prepare for Brexit. These SIs were originally due to commence on exit day. The Withdrawal Agreement Act 2020[4] subsequently delayed those parts of these instruments that were to come into force immediately before, on, or after exit day so they instead came into force at the end of the implementation period, by amending references to "exit day" in the relevant commencement provisions to "IP completion day".

1.2.5 The UK regulators (namely, the FCA, the PRA, the Bank of England and the Payment Systems Regulator) also gained responsibility to correct deficiencies in, and ensure the effective operation of, onshored EU binding technical standards as well as their own rules. This was achieved through the Financial Regulators' Powers (Technical Standards etc.) (Amendment etc.) (EU Exit) Regulations 2018 (the **Financial Regulators' Powers Regulations 2018**),[5] which amended the Act by adding a new Chapter 2A to Part 9A (Rules and Guidance). As such, the regulators have the power to make instruments (referred to as "standards instruments") creating new technical standards or modifying, amending or revoking an existing technical standard that has been domesticated into UK law under sections 138P and 138Q of the Act (as well as sections 97A and 97B of the Banking Reform Act). The regulators are required to consult on any proposal to make changes to technical standards[6].

4 Paragraph 1 of Schedule 5.
5 SI 2018/1115.
6 Section 138S of the Act and section 97D of the Banking Reform Act.

1.2.6 All standards instruments made by the regulators are subject to approval by HM Treasury. HM Treasury may only refuse approval if it considers that the instrument would have implications for public funds or would prejudice negotiations for an international agreement[7].

1.3 Managing the transition

1.3.1 Recognising the need to provide for continuity and to allow time to prepare for a smooth transition, HM Treasury introduced the framework for a Temporary Permissions Regime (the **TPR**) through the EEA Passport Rights (Amendment, etc., and Transitional Provisions) (EU Exit) Regulations 2018 (the **EEA Passport Rights Regulations**)[8]. This was in line with an announcement originally made in December 2017. To deal with the loss of their passporting rights on the UK's exit from the EU, the TPR allows EEA firms to continue operating in the UK for a limited period. For those firms wishing to maintain their UK business on a permanent basis, the regime provides time to apply for full authorisation from UK regulators. Many of these firms have already been provided with the dates for their 'landing slot' (the period during which they can apply for full (non-temporary) Part 4A permission or to vary their existing Part 4A permission if the firm has a UK top-up permission).

1.3.2 Separately, the Central Counterparties (Amendment, etc., and Transitional Provision) (EU Exit) Regulations 2018[9] introduced a Temporary Recognition Regime for EEA-based central counterparties (**CCPs**) carrying on activities in the UK to continue their activities for a limited period after the end of the transition period. See further Chapter 20 'Recognised investment exchanges and recognised clearing houses'.

1.3.3 The onshoring process meant that there were some areas where regulatory requirements on authorised firms and other persons changed. To help firms adapt to these new requirements, under the Financial Services and Markets Act 2000 (Amendment) (EU Exit) Regulations (the **FSMA Amendment Regulations**)[10], HM Treasury gave transitional powers to the FCA, the PRA and the Bank that allowed them to delay or phase in regulatory requirements that changed or applied for the first time because of Brexit. The general power to phase in post-

7 Section 138R and section 97C.
8 SI 2018/1149.
9 SI 2018/1184.
10 SI 2019/632.

exit requirements, allowing flexibility for firms to transition to a fully domestic UK regulatory framework, is known as the Temporary Transitional Power (the TTP).

1.3.4 The result is that onshored legislative provisions need to be read in conjunction with the "transitional directions" that have been made by the FCA and the PRA under the TTP. These directions generally have the effect of delaying certain onshoring changes which fall within the remit of the PRA and the FCA. Essentially this means that regulated firms should interpret their regulatory obligations as those which applied immediately before the end of the transition period, at least for the duration of the period during which the TTP applies. The regulators expect firms to use the duration of the TTP period to prepare for full compliance with the onshored UK regime by 31 March 2022. In certain areas, the use of the transitional power has the same effect as if the EU had been found equivalent by HM Treasury.

1.3.5 There are some specific areas where the TTP does not apply, for instance where the onshoring regime affects the duties, functions or powers of the regulators or Treasury and the FCA has taken over the function of supervising credit rating agencies, trade repositories and securitisation repositories. These areas are discussed further in the chapters that follow in this Guide, where relevant.

1.3.6 The Government also passed legislation to ensure that contractual obligations between EEA firms and UK-based customers that were not covered by the TPR could continue to be met. The Financial Services Contracts (Transitional and Saving Provision) (EU Exit) Regulations 2019 (SI 2019/405) established the Financial Services Contracts Regime (the **FSCR**) to allow for the orderly wind down of the UK regulated activities of firms that do not enter the TPR or those that leave the TPR without full UK authorisation by inserting various provisions into the EEA Passport Rights Regulations.

1.3.7 The FSCR provides two mechanisms: firstly, supervised run-off (**SRO**) for multiple categories of firms, including EEA firms with UK branches or top-up permissions in the UK and firms who entered the TPR but then did not secure a UK authorisation; or, secondly, contractual run-off (**CRO**) for remaining incoming cross-border services firms EEA firms that previously operated under the EU freedom of establishment passport. The CRO regime works on the basis of a limited exemption from the general prohibition in section 19 of the Act for the purposes of winding down UK regulated activities in an orderly manner. Firms in SRO are

"deemed" to be Part 4A authorised for the purposes of winding down their UK regulated activities in an orderly manner.

1.3.8 There are also run-off regimes for EEA firms that previously passported into the UK under the Payment Services Regulations 2017 and Electronic Money Regulations 2011, and for services provided by non-UK CCPs and trade repositories (**TRs**).

1.4 Changes to the Act

1.4.1 The UK's withdrawal from the EU necessitated a range of amendments to the Act, some of which were extensive. Changes to the Act arising as a result of Brexit are described in more detail in the relevant chapters of this Guide. See for instance Chapter 14 'Collective investment schemes' for amendments made to Part 17 of the Act by the Collective Investment Schemes (Amendment etc.) (EU Exit) Regulations[11].

1.4.2 Many of the changes were set out in the FSMA Amendments Regulations which amended certain definitions in the Act, as well as definitions in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544) (the **Regulated Activities Order**) and the Financial Services and Markets 2000 (Financial Promotion) Order 2005 (the **Financial Promotion Order**). These were largely dependent on provisions in EU legislation or were based on an activity being carried out within the EU's single market. They now reflect the UK's position as a standalone regulatory regime outside of the single market for financial services.

1.4.3 The FSMA Amendment Regulations worked in conjunction with the EEA Passport Rights Regulations. The latter provided the framework for the TPR referred to above and repealed those parts of domestic UK legislation (such as section 31(1)(b) and (c) and Schedules 3 and 4 of the Act) that enabled EEA firms to access the UK via a financial services passport and provided for EU-treaty derived access.

1.4.4 The EEA Passport Rights Regulations also largely repealed Part 13 of the Act, which previously set out the powers of the FCA and the PRA to take regulatory action against firms passporting into the UK under EU single market directives and treaty firms. The only provisions in force in Part 13 are now sections 195(3) and (4), which have preserved the definition of an "overseas regulator". Part 13A of the Act, on the enhanced

[11] SI 2019/325.

supervision of firms exercising rights under the Insurance Distribution Directive, was also repealed by the EEA Passport Rights Regulations with effect from IP completion day.

1.4.5 Although the UK's regulatory framework underwent amendment following the UK's withdrawal from the EU, any such amendments should be seen as distinct from the approach to supervision currently taken by the FCA and the PRA[12]. The approaches of the FCA and the PRA in this respect are not derived from EU law and are, therefore, broadly unaffected by the UK no longer being a member of the EU.

1.5 Post-Brexit and the future of the UK's regulatory framework

1.5.1 In December 2020, the UK and the EU agreed on the text of the UK-EU Trade and Co-operation Agreement (the **TCA**). The TCA was incorporated into UK law by the European Union (Future Relationship) Act 2020 hours before the expiry of the Brexit transition period. The TCA commits both the UK and the EU to maintain their markets as being open on a non-discriminatory basis to firms in the UK and the EU provided these firms are appropriately established in the relevant country. The financial services aspects of the deal were limited. Financial services are excluded from the provisions in the TCA on services generally, from the TCA's most-favoured nation clause and also from the requirement to review trade in services and investment relations in the future. In short, the TCA does not provide the levels of market access available while the UK was part of the single market.

1.5.2 Alongside the TCA, the UK and the EU also published in December 2020 declarations on various issues, including financial services. In these declarations, the parties agreed to establish structured regulatory co-operation on financial services. In particular, the UK and the EU agreed on the text of a memorandum of understanding (**MoU**) establishing the framework for this co-operation in March 2021. At the time of writing, this MoU is yet to be ratified.

1.5.3 All this has left the UK outside the EU's single market and, at least in principle, free to determine its own financial services regulatory regime. We are now seeing a new approach by the UK government to

[12] Detailed at https://www.fca.org.uk/about/supervision (in respect of the FCA) and http://www.bankofengland.co.uk/pra/Pages/supervision/approach/default.aspx (in respect of the PRA).

take domestic financial services legislation in a new and seemingly independent direction.

1.5.4 The Chancellor announced a "new chapter" in UK financial services on 9 November 2020 and the granting of a package of unilateral equivalence decisions to the EU and EEA member states. These unilateral equivalence decisions were laid before Parliament on 10 November 2020 and have been made (for the most part) by directions under the Equivalence Determinations for Financial Services and Miscellaneous Provisions (Amendment etc) (EU Exit) Regulations 2019[13]. They each have effect as if made under the relevant provisions of retained EU law, whether they were granted by direction or statutory instrument. Other notable decisions include the Central Counterparties (Equivalence) Regulations 2020 and the Prospectus Regulation and Transparency Directive Directions 2019.

1.5.5 Recent regulatory and legislative initiatives demonstrate how the UK might develop an approach to financial services regulation that is more tailored to its individual circumstances than the EU framework it has inherited. These include, for example, the Financial Services Act 2021 (the **FS Act 2021**), which received Royal Assent on 29 April 2021 and made a number of significant amendments to the Act and onshored EU regulation relating to financial services. The FS Act 2021 is discussed further in a dedicated chapter of this Guide.

1.5.6 The UK government is currently undertaking a review of the UK financial services regulatory framework intended to address issues relating to legislation and the governance of the financial services regulators that have arisen as a consequence of Brexit. This is referred to as the Financial Services Future Regulatory Framework (**FRF**) Review, announced in 2019.

1.5.7 Phase I of the Review began in July 2019 with the publication of a call for evidence on how the UK government and regulators should work together to ensure the best outcomes for the financial services sector. The Government's response to Phase I was published in March 2020 and led to the establishment of the Financial Services Regulatory Initiatives Forum and the creation of the Regulatory Initiatives Grid, which sets out the financial services regulatory pipeline.

[13] SI 2019/541.

1.5.8 A consultation on Phase II of the Review was launched in October 2020. The consultation generally noted:

"*The Financial Services and Markets Act 2000 (FSMA), and the model of regulation introduced by that Act, continue to sit at the centre of the UK's regulatory framework. The government believes that this model, which delegates the setting of regulatory standards to expert, independent regulators that work within an overall policy framework set by government and Parliament, continues to be the most effective way of delivering a stable, fair and prosperous financial services sector… But the UK's membership of the EU has complicated the operation of the FSMA model.*[14] "

It went on to highlight a range of drawbacks of retaining the onshored regime relating to financial services in the long term. One noted disadvantage is the inflexibility of having regulatory requirements specified in legislation. It was observed that the ongoing maintenance of detailed financial services regulatory requirements set out in legislation would demand considerable Parliamentary time. Moreover, HM Treasury and other government departments would be responsible for maintaining regulatory requirements even though they do not supervise firms and markets. The consultation also referred to the challenges of navigating the fragmented status of the current model, which is spread across a range of sources, including domestic and retained EU legislation, regulators' rules and onshored EU technical standards.

1.5.9 The Phase II consultation therefore set out a blueprint for future financial services regulation in the UK ensuring a clear division of responsibilities between government, Parliament and the regulators, providing for appropriate policy input by democratic institutions and allowing regulation to adapt to changing conditions. As part of this future framework, HM Treasury set out its intention for the majority of retained EU provisions to be transferred to the PRA Rulebook and the FCA Handbook.

1.5.10 This blueprint was further developed in a consultation paper published in November 2021. Seeking "*to move to a comprehensive FSMA model of financial services regulation*" that is "*more agile*", it is proposed that the financial services regulators should have the ability to

[14] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/927316/141020_Final_Phase_II_Condoc_For_Publication_for_print.pdf.

determine the "*direct regulatory requirements*" which are currently set out in retained EU law.[15] Direct regulatory requirements are the obligations that firms must follow, with the framework within which the regulators must operate being set by Parliament and the Government. An example of a direct requirement is a requirement for a firm to hold a certain level of capital, or a requirement to act (or refrain from acting) in a particular way.

1.5.11 In order to achieve this outcome, it is suggested that a significant amount of retained EU law that currently contains many direct regulatory requirements is repealed. The repeal of any particular piece of retained EU law will take effect at the same time as the regulatory rules designed to replace it, thereby avoiding any gap in regulation. It is anticipated that this process will take a number of years.

1.5.12 To ensure that regulators consider specific aspects of public policy when making their rules (where this is considered necessary), the Government proposes to have an ability to set specific "*have regards*". These are considerations which the regulator must "*have regards*" to when exercising their rules in specific areas of regulation; for example, the Government may set "*have regards*" for the FCA when it is making rules in relation to uncleared derivatives. The Government also believes that there is a case for ensuring that the regulators consider the potential impacts on deference arrangements and assess compliance with relevant trade agreements as a matter of course when making rules and when setting general approaches on supervision, where relevant and proportionate.

1.5.13 HM Treasury further notes that there are many pieces of retained EU law which set the rules for a kind of activity, product, or conduct which are not FSMA regulated activities, and which apply to a broader range of entities than FSMA authorised persons, such as in relation to the Short Selling Regulation ((EU) 236/2012). In these contexts the general rulemaking powers of the PRA and the FCA in relation to authorised persons do not apply. Where this is the case, the Government proposes to create a new 'Designated Activities Regime' (DAR) to ensure that these activities can continue to be regulated in a proportionate manner that is consistent with the existing FSMA framework. The DAR will mirror the existing approach for the RAO, although the regime would be more limited and would only allow the relevant regulator to make rules

[15] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1032075/FRF_Review_Consultation_2021_-_Final_.pdf.

relating to the designated activity only, and not other unrelated activities of the firm.

1.5.14 Finally, viewing the DAR as an unsuitable means of regulating certain types of financial market infrastructure (FMI) — but observing that these sit outside the core FSMA authorisation regime — HM Treasury has proposed putting the FCA's general rulemaking power in relation to trade repositories and credit rating agencies on an appropriate statutory footing, and is considering granting the Bank of England a general rulemaking power in relation to central counterparties (CCPs) and central securities depositories (CSDs).

1.5.15 The proposed accountability and transparency requirements applicable to the financial regulators, and requiring the FCA and PRA to demonstrate that they are taking account of the public policy established by Parliament in the framework legislation, are described in more detail in the Chapters that follow.

1.5.16 It is inevitable that these initiatives will necessitate amendments to the Act. Until such time that the consultation closes and the detail and delivery of the final policy is apparent, it is difficult to predict the contours of these amendments.

SLAUGHTER AND MAY/

Part One: Overview of the Financial Services and Markets Act 2000

Back to contents

Part One: Overview of the Financial Services and Markets Act 2000

2. THE FINANCIAL SERVICES ACT 2021

2.1 Introduction

2.1.1 The Financial Services Act 2021 (the **FS Act 2021**) was initially put to Parliament as the Financial Services (Implementation of Legislation) Bill. However, the Bill fell following the prorogation of Parliament in October 2019. The Bill was again introduced to Parliament in October 2020 under the name of the Financial Services Bill, and received Royal Assent on 29 April 2021.

2.1.2 The intention behind the FS Act 2021 was to ensure that the UK's financial services regulatory framework continues to function effectively following the UK's departure from the European Union (EU), and to make certain important updates to that framework. Many of those reforms were made under the FS Act 2021 by way of changes to the Act, including, among other things, in the areas of: the prudential regulation of credit institutions and investment firms; and international access to UK financial services markets.

2.1.3 The FS Act 2021 also made amendments to other pieces of financial services legislation and regulation, including UK EMIR,[16] UK MAR[17] and UK PRIIPs Regulation[18] as well as, among other things, the legislative and regulatory regime for benchmarks in light of LIBOR transition. These amendments are, however, beyond the scope of this Chapter, and we do not, therefore, discuss them further here save as set out below.

16 The UK version of the Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories as it forms part of English law under the EUWA.

17 The UK version of Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC as it forms part of English law under the EUWA.

18 The UK version of Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs) as it forms part of English law under the EUWA.

2.2 Prudential regulation of investment firms and credit institutions

IFPR

2.2.1 The FS Act 2021 supports the formation of a revised prudential regime for investment firms, referred to as the Investment Firms Prudential Regime (the **IFPR**). The IFPR is based upon the framework implemented in the EU through the Investment Firms Regulation (the **IFR**[19]) and Investment Firms Directive (the **IFD**[20]). However, as the application date of the IFR and the IFD fell outside the Brexit transition period, the UK was not required to implement them.

2.2.2 Schedule 2 to the FS Act 2021 introduced a new Part 9C to the Act which sets out the legislative framework for the IFPR, including provisions that govern the FCA's role in making rules concerning the prudential regulation of FCA investment firms. The IFPR will apply to "MIFIDPRU investment firms", in other words, FCA investment firms as defined in new section 143A of the Act, inserted by the FS Act 2021.

2.2.3 Much of the substance of the IFPR will be implemented through rules made by the FCA under its existing rule-making powers, rather than by way of legislation. The FCA's baseline approach is for consistency with the EU regime unless it has specific reasons for diverging to reflect the nature of the UK market or otherwise to comply with the FCA's duties under Part 9C of the Act (as inserted by the FS Act 2021).

2.2.4 The new Part 9C to the Act also provides for the FCA's powers in respect of parent undertakings of FCA investment firms. The FS Act 2021 requires the FCA to introduce rules relating to group prudential requirements that apply to parent undertakings authorised under the Act, and to make rules that apply to parent undertaking which are not authorised under the Act where necessary or expedient for advancing the FCA's operational objectives.

2.2.5 A new section 143J also provides that the FCA may exercise its powers under the Act to require FCA investments firms to establish a parent undertaking with a head office in the UK. The FCA may exercise this power where two or more FCA investment firms are subsidiary undertakings of the same parent undertaking which has a head office outside of the UK in a country which, in the FCA's opinion, does not

[19] (EU) 2019/2033.
[20] (EU) 2019/2034.

impose requirements on the parent undertaking which have equivalent effect to requirements imposed by Part 9C rules.

2.2.6 It is worth noting in passing that the FS Act 2021 will amend, from 1 January 2022, the retained EU law version of the Capital Requirements Regulation (the **UK CRR**[21]), ending its application to investment firms other than PRA-designated firms and thereby allowing for a more efficient introduction of the IFPR.

Basel III and Basel 3.1

2.2.7 Basel III is a series of reforms proposed by the Basel Committee on Banking Supervision (**BCBS**) in respect of the regulatory framework regarding capital requirements. The reforms were introduced to address shortcomings in financial regulation exposed by the financial crisis of 2008.

2.2.8 In the EU, the reforms originally proposed by the BCBS were implemented primarily through the Capital Requirements Regulation (575/2013) (the **CRR**), which has been retained in the UK following Brexit. Those Basel III reforms subsequently finalised between 2010 and 2017 were implemented in the EU through the CRR II Regulation[22] (**CRR II**), and are known as the CRR II Basel standards.

2.2.9 Only a limited number of provisions in the CRR II applied in the EU (and by extension, the UK) prior to the end of the Brexit transition period. Certain of those provisions, which included, among other things, amendments to definitions in the CRR, and amendments to provisions relating to own funds and eligible liabilities in the CRR, applied from 27 June 2019. Certain other of those provisions, which included, among other things, amendments relating to consolidation methods and risk weights of certain exposures, applied from 28 December 2021.

2.2.10 The majority of CRR II provisions have, however, applied only since the end of the Brexit transition period (that is, from 28 June 2021), and did not, therefore, automatically apply in the UK under EU law. The UK Government has stated,[23] however, that it intends to implement the Basel III standards enshrined in the CRR II by way of amendments to the

21 The UK version of Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 as it forms part of English law under the EUWA.
22 (EU) 2019/876.
23 HM Treasury, *Policy Statement: Prudential standards in the Financial Services Bill: June update*, June 2020.

UK legislative and regulatory framework, albeit that it reserved the UK's right to depart from CRR II standards where it considered it necessary to do so considering the nuances of the UK financial services market such as the number, size and nature of credit institutions in the UK. This approach was implemented, in part, by the FS Act 2021 and further implementation will be achieved through secondary legislation and changes to the PRA Rulebook and PRA supervisory materials.

2.2.11 The BCBS agreed a further package of reforms in December 2017, known as the final Basel III standards or Basel 3.1 standards. The Basel 3.1 standards are intended to supplement and amend the Basel III standards in respect of calculating credit risk, market risk and operational risk. The Basel 3.1 standards are yet to be implemented in the EU or the UK, although HM Treasury, the PRA and the FCA have indicated[24] that they intend to give effect to those standards in the UK on 1 January 2023.

2.2.12 The FS Act 2021 sets out a mechanism for HM Treasury and the PRA to implement the CRR II Basel standards and the Basel 3.1 standards. Section 3 of the FS Act 2021 provides that HM Treasury may make regulations to revoke provisions of the UK CRR relating to an extensive list of matters specified in section 3. The PRA's rule-making powers under the Act, as discussed in further detail in Chapter 5 'The Prudential Regulation Authority', allow for the PRA to remedy the resulting regulatory gap by introducing new rules to implement the Basel standards in a tailored way. Alongside this, section 6 of the FS Act 2021 provides that HM Treasury may make regulations to amend the UK version of the Credit Rating Agencies Regulation[25], by making provisions related to the issuing and use of credit ratings which it considers necessary or desirable having regard to the CRR Basel standards.

2.2.13 Schedule 3 to the FS Act 2021 introduces a new Part 9D to the Act. Among other things, the new Part 9D to the Act defines the phrase "CRR rules" as including provisions in the UK CRR and rules relating to Basel standards which are or will be revoked. Part 9D also sets out which matters should be taken into account by the PRA in making CRR rules. Schedule 3 of the FS Act 2021 also provides the PRA with the power to make rules relating to matters such as prudential requirements and

24 Financial Services Regulatory Initiatives Forum, *Regulatory Initiatives Grid, September 2020.*
25 (EU) 2009/1060, as it forms part of English law under the EUWA.

governance in respect of bank holding companies that are approved or designated under Part 12B of the Act.

2.3 Access to financial services markets

Gibraltar Authorisation Regime

2.3.1 Section 22 of the FS Act 2021, alongside schedules 6 to 8 of the FS Act 2021, will amend Part 3 of the Act to establish a permanent market access regime between Gibraltar and the UK in respect of financial services, known as the Gibraltar Authorisation Regime (the **GAR**). Section 23 of the FS Act 2021 provides HM Treasury with the power to make, amend or revoke regulations relating to the cross-border carrying on of activities (or other interactions) between the UK and Gibraltar in respect of regulations specified in section 23 of the FS Act 2021.

2.3.2 The GAR looks to recognise Gibraltar's role as a UK Overseas Territory and to facilitate co-operation between UK and Gibraltarian governments and regulators. Continuing access of Gibraltar-based firms to the UK market under the GAR is dependent upon legislative and regulatory alignment and cooperation between Gibraltar and the UK, including in respect of authorisation and supervisory and enforcement practices.

2.3.3 The GAR is intended to ensure the access of Gibraltarian financial services firms to the UK's wholesale and retail markets as authorised persons under the Act on a services or branch basis, without the need for full authorisation under the Act. The regime is also intended to facilitate the access of UK firms to Gibraltar's financial services markets, although this is ultimately dependent on the legislative action of the Gibraltarian government. To this end, Schedule 6 of the FS Act 2021 inserts Schedule 2A (relating to Gibraltar-based persons carrying on regulated activities in the UK), and Schedule 7 inserts Schedule 2B (relating to UK-based persons carrying on activities in Gibraltar), into the Act.

2.3.4 Although the date on which the GAR will enter into force is yet to be appointed by HM Treasury, the regime is likely to commence on 1 January 2022, following the expiration of the temporary passporting regime provided for by the Financial Services (Gibraltar) (Amendment) (EU Exit) Regulations 2019 on 31 December 2021.

Overseas Funds Regime

2.3.5 On a date specified in regulations made by HM Treasury, sections 24 to 26 alongside Schedule 9 of the FS Act 2021 will amend Part 17 of the Act to establish the Overseas Funds Regime (the **OFR**) in respect of collective investment schemes and money market funds. The OFR will allow for the marketing of overseas collective investment schemes to UK investors, including retail investors, where HM Treasury has granted an equivalence determination in favour of that category of schemes from that particular overseas jurisdiction.

2.3.6 The temporary marketing permissions regime (the **TMPR**) currently operating under the Collective Investment Scheme (Amendment etc) (EU Exit) Regulations 2019 allows for collective investment schemes to temporarily continue marketing in the UK. The FS Act 2021 has extended the operation of the TMPR by two years, until the end of 2025, to allow for the OFR to be established.

2.4 Variation or cancellation of permission to carry on regulated activity

2.4.1 Section 28 of the FS Act 2021 gives effect to Schedule 11 which amends Part 4A of the Act, relating to permission to carry on regulated activities. The FS Act 2021 inserts a new section 55JA into the Act, giving effect to Schedule 6A which confers a power on the FCA to vary or cancel Part 4A permissions of FCA-only authorised firms. Schedule 6A allows the FCA to vary or cancel the permissions of a firm which it considers to be no longer carrying on a regulated activity to which its permissions relate. The FCA may reach this conclusion on the basis of, for example, a firm's failure to pay a periodic fee or provide information as required by the FCA Handbook. This power to vary or cancel permissions under Schedule 6A sits alongside the FCA's power under section 55J of the Act to vary or cancel permissions on the grounds of, among other things, a firm's apparent failure to satisfy threshold conditions. The FCA's powers under section 55J are discussed further in Chapter 9 'Authorisation and permission'.

2.4.2 Schedule 6A of the Act also gives the FCA the power to restore a person's varied or cancelled authorisation upon their application, where it is just and reasonable to do so.

2.4.3 In September 2021, the FCA published a consultation paper, 'New cancellation and variation power: Changes to the Handbook and

Enforcement Guide'[26] on changes to the FCA Handbook and Enforcement Guide reflecting the FCA's new powers under Schedule 6A. The consultation closed on 29 October 2021.

2.5 Duty of care to consumers

2.5.1 Section 29 of the FS Act 2021 came into force on 1 July 2021 and requires the FCA to carry out a public consultation about whether it should make rules of general application providing that authorised firms owe a duty of care to consumers.

2.5.2 This requirement should be understood in the context of developments regarding a potential consumer duty for authorised firms that preceded the passing of the FS Act 2021. This includes the FCA's discussion paper, 'A duty of care and potential alternative approaches'[27] published in July 2018 which asked stakeholders to consider the potential merits of introducing a statutory duty of care and the subsequent feedback statement[28] published in April 2019 which explained the FCA's decision not to propose to implement a consumer duty through statute.

2.5.3 In May 2021, the FCA published a consultation paper, 'A new Consumer Duty' which closed for feedback in July 2021.[29] In this paper, the FCA explained that a consumer duty would be achieved through the introduction of a new consumer principle to be inserted in the FCA Handbook's Principles for Businesses sourcebook (PRIN), as supported by a set of cross-cutting rules and outcomes, rather than through being prescribed as a statutory duty in the Act. The FCA expects to publish a second consultation on a potential consumer duty by December 2021 and will make any new rules by July 2022, in line with the timeframe required by section 29 of the FS Act 2021.

2.6 Other changes

2.6.1 In addition to the reforms discussed above, the FS Act 2021 also makes certain other amendments to the Act, including, among other things:

(a) Section 42 of the FS Act 2021 inserts subsection (1A) in paragraph 2A of Schedule 1ZA of the Act. This newly inserted

[26] CP21/28: New cancellation and variation power: Changes to the Handbook and Enforcement Guide, September 2021.
[27] DP18/05: Discussion Paper on a duty of care and potential alternative approaches, July 2018.
[28] FS19/2: A duty of care and potential alternative approaches: summary of responses and next steps, April 2019.
[29] CP21/13: A new Consumer Duty, May 2021.

provision subjects the person appointed as chief executive of the FCA to a fixed term of five years. This five year term can be renewed once only, such that an appointee's maximum tenure in the role is ten years.

(b) Section 43 of the FS Act 2021 amends the definitions of "qualifying provision" in section 425C of the Act and "legislative function", in paragraph 8 of Schedule 1ZA to the Act. In turn, this determines the scope of powers under the Act to make subordinate legislation under retained direct EU legislation. "Qualifying provision" is amended to include regulations made by HM Treasury and rules made by the regulators under new powers contained in retained direct EU legislation, such that these rules made under retained EU legislation are subject to regulatory powers and functions under the Act, if HM Treasury specifies this. "Legislative function" is amended to include rule-making powers conferred on the FCA by changes affected in retained direct EU legislation by the FS Act 2021.

(c) Section 37 of the FS Act 2021 extends the power provided to HM Treasury in section 107(6) of the Financial Services Act 2012 to disapply provisions of the Consumer Credit Act 1974 (the **CCA**) in respect of an activity which has become a regulated activity under the Act. Under the FS Act 2021, this power is extended to the activities of:

(i) entering into a borrower-lender-supplier agreements for fixed-sum credit or running-account credit as a lender, as described in articles 60F(2) or (3) of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544) (the **Regulated Activities Order**); and

(ii) exercising, or having the right to exercise, the lender's rights and duties under such an agreement.

3. OVERVIEW

3.1 Introduction

3.1.1 This chapter provides a brief history of the financial services regulatory framework in the UK and a summary of the main features of the Financial Services and Markets Act 2000 (the **Act**), which came into force in December 2001 and which is the bedrock of financial regulation in the UK. Although the Act remains the centrepiece statute governing the UK financial services sector, it is important to note that the legal and regulatory framework applicable to the UK financial services sector is not confined solely to the Act or legislation made under it.

3.1.2 Over the years, the Act has been amended to reflect certain aspects of EU law to the extent such law did not have direct effect in the UK. This continued to be the case up until 31 December 2020 (at which point the so-called "Brexit transition period" came to an end). Notwithstanding the UK's departure from the EU, the Act will continue to develop in line with changes to the regulatory regime at both national and international level.

3.1.3 The Government's November 2021 consultation on the Future Regulatory Framework Review (**FRF Review**) commented that the model of regulation underpinned by the Act "*remains the most appropriate way to regulate financial services in the UK*". Notwithstanding this statement, the consultation also contains a number of significant proposals for change, including to the regulators' statutory objectives and enhanced mechanisms for accountability, scrutiny and oversight of the regulators by Parliament, HM Treasury and stakeholders. It puts forward a plan to broaden the regulators' rulemaking powers to allow them to design and implement requirements covering all areas of financial services regulation currently in retained EU law. Moreover, it proposes a new Designated Activities Regime (**DAR**) for activities, products or conduct that do not constitute "regulated activities" for the purposes of the Act, further extending the regulators' current rulemaking remit. Details can be found in the Chapters that follow.

3.2 The unsteady progress of regulatory reform — a brief history

3.2.1 A comprehensive system of regulation for investment business was first introduced in the UK by the Financial Services Act 1986 (the **FS Act 1986**), which came into effect in 1988. Banking and insurance were

at that time already regulated for prudential matters under separate, industry-specific legislation.

3.2.2 The nature of the core activities and instruments which became subject to regulation in 1988 has remained fairly constant, although the scope of regulation has evolved and widened over time (for example, to cover the regulation of residential mortgages, consumer credit, anti-competitive behaviour and market conduct activity). This was largely in response to EU developments and to address consumer protection and market conduct concerns, particularly as a result of the financial crisis of 2007-2008.

3.2.3 However, in one vital respect, the regulation of financial services has undergone several radical changes. These changes relate to the identity and powers of the regulator or regulators. In a number of different ways, the system of regulation has been perceived as flawed and as needing fundamental political re-engineering at (what seem now to be) fairly regular intervals —

(a) The FS Act 1986 introduced "self-regulation" to investment firms by sector membership organisations (for example, investment managers, brokers and investment banks) overseen by a central co-ordinating body, the Securities and Investments Board. The Bank of England (the **Bank**) remained responsible for prudential regulation of banks. The Department of Trade and Industry policed insurance companies.

(b) When the Labour government came to power in 1997, it decided that self-regulation under the FS Act 1986 should give way to central regulation by the former Securities and Investments Board, then renamed the Financial Services Authority (the **FSA**). This was, in part, as a result of various financial upheavals and scandals, but especially in response to the growth of multi-service firms which rendered strictly sectoral regulation out of date and needlessly complicated. In separate moves, the regulation of banks and insurers under the respective industry-specific statutes was also transferred to the FSA.

(c) The bringing together of these historically separate legislative frameworks was completed by the consolidation of all major financial services legislation under the Act, leaving the FSA as the sole regulator of financial services (with the anomalous exception until 1 April 2014 of the provision of consumer credit,

which had up until then remained subject to the oversight of the Office of Fair Trading (the **OFT**)).

(d) After the coalition government came to power in 2010, the FSA was pronounced a failure, at fault both for shortcomings in regulating the conduct of financial services firms and for not anticipating and mitigating the financial crisis which erupted in 2007. In consequence, regulatory responsibility was split again in 2013 — not, as in former days, by sector but by theme.

(e) The Prudential Regulation Authority (the **PRA**) is responsible for the prudential supervision of banks, building societies, credit unions, insurers and certain large investment firms. The Financial Conduct Authority (the **FCA**) is responsible for the conduct supervision of all regulated firms and for the prudential supervision of firms not otherwise supervised by the PRA.

3.3 Summary of the Act's main features

The regulators

3.3.1 The Act prescribes the duties and objectives of the FCA and the PRA in carrying out their respective functions; and contains provisions on the regulatory principles to be applied by both regulators as well as provisions governing the interaction between both regulators. It also gives the regulators the power to make rules which authorised firms must comply with.

Authorisation or exemption to carry on regulated activities

3.3.2 The Act sets out the regulatory perimeter for the regulation of financial services in the UK. Regulation extends over mainstream financial services such as banking, insurance and securities (including commodity derivatives) businesses and also covers residential mortgages, consumer credit, insurance mediation and certain other activities.

3.3.3 The basic proposition is that, save where an applicable exemption applies, any person carrying on one or more regulated activities in the UK "by way of business" is first required to seek formal authorisation to do so from the PRA or FCA as appropriate (otherwise, carrying on such activity without authorisation or an exemption is a criminal offence). "By way of business" is a term of art having different meanings depending on the regulated activity in question, as set out in the Financial Services and Markets Act 2000 (Carrying on Regulated

Activities by Way of Business) Order 2001[30] (the **Business Order**), however, at a minimum it typically requires there to be a degree of continuity and a commercial element. "In the UK" is also a term of art and its meaning generally varies depending on the activity and/or financial product in question.

3.3.4 Any firm seeking authorisation must meet (and continue to meet on an ongoing basis) certain threshold conditions covering, in particular, financial resources, business plan and organisation, the quality of management and the nature of the firm's owners. If authorisation is granted, the firm becomes an authorised firm (or "authorised person") for the purposes of the Act.

3.3.5 The activities which constitute "regulated activities" (and thus require an authorisation or exemption) are set out in detail in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001[31] (the **Regulated Activities Order**) (which has been subject to much amendment over the years) — this specifies the activities and corresponding products (generally called "investments") subject to regulation and also contains a number of exclusions where regulation is not required.

3.3.6 It is also worth noting that, while the regulators' focus is naturally on those firms which it regulates, the PRA and the FCA also have certain powers in relation to unregulated parent entities of such firms.

Supervision of authorised firms

3.3.7 In addition to being subject to certain legislative requirements, an authorised firm is also subject to the rules and guidance contained in the FCA Handbook and, if dual-regulated, the PRA Rulebook. The regulators' supervisory powers, which are set out in or are derived from the Act, include (among other things):

(a) the supervision of a firm's capital adequacy, organisation and systems and controls;

(b) conduct of business requirements;

(c) information-gathering and investigation powers; and

30 SI 2001/1177.
31 SI 2001/544.

(d) enforcement powers, including unlimited fines, restrictions on business activities, censures, injunctions and variation or cancellation of permissions.

Approval and oversight of individuals

3.3.8 In tandem with the authorisation of firms, the Act provides a regime for the regulators (and, to an extent, the firm itself also) to vet, approve and oversee individuals working in or for those firms such as:

(a) senior management (including, where appropriate, managers situated elsewhere in a firm's group);

(b) individuals dealing with customers;

(c) traders; and

(d) compliance and risk personnel.

3.3.9 Those individuals judged by the regulator to have fallen short of the standards expected may be the subject of a sanction such as a fine and/or prohibition order. In certain circumstances, the regulator also has the power to compel an authorised firm to remove a member of senior management.

Other

3.3.10 Some of the other main features of the Act include:

(a) rules regarding financial promotions;

(b) mechanisms which provide for a court-sanctioned transfer of certain types of regulated business (most notably, banking and insurance business);

(c) provisions relating to market abuse (including the power of the FCA to issue sanctions for market abuse);

(d) mechanisms for hearings and appeals (for example, of decisions made by the regulators);

(e) a framework for the UK ring-fencing regime;

(f) a change in control regime where regulatory pre-approval is required in order to acquire or increase significant control over authorised firms;

(g) a framework for the Financial Services Compensation Scheme;

(h) a framework for the Ombudsman Scheme;

(i) provisions in relation to the operation of collective investment schemes;

(j) provisions in relation to the authorisation and supervision of investment exchanges and clearing houses;

(k) a framework for the UK listing regime;

(l) a power for the FCA to require the suspension or removal of financial instruments from trading;

(m) provisions in relation to the insolvency of an authorised firm; and

(n) a power for the regulators to prosecute certain offences.

SLAUGHTER AND MAY/

Part Two: The Regulators

Back to contents

Part Two: The Regulators

4. THE BANK OF ENGLAND AND THE FINANCIAL POLICY COMMITTEE

4.1 Overview

4.1.1 The Bank of England (the **Bank**) is the central bank of the UK. The Bank's core statutory objectives are monetary stability (maintaining stable prices and confidence in the UK currency) and maintaining financial stability (detecting and reducing threats to the financial system as a whole, including crisis management, such as the resolution of failed or failing banks and, as part of its central bank responsibilities, the provision of liquidity insurance to the financial sector and emergency liquidity assistance)[32]. Following the financial crisis, the Banking Act 2009 gave the Bank key responsibilities in the operation of the special resolution regime (**SRR**).

4.1.2 The Bank is also responsible for the supervision of the certain types of financial market infrastructure, including recognised clearing houses[33] (**RCHs**), that is, central counterparties (**CCPs**) (see further Chapter 20 'Recognised investment exchanges and recognised clearing houses') and for the regulation of operators of electronic settlement systems[34]. It also has responsibility for the oversight of inter-bank payment systems[35].

4.1.3 The PRA was created as a wholly-owned subsidiary of the Bank, operating independently in regulating deposit-takers, insurance companies and certain investment firms. However, pursuant to changes introduced by the Bank of England and Financial Services Act 2016 (the **2016 Act**), the PRA's functions were transferred to the Bank itself, acting through the Prudential Regulation Committee. The role and constitution of the PRA is considered further in Chapter 5 'The Prudential Regulation Authority'.

4.1.4 The affairs of the Bank are generally managed by the Court of Directors of the Bank (the **Court of Directors**).

32 Sections 2A and 11 of the Bank of England Act 1998 (the **BoE Act**).
33 Under Part 18 of the BoE Act.
34 Under Part 2 of the Uncertificated Securities Regulations 2001 (SI 2001/3755).
35 Under Part 5 of the Banking Act 2009.

4.1.5 The Financial Policy Committee (**FPC**) is a committee of the Bank, responsible for considering macro-prudential issues affecting economic and financial stability. Its status is aligned with that of the Monetary Policy Committee.

4.1.6 There is a clear need for close co-operation between the Bank and other regulators. By way of example, as the regulator of systemically important infrastructure, the Bank is required to co-ordinate closely with the FCA, which is responsible for market regulation. The FCA and the Bank also co-operate on operational resilience matters through the Cross-Market Operational Resilience Group. A Memorandum of Understanding (**MoU**) between the Bank of England, the PRA and the FCA is considered further in Chapter 7 'Co-ordination between the PRA and the FCA'. The Bank is also party to a number of MoUs with other organisations, including the Treasury[36] and other UK regulators (such as the Payment Systems Regulator[37]) as well as overseas central banks (including the European Central Bank[38]).

4.1.7 The 2016 Act made reforms to the governance of the Bank and brought it within the remit of the National Audit Office (**NAO**). The NAO must now be consulted during the appointment process for the Bank's external auditors and on the work programme for the audit itself[39].

4.1.8 In March 2020, the Treasury launched a consultation to explore how the UK regulatory framework for financial services needs to adapt post-Brexit (referred to as the Future Regulatory Framework Review, or FRF Review). In response, in April 2020, the Financial Services Regulatory Initiatives Forum was launched to strengthen co-ordination between its members (comprising representatives from the Bank, the FCA, the Payment Systems Regulator, the Competition and Markets Authority, the Information Commissioner's Office, the Pensions Regulator and the Financial Reporting Council).[40]

4.2 Structure of the Bank

4.2.1 The Bank was established as a corporate body by Royal Charter under the Bank of England Act 1694. There are now a number of statutory

36 https://www.bankofengland.co.uk/-/media/boe/files/memoranda-of-understanding/financial-relationship-between-hmt-and-the-boe-memorandum-of-understanding.pdf.
37 https://www.bankofengland.co.uk/-/media/boe/files/memoranda-of-understanding/bank-fca-psr-and-pra-supervision-of-payment-systems.pdf?la=en&hash=F0357FE01ABE77FB562C6AF471AE05B029C2C213.
38 https://www.bankofengland.co.uk/-/media/boe/files/memoranda-of-understanding/bank-fca-ecb.pdf.
39 Section 7ZA of the BoE Act.
40 https://www.bankofengland.co.uk/report/2021/third-edition-of-the-regulatory-initiatives-grid.

provisions in force which are concerned with the Bank's organisation, governance, powers and functions.

4.3 The Financial Policy Committee

Composition and procedure

4.3.1 The members of the FPC are:

- the Governor of the Bank (acting as chair of the FPC);
- the Deputy Governors of the Bank[41];
- the chief executive of the FCA;
- one member appointed by the Governor of the Bank after consultation with the Chancellor of the Exchequer;
- five "external" members appointed by the Chancellor of the Exchequer; and
- a representative of the Treasury.[42]

4.3.2 Appointments to the FPC made by the Governor of the Bank or the Chancellor of the Exchequer are normally for a three-year period.[43] An individual cannot be appointed to the FPC more than twice[44]. The Chancellor has the power to extend the term of a member appointed by him by up to six months[45].

4.3.3 The presence of the Deputy Governor for Prudential Regulation (currently the chief executive of the PRA) and the chief executive of the FCA on the FPC is to ensure that the FPC takes into account the views of these regulators and also has access to micro-prudential and conduct-of-business expertise.

4.3.4 The FPC meets at least four times a year and, except in certain limited circumstances (including where the FPC considers that publication within the required time is against the public interest), the Bank must

41 Comprising the Deputy Governors for Financial Stability, Markets and Banking, Monetary Policy and Prudential Regulation.
42 Section 9B of the BoE Act.
43 Schedule 2A, paragraph 1(1) of the BoE Act.
44 Schedule 2A, paragraphs 1 and 2 of the BoE Act.
45 Schedule 2A, paragraph 3 of the BoE Act.

publish a record of each meeting within six weeks from the date of the relevant meeting[46].

4.3.5 FPC members are subject to a statutory code of practice regarding conflicts of interest (most recently updated in February 2019) and the Bank has published (most recently updated in February 2020) additional communications guidance for FPC members, which covers, among other things, discussion of monetary policy issues and the 'purdah' period which applies between the date of an FPC policy meeting and the date on which the formal record of that meeting is published.

4.3.6 The FPC is accountable to the Bank's Court of Directors, Parliament and the Treasury. The Treasury may also make recommendations to the FPC about matters which the FPC should regard as relevant to the Bank's financial stability objective and the exercise of the FPC's functions.

Functions and objectives

4.3.7 Following the financial crisis it was recognised, both internationally and in the UK, that insufficient attention had been given to the interconnectivity of the financial system and the impact this could have on financial stability. To fill this perceived gap in the pre-existing "tripartite" regulatory regime, the UK Government created the FPC as a dedicated macro-prudential authority. The Government is not proposing to alter the macro-prudential elements of the UK's regulatory framework as part of the FRF Review and the FPC is not within scope of the changes proposed in that context.

4.3.8 The FPC's primary statutory objective is to contribute to the achievement of the Bank's financial stability objective by identifying, monitoring and taking action to remove or reduce systemic risks with a view to protecting and enhancing the resilience of the UK financial system.

4.3.9 Systemic risk is defined to mean a risk to the stability of the whole, or a significant part, of the UK financial system; it is immaterial whether the risk arises in the UK or elsewhere. Such systemic risks are stated to include, in particular:

- those attributable to structural features of financial markets, such as connections between financial institutions;

[46] Schedule 2A, paragraph 10; and section 9U of the BoE Act.

- those attributable to the distribution of risk within the financial sector; and
- unsustainable levels of leverage, debt or credit growth.[47]

4.3.10 The stated aim of the FPC is to "*ensure that the UK financial system is prepared for, and resilient to, the wide range of risks it could face so that the financial system can serve UK households and businesses in bad times, as well as good*"[48].

4.3.11 In a 2019 speech entitled '*Central bank independence as a prerequisite for financial stability*' delivered by Richard Sharp, an outgoing Member of the FPC, it was noted that "[t]*he FPC functions well. I've seen it assess and analyse risks from the banking sector, Scottish referendum, Brexit risk, the Europe crisis, cyber risk, and domestic credit creation… debate between members is challenging and we are well supported by the dedicated team within the Bank of England*[49]". Recently, the FPC has sought to fortify the resilience of the financial system by:

- building the operational resilience of individual firms;
- building cyber resilience; and
- examining the risks arising from innovation in payments.

These priorities are frequently addressed in the FPC's biannual reports on financial stability (**Financial Stability Reports**).

4.3.12 The FPC confirmed in its most recent response to the Treasury's annual 'remit' letter that it considers that the risks from climate change are relevant to its primary objective[50]. In order to better assess these risks, the FPC and Prudential Regulation Committee launched a climate change-focused Biennial Exploratory Scenario exercise in June 2021, which was intended, among other things, to provide useful information for the FPC on the extent of financial system exposures to risks associated with the transition to a net-zero economy and the potential physical effects of climate change. It was also designed to help the FPC assess the current state of climate-related risk management

47 Section 9C of the BoE Act.
48 https://www.bankofengland.co.uk/financial-stability-report/2021/july-2021.
49 https://www.bankofengland.co.uk/-/media/boe/files/speech/2019/central-bank-independence-as-a-prerequisite-for-financial-stability-speech-by-richard-sharp.pdf?la=en&hash=1067AFDA323249641E37C2B4B3ED13FDA72B4EB6.
50 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/965778/FPC_Remit_and_Recommendations_Letter_2021.pdf.

capabilities across the financial sector and understand how participating UK banks and insurers might seek to adapt their business models in the face of different climate scenarios.

4.3.13 The FPC has a secondary objective to support the economic policies of the Government, including its objectives for growth and employment, thereby enshrining the requirement that, in pursuing its financial stability objective, the FPC must act proportionally and consider the impact of its actions on the growth of the economy. The BoE Act states expressly that the FPC is not authorised or required to take action that it believes would be likely to have a significant adverse effect on the capacity of the financial sector to contribute to the growth of the UK economy in the medium or the long term[51]. In practice, and as noted in the FPC's most recent remit letter, actions that seek to protect and enhance the resilience of the UK financial system would be expected to contribute positively to growth over the medium and long term, and therefore the FPC's primary and secondary objectives will often be complementary.

4.3.14 In addition to monitoring the stability of the UK financial system, other functions of the FPC are to:

- give directions to the FCA or the PRA, requiring them to ensure the implementation of a macro-prudential measure described in the direction;
- make recommendations within the Bank, in particular relating to the provision by the Bank of financial assistance to financial institutions and the exercise by the Bank of its functions in relation to payment systems, settlement systems, clearing houses and central securities depositories;
- make recommendations to the Treasury, the FCA, the PRA or other persons (for example, industry or other regulatory bodies) relating to the exercise of certain of their respective powers; and
- prepare and publish the Financial Stability Reports.[52]

4.3.15 The Bank of England Act 1998 (Macro prudential Measures) (Amendment) Order 2021 (**MPM Order 2021**), which came into force on 21 July 2021, amends the statutory instruments that give the FPC the

[51] Sections 9C(1) and 9C(4) of the BoE Act.
[52] See, respectively: sections 9G, 9H and 9L; 9G and 9O; 9G, 9P, 9Q and 9R and 9G and 9W of the BoE Act.

power to direct the PRA and the FCA to take action with respect to specified macro-prudential measures relating to sectoral capital requirements, mortgage lending and the leverage ratio.[53] It also extends the FPC's power to make specifications as to how the leverage ratio exposure measure is defined for the purposes of the FPC's leverage measures. Moreover, the MPM Order 2021 ensures that all macro-prudential measures, as currently set out in secondary legislation, can be applied to holding companies that are approved or designated by the PRA.

4.3.16 In the exercise of its functions, the FPC must have regard to:

- the Bank's financial stability strategy (unless the function in question concerns the FPC's role in determining or reviewing that strategy);
- the principle of proportionality (meaning that any burdens resulting from its actions are proportionate to achieve the benefits);
- the contribution the FPC can make to the Bank achieving its financial stability objective by disclosing the FPC's views about possible systemic risks or disclosing other information about possible systemic risks; and
- the international obligations of the UK.[54]

4.3.17 In its work involving the FCA or the PRA, the FPC must, so far as it is possible to do so while contributing to the Bank's financial stability objective and supporting the economic policies of the Government, seek to avoid exercising the FPC's functions in a way that would prejudice the advancement by the FCA of any of its operational objectives or the advancement by the PRA of any of its objectives[55].

Recommendations

4.3.18 Where the FPC makes a recommendation to the FCA or the PRA, the FPC can make the recommendation on a 'comply-or-explain' basis[56], in which case, if the FCA or the PRA does not implement the

53 https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/consultation-paper/2021/june/cp1421.pdf?la=en&hash=B878D85FFC2CD5B98870EFF8F26214027C5E3D6C.
54 Section 9F(1) and 9F(3) of the BoE Act.
55 Section 9F(2) of the BoE Act.
56 Section 9Q(3) of the BoE Act.

recommendation, it must explain in writing to the FPC why it did not comply.

4.3.19 Such recommendations may relate to all regulated persons or to regulated persons of a specified description, but not to a specified regulated person.

4.3.20 The FPC may also advise other parts of the Bank[57]. The FPC is not permitted to advise other parts of the Bank on the provision by it of financial assistance in relation to a particular financial institution, or the exercise by the Bank of powers under the special resolution regime[58].

4.3.21 Recommendations by the FPC to the Treasury can include recommendations in relation to the regulatory perimeter (that is, which activities should be regulated and which should not and the division of supervisory responsibilities between the PRA and the FCA)[59]. This gives the FPC an important role in monitoring activities which may have an impact on financial stability and which it therefore considers should be regulated, or subject to prudential regulation by the PRA has been particularly relevant in the context of the ongoing debate on the regulation of shadow banking and the attention conferred on certain 'fintech' services[60].

4.3.22 The FPC may also make recommendations to the Treasury in relation to its power to prescribe new 'macro-prudential measures' over which the FPC is to have a power of direction.[61]

4.3.23 The FPC may also make recommendations to persons other than the FCA, PRA, the Bank and the Treasury[62] including the financial services industry, other UK bodies (such as the Financial Reporting Council) or international bodies[63].

57 Section 9O of the BoE Act.
58 Parts 1 to 3 of the Banking Act 2009.
59 Section 9P(2)(b) and (c) of the BoE Act.
60 Speech on 'The role of the leverage ratio and the need to monitor risks outside the regulated banking sector' given by Sir Jon Cunliffe, Deputy Governor for Financial Stability at the Bank, and member of the Monetary Policy Committee, FPC and the PRA Board (17 July 2014); Speech on 'Enabling the FinTech transformation: Revolution, Restoration, or Reformation?' by Mark Carney (17 June 2016).
61 Section 9P(2)(a) of the BoE Act.
62 Section 9R of the BoE Act.
63 Paragraph 2.33 — HM Treasury: A new approach to financial regulation: building a stronger system (February 2011) https://webarchive.nationalarchives.gov.uk/20140325032409/https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/81411/consult_newfinancial_regulation170211.pdf.

Directions relating to macro-prudential measures

4.3.24 As mentioned above, one of the functions of the FPC is to give directions to the FCA or the PRA requiring that body to ensure the implementation of a macro-prudential measure described in the direction. The recipient of the direction must comply as soon as reasonably practicable and report to the FPC on how it is complying with the direction.

4.3.25 If the FPC makes a direction that concerns measures that are stricter than the requirements set out in the UK CRR or legislation made under it, the FCA or the PRA (as applicable) may need to comply with additional procedures set out in Articles 458 to 458C of the UK CRR. The same process applies to FPC recommendations to the FCA or the PRA made under section 9Q of the BoE Act.

4.3.26 Directions given by the FPC may relate to all regulated persons or to a specified class of regulated persons (for example, banks). However, they may not relate to a specific regulated person. In addition, a direction may not require the regulator to implement the provisions of the direction by specified means or within a specified period, although it may include recommendations as to the means to be used and the timing of implementation. Finally, a direction may not require the PRA or the FCA to do anything that it does not have the power to do.[64]

4.3.27 Any direction given by the FPC to the PRA and the FCA must be copied to the Treasury, which will lay it before Parliament. Relevant macro-prudential measures must be prescribed in a Treasury order.

4.3.28 The Treasury has made the following macro-prudential measures under the BoE Act:

- An order providing the FPC with power to direct the PRA to vary certain institutions' capital requirements against exposures to specific sectors over time.[65] This order allows the FPC to adjust sectoral capital requirements (**SCRs**) for the exposures of banks and certain investment firms (for example, in relation to commercial property lending) with a view to enhancing the resilience of the financial system.

64 Section 9H of the BoE Act.
65 The Bank of England Act 1998 (Macro-prudential Measures) Order 2013 (SI 2013/644).

- An order providing the FPC with powers to direct the PRA and/or the FCA to limit the proportion of owner-occupied mortgage contracts that lenders can enter into at a loan-to-value percentage or a debt-to-income ratio above a maximum specified by the FPC.[66] This allows the FPC to restrict the proportion of high loan-to-value mortgages that lenders can lend and/or the proportion of mortgages extended to borrowers with a high ratio of debt to income. Prior to the introduction of this direction power, in June 2014 the FPC made a recommendation to the PRA and the FCA to ensure that mortgage lenders do not extend more than 15 per cent. of their total number of new residential mortgages at loan-to-income ratios at or greater than four point five. The FPC's powers of direction over the housing market were subsequently extended to cover limits on buy-to-let mortgage lending by reference to loan-to-value ratios and interest coverage ratios in 2016.

- An order providing the FPC with powers of direction over a minimum leverage ratio requirement, to be set and varied by the PRA, for banks and certain investment firms[67] as well as a countercyclical leverage ratio buffer for globally systemically important firms (**G-SIIs**). The FPC has also been granted powers to direct a supplementary leverage ratio buffer for certain firms, including PRA-regulated investment firms subject to the systemic risk buffer. The FPC subsequently made a direction to the PRA in 2015 requiring it to implement a leverage-ratio framework. The PRA implemented this framework in the Leverage Ratio section of its Rulebook and through Supervisory Statement 45/15 (and, in respect of the additional buffer for G-SIIs, through firm-specific requirements). In 2018, the PRA applied the leverage ratio framework to ring-fenced banks within scope of the leverage ratio framework, with FPC support. As a result of the UK implementation of the Capital Requirements Directive (2019/878/EU) (CRD V), in December 2020, the Other Systemically Important Institutions Buffer (O-SII buffer) replaced the previous buffer used to address the risk posed by systemically important institutions, the systemic risk buffer.

66 The Bank of England Act 1998 (Macro-prudential Measures) Order 2015 (SI 2015/909) and The Bank of England Act 1998 (Macro-prudential Measures) Order 2016 (SI 2016/1240) (Macro-prudential Measures Order 2016). This applies to buy-to let mortgage lending.

67 The Bank of England Act 1998 (Macro-prudential Measures) (No.2) Order 2015 (SI 2015/905).

4.3.29 The BoE Act requires the FPC to prepare a written statement of its general policy in relation to the exercise of its powers of direction[68]. The FPC published a policy statement setting out its approach regarding the SCR tool, with reference to a range of indicators, in January 2014 and a policy statement on its powers over housing policy instruments in November 2016. The FPC's policy statement on the leverage ratio tools was last updated in October 2017. The policy statement on powers over leverage ratio tools was updated in October 2021 to reflect changes made by the FPC to the UK leverage ratio framework as part of its 2021 leverage ratio review.

4.3.30 Additional macro-prudential measures may be added to the FPC's "toolkit" as required. The Government has previously considered that there would be a case for adding to the FPC's directive tools in circumstances where the FPC provided evidence that:

- there were potential risks in those sectors that needed to be addressed;
- the tools would work effectively in those sectors; and
- the tools would not create material unintended consequences or costs in excess of the benefits that they would be expected to deliver if implemented in those sectors[69].

4.3.31 When implementing a direction given to it by the FPC, the PRA or the FCA is required to comply with normal rule-making procedures, such as consultation and a cost-benefit analysis. However, in urgent situations, the PRA (where a delay would be prejudicial to the safety and soundness of the firms it supervises) and the FCA (where a delay would be prejudicial to consumers) may waive consultation requirements. In addition, the Treasury can modify or exclude any procedural requirements that would otherwise apply under the Act on a tool-by-tool basis[70]. The Government has said that it does not expect to use this power frequently and will only do so where full procedural requirements are clearly unnecessary[71]. The existing macro-prudential measures orders allow certain procedural requirements to be disapplied

68 Section 9M of the BoE Act.
69 The Treasury consultation document 'The Financial Services Bill: the Financial Policy Committee's macro-prudential tools' (September 2012), Cm 8434, paragraph 4.48.
70 Section 9I(2) of the BoE Act.
71 The Treasury consultation document 'The Financial Services Bill: the Financial Policy Committee's macro-prudential tools' (September 2012), Cm 8434, paragraph 4.53.

in limited circumstances, which involve the recalibration of an existing measure only.

Review of UK leverage ratio framework

4.3.32 In June 2021, the FPC conducted a comprehensive review of the UK leverage ratio framework in light of revised international standards and its ongoing commitment to review its policy approach, co-ordinating closely with the PRA. The underlying consultation (CP14/21)[72] notes that the "*leverage ratio is a relatively simple indicator of a firm's solvency that relates a firm's capital resources to the nominal value of its exposures, as opposed to the riskiness of its portfolio. The purpose of the leverage framework is to make the capital framework robust against the inherent errors and uncertainties in assigning risk weights*".

4.3.33 Among other things the FPC proposed to extend the scope of the application the leverage framework to include banks and PRA-regulated investment firms with significant non-UK assets. It also suggested the exclusion of qualifying central bank claims from the exposure measure, as set out in the FPC's earlier 2015 Policy Statement. Having considered the consultation responses, the FPC decided to finalise its Direction and Recommendation on the UK leverage ratio framework in the form presented in its consultation[73]. The only exception was a change to the deposit-matching criteria required when exempting eligible central bank claims from the total exposure measure. The requirements are applied at a consolidated, sub-consolidated and individual (solo) level (including to those firms newly in scope with significant non-UK assets).

Power to set the countercyclical capital buffer

4.3.34 Since 1 May 2014, the FPC has been responsible for the quarterly setting of the countercyclical capital buffer (**CCB**) rate for the UK[74]. The CCB tool allows the FPC to vary capital requirements in relation to all loans and other exposures of banks and certain investment firms to borrowers in the UK. The FPC has published a policy statement explaining its

72 https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/consultation-paper/2021/june/cp1421.pdf.

73 The final text of the Direction and Recommendation can be found here: https://www.bankofengland.co.uk/prudential-regulation/publication/2021/june/changes-to-the-uk-leverage-ratio-framework.

74 Regulation 10(1) of the Capital Requirements (Capital Buffers and Macro-prudential Measures) Regulations (SI 2014/894).

approach to setting the countercyclical capital buffer (published in April 2016 and updated in December 2019).[75]

4.3.35 The PRA's regulatory framework concerning the buffer is set out in the Capital Buffers Part of its Rulebook and in its Supervisory Statement (SS6/14) on capital buffers. The FCA's equivalent regulatory framework is set out in its Prudential sourcebook for Investment Firms (IFPRU) at IFPRU 10.3.

4.3.36 In its July 2021 Report[76], the FPC noted it expects to maintain the UK countercyclical capital buffer rate at 0% until at least December 2021. Due to the usual 12-month implementation lag, any subsequent increase would therefore not be expected to take effect until the end of 2022 at the earliest. The FPC also noted that the pace of return to a standard UK rate of 2% will depend on banks' ability to rebuild capital in light of the impact of the COVID-19 pandemic.

FPC accountability

4.3.37 The 2019 speech noted elsewhere in this chapter and delivered by an outgoing FPC member referred to the "comprehensive accountability framework" within which the FPC operates.

4.3.38 Among other reasons, the FPC was initially established as part of the Bank in order to ensure that macro-prudential policy making "is insulated from political pressures"[77]. However, any direction (or notice revoking a direction) relating to macro-prudential powers given by the FPC to the PRA or the FCA must be copied to the Treasury and, if the Treasury thinks fit, a copy of the direction (or notice revoking a direction) will be laid before Parliament[78]. In addition, the FPC must publish an explanation of each of its decisions to give directions or make recommendations to the PRA, the FCA, the Treasury or the Bank in relation to its regulatory responsibilities[79]. These explanations will set out how the action is compatible with the FPC's duties and objectives and must include an estimated cost-benefit analysis, if reasonably practicable.

75 https://www.bankofengland.co.uk/-/media/boe/files/statement/2016/the-financial-policy-committees-approach-to-setting-the-countercyclical-capital-buffer.pdf.
76 BoE Financial Stability Report — July 2021 https://www.bankofengland.co.uk/financial-stability-report/2021/july-2021.
77 The Treasury consultation document 'The Financial Services Bill: the Financial Policy Committee's macro-prudential tools' (September 2012), Cm 8434, paragraph 3.4.
78 Section 9K of the BoE Act.
79 Section 9S of the BoE Act.

4.3.39 The FPC is also required to review the continued relevance of its directions and recommendations[80]. Among other things, these explanations and reviews are published in the biannual Financial Stability Report which is laid before Parliament[81].

4.3.40 As soon as reasonably practicable after the publication by the FPC of a Financial Stability Report, the Governor of the Bank and the Chancellor of the Exchequer must meet to discuss the report and any other matters relating to the stability of the UK financial system. A record of this meeting must be published (in a manner decided by the Treasury) within six weeks of the meeting, except that information need not be published if the Treasury believes that publication of it at that time would be against the public interest.[82]

4.3.41 At least annually, the Treasury will make recommendations in writing to the FPC about matters that the FPC should regard as relevant (for example, reports and international papers) to its understanding of the Bank's financial stability objective and the responsibility of the FPC in relation to the achievement of that objective. In addition, the Treasury may make recommendations in relation to matters to which the FPC should have regard in exercising its functions (for example, the experience of another country in using a particular macro-prudential measure). The FPC must respond to a Treasury recommendation by indicating the action it has taken in response to the recommendation, how it intends to respond to it or why it is not intending to act in accordance with it. The ability not to comply with a Treasury recommendation is considered an important safeguard in maintaining the independence of the FPC. However, in order to retain the accountability of the FPC, Treasury recommendations and the FPC's response to them must be laid before Parliament and may be published by the Treasury.[83]

4.3.42 In addition, the Treasury must, at least annually, specify in writing to the FPC what the Government's economic policy is taken to be for the purposes of section 9C(1)(b) of the BoE Act. This notice, together with the Treasury's recommendations to the FPC as mentioned above, are set out in the annual 'remit letter' sent by the Chancellor of the Exchequer to the Governor of the Bank.[84] These remit letters, together

80 Section 9T of the BoE Act.
81 Section 9W of the BoE Act.
82 Section 9X of the BoE Act.
83 Section 9E of the BoE Act.
84 Additional remit letters may be sent during the year if necessary in order to reflect new policy priorities of the Government.

with the Governor's response to the Chancellor, are published on the Bank's website.[85]

4.3.43 At the end of each financial year, the Bank must submit to the Chancellor of the Exchequer a report on its activities in that year. The report must include reports by the Court of Directors on the matters which it reviews and monitors and otherwise considers in the performance of its oversight functions, and on the activities of the FPC[86], as well as a copy of the Bank's financial statement for the year and the related auditor's report on it.

4.4 Transformation of the Bank

4.4.1 In March 2014, the Bank launched a three-year 'One Mission, One Bank'[87] strategy with a view to better exploiting its expertise across its functions to maximise its impact as a single organisation and deliver a shared sense of mission. A Strategic Plan established a new mission statement for the Bank ("*promoting the good of the people of the United Kingdom by maintaining monetary and financial stability*") and outlined 15 core initiatives aimed at transforming the Bank over the three years to 2017[88]. By the end of March 2017, the Bank had delivered a reorganisation of its operations to support the delivery of that strategy.

4.4.2 Further significant changes to the Bank's governance structure were introduced under the 2016 Act. The 2016 Act provided, among other things:

- A simplified and strengthened governance structure for the Bank, with:

  (i) all policy committees on the same legal footing (with harmonisation of conflict-of-interest provisions across all committees),

  (ii) the unification of the Court of Directors as a single unitary board; and

85 https://www.bankofengland.co.uk/letter/2021/march/remit-for-the-fpc-2021.
86 Section 4(1) and (2) of the BoE Act.
87 National Audit Office: Progress delivering the 'One Mission, One Bank' strategy https://www.nao.org.uk/wp-content/uploads/2017/06/Progress-delivering-the-One-Mission-One-Bank-strategy.pdf.
88 The Bank publication 'Strategic Plan: Background Information' (18 March 2014).

(iii) a statutory basis for the role of Deputy Governor for Markets and Banking (**DGMB**), which involves adding the DGMB as a member of the Court of Directors as well as an ex officio member of both the MPC and the FPC.[89]

- 'De-subsidiarisation' of the PRA and integration of it into the Bank (with the subsequent creation of the 'Prudential Regulation Committee').[90]
- A change to the frequency of Monetary Policy Committee meetings (from once a month to eight times per calendar year).[91]
- Updates to the resolution planning and crisis management arrangements between the Treasury and the Bank.[92]

4.4.3 In 2018, the Bank updated its strategy to cover what it wanted to achieve by 2020. 'Vision 2020'[93] was described as a three-year strategy that identified two key areas for the Bank to improve its effectiveness: the way it works and how it communicates, with initiatives around more effective decision-making, unlocking potential and enabling stronger collaboration. At the heart of the plan, Vision 2020 was an initiative to 'do what matters most,' which means "*prioritising work within our flat nominal budget constraint that makes the biggest contribution to the Bank's mission, and so maximises value for money while containing costs*"[94].

4.4.4 In May 2018 the Bank commissioned Huw van Steenis to lead research looking at how financial services might evolve over the next decade, and what this could mean for everyone who uses, provides or regulates them, referred to as the Future of Finance project. The Bank published Huw van Steenis' report and its response to it on 20 June 2019[95]. In short, the Bank committed in its response to the following five priorities:

89 Sections 1, 6 and 7 of the 2016 Act.
90 Sections 12 to 15 and Schedule 1 to the 2016 Act.
91 Section 8 of the 2016 Act.
92 Section 36 of the 2016 Act.
93 National Audit Office: 'Managing the Bank of England's Central Services' https://www.nao.org.uk/wp-content/uploads/2018/12/Managing-the-Bank-of-Englands-Central-Services.pdf.
94 https://quarterly.blog.gov.uk/2019/02/13/in-conversation-with-mark-carney-governor-of-the-bank-of-england/.
95 https://www.bankofengland.co.uk/research/future-finance.

- Supporting a more resilient, innovative and competitive payments system for UK households and businesses.
- Helping create an open platform to boost access to finance for small businesses and choice for households.
- Supporting an orderly transition to a carbon-neutral economy.
- Delivering a world-class regtech and data strategy.
- Facilitating greater resilience and adoption of the cloud and other new technologies.

4.4.5 The response also commented that, culturally, the Bank "*is becoming more agile to respond to new challenges more quickly*". It is doing this by "*seeking out an ever more diverse set of skills and backgrounds, reflected in its hiring training and career-long learning programmes… [A]nd it is becoming more collaborative with a wider set of stakeholders and authorities than ever before*".

4.4.6 Phase II of the Government's FRF Review contains proposals relating to the Bank's existing rulemaking powers over CCPs and CSDs. They envisage granting the Bank wider powers to replace the provisions in retained EU law relating to the regulation of CCPs and CSDs, as well as a general rulemaking power in relation to these firms. This will be accompanied by enhancements or additions to the Bank's current framework of objectives and accountability in relation to the regulation and supervision of these entities.

5. THE PRUDENTIAL REGULATION AUTHORITY

5.1 Overview

5.1.1 The PRA originally operated as a subsidiary of the Bank of England (the **Bank**). On 1 March 2017 the PRA became the Bank by virtue of the provisions of the Bank of England and Financial Services Act 2016 (the **2016 Act**). Since 1 April 2013, the PRA has carried out the functions stipulated for it by or under the Act. This includes, among others, functions under the Insolvency Act 1986, the Banking Act 2009, the FS Act 2012 and regulations made by the Treasury under the European (Withdrawal) Act[96].

5.1.2 The PRA is the micro-prudential regulator for deposit-takers, insurers and designated investment firms. The latter are investment firms that have the potential to present significant risk to the stability of the financial system.[97] The PRA divides all deposit-takers, insurers and designated investment firms into five "categories" of impact, reflecting that firm's potential to affect adversely the stability of the UK financial system. Some of the firms regulated are mutuals — see further Chapter 25 'Mutuals'.

5.1.3 The FCA is the micro-prudential regulator for other authorised firms. The FCA regulates both sets of firms for conduct of business — see further Chapter 6 'The Financial Conduct Authority'. "Dual-regulated" firms (firms that are regulated under the Act by both the PRA and the FCA) need to meet two sets of threshold conditions, one set from the PRA and one set from the FCA. Both the PRA and the FCA are responsible for regulating individuals to some extent. For more on senior managers and approved persons, see Chapter 11 'Senior managers and certification regime'.

5.1.4 Both regulators can be subject to direction by the FPC in the interests of financial stability. In addition, the PRA has the power to veto an action to be taken by the FCA in certain circumstances. For more on relations between the regulators, see Chapter 7 'Co-ordination between the PRA and the FCA'.

[96] Section 2AB(3). Certain functions under the Banking Reform Act are to be treated as functions under the Act.

[97] A list of banks and building societies is published by the Bank on a monthly basis. A list of PRA-designated firms was last published in January 2021.

5.1.5 In performing its functions, the PRA is treated as a public authority for certain purposes, such as the Human Rights Act 1998, the Freedom of Information Act 2000 (although exemptions from disclosure may be available) and judicial review.

5.1.6 There are a number of measures designed to provide checks and balances on the PRA's use of its powers, including lines of accountability to the Treasury, to Parliament, and to practitioners and the public more generally. There is provision for reviews, inquiries and investigations relating to the PRA.

5.1.7 The PRA has a general objective of promoting the safety and soundness of PRA-authorised firms. In relation to the effecting or carrying out of contracts of insurance, the PRA has a second objective, an insurance objective, of contributing to the securing of an appropriate degree of protection for those who are or may become policyholders. From 1 March 2014, these were supplemented by a new secondary objective: to facilitate effective competition in the markets for services provided by PRA-authorised firms in carrying on regulated activities. Like the FCA, the PRA must have regard to the principles of good regulation. The PRA places emphasis on furthering its regulatory objectives when determining its policy.

5.1.8 Section 137G of the Act gives the PRA wide power to make general rules applying to PRA-authorised firms, in relation to both regulated activities and activities that are not regulated. Other provisions of the Act make specific provision in respect of rules about remuneration, remuneration policies, recovery plans and resolution packs, ring-fencing and conduct. The PRA is allowed, but not required, to make a "threshold condition code".

5.1.9 The PRA's approach is largely set out in two 'approach documents': 'The Prudential Regulation Authority's approach to banking supervision' (which sets out the PRA's approach to the supervision of banks, building societies, credit unions and designated investment firms) and 'The Prudential Regulation Authority's approach to insurance supervision'[98]. In both documents, the PRA states that its approach will be based on proportionality and judgement (rather than rules) and that it will be forward-looking.

[98] The current versions of which are dated October 2018.

5.1.10 The PRA has its own rulebook (the **PRA Rulebook**). Where the PRA judges that general guidance material is required in addition to the provisions of the PRA Rulebook, it will issue it in the form of 'supervisory statements'.

5.1.11 As well as the PRA Rulebook, other material will also be relevant to PRA-authorised firms, such as the approach documents, supervisory statements and various statements of policy. PRA-authorised firms will also be subject to the FCA Handbook in relation to conduct.

5.2 The PRA's structure

5.2.1 The PRA was originally incorporated as the Prudential Regulation Authority Limited[99], which was a subsidiary of the Bank. The 2016 Act made it formally a part of the Bank of England as of 1 March 2017[100]. The Bank's functions as the PRA are exercised exclusively by the Bank's Prudential Regulation Committee[101].

5.2.2 The PRA must comply with the requirements as to its constitution set out in Part 3A (and Schedule 6A) of the BoE Act, as well as with the provisions about its functions set out in section 2AB. The Bank's obligations under the BoE Act include making arrangements for (and issuing a statement on) the operational independence of the discharge of its resolution functions.

5.2.3 The PRA must have regard to such generally accepted principles of good corporate governance as it is reasonable to regard as being applicable to it. The Bank has also published details of its compliance with senior management regime, including in respect of the PRA. Furthermore, the PRA must have regard to certain principles and the Regulators' Code when developing policies and operational procedures that guide its regulatory activities.[102] In addition, although voluntary in nature, it may be good practice for the PRA to have regard to the Organisation for Economic Co-operation and Development's 'Best Practice Principles for Regulatory Policy: The Governance of Regulators'.

99 It is exempt from the requirements of the Companies Act 2006 relating to the use of the word "limited" as part of its name; Section 2A(1); and Schedule 1ZB, paragraph 25. Other references to paragraphs in the footnotes to this chapter are to paragraphs of Schedule 1ZB to the Act, unless otherwise indicated.

100 Section 2A(1).

101 Section 2A(2).

102 PRA Annual Report 2020/21; https://www.bankofengland.co.uk/about/people/senior-managers-regime (last updated 26 February 2021); sections 21 and 22 of the Legislative and Regulatory Reform Act 2006.

The Prudential Regulation Committee

5.2.4 Until 1 March 2017, the PRA was a subsidiary of the Bank. The Governor of the Bank was the chair of the PRA, and the Bank's Deputy Governor for Prudential Regulation the PRA's chief executive. The PRA's Board consisted of the chair, the chief executive, the Bank's Deputy Governor for Financial Stability, the Chief Executive of the FCA, and members appointed by the Bank with the approval of the Treasury.[103]

5.2.5 As of 1 March 2017, the Bank's functions as the PRA are exercised through the Prudential Regulation Committee. This consists of the Governor of the Bank, the Deputy Governor for financial stability, the Deputy Governor for markets and banking, the Deputy Governor for prudential regulation, the chief executive of the FCA, one member appointed by the Governor of the Bank with the approval of the Chancellor of the Exchequer, and at least six members appointed by the Chancellor of the Exchequer.[104]

5.2.6 The chief executive of the FCA must not take part in any discussion by, or decision of the Prudential Regulation Committee that relates to the exercise of the PRA's functions in relation to a particular person, or a decision not to exercise those functions[105].

5.2.7 The majority of the members of the Prudential Regulation Committee are non-executive, and there are provisions dealing with the appointment of members to ensure that they are not subject to direction of the Bank, the Treasury or any other person, and to prohibit the acquiring of financial or other interests that could substantially affect the functions it would be proper for them to discharge. The Bank publishes details of its compliance with the senior managers regime.[106]

5.2.8 The Court of Directors may, with the consent of the Chancellor of the Exchequer, remove appointed members of the Prudential Regulation Committee if they have been absent from 3 or more meetings of the Prudential Regulation Committee, have become bankrupt, subject to a debt relief order, their estate sequestrated or have made arrangements with their creditors or if they are unfit or unable to discharge their responsibilities as a member. In addition, the Court of Directors may,

103 (Until repealed) paragraphs 2(a), 2(b), 3, and 6 to 12.
104 Section 2A(2), and section 30A (and Schedule 6A) of the BoE Act.
105 Paragraph 13 of Schedule 6A to the BoE Act.
106 Paragraphs 2 to 9 of Schedule 6A to the BoE Act and https://www.bankofengland.co.uk/about/people/senior-managers-regime (last updated 26 February 2021).

with the consent of the Chancellor of the Exchequer, remove members appointed by the Chancellor of Exchequer if it is satisfied that their financial or other interests are such as substantially to affect the functions which it would be proper for them to discharge.[107]

5.2.9 The PRA's rule-making powers (and certain other functions) must be exercised through the Prudential Regulation Committee, and, unlike certain other powers of the PRA, cannot be delegated.[108]

Annual report

5.2.10 The PRA must make an annual report on the discharge of its functions and the PRA-authorised persons which are ring-fenced bodies, which is to be laid before Parliament. After making each report, the PRA must invite members of the public to make representations to it about the report, the discharge of the PRA's functions, the advancement of the PRA's objectives or the PRA's consideration of the regulatory principles (see paragraph 5.6.14). The PRA must then publish a report about its consultation.[109]

Fees

5.2.11 The PRA has statutory fee-raising powers. The PRA may make rules providing for the payment of fees, in connection with specified "qualifying functions" (which include functions specified by the order of the Treasury). In fixing the amount of any fee to be payable to the PRA, no account is to be taken of any sums which the PRA receives by way of penalties imposed by it under the Act. The PRA can deduct its enforcement costs from penalty receipts, but the remainder is to be paid to the Treasury. Provision is made so that firms who pay penalties do not get the benefit of amounts retained by the PRA. The Act makes provision for the recovery of fees owed under any provision by or under the Act as a debt due to the PRA.[110]

Immunity, damages and judicial review

5.2.12 There is an exemption from liability in damages for anything done or omitted in the discharge, or purported discharge, of the PRA's functions for:

107 Paragraph 9 of Schedule 6A to the BoE Act.
108 Section 2A(2) and paragraph 17 of Schedule 6A to the BoE Act.
109 Paragraphs 19 to 21.
110 Paragraphs 31(1) (2), 32, 31(6), 28(1), 29(3) and 31(7). See also section 410A.

(a) the PRA;

(b) any person who is, or is acting as, a member, officer, or member of the staff of the PRA;

(c) any person who could be held vicariously liable for things done or omitted by a person mentioned in (b) above, but only in so far as the liability relates to such person's conduct[111].

5.2.13 This exemption from liability does not apply to an act or omission that is shown to have been in bad faith or in the circumstances mentioned in the next paragraph[112].

5.2.14 As it forms part of the Bank, the PRA is to be treated as a public authority for the purposes of the Human Rights Act 1998. As a limitation on the exemption from liability in damages mentioned above, the PRA can be liable for an award of damages in respect of an act or omission on the ground that the act or omission was unlawful as a result of section 6(1) of the Human Rights Act 1998.

5.2.15 The PRA is also to be treated as a public authority for the purposes of the Freedom of Information Act 2000 and the Equality Act 2010[113].

5.2.16 Notwithstanding the exemption from damages for the PRA, proceedings can be brought against the PRA for judicial review, and orders (other than for damages) can be made. The PRA is subject to judicial review if it acts illegally, unfairly or unreasonably, or if it fails to follow proper procedure. However, the broad discretion granted to the PRA as to how to act in particular circumstances, and the fact that none of the PRA's objectives imposes on the PRA a statutory duty to take action[114], tends to hamper the availability of judicial review in practice[115].

5.3 The PRA's functions

5.3.1 The PRA has the functions conferred on it by or under the Act. These include functions conferred on the PRA by or under the Insolvency Act 1986, the Banking Act 2009, the FS Act 2012, provisions of EU retained

111 Paragraph 33.
112 Paragraph 33(3).
113 Part VI of Schedule 1 to the Freedom of Information Act 2000 and Part 1 of Schedule 19 to the Equality Act 2010.
114 As is explained in paragraph 98 of the Explanatory Notes to the FS Act 2012 in relation to the FCA. Under section 2K, the PRA has a duty to maintain arrangements for supervising PRA-authorised firms, although this is tempered by section 2G which makes clear that, in relation to its objectives, the PRA is not required to achieve a zero-failure outcome.
115 For more on judicial review of the FSA/FCA, see Chapter 6 'The Financial Conduct Authority'.

legislation or technical standards specified by the order of the Treasury or regulations made by the Treasury under section 8 of the European Union (Withdrawal) Act 2018.[116] In addition, certain functions of the PRA under the Banking Reform Act are treated as functions under the Act.

5.3.2 The PRA's general functions (for the purposes of section 2A to 2P) are the function of making rules under the Act, the function of making technical standards under the Chapter 2A of the Act, the function of preparing and issuing codes under the Act and the function of determining the general policy and principles by reference to which it performs particular functions under the Act[117].

5.3.3 Under section 2K, the PRA must maintain arrangements for supervising PRA-authorised firms[118]. The Treasury states that the concept of "supervision" includes monitoring the safety and soundness of PRA-authorised firms, forming a view on the firm's long-term strategy for doing business, providing advice (and, where appropriate, warnings), monitoring compliance with regulatory requirements and taking disciplinary action where appropriate[119].

5.3.4 PRA responsibilities under the Act relate to the micro-prudential regulation of PRA-authorised firms — deposit-takers, insurers and designated investment firms (investment firms that could present significant risks to the stability of the UK financial system, of which, according to a list last published by the PRA in January 2021, there are eight in total)[120].

5.3.5 The FCA is the conduct of business regulator for all firms regulated under the Act[121]. Thus, PRA-authorised firms are "dual-regulated", by the PRA for prudential matters and by the FCA in respect of conduct of business. Nowhere is this more apparent than in relation to insurance companies with with-profit funds, in relation to which there is a

116 Section 2AB. See also the FSMA (Qualifying EU Provisions) Order 2013 (SI 2013/419) and the FSMA (Qualifying EU Provisions) (No 2) Order 2013 (SI 2013/3116) and section 452C.
117 Section 2J(1).
118 But nothing in relation to its objectives is to be regarded as requiring the PRA to ensure that no PRA-authorised firm fails (section 2G).
119 Explanatory Notes to the FS Act 2012.
120 The PRA is given power to designate certain firms with permission to "deal in investments as principal" under the Financial Services and Markets Act 2000 (PRA-Regulated Activities) Order 2013 (SI 2013/556). The PRA is required to issue a statement of its policy about designation — see its Statement of Policy 'Designation of investment firms for prudential supervision by the Prudential Regulation Authority' (March 2013).
121 In addition to being the micro-prudential regulator of firms that are not PRA-authorised.

specific MoU — see further Chapter 7 'Co-ordination between the PRA and the FCA'.

5.3.6 There is also an MoU between the FCA, the Bank and the PRA on recognised investment exchanges (RIEs) and RCHs, an MoU on crisis management between the Treasury, the Bank and the PRA, and an MoU on international organisations between the Treasury, the Bank (for its functions in relation to financial stability and as a regulator), the FCA and the PRA. For more information on the relationship between the regulators, see Chapter 7 'Co-ordination between the PRA and the FCA'.

5.3.7 The PRA has power of direction over the FCA in three circumstances: where the FCA proposes to exercise certain powers and such exercise might threaten the stability of the UK financial system, result in the failure of a PRA-authorised firm in a manner that would adversely affect the UK financial system or threaten the continuity of core services provided in the UK, and the PRA considers such direction necessary to avoid these consequences; where the FCA proposes to exercise a regulatory power in relation to discretionary benefits under with-profits insurance policies; and in relation to consolidated supervision of groups (in this latter case, the direction may relate to exercising or not exercising a relevant function (as defined) and the FCA may equally have such power to direct the PRA where the FCA is the competent authority)[122].

5.3.8 In addition, the FPC may give a direction or recommendation to the PRA about the exercise of its functions; see further Chapter 4 'The Bank of England and the Financial Policy Committee'.

5.3.9 The PRA participates in supervisory colleges for UK firms and firms with significant operations in the UK.

5.3.10 The PRA is also a member of the International Co-ordination Committee established by the MoU on international organisations entered into under section 66 of the FS Act 2012. Pre-Brexit, the PRA was the UK representative at the European Banking Authority (the **EBA**), the European Insurance and Occupational Pensions Authority (the **EIOPA**), the Basel Committee on Banking Supervision, the International Association of Insurance Supervisors, and the Joint Forum (with the FCA).

[122] Sections 3I, 3J and 3M.

5.3.11 The framework of PRA's co-operation with EU institutions has changed as a result of Brexit. The UK has become a third country for the purposes of the EU legislation and the co-operation between the FCA and the PRA and EU institutions continues on the basis of memoranda of understanding which both parties negotiated separately for each regulatory area. The PRA is a party to memorandum of understanding with the FCA, EIOPA and national competent authorities of the EU member states which took effect on 1 January 2021. The PRA also entered into a template memorandum of understanding with the FCA, the EBA and national competent authorities and is party to a memorandum of understanding with the FCA and the European Central Bank.

5.3.12 The UK government and the European Commission are separately negotiating a new international framework of co-operation. The parties entered into a Joint Declaration on Financial Services Co-operation in December 2020 and in March 2021 finalised the technical negotiations on the text of the related memorandum of understanding. The memorandum will establish a joint UK-EU Financial Regulatory Forum which will serve to facilitate the dialogue and regulatory co-ordination between the UK and the EU.

5.3.13 Following the end of the transition period on 31 December 2020, the PRA has taken over certain functions previously performed by the European Supervisory Authorities (that is, the EBA, EIOPA and ESMA) (the **ESAs**). This includes various responsibilities under the Solvency II Directive, Capital Requirements Regulation and certain other statutory instruments[123]. The PRA will also issue technical standards in place of the ESAs where it is given such power by regulations made under the European Union (Withdrawal) Act 2018. Before making such technical standards, the PRA is required to consult the FCA where the FCA has an interest in the relevant technical standard or where the power to make the technical standard has been given to the PRA and the FCA jointly[124]. The power to make technical standards is exercised by the PRA issuing a "standards instrument", which must be approved by the Treasury, published in the way best calculated to bring it to the attention of the public and the copy of which must be laid before the Parliament by the Treasury[125].

123 https://www.bankofengland.co.uk/eu-withdrawal/transfer-of-roles-and-responsibilities-to-the-bank.
124 Section 138P.
125 Sections 138Q and 138R.

5.3.14 Other chapters of this Guide deal with the PRA's powers in relation to authorised firms, senior managers, investigations and discipline, acquisitions of financial services businesses, parent undertakings, insolvency, auditors and actuaries, Lloyd's of London (Lloyd's) and mutuals.

5.4 The Future Regulatory Framework Review

5.4.1 In June 2019, the Government announced the Financial Services Future Regulatory Framework Review (**FRF Review**). The aim of the FRF Review is to assess how the regulation of financial services needs to adapt to the UK's withdrawal from the EU and to ensure the regulatory framework is fit for supporting long-term future growth in the UK. It has proceeded in two phases with Phase I (from July 2019 to March 2020) focusing on the co-ordination between UK regulators and Phase II (from October 2020 and ongoing as at the date of this publication) focusing on the regulatory framework itself, with the aim of moving to a more coherent system with clear division of responsibilities between Parliament, the Government and the financial services regulators.

5.4.2 The proposals of the Treasury published as part of the Phase II consultation point out the structural difference between the EU and UK approaches to regulation of financial services. The EU regulatory framework consists of detailed statutory rules whereas the UK approach has historically relied on delegation of the rule-making powers to individual regulators, who can rely on sector-specific expertise and experience in laying down detailed standards for the firms they regulate. The onshoring of EU legislation to the UK domestic law resulted in a fragmented regulatory landscape with many regulatory standards currently set out in legislation as well as in the materials published by the financial services regulators. The Government's preference is to move closer to the original UK model with emphasis on the rule-making powers of the financial services regulators.

5.4.3 These proposals would extend the competencies and rule-making powers of the PRA to some of the areas currently governed by primary or secondary legislation. In addition, the PRA would be subject to increased transparency requirements and scrutiny by Parliament, as policy-makers would be keen to ensure that the public policy aims are properly reflected in the rules laid down by the PRA, and to a more robust obligation to consult with the Treasury. Further discussion on the FRF Review can be found in the relevant sections of this Chapter and other Chapters, including Chapter 6 'The Financial Conduct Authority'.

5.5 Accountability

5.5.1 The principal accountability measures affecting the PRA include:

(a) the regulatory objectives and regulatory principles applicable to the PRA (see paragraphs 5.6.1 to 5.6.21);

(b) the requirement for the PRA to publish its strategy in relation to its objectives[126];

(c) the method of appointment and composition of the PRA's governing body, including the requirement for a majority of non-executive members (see paragraphs 5.2.4 to 5.2.9);

(d) the obligation on the PRA to prepare an annual report to the Treasury, and for this to be laid before Parliament (see paragraph 5.2.10);

(e) the requirement for the PRA to hold a subsequent consultation on this report (see paragraph 5.2.10);

(f) the requirement for the PRA to have regard to generally accepted principles of good corporate governance (see paragraph 5.2.3);

(g) the obligation on the PRA to produce an MoU with the FCA which is to be laid before Parliament[127];

(h) the power of the Treasury to commission efficiency reviews[128];

(i) the power of the Treasury to arrange independent inquiries, a requirement on the PRA to investigate and report to the Treasury on possible regulatory failure and a power for the Treasury to ask the PRA to conduct an investigation into "relevant events"[129]; and

(j) the provisions on competition scrutiny (giving the relevant competition authority power to give advice to the PRA)[130].

126 Section 2E(6).
127 Section 3E. The MoU dated July 2019 can be found at https://www.bankofengland.co.uk/-/media/boe/files/memoranda-of-understanding/fca-and-bank-prudential-july-2019.pdf.
128 Section 7F of the BoE Act.
129 Sections 68, 74 and 77 of the FS Act 2012.
130 Sections 140A to 140H.

5.5.2 Members of the Houses of Parliament may ask questions of Treasury Ministers, and the PRA is subject to scrutiny by the House of Commons Treasury Committee.

5.5.3 In addition, there is a single complaints scheme to investigate complaints arising in connection with the exercise of, or failure to exercise, any of the relevant functions of the FCA, the PRA and the Bank[131].

5.5.4 The PRA has a general duty to consult PRA-authorised firms, including a duty to set up a PRA Practitioner Panel[132]. In addition, firms regulated by the PRA (and certain others affected by PRA decisions) have the power to refer certain decisions to the Upper Tribunal (Tax and Chancery Chamber) (the **Tribunal**) which is administered by HM Courts and Tribunals Service, and the right, in certain circumstances, to apply for judicial review of decisions.

5.5.5 Unlike the FCA, the PRA has no general duty to consult consumers. Consumers do have the right to refer complaints against PRA-authorised firms to the FOS, although in practice, consumer complaints are probably more likely to relate to conduct of business issues.

5.5.6 In certain circumstances, the PRA must consult the Treasury, the Bank or the FCA. For more information, see Chapter 7 'Co-ordination between the PRA and the FCA'.

5.5.7 The Phase II consultation of the FRF Review remarked that "*accountability to Parliament has been complicated and limited by increasing EU competence for financial services regulation*" and that, post-Brexit, the Government intends to have Parliament play a "*meaningful and effective role*" in setting the overall approach for UK financial services policy[133]. In the proposed post-EU regulatory framework, regulators will become responsible for the majority of regulatory requirements directly applicable to financial services firms and markets, resulting in greater policy responsibility and discretion for the regulators since the introduction of the Act approximately 20 years ago. The Government hopes to implement new accountability arrangements requiring the regulators consider to the impact of exercising their powers to make rules and set general approaches and policy on supervision upon the UK's deference arrangements, and to

131 Section 84 of the FS Act 2012.
132 Sections 2L and 2M.
133 See paragraph 3.10 of the Phase II Consultation.

assess compliance with relevant trade agreements with overseas jurisdictions.[134]

5.6 Objectives and regulatory principles

General

5.6.1 The Act sets out various regulatory objectives and principles of good regulation applicable to the PRA. In carrying out its general functions, the PRA has a general objective, set out in section 2B of the Act, and in relation to the effecting or carrying out of contracts of insurance, a second objective, an insurance objective, set out in section 2C. The Treasury may specify further objectives if additional activities are added to the PRA's remit. The Banking Reform Act gave the PRA a secondary competition objective, set out in section 2H(1), from March 2014. The same principles of good regulation set out in section 3B apply to both the PRA and the FCA[135].

5.6.2 The objectives are primarily concerned with the purpose of regulation, while the principles are concerned with how PRA's discretion is exercised. The objectives are significant in describing the Government's vision for the PRA, and also the PRA's vision for itself as set out in its approach documents. The PRA has a general duty to consult practitioners on the extent to which its policies and general practices are consistent with its general duties under sections 2B to 2H. In addition, the Act requires the PRA's annual report to address certain issues regarding its objectives and the principles.

Objectives — the general objective and the insurance objective

5.6.3 Originally, the PRA had only a general objective and an insurance objective.

5.6.4 The PRA's general objective is promoting the safety and soundness of PRA-authorised firms. In discharging its general functions (such as the exercise of its rule-making powers, preparing codes and determining its general policy), the Act requires the PRA, so far as is reasonably possible, to act in a way which advances its general objective. The primary way the general objective is to be advanced is by seeking to avoid adverse effects on the stability of the UK financial system in the way the business of PRA-authorised firms is carried on, seeking to

[134] See paragraphs 3.10 to 3.13 of the Phase II Consultation.
[135] Section 2H(2) and section 3B. The PRA's "general functions" are defined in section 2J.

minimise the adverse effects that the failure of a PRA-authorised firm could be expected to have, and discharging its general functions in connection with the ring-fenced bodies in a way which seeks to (i) ensure that the business of ring-fenced bodies is carried on in a way which avoids any adverse effects on the stability of the UK financial system, (ii) ensure the business of ring-fenced bodies is protected from any risks that could adversely affect the continuity of the provision in the UK of core services and (iii) minimise the risk that the failure of a ring-fenced body or of a member of a ring-fenced body's group could affect the continuity of the provision in the UK of core services. The adverse effects on financial stability that must be avoided or minimised mean, in particular, the disruption of the continuity of financial services.[136]

5.6.5 "Failure" of a PRA-authorised firm includes the firm entering insolvency, any of the stabilisation options in Part 1 of the Banking Act 2009 being implemented (for example, transfer to a private sector purchaser, transfer to a bridge bank or transfer to temporary public ownership in relation to the firm), or the firm being taken for the purposes of the compensation scheme to be unable, or likely to be unable, to satisfy claims against it[137].

5.6.6 None of the PRA's objectives is to be taken as requiring the PRA to ensure a "zero-failure" regime. The Treasury has also made clear that the regulatory principles of senior management responsibility and consumer responsibility also indicate that the PRA should not aim for zero-failure.[138]

5.6.7 The PRA's insurance objective is contributing to the securing of an appropriate degree of protection for those who are or may become policyholders. In discharging its general functions in relation to effecting or carrying out contracts of insurance, the Act requires the PRA to act in a way which is compatible with, and which the PRA considers most appropriate to advance, its general objective and its insurance objective.[139]

5.6.8 If the PRA is given more activities to regulate, there is power for it to be given additional objectives[140].

136 Sections 2B(1) to 2B(4), and 2J(1).
137 Section 2J(3).
138 Section 2G; and paragraph 165 of the Explanatory Notes to the FS Act 2012.
139 Sections 2C(2) and 2C(1).
140 Section 2D.

Secondary objective

5.6.9 Since 1 March 2014, the PRA's new secondary objective has been to facilitate effective competition in the markets for services provided by PRA-authorised persons in carrying on regulated activities[141]. Previously, this was not an objective; the PRA merely had to "have regard" to the need to minimise any adverse effect on competition.

5.6.10 The PRA must, when discharging its general functions in a way that advances its objectives, so far as is reasonably possible, facilitate effective competition in relevant markets. Thus, it is not a self-standing primary objective, but only applies when the PRA is advancing its primary objectives. Because of this, the Bank suggests that the PRA's secondary competition objective should be seen as complementary to, rather than equivalent to, the FCA's primary objectives[142].

5.6.11 For more on how the PRA interprets its secondary competition objective, see the PRA Annual Report 2020/21[143].

5.6.12 The Treasury's consultation on the FRF Review proposes the introduction of a new statutory objective for the PRA (as well as the FCA) which would require it to act in a way which facilitates the long-term growth and international competitiveness of the UK economy (including the financial services sector). The new objective would be "secondary" — in other words it would not require the PRA to act inconsistently with its primary objectives.

Principles of good regulation

5.6.13 As mentioned above, in discharging its general functions, the PRA must also have regard to the principles of good regulation set out in section 3B of the Act (as amended by the 2016 Act)[144]. These are the same regulatory principles that apply to the FCA.

5.6.14 The principles of good regulation are:

(a) the need to use the resources of each regulator in the most efficient and economic way;

141 Section 2H(1).
142 PRA Annual Competition Report 2016 (June 2016).
143 Annual Competition Report 2021 is included on pages 53-61.
144 Section 2H(2).

(b) the principle of proportionality;

(c) the desirability of sustainable growth in the UK economy;

(d) that consumers should take responsibility for their decisions;

(e) the principle of senior management responsibility for compliance with regulatory requirements;

(f) principle of diversity;

(g) the desirability of regulators publishing information relating to persons on whom requirements are imposed, or requiring such persons to publish information; and

(h) that regulators should exercise their functions as transparently as possible.

5.6.15 The Treasury has stressed that these principles do not place burdens or requirements on consumers or firms[145].

5.6.16 At the time of writing, Phase II of the FRF Review proposes a change to the principle on the desirability of sustainable growth in the UK economy to clarify that such growth should happen in a sustainable way that is consistent with the UK's net zero commitments.

Financial crime

5.6.17 Unlike the FCA, minimising financial crime is not one of the matters to which the PRA must have regard. However, this does not mean that the PRA will not have regard to financial crime. As the PRA's approach documents state, the PRA aims to assess the adequacy of a firm's control framework in preventing serious fraud that could threaten its safety and soundness and, in the case of insurers, the protection of policyholders. In addition, it can be expected that the PRA will take account of such matters when considering integrity, both of firms and individuals.

Recommendations by Treasury

5.6.18 The Treasury may make recommendations to the Prudential Regulation Committee about aspects of the Government's economic policy to

[145] Paragraph 165 of the Explanatory Notes to the FS Act 2012.

which the Committee should have regard when considering how to advance its objectives and when considering the application of the regulatory principles and the Treasury is required to make such recommendations at least once in each Parliament[146]. There is a similar provision in respect of the FCA.

5.6.19 A recommendation about aspects of the Government's economic policy was issued by the Treasury in the letter to the Committee dated 23 March 2021[147]. The Treasury concludes that in the assessment of the costs, burdens and benefits of potential rules or policies, the Committee should take into account:

(a) *Competition*: the Government is keen to promote competition in all sectors of the industry, in particular retail banking.

(b) *Growth*: the Government wishes to ensure financial services support sustainable economic growth, including supporting high-skilled jobs and facilitating finance for productive and clean investments.

(c) *Competitiveness*: the Government wishes to ensure the UK remains an attractive domicile for international financial institutions and that London retains its position as the leading international financial centre for green finance.

(d) *Innovation*: the Government is keen to see innovation in the financial services sector, including new methods of engaging with consumers of financial services and new ways of raising capital.

(e) *Trade*: the Government aims to encourage trade and inward investment to the UK to boost productivity and growth across the UK economy.

(f) *Better outcome for consumers*: the Government wants to see financial services work in the best interests of consumers and businesses they serve, including by securing better consumer outcomes by improving competition and having regard to the needs of different groups of consumers.

[146] Section 30B of the BoE Act. The latest recommendations were published on 4 November 2019.
[147] Found at CX_Letter_-_PRC_Remit_230321.pdf (publishing.service.gov.uk).

(g) *Climate change*: the Government wishes to deliver a financial system which supports a net-zero economy and the Prudential Regulation Committee should have regard to the Government's commitment to achieve a net-zero economy by 2050.

Strategy and guidance about objectives

5.6.20 The PRA must publish its strategy in relation to its objectives, after consulting the Court of Directors, and review it annually[148].

5.6.21 The PRA must also give guidance about how it intends to advance its objectives in relation to different categories of PRA-authorised firm or PRA-regulated activity[149]. Before giving or amending this guidance, the PRA must consult the FCA. The PRA has published two such documents, relating to banking supervision (which also covers designated investment firms) and insurance supervision, discussed at paragraphs 5.7.3 to 5.7.6.

5.7 The PRA's approach

5.7.1 Under the Act, the PRA is obliged to maintain arrangements for supervising PRA-authorised firms[150] (discussed in paragraph 5.3.3).

5.7.2 The PRA draws a distinction between its approach to supervision under the Act, and its approach to regulation, including (pre-Brexit) the implementation of EU legislation.

Approach documents

5.7.3 As previously mentioned, the PRA must give guidance on how it intends to advance its objectives in relation to different categories of PRA-authorised firm or PRA-authorised activity. The PRA has published two "approach documents": 'The Prudential Regulation Authority's approach to banking supervision' (which sets out the PRA's approach to the supervision of banks, building societies, credit unions and designated investment firms) and 'The Prudential Regulation Authority's approach to insurance supervision'[151]. Separate documents have been published in order to deal with the additional objective the PRA has in relation to insurance, the different risks posed by banks and insurers, and differences in the PRA's supervisory approach in relation to banks

148 Section 2E. PRA Strategic Report, part of the PRA Annual Report 2020/21.
149 Section 2I.
150 Section 2K.
151 Both dated October 2018.

and insurers. Both approach documents largely deal with supervision rather than regulation, as explained above.

5.7.4 In each approach document, Section 1 describes the PRA's statutory objectives. Section 2 sets out PRA's approach to advancing its objectives. Section 3 outlines how the PRA will identify key risks to its objectives. Section 4 examines the supervision by the PRA including the tools at its disposal and the principles which govern how the PRA uses its statutory powers. Section 5 describes how the PRA's supervisory approach is tailored to the various types of firms regulated by the PRA.

5.7.5 In both approach documents, the PRA states that its approach will be forward-looking and judgement-based. The PRA is committed to applying the principle of proportionality. The PRA focuses on those issues and those firms that pose the greatest risk to the stability of the UK financial system and, in the case of insurers, to policyholder protection.

5.7.6 According to the approach documents, the level of supervision for a particular firm will reflect the PRA's judgement of a firm's potential impact on the PRA's objectives, its proximity to failure, its resolvability and the PRA's statutory obligations. The PRA states that "potential impact" will have a wider meaning for insurers than for deposit-takers because of the additional objective the PRA has in relation to insurance. Firms are categorised according to their potential impact. They are told the category to which they have been assigned, and the PRA publishes aggregate statistics of the number of firms in each category in its annual report. Business models form an important part of the PRA's analysis of risk. Proximity to failure is judged according to a firm's position within the different stages in the PRA's Proactive Intervention Framework. The PRA does not routinely disclose to firms or the market its judgement on a firm's proximity to failure. It has given an indication of the possible recovery and resolvability steps that might be considered at each stage.

Approach to enforcement and other decisions

5.7.7 The PRA's supervisory powers include the power to vary a firm's permission or impose a requirement under Part 4A of the Act. The PRA has stated that its policy of deploying these powers at an early stage

should mean that enforcement actions are rare[152]. However, it will use formal enforcement powers where it considers them to be an appropriate means of achieving its desired supervisory outcomes. This might be, for example, where it wishes to send a clear signal to a firm and the regulated community that the PRA considers a firm's behaviour to be unacceptable.

5.7.8 The PRA has published statutory statements of policy and procedure in relation to:

(a) statutory notices and allocation of decision-making;

(b) financial penalties;

(c) suspensions or restrictions;

(d) settlement of cases;

(e) publication of disciplinary and other enforcement actions;

(f) conduct of interviews at the request of overseas regulators; and

(g) financial penalties on auditors and actuaries[153].

5.7.9 The PRA will co-operate with the FCA, where appropriate carrying out investigations on a joint or co-ordinated basis. The PRA states that it may outsource the conduct of investigations to third parties, including the FCA.

5.7.10 The PRA has also published a high level guide to its investigation and enforcement processes. The guide is intended as a reference for firms and individuals subject to the PRA investigation and sets out the key stages of an investigation process, namely opening of the investigation, process and progress of the investigation, decisions at the conclusion of the investigation including any enforcement sanctions, settlement discussions and outcomes and procedure for contesting the decisions and review by the Upper Tribunal.[154]

152 'The Prudential Regulation Authority', an article by Andrew Bailey, Executive Director of the Bank and Managing Director of the FSA's Prudential Business Unit, and Sarah Breeden and Gregory Stevens of the Bank's PRA Transition Unit, published in the Bank's Quarterly Bulletin (Q4, 2012).

153 The PRA Statement of Policy 'The Prudential Regulation Authority's approach to enforcement: statutory statements of policy and procedure' (September 2021). The statements are required, respectively, by: sections 395; 63C(1), 69(1), 142V, 192N(1) and 210(1); 69(1) and 210(1); 63C(1), 69(1), 192N(1), 142V(1), 210(1) and 395(5); 391; 169(9) and (11); and 345D.

154 Regulatory investigations guide (April 2019).

5.7.11 The PRA has published guidance for international regulators on how to submit a request for assistance[155].

Statements of policy

5.7.12 The PRA may also publish statements of policy, and in various areas it is obliged to do so — see, for example, paragraph 5.7.8.

Approach to regulation

5.7.13 More detail on the PRA's approach to regulation can be gained from its rules. For information on the PRA's rules, see paragraphs 5.13.1 to 5.13.18.

New approach after Brexit

5.7.14 On 29 April 2021, the Bank published a speech by Victoria Saporta, the Bank's Executive Director of Prudential Policy, outlining the changes to the PRA's approach to policy-making in light of Brexit. The PRA will move from being a "rule-taker" to being a "rule-maker". The increase in the scope of PRA's responsibilities will be accompanied by further scrutiny from Parliament and a new duty of the PRA to have regard to certain matters in its policy-making, such as international standards, equivalence, the relative standing of the UK to do business, as well as climate change and productive finance. In this context, the PRA's vision is to be an "accountable, responsive and accessible" policymaker: "accountable" in that the PRA will aim to be clear on the issues it is trying to address with its policy-making, how PRA's intervention solves the problem and how it fits into the PRA's overall strategy; "responsive" in that the PRA will react quickly to new issues favouring flexibility over "one-size-fits-all" approach; and "accessible" in that the PRA will focus on rethinking the current patch-work primary legislation, statutory instruments, on-shored technical standards and PRA rules and guidance into a rationalised framework to ensure that the prudential regulation is as clear as possible.

5.8 Upper Tribunal (Tax and Chancery Chamber)

5.8.1 The Act provides for certain decisions of the PRA to be referred to the Tribunal. The Tribunal is a specialist judicial body, administered by HM Courts and Tribunals Service, an agency of the Ministry of Justice.

[155] International regulatory assistance document (July 2014).

5.9 PRA Practitioner Panel

5.9.1 The Act requires the PRA to make and maintain effective arrangements for consulting PRA-authorised firms (or persons representing their interests) on the extent to which its general policies and practices are consistent with its general duties. These arrangements must include the establishment and maintenance of a PRA Practitioner Panel. The Treasury's approval is required for the appointment or dismissal of the chairman of the Panel.[156] The establishment of the panel forms part of the mechanism for oversight of the PRA.

5.9.2 The Act requires the PRA to consider representations that are made to it as a result of these arrangements[157], and from time to time to publish responses. The requirement is not confined to representations made in response to a formal consultation.

5.9.3 In addition, since 1 March 2014, the FCA Consumer Panel has been able to communicate to the PRA its views on the extent to which the general policies and practices of the PRA are consistent with its general duties under sections 2B to 2H[158].

5.9.4 The Government acknowledges in its FRF Review that the regulators' statutory panels are an important part of the process through which stakeholders can feed in views on proposals. As part of its Phase II proposals for reform, it plans to require the regulators to publish a statement on their approach to the recruitment of panel members, to ensure that their membership represents a truly diverse range of stakeholder views. In addition, it proposes to put the PRA Practitioner Panel's insurance sub-committee on a statutory footing, in line with the PRA's and FCA's other panels.

5.10 Complaints scheme

5.10.1 There is a single complaints scheme in respect of the PRA, the FCA and the Bank. It is provided for in Part 6 of the FS Act 2012 but it is nevertheless convenient to mention it in this Guide.

5.10.2 The FCA, the PRA and the Bank must make arrangements for the investigation of complaints arising in connection with the exercise of, or failure to exercise, any of their relevant functions[159]. The PRA's and

156 Sections 2L and 2M.
157 Section 2N.
158 Section 1Q(5).
159 Section 84 of the FS Act 2012. The "relevant functions" are defined in section 85 of the FS Act 2012.

FCA's legislative functions are, however, excluded from the scheme. The scheme must consist of two elements: investigation of a complaint by the regulators themselves and investigation of the complaint by an independent person (the Complaints Commissioner). The complaints scheme must be designed so that, as far as is reasonably practicable, complaints are investigated quickly. The regulators have adopted a scheme very similar to the previous scheme which operated in respect of the FSA alone[160]. It covers "expressions of dissatisfaction" about the manner in which the regulators have carried out (or failed to carry out) their relevant functions, and includes allegations of mistakes and lack of care, unreasonable delay, unprofessional behaviour, bias or a lack of integrity. There are certain exclusions to the scheme, and circumstances when a complaint will not be investigated. In addition, a complaint need not be investigated under the complaints scheme if the regulator reasonably considers it would be more appropriately dealt with in another way (for example, by referring the matter to the Tribunal or by the institution of legal proceedings)[161].

5.10.3 The Complaints Commissioner is appointed by the regulators, but the terms and conditions on which the Complaints Commissioner is appointed must be such as, in the opinion of the regulators, are reasonably designed to secure that the Complaints Commissioner will be free at all times to act independently of the regulators, and that complaints will be investigated under the complaints scheme without favouring the regulators[162]. Under the FS Act 2012, the approval of the Treasury is required for the appointment or removal of the Complaints Commissioner[163]. Further, although the regulators have the power to determine the terms of the complaints scheme, there are statutory provisions concerning the provisions that must be made, and the regulators must consult on the scheme[164].

***Ex gratia* payments**

5.10.4 The FS Act 2012 requires that the complaints scheme must provide for the Complaints Commissioner to be able to publish a report (or part of it) if the Complaints Commissioner considers that it should be brought

160 The Bank and the FSA Policy Statement PS13/7 'Complaints against the regulators' (March 2013) and Policy Statement PRA PS14/16 / FCA PS16/11 'Complaints against the Regulators' (March 2016). The details of the Complaints Scheme were published in a separate 'Complaints against the regulators' document (March 2016).
161 Section 87(1) of the FS Act 2012.
162 Section 84(5) of the FS Act 2012.
163 Section 84(4) of the FS Act 2012.
164 Sections 87 (as amended by the Small Business, Enterprise and Employment Act 2015) and 86 of the FS Act 2012.

to the attention of the public. This is in addition to an annual report. In addition, the FS Act 2012 gives the Complaints Commissioner power to recommend that the regulator to whom a complaint relates makes a compensatory payment, and/or takes steps to remedy the matter complained of. Where the Complaints Commissioner finds a complaint to be well-founded, or has criticised a regulator in a report, the regulator must inform the Complaints Commissioner and the complainant of the steps it proposes to take in response to the report. The decision whether to make an *ex gratia* payment, therefore, remains with the regulator.[165]

5.10.5 The Complaints Commissioner's Annual Report 2014-2015 contains 'The Commissioner's Approach to Remedies'. This explains how the Complaints Commissioner will consider remedies, including compensation.

5.10.6 In a Consultation Paper issued in July 2020 (CP8/20), the PRA (together with the FCA and the Bank) proposed a revised version of the complaints scheme which is more "user friendly, using plain language to make it more accessible" and included a more detailed description of the approach to *ex-gratia* compensatory payments. Any changes to the Scheme emerging from that consultation will not be published until towards the end of 2021."

5.11 Reviews, inquiries and investigations

5.11.1 There are four provisions in respect of reviews, inquiries and investigations relating to the PRA: one in the Act (a power for the Treasury to commission efficiency reviews of the PRA) and three in the FS Act 2012 (a power for the Treasury to arrange independent inquiries, a requirement on the PRA to investigate and report to the Treasury on possible regulatory failure, and a power for the Treasury to require the PRA to undertake an investigation in the public interest).[166] It is convenient to deal with them all here.

Efficiency review

5.11.2 The Treasury is given power to appoint an independent person to conduct a review of the economy, efficiency and effectiveness with

[165] Section 87(5) of the FS Act 2012.
[166] Section 7F of the BoE Act; and sections 68, 74 and 77 of the FS Act 2012. In March 2016, the Bank's Independent Evaluation Office published an evaluation of the PRA's approach. See also the other reports mentioned in paragraphs 6.12.10 to 6.12.13.

which the PRA has used its resources in discharging its functions. Such a review is not to be concerned with the merits of the PRA's general policy or principles in meeting the PRA's objectives.[167]

Independent inquiry

5.11.3 Since 1 March 2014, the Treasury has had power to order an independent inquiry in three cases, up from two prior to the Banking Reform Act. The first of these is likely to be most relevant to the PRA. This is where it appears to the Treasury that:

(a) events have occurred in relation to certain firms or things, including a firm that is or was carrying on a regulated activity;

(b) which posed or could have posed a serious threat to the stability of the UK financial system or caused or risked causing significant damage to the interests of consumers; and

(c) these events might not have occurred, or the threat or damage might have been reduced, but for a serious failure in the legislative regime for the regulation of such persons or firms or the operation of such regime,

and the Treasury considers that an independent inquiry is in the public interest. The Government has said that the type of inquiry provided for by Part 5 of the FS Act 2012 is similar to the Chairman-led inquiry provided for in the Inquiries Act 2005. The Treasury is able to issue directions controlling the scope, timing, and conduct of the inquiry, and the making of reports. The costs of an inquiry are to be met by the Treasury out of the money provided by Parliament.[168]

Investigations into possible regulatory failure

5.11.4 The duty of the PRA to investigate and report on possible regulatory failure applies when the Treasury directs the PRA that specified conditions in relation to a specified PRA-authorised firm[169] or specified events are met, or where it appears to the PRA that the relevant

167 Section 7F of the BoE Act.
168 Sections 68(2) and 68(4) of the FS Act 2012. See also Government's response to the Treasury's Committee review of the reports into the failure of HBOS (October 2016).
169 Section 76 of the FS Act 2012 modifies section 74 of the FS Act 2012 where "PRA-authorised firms" includes Lloyd's or other persons who carry on regulated activities in relation to anything done at Lloyd's.

conditions are met (unless the Treasury directs that an investigation is not required).[170]

5.11.5 The conditions in relation to a PRA-authorised persons are that:

(a) relevant public expenditure has been incurred; and

(b) that expenditure might not have been incurred but for a serious failure in the regulatory system in relation to the functions of the PRA, or the operation of that system[171].

5.11.6 The conditions in relation to specified events are that events have occurred which:

(a) had, or could have had, a significant adverse effect on the safety or soundness of one or more PRA-authorised persons; or

(b) related to a PRA-authorised person carrying on the effecting and carrying out of contracts of insurance, and indicated a significant failure to secure an appropriate degree of protection for policyholders,

and those events might not have occurred, or the adverse effect or failure might have been reduced, but for a serious failure in the regulatory system in relation to the functions of the PRA, or the operation of that system[172].

Investigations in the public interest

5.11.7 The Treasury has residual power, where it considers that it is in the public interest and it does not appear to the Treasury that the regulator has undertaken or is undertaking an investigation, to require the PRA to undertake an investigation into and report to it on "relevant events". "Relevant events" include events that have occurred in relation to a firm that is or was carrying on a regulated activity.[173]

Conduct of investigations

5.11.8 In carrying out an investigation, the PRA must have regard to the desirability of minimising any adverse effect that the carrying out of

170 Section 74 of the FS Act 2012.
171 Section 74(1) of the FS Act 2012. "Public expenditure" is defined in section 75(3) of the FS Act 2012.
172 Section 74(2) of the FS Act 2012.
173 Section 77 of the FS Act 2012.

the investigation may have on the exercise by it of any of its other functions, and may postpone the start of, or suspend, an investigation if it considers it necessary to avoid a material adverse effect, although it must notify the Treasury if it does so. The PRA must also prepare a statement of policy with respect to such investigations, and obtain the consent of the Treasury to its issue.[174]

5.11.9 The Treasury has power to make directions concerning an investigation, but in exercising this power, must have regard to the desirability of minimising any adverse effect that the carrying out of the investigation may have on the exercise by the PRA of any of its functions.[175]

Reports

5.11.10 On completion of an investigation, the PRA must make a written report to the Treasury setting out the result of the investigation and any lessons learned, and making such recommendations as it considers appropriate.[176]

5.11.11 Where a report is made to the Treasury, either as a result of an independent inquiry or as a result of a PRA investigation, the Treasury must publish the report in full, subject to a power to withhold certain material. The Treasury must lay before Parliament whatever is published.[177]

5.11.12 For other reports, see paragraphs 6.12.10 to 6.12.13.

5.12 Competition scrutiny

5.12.1 As mentioned above, since 1 March 2014, the PRA has had a secondary competition objective. In addition to this, the PRA's own rules are put under competition scrutiny[178].

5.12.2 Under the Act, the Competition and Markets Authority (**CMA**) may give "section 140B advice" to the PRA in certain circumstances. The CMA must consult the PRA before the advice is given. The PRA must publish a response, within 90 days after receipt of the advice, stating how it proposes to deal with the advice. If, having considered the response, the CMA continues to consider that the matters it has considered may

174 Sections 78(2), 78(3), 78(4) and 80 of the FS Act 2012.
175 Sections 78(5) and 78(7) of the FS Act 2012.
176 Section 79 of the FS Act 2012.
177 Section 82 of the FS Act 2012.
178 Sections 140A to 140H.

cause or contribute to the prevention, restriction or distortion of competition in the supply or acquisition of goods or services in the UK, the CMA may refer the matter to the Treasury. The Treasury may, after consulting the PRA, give a direction to the PRA.[179]

5.13 Rules

General

5.13.1 Since in many respects the Act provides only a framework, the exercise of the PRA's rule-making and related powers are of great importance to authorised firms. Section 137G of the Act gives the PRA wide power to make general rules applying to PRA-authorised firms, in relation to both regulated activities and activities that are not regulated. Other provisions of the Act make specific provision in respect of general rules about remuneration, remuneration policies, recovery plans and resolution packs, and ring-fencing. The PRA may also make specific rules in the form of a threshold condition code and control of information rules. Part 9A also allows the PRA to grant rule waivers. The rule-making powers of the PRA must be exercised by the Prudential Regulation Committee and cannot be delegated[180]. One point to note is that unlike the FCA, the PRA is not given express general power to give guidance, although it does have power to give guidance about how it intends to advance its objectives[181].

5.13.2 Although the Act provides for the PRA to consult on new rules, it does not provide a direct mechanism for a firm or individual to challenge any particular rule. Judicial review is available, although traditionally the courts have adopted a cautious approach to the judicial review of regulatory bodies[182].

5.13.3 Phase II of the FRF Review envisages a new power for HM Treasury to require the PRA (and the FCA) to review their existing rules where the Government considers that it is in the public interest.

5.13.4 The Government also proposes to have an ability to set specific "have regards" which the regulators must consider when exercising their rules in specific areas of regulation. It will also require the regulators to make rules in relation to specific areas, particularly to any areas

179 Sections 140B, 140C, 140G, 140H.
180 See section 17(9) of the BoE Act.
181 Section 2I. The FCA is given such power in section 139A.
182 See *R (on the application of the British Bankers' Association v Financial Services Authority* [2011] EWHC 999 (Admin), and [2011] All ER (D) 222 (Apr), referred to in paragraph 6.2.26.

currently covered by retained EU law, with appropriate tailoring for the UK markets.

General rules

5.13.5 The basic approach of the legislation is to give the PRA power to make rules to advance any of its objectives (so-called "general rules")[183] and then to supplement that power in certain areas where the general rule-making power might not be broad enough. Examples of this include the power to make rules in relation to controlled functions, in relation to parent undertakings, in respect of auditors of PRA-authorised firms and in respect of fees.[184] Special provisions about the power to make general rules about remuneration and remuneration policy, recovery plans and resolution packs, and ring-fencing rules are dealt with at paragraphs 5.13.9 to 5.13.16.

5.13.6 Unlike the FCA, the PRA's rule-making powers are generally confined to making rules applicable to PRA-authorised firms. However, general rules may apply to a PRA-authorised firm's regulated and non-regulated activities. In addition, the PRA's general rules may contain requirements which take into account, in the case of a PRA-authorised firm that is a member of a group, any activity of another member of the group. Also, rules about recovery plans and resolution packs may impose requirements on a qualifying parent undertaking, and may relate to action to be taken by any other entity in the same group as an authorised firm, or a partnership of which the authorised firm is a member. Furthermore, the PRA may make rules concerning qualifying parent undertakings.[185] For more on this last item, see Chapter 18 'Powers exercisable in relation to parent undertakings'.

5.13.7 One of the measures proposed in Phase II of the FRF Review is to create a new Designated Activities Regime (DAR), which will be a mechanism to allow the regulation of certain activities that, while outside the authorisation process in the Act, were before Brexit subject to separate directly applicable EU regulatory regimes (such as short-selling or certain derivatives transactions). It is anticipated that the regulators, including the PRA, would be granted a limited rulemaking power to determine the rules that will regulate these designated activities.

183 Section 137G.
184 See, respectively: sections 59; 192J, 192JA and 192JB; 340(3A) (which includes a duty to make rules in respect of co-operation); and paragraph 31.
185 Sections 137G(1), 137G(4), 137J, 137K, 192J, 192JA and 192JB.

5.13.8 The PRA's general rules may not modify, amend or revoke any retained direct EU legislation (except retained direct EU legislation which takes the form of PRA Rules)[186].

General rules about remuneration and remuneration policy

5.13.9 Both the PRA and the FCA may make general rules prohibiting persons, or persons of a specified description, from being remunerated in a specified way[187], although as mentioned above, the PRA may only make rules applying to PRA-authorised firms. The rules may provide that any provision that contravenes such a provision is void, and for the recovery of money or property paid under it. A previous provision requiring such a prohibition to be imposed only for the purpose of ensuring that the provision of remuneration is consistent with the effective management of risk, or the 'Implementation Standards for Principles for Sound Compensation Practices' issued by the Financial Stability Board, has not been retained.

5.13.10 In a similar way, both regulators may also make general rules requiring authorised firms to have and to comply with a remuneration policy[188]. Historically, the FSA had an equivalent power, and the rules had to be consistent with the effective management of risks and the Implementation Standards mentioned in the previous paragraph. The FSA also had to have regard to any international standards about remuneration of individuals working in the financial sector. These provisions have not been retained.

5.13.11 If rules contain a requirement for authorised firms to act in accordance with a remuneration policy, the Treasury may direct the regulator to review the compliance of the contents of the remuneration policy of a specified authorised firm, or authorised firms of a specified description, with such rules. If there is non-compliance, the regulator must take such steps as it considers appropriate to deal with the failure, including requiring the remuneration policy to be revised.[189]

General rules about recovery plans and resolution packs

5.13.12 The PRA and the FCA may make general rules that require authorised firms (in the case of PRA rules, PRA-authorised firms) or qualifying

186 Section 137G(6).
187 Section 137H.
188 Section 137I(1).
189 Section 137I(3), 137I(5) and 137I(6).

parent undertakings within the meaning given in section 192B to prepare a recovery plan (as described in section 137J(3)). Before preparing a draft of such rules, the regulator must consult the Treasury (and, in the case of the FCA, the Bank).[190]

5.13.13 The regulator must also consult the Treasury (and, in the case of the FCA, the Bank) before preparing a draft of any general rules that require the preparation of a resolution pack (a document containing the information set out in section 137K(4) or (5)).

5.13.14 A previous provision requiring the regulator to have regard to international standards when making rules about recovery plans or resolution packs has not been retained.

5.13.15 Section 137N makes special provision to relax contractual and other duties of confidence for authorised persons, qualifying parent undertakings and third parties in connection with a requirement imposed by general rules to prepare or keep up to date a recovery plan or a resolution pack.

Ring-fencing rules

5.13.16 In the exercise of its power to make general rules, the PRA must make ring-fencing rules[191] — see further Chapter 13 'Banking structural reform'.

Specific rules

5.13.17 In addition to its general rule-making powers, the PRA (as well as the FCA) may make the following specific rules:

(a) a "threshold conditions code" (rules supplementing any of the conditions for the time being set out in Schedule 6); and

(b) "control of information rules" (rules about the disclosure and use of information held by an authorised firm); and

(c) "rules about the conduct of certain persons" — see further Chapter 11 'Senior managers and certification regime'.[192]

190 Section 137J.
191 Section 142H.
192 Sections 137O, 137P and 64A(2).

Evidential rules

5.13.18 Section 138C allows for so-called "evidential" rules to be made. These are rules which provide either that contravention may be relied on as tending to establish contravention of another rule, or that compliance may be relied on as tending to establish compliance with such other rule. Contravention of evidential rules does not give rise to any other consequences of rule breaches provided for in other provisions of the Act.

5.14 Principles replaced by Fundamental Rules

5.14.1 Although at legal cutover the PRA designated certain of the FSA's 'Principles for Businesses' (PRIN), from 19 June 2014, the PRA replaced these Principles within the PRA Rulebook with new high-level so-called fundamental rules expressing the PRA's expectations of firms (the **Fundamental Rules**)[193]. The PRA states that "the Fundamental Rules are core to the PRA's supervisory approach and underpin the PRA Rulebook"[194]. However, the Principles remain relevant in respect of enforcement action for behaviour taking place prior to the Fundamental Rules coming into force.

5.15 Code

5.15.1 The PRA is allowed, but not required, to make a "threshold condition code" (rules supplementing any of the conditions for the time being set out or specified under Schedule 6 that are stated to be relevant to the discharge of the PRA's functions)[195].

5.16 Rule-making procedures

5.16.1 The Act generally requires the PRA to consult the FCA before making any rules, and thereafter to consult publicly, including giving an explanation of the purpose of the proposed rules, its reasons for believing the rules are compatible with its objectives and the principles of good regulation and (subject to certain exceptions) a cost-benefit analysis. There is also the general duty to consult PRA-authorised firms, including through the PRA Practitioner Panel, on the extent to which its general policies and practices are consistent with its general duties

193 The Principles for Businesses remain for the purposes of the FCA Handbook, and so remain relevant for dual-regulated firms.
194 Alongside the threshold conditions and the PRA approach documents; PRA Policy Statement PS5/14 'The PRA Rulebook' (June 2014).
195 Section 137O.

under sections 2B to 2H. There are additional requirements if a rule applies to both authorised firms that are mutual societies and other authorised firms; the regulator must prepare a statement setting out whether or not, in its opinion, the impact of the proposed rule on mutual societies will be significantly different from its impact on other authorised firms, and the difference. Additionally, the PRA must consult the Treasury before preparing a draft of any general rules that require an authorised firm or a qualifying parent undertaking to prepare a recovery plan or resolution pack.[196]

5.16.2 If the PRA makes the proposed rules, it must publish an account, in general terms, of the representations made to it in connection with the consultation and of its responses to such representations[197].

5.16.3 Section 138L contains a general exemption from the duty to consult publicly (but not the duty to consult the FCA) if the PRA considers that the delay involved would be prejudicial to the safety and soundness of PRA-authorised firms or to securing the appropriate degree of protection for policyholders.

5.16.4 A simplified consultation procedure, including pre-consultation with the FCA, but not including a cost-benefit analysis, applies to the PRA issuing a statement of policy with respect to the giving of directions to qualifying parent undertakings under section 192C[198]. Consultation procedures also apply in respect of certain statements, such as a statement of fining policy (although the duty to consult the FCA does not apply)[199].

5.17 Rule waivers and modifications

5.17.1 Section 138A of the Act allows for PRA rules (other than the threshold condition code, or rules of conduct under section 64A) to be waived or modified in particular circumstances. The Government has indicated in the past that these powers may be used to achieve a similar outcome to "no-action" letters in other jurisdictions.

5.17.2 The PRA may grant rule waivers or modifications if it is satisfied that compliance with the rule would be "unduly burdensome", or would not achieve the purpose for which the rule was made. In addition, the PRA

196 Sections 138J and 138K, 2L and 2M, and 137K and 137J. These duties are in addition to any public law duty to consult.
197 Section 138J(4).
198 Section 192I.
199 Section 192N.

will need to be satisfied that the direction would not adversely affect the advancement of any of the PRA's objectives.

5.17.3 A direction under section 138A must be published by the PRA in a way which is calculated to bring it to the attention of firms likely to be affected by it and other firms likely to make an application for a similar direction unless the PRA thinks it inappropriate or unnecessary to do so after considering the matters listed in sections 138B(3) and 138B(5).

5.17.4 The PRA may revoke the direction under section 138A, or vary it on the application, or with the consent, of the person to whom it relates.[200]

5.18 Guidance

5.18.1 Unlike the FCA, the PRA is not given general power to give guidance in the Act.[201] The PRA has said that it does not plan to issue significant amounts of additional, detailed guidance to clarify its policy, whether in the form of general guidance issued publicly or advice given by supervisors to individual firms. However, where it judges that general guidance is required, it issues "supervisory statements" which are intended to set flexible frameworks for firms setting out PRA's supervisory expectations. They are aimed at facilitating firms' and supervisory judgment in determining whether PRA's expectations are met. Supervisory statements do not set absolute requirements[202].

5.18.2 However, the Act does contain provisions requiring the PRA to give guidance in certain circumstances. For example, as mentioned previously, the PRA is required to give guidance about how it intends to advance its objectives[203]. The PRA states that it does this in its approach documents.

5.18.3 In addition, the PRA provides guidance on the 'Total Capital Requirements' to banks, building societies and designated investment firms under "Pillar 2A"[204]. The PRA also issues guidance on assessing liquidity risk and requirements under "Pillar 2B"[205]. The PRA also gives guidance about the adequacy of an insurer's capital[206].

200 Section 138A(7).
201 The FCA is given such power in section 139A; in particular, see section 139A(1)(c).
202 https://www.bankofengland.co.uk/prudential-regulation/policy.
203 Section 2I(1).
204 Supervisory Statement (SS) 31/15 'The Internal Capital Adequacy Assessment Process (ICAAP) and the Supervisory Review and Evaluation Process' (April 2021) and Statement of Policy (SoP) 'The PRA's methodologies for setting Pillar 2 capital' (April 2021).
205 Statement of Policy (SoP) 'Pillar 2 Liquidity' (June 2019).
206 Supervisory Statement (SS) 3/15 'Solvency II: The quality of capital instruments' (March 2020).

5.18.4 In light of Brexit, the PRA has stated that even though it has not made line-by-line amendments to its non-binding materials such as the approach documents and supervisory statements, these materials should be read in light of any relevant onshoring changes to the legislation to which they relate.[207]

5.19 Consequences of breaching the PRA's rules

5.19.1 Breach of the PRA's rules is not a criminal offence[208]. However, disciplinary action (for example, fines or public censure) can be taken in relation to a rule breach and ultimately, an authorised firm may have its permission curtailed or cancelled as a result.

5.19.2 Generally, contravention of the PRA's rules does not, of itself, make any transaction void or unenforceable. However, general rules about remuneration may provide that any provision of an agreement that contravenes a prohibition is void, and for recovery of any payment made or property transferred.[209]

5.19.3 A rule made by the PRA may provide that contravention of the rule is actionable at the suit of a private person who suffers loss as a result of the contravention, subject to the defences applicable to actions for breach of statutory duty. This contrasts with the position with the FCA, and before that the FSA, where there is a presumption that a breach of a rule is actionable unless the rule makes contrary provision. The definition of rule for this purpose does not include rules made under section 64A (rules of conduct), section 137O (threshold conditions code), rules made under section 192J (provision of information by parent undertakings) or a rule requiring an authorised firm to have or maintain financial resources, so no action for damages will lie for breach of one of these rules.[210] In practice, this is a power hardly exercised by the PRA.

5.20 The PRA Rulebook

5.20.1 At legal cutover, the PRA adopted parts of the FSA Handbook and called it the PRA Handbook. Between 2013 and 2016, the PRA Handbook was fully rewritten into its current form, the PRA Rulebook. All guidance was deleted but retained, where applicable, in relevant PRA supervisory

207 Supervisory Statement (SS) 1/19 'Non-binding PRA materials: The PRA's approach after the UK's withdrawal from the EU' (December 2020).
208 Section 138E(1).
209 Sections 138E(2) and 137H(2).
210 Sections 138D(1) and 138D(5).

statements and webpages. Information on how the regulator will act (previously included within the FSA Handbook) is now published outside the PRA Rulebook.

5.20.2 The PRA rules are consolidated and published online in the PRA Rulebook, including the Fundamental Rules. The PRA Rulebook is not intended to contain as much information as the FCA Handbook and is supplemented by other material, such as the retained EU legislation, Supervisory Statements issued by the PRA, the two PRA approach documents, PRA statements of policy, and the PRA section of the Bank's website. All of these materials are relevant for the PRA-authorised firms.

5.20.3 The PRA Rulebook is regularly amended when the PRA makes new rules or guidance. At the time of writing, the PRA is reviewing the Rulebook website to ensure that PRA rules, Supervisory Statements, and Statements of Policy are presented in a way that Rulebook users have easy access to and can understand and intends to make an updated Rulebook platform available to users by the end of 2023[211].

5.20.4 PRA-authorised firms are subject to both the PRA Rulebook and, in relation to conduct of business, the FCA Handbook.

[211] PRA Discussion Paper DP3/21 'The PRA Rulebook website: Planned updates' (November 2021).

6. THE FINANCIAL CONDUCT AUTHORITY

6.1 Overview

6.1.1 The FCA is the body formerly known as the FSA[212]. Under the Act as originally enacted, the FSA was a powerful unified regulator. Since the coming into force of the FS Act 2012, that power has been shared with the PRA, which also has a power of direction over the FCA in certain circumstances. Both regulators can be subject to direction by the FPC. The FCA is responsible for retail and wholesale conduct of business regulation, regulation of markets, and the prudential regulation of firms not authorised by the PRA.

6.1.2 Although a private company limited by guarantee, in performing its functions, the FCA will be treated as a public authority for certain purposes, such as the Human Rights Act 1998, the Freedom of Information Act 2000 (although exemptions from disclosure may be available) and judicial review.

6.1.3 There are a number of measures designed to provide checks and balances on the FCA's use of its powers. The prime lines of accountability are to the Treasury and to Parliament. There are other lines of accountability from the FCA to consumers and practitioners more generally. Since the FS Act 2012, legislation makes greater provision for reviews, inquiries and investigations relating to the FCA. In 2020, independent investigations were launched to review the FCA's approach to its regulation of London Capital & Finance plc and the Connaught Income Fund (Series 1), on the instruction of the Treasury and the recommendation of the Financial Regulators' Complaints Commissioner, respectively[213]. The FCA accepted the recommendations and lessons published in the final reports of each investigation.

6.1.4 The FCA has a strategic objective of ensuring that relevant markets function well. It has operational objectives of securing an appropriate degree of protection for consumers, protecting and enhancing the integrity of the UK financial system, and promoting effective competition in the interests of consumers. "Consumer" is widely defined[214]. The FCA must have regard to the principles of good

212 Section 1A(1).
213 The FCA published a response to these independent reviews on 17 December 2020 'FCA responds to independent reviews into its regulation of London Capital & Finance and Connaught'.
214 See the definition of "consumer" in the FCA Handbook's Glossary.

regulation and, in addition, the FCA must have regard to the importance of minimising financial crime.

6.1.5 In relation to the competition objective, the FCA has stated that an essential component and key driver of effective competition is innovation. In recent years, the FCA has committed to encouraging innovation in the interest of consumers through a package of measures, including a "regulatory sandbox". The regulatory sandbox allows businesses to test innovative propositions in the market with real consumers and, most recently, the FCA collaborated with The City of London Corporation to pilot a "digital sandbox" which provided enhanced support to innovative firms tackling challenges caused by the Covid-19 pandemic[215]. In February 2021, the Kalifa Review of UK Fintech recommended enhancements to the regulatory sandbox as well as a permanent digital sandbox, and suggested that some reconsideration of the FCA's objectives may also be necessary.[216] In April 2021, Chancellor of the Exchequer Rishi Sunak confirmed that the FCA would take forward and build on many of the Kalifa Review's recommendations, including (a) the creation of a "Regulatory Scalebox" to support rapid growth in start-ups; (b) the launch of the second phase of the digital sandbox (to be focused on tackling sustainability and climate change challenges); and (c) an imminent collaboration between the FCA, the Treasury and the Bank in the creation of an entirely new sandbox for the exploration of certain technologies to improve financial market infrastructure, such as distributed ledgers[217]. In August 2021, the FCA moved the regulatory sandbox from a cohort basis to an "Always Open" (that is, permanent) basis in late 2021, such that applications can now be submitted throughout the year — it is the FCA's hope that this change will allow firms to access sandbox testing services at the right points in their development lifecycles and maximise the benefits of live market testing in progressing innovative models[218].

6.1.6 The Government was not persuaded to add a dedicated additional regulatory principle focused on innovation as part of its proposals for reform comprising Phase II of the FRF Review.

6.1.7 The FCA has indicated that its supervisory principles are:

215 See FCA publication 'Supporting innovation in the financial services: the digital sandbox pilot' (April 2021).
216 See the Treasury's policy paper 'Kalifa Review of UK FinTech: Final Report' (February 2021).
217 See Treasury news publication 'Ambitious plans to boost UK fintech and financial services set out by Chancellor' (April 2021).
218 See FCA webpage 'Regulatory sandbox' (last updated 17 August 2021).

(a) to be forward looking by pre-empting or addressing poor conduct;

(b) a focus on strategy and business models;

(c) a focus on culture and governance;

(d) a focus on individual as well as firm accountability;

(e) taking a proportionate and risk-based approach;

(f) two-way communication, engaging with consumers, industry, firms and other market participants;

(g) co-ordination between supervision teams and those in authorisations, market oversight, policy, competition and enforcement functions as well as with other regulatory bodies in the UK and overseas; and

(h) to put right systematic harm that has occurred and stop it happening again.[219]

6.1.8 The FCA is given wide powers to make rules, applying to firms for both their regulated and unregulated activities[220]. Unlike the PRA, the FCA is given specific power to give guidance, some of which it exercises outside the FCA Handbook. Recent examples of this include the FCA's published guidance in relation to mortgages and the COVID-19 pandemic[221] and the fair treatment of vulnerable customers[222]. Together with its finalised guidance, the FCA further publishes policy statements, which typically outline the FCA's response to, and summary of, various consultations it launches on specific issues.

6.1.9 Following Brexit and the end of the transition period on 31 December 2020, the European Union (Withdrawal) Act 2018 provided the Government powers to amend retained EU legislation to reflect the UK's departure from the EU. In line with this, the FCA updated its Handbook to ensure consistency with the Government's amendments. The FCA was granted responsibility for the amendment and

219 See the FCA publication 'FCA Mission: Approach to Supervision' (April 2019).
220 See Chapter 1 of the FCA's publication 'FCA Mission: Approach to Consumers' (July 2018) and PRIN 2.1 'The Principles' of the Principles for Businesses section in the FCA Handbook.
221 See the FCA publication 'Finalised Guidance: Mortgages and coronavirus: further updated tailored support guidance for firms' (March 2021).
222 See the FCA publication 'Finalised guidance: FG21/1 Guidance for firms on the fair treatment of vulnerable customers' (February 2021).

maintenance of certain EU binding technical standards that have been transposed into UK law. These technical standards specify the detailed requirements of retained EU regulations and directives.[223]

6.1.10 The FCA Handbook itself consists of rules and guidance, and signposts to UK legislation. The FCA Handbook is the sole rulebook applicable to FCA-authorised firms, but dual-regulated firms (that is, PRA-authorised firms) are subject to both the PRA Rulebook and the FCA Handbook.

6.2 The FCA's structure

6.2.1 The FCA is a private company limited by guarantee without share capital and is exempt from the requirements of the Companies Act 2006 relating to the use of "limited" as part of its name.[224]

6.2.2 The FCA must comply with the requirements as to its constitution set out in Schedule 1ZA to the Act. Schedule 1ZA also makes provision about the status of the FCA and the exercise of certain of its functions.[225]

6.2.3 The FCA, as a company limited by guarantee, is not obliged to comply with the UK Corporate Governance Code. It must, however, have regard to such generally accepted principles of good corporate governance as it is reasonable to regard as applicable to it[226]. The FCA complies with the UK Corporate Governance Code, as far as appropriate, on a voluntary basis[227]. In addition, the FCA has given details of senior management responsibilities internally. In June 2016, the FCA also signed the Women in Finance Charter (**Charter**), which seeks to increase the representation of women in the financial services sector, particularly at senior levels. Following its signature to the Charter, the FCA set gender and diversity targets in relation to senior management representation for the years 2020 and 2025.[228] In its Business Plan for the years 2021/22, the FCA indicated its commitment to improving its

223 See the FCA webpage 'Considerations for firms after the transition period' (last updated 31 December 2020).
224 Schedule 1ZA, paragraphs 17 and 18. Other references to paragraphs in the footnotes to this chapter are to paragraphs of Schedule 1ZA to the Act, unless otherwise indicated.
225 Sections 1A(3) and 1A(4) and paragraphs 2, 3, 4, 5 and 6.
226 Section 3C.
227 See paragraph 1.2 of the FCA publication 'Corporate governance of the Financial Conduct Authority: Adopted by resolution of the Board on 30 January 2020' (March 2020) (FCA Corporate Governance Policy 2020).
228 See the FCA webpage 'Women in Finance Charter and progress against targets' (September 2020) (last updated 15 July 2021).

diversity and inclusion, through the publication of key indicators such as pay gap data and progress against its ethnicity action plan[229].

6.2.4 Furthermore, the FCA must have regard to the Regulators' Code when (a) developing policies and operational procedures that guide its regulatory activities; and (b) setting standards or providing guidance on the regulatory activities of other regulators[230]. The FCA is also a founding member of the UK Regulators' Network (**UKRN**), comprising the UK's economic regulators. Among other things, the UKRN drives the pro-active sharing of best practice between its members and publishes guidelines on certain issues, such as the use of powers of attorney in relation to vulnerable customers[231].

The Board of the FCA (Board)

6.2.5 The only members of the FCA are its directors[232]. The Board must consist of:

(a) a chair appointed by the Treasury;

(b) a chief executive appointed by the Treasury[233];

(c) the Bank's Deputy Governor for prudential regulation;

(d) two directors appointed jointly by the Secretary of State and the Treasury; and

(e) at least one other director appointed by the Treasury[234].

6.2.6 A majority of the Board, including the chair, must be non-executive. The term of office of a person appointed as chief executive must not begin before the person has appeared before the House of Commons Treasury Committee (or three months have elapsed). The terms of service of an appointed director of the Board must (a) secure that such

229 Page 18 of the FCA's 'Business Plan 2021/22' (15 July 2021).
230 See the then-Department for Business Innovation & Skills (DBIS) publication 'Regulators' Code' (April 2014). The FCA must have regard to the Regulators' Code under The Legislative and Regulatory Reform (Regulatory Functions) Order 2007, made by the Minister for the Cabinet Office, pursuant to section 24(2) of the Legislative and Regulatory Reform Act 2006.
231 See the UKRN publications 'UKRN annual report and multi-year workplan' (March 2021) and 'Joint UKRN-OPG Guide to Power of Attorney' (May 2019).
232 See Article 23.1 of the FCA's Articles of Association.
233 Section 42 of the FS Act 2021 inserts a new sub-paragraph 1A to paragraph 2A, making the FCA's chief executive subject to a fixed five-year term. A new paragraph 2B indicates that this appointment may be renewed once such that any appointee will be in the chief executive role for a maximum of 10 years. Section 42 entered into force on 29 June 2021.
234 Paragraph 2(2).

person is not subject to direction by the Treasury or the Secretary of State; (b) require that such person does not act in accordance with the directions of any other person; and (c) prohibit that person from acquiring any financial (or other) interest that would have a material effect on their function as a director. In addition, an appointed director cannot be an employee of the PRA. Appointments to the Board are subject to a Code of Practice issued by the Office of the Commissioner for Public Appointments.[235]

6.2.7 The Treasury has the power to remove an appointed director from office on grounds of incapacity or serious misconduct or on the grounds that the director's financial or other interests are such as to have a material effect on the extent of his functions as director that it would be proper for him to discharge.[236]

6.2.8 The Bank of England's Deputy Governor for prudential regulation must not take part in any discussion by, or decision of, the FCA which relates to the exercise of the FCA's functions in relation to a particular person, or a decision not to exercise those functions.[237]

6.2.9 The FCA's legislative functions must be exercised through the Board, although the FCA may make arrangements for other functions to be delegated to a committee, sub-committee or (except for issuing general guidance) an officer or member of staff.[238]

6.2.10 The FCA must publish a record of Board meetings, which must specify decisions taken (including decisions not to act), and give a summary of deliberations leading to that decision, but need not include information which the Board considers would, if published, be against the public interest.[239]

Annual report and meeting

6.2.11 The FCA must make a report to the Treasury at least annually, covering subjects such as the discharge of its functions and attaching a remuneration statement for Board members. The Treasury must lay this report before Parliament. Within three months of the report, the FCA

235 Paragraphs 2(3), 2(4), 2A, 3(4) and 3(6); the FCA publications 'Corporate governance of the Financial Conduct Authority: Adopted by resolution of the Board on 30 January 2020' (March 2020), pages 4 and 19; and 'Financial Conduct Authority Annual Report and Accounts 2019/2020' (printed September 2020), page 98.
236 Paragraph 4.
237 Paragraph 6.
238 Paragraph 8.
239 Paragraph 10.

must hold a public meeting to enable the annual report to be considered. At the meeting, a general discussion of the report's contents will be held with reasonable opportunities provided for attendees to put questions to the FCA. The FCA must publish a report of the proceedings of this annual meeting within one month.[240]

Business plan

6.2.12 Each year, the FCA publishes its Business Plan, which sets out its key priorities and objectives for the coming year. In light of the COVID-19 pandemic, in its Business Plan for the year 2021/22[241] (**Business Plan 21/22**), the impact of — and changes brought about by — the pandemic is a prominent trend throughout the FCA's future outlook. For example, it notes the increasing digitalisation of financial services (bringing with it inherent changes to firms' business operations) and persistently low interest rates (causing possible risks of customers taking on excessive financial risk)[242].

6.2.13 The FCA's priorities in its Business Plan 21/22 for the coming year have been split across three categories:

(a) *consumer protection*: the FCA, building on four consumer priorities originally set out in its Business Plan for 2020/21[243], will focus on: (i) enabling consumers to make effective investment decisions; (ii) ensuring consumer credit markets work well (including monitoring how firms approach consumers with debt and financial difficulties); (iii) making payments safe and accessible; and (iv) delivering fair value for consumers. The FCA also aims to improve consumer outcomes through a new "Consumer Duty", which will require firms to put consumers at the centre of their business plans (see paragraph 6.5.4 on the consultation that the FCA has launched in respect of this new duty);

(b) *wholesale markets*: in the wholesale markets, the FCA will continue to critically review changes to its rules now that the UK has left the EU, while ensuring it adheres to its commitment not to diverge from minimum standards under the EU frameworks. It will also focus on the overall effectiveness of the

240 Paragraphs 11, 12 and 13.
241 FCA publication 'Business Plan 2021/22' (15 July 2021).
242 Page 9 of the Business Plan 21/22.
243 FCA publication 'Business Plan 2020/21' (7 April 2020).

wholesale markets, supervision of appointed representatives, managing the orderly transition away from LIBOR, reducing financial crime risks and ensuring that products and services are accessible and offer choice, fair value and deliver in accordance with expectations;

(c) *all markets*: cross-sectoral priorities for the FCA include: (i) environmental, social and governance issues, including supporting the Government's commitment toward a net-zero economy; (ii) reducing fraud and tackling misconduct; (iii) ensuring firms remain operationally and financially resilient (see further paragraph 6.5.4 on the FCA's new UK Investment Firms Prudential Regime); (iv) promoting gender and ethnic diversity at the FCA and across FCA-regulated firms (see more on the FCA's diversity targets at paragraph 6.2.3); (v) enabling a more sustainable financial future; (vi) emphasising strong international cooperation; and (vii) supporting the Government in terms of market access, equivalence and trade negotiations.

6.2.14 In his speech launching the Business Plan, CEO Nikhil Rathi indicated a step-change in the FCA's overall approach, with hopes for it to become an increasingly more decisive, forward-looking and proactive regulator, through an approach "*that is tough, assertive, confident, decisive, agile*"[244]. Rathi indicates that the FCA will be prepared to "*test [its] powers to the limit*". As a result, the FCA is planning to undergo three distinct changes: to becoming more innovative by taking advantage of data and technology to increase its ability to act decisively (with £120 million set to be invested over three years in its data strategy[245]); being more assertive; and being more adaptive in its approaches to consumer choices, markets, services and products (such as through automation)[246].

6.2.15 Further, the FCA considers accountability to be central to the financial regulatory framework — it will set measurable goals and report publicly on its progress towards achieving them, starting from April 2022[247]. The FCA has set seven strategic overarching outcomes and metrics against which it plans to measure its progress:

244 Speech by FCA CEO Nikhil Rathi titled 'Transforming to a forward-looking, proactive regulator' (15 July 2021).
245 Page 12 of the Business Plan 21/22.
246 Page 4 of the Business Plan 21/22.
247 Page 4 of the Business Plan 21/22.

(a) setting the bar high to support sustainable innovation for consumers;

(b) setting the bar high to support market integrity in wholesale markets;

(c) ensuring firms start with high standards and maintaining them (this will include increased refusal, withdrawal and rejection rates as well as the monitoring of complaints about newly authorised firms);

(d) using new approaches to detect issues and harm more quickly (this will include monitoring the value and volume of FSCS claims and aims to reduce the FSCS levy);

(e) tackling misconduct to maintain trust and integrity;

(f) enabling consumers to make informed financial decisions (for example, through increasing the effectiveness of its 'ScamSmart' campaign, which aims to increase public awareness of pension and investment scams); and

(g) diversity and inclusion across the industry.[248]

6.2.16 In respect of becoming a "more assertive" regulator, the FCA has stated it is seeking to reduce harm outside of its regulatory perimeter by (a) asking questions and analysing data outside its perimeter; (b) being clearer where it notices legislative gaps, including on information-gathering powers; and (c) speaking up and alerting its partners when it identifies risks and issues in the markets[249]. It also intends to: ensure firms maintain high standards through greater scrutiny; set up a "regulatory nursery" for newly authorised firms, providing stronger oversight over such firms as they evolve[250]; undertake a "use it or lose it" exercise, piloting the removal of firms' permissions where they do not carry out regulated activities, to limit the "halo effect" of regulation — that is, where firms use FCA oversight of one activity to make other unregulated activates appear more trustworthy[251]. The FCA is also planning to launch a "Regulatory Scalebox", providing enhanced oversight and support for newly authorised firms with plans to scale

248 Page 22 of the Business Plan 21/22.
249 Page 14 of the Business Plan 21/22.
250 Page 12 of the Business Plan 21/22.
251 Page 12 of the Business Plan 21/22.

significantly over a short timeframe[252]. This new proactive approach was endorsed by the Board in its annual 2021 board minutes[253].

6.2.17 The FCA has also stated it will publish a three-year Consumer Investments Strategy and launch a consultation on changes to its financial promotion rules as they relate to high-risk investments (which includes cryptoassets)[254]. It also noted in its Business Plan 21/22 that it will create a "consumer investment co-ordination group" together with the FSCS, FOS and MaPS (as defined below) and review the scope and coverage of FSCS compensation for specified regulated activities[255]. The FCA noted that it will also place emphasis on ensuring access to payments services (including protecting consumer access to cash) and further ensuring that the payments market remains competitive and innovative[256].

Fees

6.2.18 The FCA is funded by the industry it regulates through its statutory fee-raising powers. The FCA may make rules providing for the payment of fees, in connection with its "qualifying functions". "Qualifying functions" for this purpose are its functions under or as a result of the Act or any of the other Acts or Regulations mentioned in section 1A(6) (other than those "excepted functions" carved out in section 2ZA), and its functions under or as a result of a qualifying provision that is specified, or of a description specified, by the Treasury by order. Other fees and charges may be provided for by other provisions of the Act.[257]

6.2.19 In fixing the amount of any fee to be payable to the FCA, no account is to be taken of any sums which the FCA receives by way of penalties imposed by it under the Act. The FCA can deduct its enforcement costs from penalty receipts, but the remainder is to be paid to the Treasury. The FCA must put these deducted amounts towards a financial penalty scheme, to be applied for the benefit of FCA-regulated persons, including authorised firms. Provision is made so that firms who pay penalties in a financial year do not get the benefit of amounts retained by the FCA in the following financial year.[258]

252 Page 44 of the Business Plan 21/22.
253 See FCA publication 'FCA Board minutes: 29 April 2021' (29 April 2021).
254 Page 25 of the Business Plan 21/22
255 Page 26 of the Business Plan 21/22.
256 Pages 28 and 29 of the Business Plan 21/22.
257 Paragraph 23. See also section 410A and the Financial Services and Markets Act 2000 (Qualifying Provisions) Order (SI 2013/419).
258 Paragraphs 23(7), 20(1), 21(1) and 21(4).

6.2.20 The Act makes provision for the recovery of fees owed under any provision by or under the Act as a debt due to the FCA.[259]

Immunity, damages and judicial review

6.2.21 In relation to any of its functions, the FCA is not to be regarded as acting on behalf of the Crown, and its members, officers and staff are not to be regarded as Crown servants.[260]

6.2.22 There is an exemption from liability in damages for anything done or omitted in the discharge, or purported discharge, of the FCA's functions for:

(a) the FCA;

(b) any person who is, or is acting as, a member, officer, or member of staff of the FCA;

(c) any person who could be held vicariously liable for things done or omitted by a person mentioned in (b) above, but only insofar as the liability relates to such person's conduct.[261]

6.2.23 This exemption from liability does not apply to an act or omission that is shown to have been in bad faith, or in the circumstances mentioned in the next paragraph.[262]

6.2.24 Although it is a private company, in performing its functions, the FCA is nevertheless to be treated as a public authority for the purposes of the Human Rights Act 1998 (as was the FSA[263]). As a limitation on the exemption from liability in damages mentioned above, the FCA can be liable for an award of damages in respect of an act or omission on the ground that the act or omission was unlawful as a result of section 6(1) of the Human Rights Act 1998.[264]

6.2.25 The FCA is also to be treated as a public authority for the purposes of the Freedom of Information Act 2000 and the Equality Act 2010.[265]

259 Paragraph 23(8).
260 Paragraph 16.
261 Paragraph 25.
262 Paragraph 25(3).
263 *Fleurose v The Securities and Futures Authority Limited and another* [2001] EWCA Civ 2015.
264 Paragraph 25(3)(b).
265 Part 6 of Schedule 1 to the Freedom of Information Act 2000; and the "Industry, business, finance etc" section of Part 1 of Schedule 19 to the Equality Act 2010.

6.2.26 Notwithstanding the exemption from damages for the FCA, proceedings can be brought against the FCA for judicial review, and orders (other than for damages) can be made. The FCA can be subject to judicial review if it acts illegally, unfairly or unreasonably, or if it fails to follow proper procedure. However, the broad discretion granted to the FCA as to how to act in particular circumstances, and the fact that none of the FCA's objectives imposes on the FCA a statutory duty to take action (for example, to secure an appropriate degree of protection for consumers), can hamper the availability of judicial review in practice[266]. In *R (on the application of the British Bankers' Association v Financial Services Authority*[267], the British Bankers' Association failed in its challenge against the FSA and the FOS in respect of regulatory provisions and guidance on how payment protection insurance sales complaints should be handled. However, in a case initially decided in favour of the applicant, *R (C) v Financial Services Authority*[268], the Court quashed a decision notice of the FSA's Regulatory Decisions Committee on the grounds that the reasons given in the decision notice were inadequate, and the alternative remedy of remitting the case to the Tribunal was not as effective and suitable as the claim for judicial review. Lord Justice Moore-Bick then allowed the FSA's appeal and found that the "*purpose of establishing the FSA to regulate the financial services industry and associated markets was to place responsibility for ensuring the maintenance of high standards in the hands of an expert body … It would be surprising, therefore, if Parliament had intended that disputes relating to the procedure adopted by the FSA should be reviewed by the courts, save in the most exceptional cases.*"[269]

6.2.27 In a more recent case, *R (T and another) v Financial Conduct Authority*[270], a challenge to the FCA's Regulatory Decisions Committee's decision not to stay regulatory proceedings pending the outcome of associated civil proceedings in the Commercial Court was successful. Mr Justice Swift noted that in this case, the risk of "*serious prejudice*" to the claimant "*outweigh[ed] other public interest considerations*" and

266 This was explained in the Explanatory Notes to the FS Act 2012. Note 98 states that "*[n]one of the FCA's objectives impose on the FCA a statutory duty to take action, for example, to secure an appropriate degree of protection for all persons who fall within the definition of "consumer"…*". However, section 1L(1) imposes a duty on the FCA to maintain arrangements for supervising authorised firms, and unlike section 2G relating to the PRA, there is no equivalent statement confirming that the FCA is not responsible for ensuring that no FCA-authorised firm fails.

267 [2011] EWHC 999 (Admin), and [2011] All ER (D) 222 (Apr).

268 [2012] EWHC 1417 (Admin).

269 [2013] EWCA Civ 677.

270 [2021] EWHC 396 (Admin).

refused the FCA's permission to appeal[271]. This more recent decision is another illustration that successful judicial review applications against the FCA have high hurdles, for example, serious prejudice which may lead to injustice.

6.3 The FCA's functions

6.3.1 Historically, the FSA took over the banking supervisory functions of the Bank in June 1998 under the BoE Act. It became the UK's competent authority for listing on 1 May 2000. The FSA became the primary unified regulator of financial services in the UK on 1 December 2001 when the Act was implemented, although the statutory responsibilities allocated to it under the Act were gradually added to over time, with the addition, for example, of functions in respect of general insurance brokers and the sale of certain mortgages. The FSA also had certain functions given to it under other "standalone" regimes (that is, not under the Act), such as the regulation of regulated covered bonds, payment institutions and electronic money institutions. The Banking Reform Act gave the FCA responsibility for establishing a new UK Payment Systems Regulator. Following an independent review of claims management regulation commissioned by the Treasury and the Ministry of Justice, which recommended that, if the Government wanted a step change in the regulation of the sector, responsibility for claims management companies should be shifted to the FCA[272], the Government announced in its 2016 Budget that it would transfer this responsibility from the Ministry of Justice to the FCA[273].

6.3.2 This Guide is concerned with the functions conferred on the FCA by or under the Act. These include functions conferred on the FCA by or under the Insolvency Act 1986, the Banking Act 2009, the FS Act 2012, the FS Act 2021 (as defined below), the Financial Guidance and Claims Act 2018, the Civil Liability Act 2018, the Alternative Investment Fund Managers Regulations 2013, certain qualifying EU provisions specified by the Treasury[274] and regulations made by the Treasury under section 8 of

271 The FCA indicated in its press release 'FCA responds to High Court decision to stay proceedings in enforcement case' (February 2021) that it intends to seek permission to appeal from the Court of Appeal. Further developments may follow on this topic.

272 See the Treasury and Ministry of Justice publication 'Independent review of claims management regulation: final report' (March 2016).

273 See the Treasury's publication 'Budget 2016: HC 901' (March 2016), paragraph 1.206.

274 The FSMA (Qualifying EU Provisions) Order 2013 (SI 2013/419) and the FSMA (Qualifying EU Provisions) (No 2) Order 2013 (SI 2013/3116) are statutory instruments which designate directly applicable EU regulations, to ensure regulators such as the FCA can enforce these regulations. The Financial Services and Markets Act 2000 (Amendment) (EU Exit) Regulations 2019 (published 22 March 2019) (**FSMA EU Exit Regulations**) ensures that UK regulators can continue to enforce the requirements of EU legislation

the European Union (Withdrawal) Act 2018.[275] The FCA continues to have functions under standalone regimes.

6.3.3 The FCA's general functions (for the purposes of sections 1A to 1T) are the functions of making rules under the Act, preparing and issuing codes under the Act, giving general guidance under the Act, and determining the general policy and principles by reference to which it performs its particular functions under the Act[276]. Following IP Completion Day, another general function of the FCA is in making, modifying, amending or revoking technical standards (including standards made by an EU entity that form part of retained EU law) in accordance with Chapter 2A of Part 9A of the Act.[277]

6.3.4 Under section 1L, the FCA must maintain arrangements for supervising authorised firms. The Treasury states that the concept of "supervision" includes such matters as monitoring the activities of authorised firms in the light of the FCA's objectives, forming a view on the firm's long-term strategy for doing business, providing advice and warnings, monitoring compliance with regulatory requirements and, where appropriate, taking enforcement action. The FCA must also maintain arrangements designed to enable it to determine whether persons other than authorised firms are complying with regulatory requirements and, where appropriate, take action against such persons. The Treasury suggests that this could include monitoring whether persons are carrying on regulated activities in breach of the general prohibition in section 19 of the Act, and taking action where appropriate (known as "policing the perimeter").[278]

6.3.5 In practice, therefore, the FCA's responsibilities under the Act are wide-ranging and include:

(a) policing the perimeter (though see further below for how the FCA hopes to be proactive beyond the boundaries of its regulatory perimeter);

(b) making technical standards;

retained and/or on-shored domestic UK legislation. See the Explanatory Memorandum (2019, No. 632) to the FSMA EU Exit Regulations.

275 Sections 1A(3) and 1A(6).

276 Section 1B(6).

277 Sections 1B(6)(aa) and 138P(2). See also Regulation 7 of The Financial Regulators' Powers (Technical Standards etc.) (Amendment etc.) (EU Exit) Regulations 2018 (SI 2018/1115).

278 Explanatory Notes to the FS Act 2012, notes 104 and 105.

(c) retail conduct of business regulation, including in relation to PRA-authorised firms;

(d) wholesale conduct of business regulation (including in relation to PRA-authorised firms) and responsibility for market abuse (where it may impose penalties against both authorised firms and unauthorised persons);

(e) regulation of client money and assets, including in relation to PRA-authorised firms;

(f) micro-prudential regulation of firms not authorised by the PRA;

(g) regulation of consumer credit[279];

(h) regulating RIEs under Part 18 of the Act, as well as trading platforms such as multilateral trading facilities that are operated by authorised firms[280];

(i) being the UK competent authority for listing under Part 6 of the Act (including power to take disciplinary action against sponsors[281]); and

(j) from 1 April 2015, concurrent functions with the CMA under specified competition legislation[282].

6.3.6 In certain circumstances, the PRA has power of direction over the FCA[283]. The FCA may give a direction to the PRA in relation to consolidated supervision of some or all the members of a group for the purposes of retained EU legislation[284]. See further paragraph 7.3.15.

6.3.7 In addition, the FPC may give a direction to the FCA requiring it to exercise its functions so as to ensure the implementation of a macro-prudential measure, and the direction may include recommendations as to the means to be used and the timing. The FPC may also make

279 Since 1 April 2014, following the transfer of consumer credit regulation from the Office of Fair Trading to the FCA. Section 37 of the FS Act 2021 provides the Treasury the ability to bring interest-free buy-now pay-later products into the scope of FCA regulation in a proportionate manner. At time of writing, Section 37 is to enter into force at a date to be appointed by the Treasury.

280 The Treasury publication 'A new approach to financial regulation: securing stability, protecting consumers' (January 2012), Cm 8268, paragraph 4.33.

281 Section 88A.

282 Sections 234I to 234O. See also FCA Finalised Guidance FG15/8 'The FCA's concurrent competition enforcement powers for the provision of financial services' (updated April 2018) and FG15/9 'Market Studies and investigation references — a guide to the FCA's powers and procedures' (July 2015).

283 Sections 3I and 3J.

284 Section 3M.

recommendations to the FCA about the exercise of its functions.[285] For more on FPC powers of direction and recommendation, see further Chapter 4 'The Bank of England and the Financial Policy Committee'.

6.3.8 The FCA is a member of the International Co-ordination Committee established by the MoU on international organisations entered into under section 66 of the FS Act 2012. The FCA is the UK representative at a number of international organisations including the International Organization of Securities Commissions (**IOSCO**), and the Joint Forum (with the PRA). More recently, the FCA has also become a member of the Financial Services Initiatives Regulatory Forum, announced in the Government's 2020 Budget. On 1 January 2021, a memorandum of understanding (**MoU**) came into effect between the FCA and ESMA, covering the supervision of credit rating agencies and trade repositories[286]. In particular, this MoU covers arrangements for the cooperation and exchange of supervisory information relating to certain regulated entities who are subject to regulation and supervision by both the FCA and ESMA, through cross-border activities. In its Business Plan 21/22, the FCA emphasised its commitment to developing and maintaining high-quality international standards, noting that it would continue to remain an active member of key global standard-setting bodies[287].

6.3.9 Other chapters of this Guide deal with the FCA's powers in relation to authorised firms, senior managers, financial promotion, collective investment schemes, market abuse and financial crime, investigations and discipline, acquisitions of financial services businesses, parent undertakings, official listing, insolvency, auditors and actuaries, Lloyd's and mutuals.

6.3.10 The FCA also has powers under other legislation, for example, the Criminal Justice Act 1993 (in respect of insider dealing), the Enterprise Act 2002, the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, the Regulated Covered Bonds Regulations 2008, the Payment Services Regulations 2017, the Electronic Money Regulations 2011, the Undertakings for

285 Sections 9H and 9Q of the BoE Act.
286 See 'Memorandum of Understanding concerning consultation, cooperation and the exchange of information between ESMA and the UK Financial Conduct Authority' (which entered into force from 31 December 2020).
287 Page 44 of the Business Plan 21/22.

Collective Investment in Transferable Securities Regulations 2011 and the Consumer Rights Act 2015.[288]

6.3.11 Under the Act as originally enacted, the FSA had an objective of promoting public understanding of the UK financial system. Since 1 October 2018, three existing providers of government-sponsored financial guidance, being (a) the Money Advice Service (which had an established framework of cooperation with the FCA[289]), (b) the Pensions Advisory Service and (c) Pension Wise, were replaced by the Money and Pensions Service (**MaPS**), which provides free and impartial debt advice, money guidance and pension guidance to members of the public. In line with the FCA's strategic objectives of securing an appropriate degree of protection for consumers, the FCA's role is to approve MaPS' standards for delivering guidance and advice, carrying out reviews every three years[290]. The FCA entered into a MoU with the Department for Work and Pensions and MaPS to establish a formal framework of cooperation and co-ordination in light of its regulatory responsibilities[291]. In its Business Plan 21/22, the FCA also indicated that it would work with MaPS, FSCS and the FOS in respect of the creation of a "consumer investment co-ordination group" (as described at paragraph 6.2.17).

6.4 The Future Regulatory Framework Review

6.4.1 The Financial Services Future Regulatory Framework Review (**FRF Review**), announced by the Government in June 2019, will have a number of implications for the FCA (and other UK regulators) going forward.

6.4.2 Phase I of the FRF Review began in July 2019, through the publication of a call for evidence as to how the Government could co-ordinate, efficiently and effectively, with the UK's regulators to ensure the best outcomes for the financial services sector, consumers of financial services, and the UK as a whole[292]. In March 2020, the Government published its official response to the call for evidence[293], noting that the 60 responses it received had, collectively, placed emphasis on the need

288 For further guidance on the FCA's powers outside of the Act, see the FCA Handbook's Enforcement Guide.
289 See 'Memorandum of Understanding between the Financial Conduct Authority (the FCA) and the Money Advice Service' (April 2013).
290 See Section 9 of the Financial Guidance and Claims Act 2018.
291 See 'Memorandum of Understanding between the Financial Conduct Authority, Department for Work and Pensions and Money and Pensions Service' (signed between 3 November 2020 and 14 December 2020).
292 See HM Treasury publication 'Financial Services Future Regulatory Framework Review: Call for Evidence: Regulatory Co-ordination' (July 2019), in particular paragraph 2.2.
293 See HM Treasury publication 'Financial Services Future Regulatory Framework Review: Response to the Call for Evidence on Regulatory Co-ordination' (March 2020) (RFR Response).

for the enhancement of effective regulatory co-ordination. As a result, the Government announced the creation of (a) the Regulatory Initiatives Grid; and (b) the Financial Services Regulatory Initiatives Forum (comprising the Bank, the PRA, the FCA, the CMA and the Payment Systems Regulator), to aid in improving co-ordination and transparency across the UK's regulatory landscape. The Government also indicated in this response to Phase I that it would use the upcoming Phase II of the FRF Review to develop a more coherent, agile approach to regulation, with a focus on a clearer split of regulatory responsibilities alongside democratic policy input.[294]

6.4.3 The first stage of Phase II of the FRF Review (**Phase II Consultation**)[295] was launched in October 2020, seeking to establish a blueprint for future financial services regulation. The Government noted that the Act in its present form required adaptation to address the challenges of managing the fragmented regulatory regime, currently made up of domestic and retained EU legislation, regulator rules and onshored EU technical standards; and that flexibility would be required to enable effective regulatory responses to dynamic market conditions.

6.4.4 A subsequent consultation was published in November 2021[296], setting out important proposals for reform to the UK's financial services regulatory framework. This centred around three themes: regulatory responsibility for rule-making, regulatory accountability, and an update to the regulators' objectives and principles.

(a) *Regulatory responsibility for rule-making*. Signalling the Government's intention "*to move to a comprehensive FSMA model of financial services regulation*", the paper set out proposals for the financial services regulators to take responsibility for setting many of the direct regulatory requirements which are currently set out in retained EU law. Direct regulatory requirements are the obligations that firms must follow; the regulators themselves must operate within the framework set by Parliament and the Government. This process will involve revoking retained EU law over a number of years in a manner that maintains continuity, and replacing this repealed law with regulatory rules. The creation of a new 'Designated

294 See paragraphs 1.7 to 1.8 and paragraphs 2.23 to 2.28 of the RFR Response.
295 See HM Treasury publication 'Financial Services Future Regulatory Framework Review: Phase II Consultation' (October 2020).
296 See HM Treasury document "Financial Services Future Regulatory Framework Review: Proposals for Reform" (November 2021).

Activities Regime' (DAR), which will enable the regulation of certain activities outside the authorisation process in the Act, is also proposed. The DAR will mirror the existing approach for the Regulated Activities Order, although the regime will be more limited. The Government also proposes to have an ability to set specific "have regards" for considerations which the regulators must take into account when exercising their rulemaking powers in specific areas of regulation.

(b) *Regulatory accountability*. Meeting this enhanced responsibility for UK regulators, the consultation paper also included a number of proposals for enhanced mechanisms for accountability, scrutiny and oversight of the regulators by HM Treasury, Parliament, and stakeholders. These include, among other things:

(i) proposals to formalise through statute the mechanisms through which regulators provide information to Parliament;

(ii) a new requirement for the PRA and the FCA to respond to the recommendation letters issued by HM Treasury; and

(iii) a new power for HM Treasury to require the regulators to review their existing rules where the Government considers that this is in the public interest.

(c) *Regulators' objectives and principles*. Finally, the consultation paper outlines the Government's approach to updating the regulators' objectives and principles. In particular, it proposes the addition of new growth and international competitiveness as secondary objectives for the PRA and the FCA in order to ensure that the regulators' objectives reflect the need to support the long-term growth and international competitiveness of the UK economy. It also suggests that the regulatory principle that currently requires the PRA and the FCA to take into account the desirability of sustainable growth in the economy in the UK in the medium or long-term should be updated to reference climate change and a net zero economy.

6.5 The Financial Services Act

6.5.1 On 29 April 2021, the Financial Services Act 2021 (**FS Act 2021**) received royal assent. The FS Act 2021 sets out the parameters of the

UK's future financial services regulatory regime and is the first significant piece of UK primary legislation in the financial services sector following IP Completion Day. The FS Act 2021 introduces a number of reforms to the Act (as well as other retained EU regulations), and its aim is to recalibrate the UK financial services regulatory framework towards a more regulator-led approach[297]. At time of writing, most provisions of the FS Act 2021 have entered into force, though others are due to enter into force on a date to be appointed in regulations published by the Treasury. A brief summary of how the FS Act 2021 affects the FCA's functions follows.

6.5.2 The Act enables the implementation of a new prudential regime for UK investment firms, and through the creation of a new Part 9C of the Act[298], grants the FCA the power to make or update rules to implement this new regime, including rules for capital, liquidity, exposure to concentration risk, reporting, public disclosure, governance arrangements and remuneration policies[299]. Part 9C provides the statutory framework behind the FCA's proposals as to prudential rules for investment firms[300]. Systemically important investment firms (as designated by the PRA) will continue to be subject to (UK on-shored) CRR requirements while consequential amendments are to be made to the UK CRR regime to remove non-systemic investment firms away from the scope of the CRR. Among other things, Part 9C further sets out the definition of an "FCA investment firm" and the FCA's powers in respect of the parent companies of such FCA investment firms. Section 143G of the FS Act 2021 ensures that the FCA must, when making Part 9C rules on the prudential regulation of investment firms, consider international standards, the UK's standing as a financial centre for international investment firms and the likely effect of any proposed rules on financial services equivalence. In June 2021, the FCA published a policy statement on its new prudential regime, known as the UK Investment Firms Prudential Regime (IFPR), noting that the new regime aims to streamline and simplify prudential requirements for solo regulated FCA investment firms, shifting the focus away from risks that firms face, while considering ways to mitigate potential harms such firms can pose

297 See the 'Overview of the Bill' section in 'HL Bill 162 Explanatory Notes', which are the explanatory notes to the Financial Services Bill.
298 See Section 2 of the FS Act 2021, which inserts a new Part 9C into the Act and entered into force on 1 July 2021.
299 These provisions in the FS Act 2021 reflect the consultation and policy statement on the proposed prudential regime issued by the Treasury in 2020. See the Treasury's policy statement 'Prudential standards in the Financial Services Bill: June update' (June 2020).
300 The FCA has launched a series of consultations on changing prudential standards applicable to investment firms. See for example CP20/24 'A new UK prudential regime for MiFID investment firms' (December 2020) and CP21/7 'A new UK prudential regime for MiFID investment firms' (April 2021).

to consumers and markets[301]. The IFPR is expected to take effect on 1 January 2022[302].

6.5.3 Schedule 11 to the FS Act 2021 further amends Part 4A of the Act[303], inserting a new section 55JA and a new Schedule 6A into the Act to provide an additional process for the FCA to cancel or vary Part 4A permissions. This process sits alongside the existing cancellation procedure, allowing the FCA to streamline cases and cancel or vary Part 4A permissions, where it appears to the FCA that a firm is no longer carrying on a regulated activity, including situations where the firm has failed to pay fees or levies, or to provide information to the FCA. There is a further mechanism in place, which allows the FCA to restore a firm's authorisations upon a firm's application, where the FCA considers it just and reasonable to do so.[304]

6.5.4 The FS Act 2021 requires the FCA to consult on whether it should make rules under section 137A of the Act providing that authorised firms owe a duty of care to consumers[305]. The consultation must consider:

(a) whether the FCA should make other provision in general rules about the level of care that must be provided to consumers by authorised persons, either instead of or in addition to a duty of care;

(b) whether a duty of care should be owed, or other provision should apply, to all consumers or to particular classes of consumers; and

(c) the extent to which a duty of care or other provision would advance the FCA's consumer protection objective, as laid out in section 1C of the Act.

The consultation and any publication of the responses' analysis must be completed prior to 1 January 2022. The FCA must, prior to 1 August 2022, make general rules about the level of care to be provided to consumers by authorised firms as it considers appropriate in light of its analysis of the responses. Accordingly, the FCA has launched a

301 See FCA policy statement PS21/6 'Implementation of Investment Firms Prudential Regime' (June 2021).
302 See FCA webpage 'Investment Firms Prudential Regime (IFPR)' (last updated 22 October 2021).
303 Section 28 of the FS Act 2021 which entered into force on 1 July 2021. See also the Treasury's policy statement, 'Changes to the FCA's cancellation of authorisation process' (July 2020).
304 The relevant provisions amending the FCA's powers in respect of the variation or cancellation of Part 4A permissions entered into force on 1 July 2021.
305 Section 29 of the FS Act 2021, which entered into force on 1 July 2021.

consultation to meet these requirements under the FS Act 2021[306], on the introduction of a "Consumer Duty" that would set higher expectations for the standard of care that firms provide to consumers. This will require firms in retail markets to (i) ask themselves what outcomes their customers should be able to expect from their products and services; (ii) act to enable rather than hinder those outcomes; and (iii) assess the effectiveness of their actions. The consultation closed on 31 July 2021. The FCA expects that on the basis of feedback received to this first consultation, it will launch a second consultation setting out details of any proposed new rules by 31 December 2021, while finalised rules will be published by 31 July 2022[307].

6.6 Accountability

6.6.1 Although funded by the industry it regulates, and operating independently of the Government, the FCA is accountable through Treasury Ministers to Parliament.[308]

6.6.2 The principal accountability measures affecting the FCA include:

(a) the regulatory objectives and regulatory principles applicable to the FCA (see paragraphs 6.7.1 to 6.7.16);

(b) the method of appointment and composition of the FCA's Board, including the requirement for a majority of non-executive directors on the Board (see paragraphs 6.2.5 to 6.2.10);

(c) the obligation on the FCA to prepare an annual report to the Treasury, and for this to be laid before Parliament;

(d) the requirement on the FCA to hold an annual public meeting (see paragraph 6.2.11);

(e) the requirement on the FCA to have regard to generally accepted principles of good corporate governance[309];

(f) the obligation on the FCA to produce an MoU with the PRA which is to be laid before Parliament;

306 See CP 21/13 'A new Consumer Duty' (May 2021), in particular paragraph 2.31.
307 See Section 9 'Next Steps' in the FCA webpage 'CP 21/13: A new Consumer Duty' (last updated 10 August 2021).
308 See the FCA webpage 'Reporting to Treasury and Parliament' (last updated 14 September 2021).
309 Section 3C.

(g) a requirement for the FCA's annual accounts to be certified by the Comptroller and Auditor General;

(h) the power of the Treasury to commission efficiency and effectiveness reviews;

(i) the power of the Treasury to arrange independent inquiries, a requirement on the FCA to investigate and report to the Treasury on possible regulatory failure and a power for the Treasury to ask the FCA to conduct an investigation into "relevant events"; and

(j) the provisions on competition scrutiny (giving the CMA power to give advice to the FCA).[310]

6.6.3 Members of the Houses of Parliament may ask questions of Treasury Ministers, and the FCA is also subject to reviews by the House of Commons Treasury Committee.[311]

6.6.4 The FCA has a general duty to consult practitioners, including a duty to set up a Practitioner Panel, a Smaller Business Practitioner Panel and a Markets Practitioner Panel. In addition, firms regulated by the FCA (and certain others affected by FCA decisions) have the power to refer certain decisions to the Tribunal, and the right, in certain circumstances, to apply for judicial review of the FCA's decisions. Firms also have access to the complaints scheme (a single complaints scheme maintained jointly by the FCA, PRA and Bank) to investigate complaints arising in connection with the exercise of, or failure to exercise, any of the FCA's relevant functions.[312]

6.6.5 The FCA's general duty to consult extends to consumers as well, and it must set up a Consumer Panel. In addition, consumers have the right to refer complaints against firms to the FOS, and designated consumer bodies have a power to make a super-complaint. As with practitioners, consumers may have the right, in certain circumstances, to apply for judicial review of decisions. Consumers also have access to the

310 For the measures outlined at (f) to (j), see, respectively: section 3E; paragraph 15; section 1S; sections 68, 73 and 77 of the FS Act 2012; and sections 140A to 140H. In 2014, as part of its work on accountability in financial services, the Government carried out a review of the fairness, transparency and efficiency of processes for enforcement decision-making at the FCA and the PRA.

311 See the UK Parliament webpage 'Work of the Financial Conduct Authority', for current events associated with the Treasury Committee's "ongoing scrutiny" of the FCA's work.

312 Sections 1M to 1P of the Act; and section 84 of the FS Act 2012. See also FCA Finalised Guidance 'Guidance for designated Consumer Bodies on making a Super-Complaint under s234C' (June 2013) and the FCA webpage 'Complain about us, the PRA or the Bank of England (the regulators)' for further information on the single complaints scheme (last updated 10 August 2021).

complaints scheme to investigate complaints arising in connection with the exercise of, or failure to exercise, any of the FCA's relevant functions.[313]

6.6.6 As referenced elsewhere in this Chapter, the FRF Review, particularly the Phase II Consultation, may have a number of implications in respect of the FCA's accountability. In particular, the Government has explored a number of options that seek to ensure meaningful engagement by stakeholders in the policy-making process.

6.7 Objectives and regulatory principles

General

6.7.1 In 2000, the Act set out for the first time various regulatory objectives and principles of good regulation. These were revised in 2012 when the objectives and principles relevant to the FCA were established. They are introduced in section 1B of the Act under the heading "The FCA's general duties".

6.7.2 The objectives are primarily concerned with the purpose of regulation, while the principles are concerned with how it is exercised. The objectives and principles are significant in describing the Government's vision for the FCA and the FCA takes them seriously in determining policy[314]. The FCA has a general duty to consult practitioners and consumers on the extent to which its policies and general practices are consistent with its general duties under section 1B[315]. In addition, the Act requires the FCA's annual report to address certain issues regarding its strategic and operational objectives and its consideration of the principles in section 3B.[316]

6.7.3 The Government has proposed to update the regulators' objectives and principles at part of the Phase II of the FRF Review. More specifically, the consultation sets out the Government's intention to provide for a greater focus on growth and international competitiveness through the introduction of new secondary objectives for the PRA and the FCA. It also sets out the proposals for updating the regulatory principles,

313 Sections 1M, 1Q and 234C of the Act; and section 84 of the FS Act 2012.
314 See, for example, the FCA publication 'FCA transparency framework' (August 2013) and the FCA webpage 'Transparency' (last updated 2 June 2021).
315 Section 1M.
316 Paragraph 11.

including by embedding climate change into the existing sustainable growth principle.

Objectives

6.7.4 In discharging its general functions (such as the exercise of its rule-making powers, preparing codes and giving general guidance or in determining its general policy and principles), the Act requires the FCA, so far as is reasonably possible, to act in a way which is compatible with its strategic objective and which advances one or more of its operational objectives. The FCA must also have regard to the principles of good regulation and the importance of minimising the extent to which businesses which are (or should be) regulated can be used for a purpose connected with financial crime.[317]

6.7.5 The FCA's strategic objective is ensuring that the "relevant markets" function well.[318]

6.7.6 The FCA's operational objectives are: the consumer protection objective (securing an appropriate degree of protection for consumers — "consumer" is widely defined to include all users and potential users of financial services and those who have rights, interests or obligations that are affected by the level of a regulated benchmark); the integrity objective (protecting and enhancing the integrity of the UK financial system); and the competition objective (promoting effective competition in the interests of consumers).[319]

6.7.7 Among its operational objectives, special emphasis is put on the competition objective. This represents a marked change from the position prior to the FS Act 2012, when the "*need to minimise…adverse effects on competition…*" was merely a principle to which the FSA had to "have regard", rather than an objective, never mind an objective on which special emphasis was placed. Furthermore, the objective is now a positive duty to "promote competition" rather than merely to "minimise adverse effects".

6.7.8 In the event that the FCA ever becomes responsible for regulating a "core activity", it would have the additional objective — the

317 Section 1B(1) and (5).
318 Section 1B(2). The "relevant markets" are defined in section 1F.
319 Sections 1C to 1E of the Act; for the definition of consumer, see section 1G of the Act.

"continuity objective" — to protect the continuity of core services associated with that activity[320].

6.7.9 In its Business Plan 21/22, the FCA indicated that, from April 2022, it would report publicly on its progress, to support overall accountability for how it delivers on its statutory (and non-statutory) objectives[321].

Principles of good regulation

6.7.10 As mentioned above, in discharging its general functions, the FCA must have regard to the principles of good regulation set out in section 3B of the Act (as amended by the 2016 Act)[322]. These are the same regulatory principles that apply to the PRA, namely:

(a) the need to use the resources of each regulator in the most efficient and economic way;

(b) the principle of proportionality;

(c) the desirability of sustainable growth in the UK economy;

(d) that consumers should take responsibility for their decisions;

(e) the principle of senior management responsibility for compliance with regulatory requirements;

(f) the principle of diversity;

(g) the desirability of regulators publishing information relating to persons on whom requirements are imposed, or requiring such persons to publish information; and

(h) that regulators should exercise their functions as transparently as possible[323].

320 Section 1EA, "taken to be inserted" by section 1IA, inserted by section 2 of the Banking Reform Act from 1 January 2019.
321 Pages 21 and 22 of the Business Plan 21/22.
322 Section 1B(5)(a). The FCA must also have regard to the Regulators' Code, by virtue of the Legislative and Regulatory Reform Act 2006.
323 On transparency, see the FCA publication 'FCA transparency framework' (August 2013), the FCA webpage 'Transparency' (last updated 2 June 2021), the FCA publication 'Data Strategy' (last updated 6 August 2020), the FCA's 'Register of Interests' (last reviewed January 2019) and the independent review on effectiveness 'Financial Conduct Authority: Review of Board Effectiveness' (November 2017).

Avoidance of financial crime

6.7.11 In addition, the FCA must have regard to the importance of taking action intended to minimise the extent to which it is possible for businesses which are (or should be) regulated to be used for a purpose connected with "financial crime"[324].

Recommendations by Treasury

6.7.12 The Treasury may at any time (and must at least once in every Parliament) make recommendations to the FCA about aspects of Government economic policy to which the FCA should have regard[325].

6.7.13 On 23 March 2021, the Chancellor confirmed in a letter to the FCA chief executive that the Government's economic policy objective remains to achieve strong, sustainable and balanced growth across the UK and all sectors of the economy, and that price and financial stability would be essential pre-requisites in achieving this objective. The Chancellor noted that the FCA's main contribution to such an economic policy would be — working together with the FPC and the PRA — to protect consumers, promote competition in financial services and to protect and enhance the integrity of the UK's financial system. The Chancellor further expressed the Government's commitment to effective regulation in the UK's financial services that is balanced between encouraging competition and protecting consumers. The letter recommended that the FCA have regard to the following aspects of the Government's economic policy in its assessment of the costs, burdens and benefits of potential rules or policies:

(a) *competition*, where the Government is keen to see more competition in all sectors of the industry (particularly retail banking), including the minimisation of barriers to entry and growth and ensuring a diversity of business models within the industry;

(b) *growth*, where the Government wishes to ensure that financial services markets make positive contributions to levelling up the UK and supporting long- and medium-term sustainable economic growth (such as supporting high-skilled jobs and facilitating

[324] Section 1B(5)(b). "Financial crime" is defined in section 1H(3). In relation to financial crime, the FCA has a regulatory guide on financial crime 'FCG Financial Crime Guide: A firm's guide to countering financial crime risks (FCG)' in the FCA Handbook.
[325] Section 1JA, inserted by section 19 of the 2016 Act.

financing for productive and clean investments across the economy);

(c) *competitiveness*, where the Government wishes to ensure that the UK remains attractive to internationally active financial institutions and that London retains its position as a leading international financial centre and hub for green finance;

(d) *innovation*, where the Government is keen to see innovation in financial services, and hopes to encourage new methods of engaging with consumers of financial services and new ways of raising capital, in order to maintain the UK's position as a leader in the use of technology;

(e) *trade and investment*, where the Government aims to encourage both trade and inward investment to the UK to boost productivity and growth (each supported by improved competition);

(f) *better outcomes for consumers*, where the Government hopes that financial services will work in the best interests of the consumers and businesses they serve, such as through improved competition and having regard to the needs of different consumers who use, or may use, financial services; and

(g) *climate change*, where the Government aims to deliver a financial system which (a) supports and enables a net-zero economy through the mobilisation of private finance towards sustainable and resilient growth and (b) is further resilient to the physical and transition risks that climate change presents. The Chancellor further recommended that the FCA should have regard to the Government's commitment to achieving a net-zero economy by 2050.

6.7.14 Following the Government's recommendation that the FCA should have regard to the Government's economic policy as it relates to climate change, the FCA made a renewed commitment to its sustainable finance strategy based on the three themes of transparency, trust and tools. Two additional themes emerged from the FCA's refreshed ESG strategy of November 2021: transition (supporting a market-led transition to a net zero, sustainable future) and team (ensure that the FCA has the right organisational structures, resources and capabilities in place to appropriately integrate net zero and ESG considerations in its work). The FCA's initiatives in this space include:

(a) a cross-Whitehall and regulator taskforce (including the FCA), which published a roadmap, setting out a strategy towards mandatory disclosures (aligned with the recommendations of the Task Force on Climate-related Financial Disclosures (TCFD)) across the UK by 2025;

(b) the Climate Financial Risk Forum, established with the PRA in 2019, which brings together senior financial sector representatives to discuss climate-related risks and opportunities and has published a number of guides;

(c) promoting investor stewardship by, for example, setting new duties for Independent Governance Committees to consider and report on their firms' policies on environmental, social and governance (ESG) matters and stewardship; and

(d) collaborating with regulators across a range of countries, for example, as a member of the Sustainable Taskforce under the IOSCO.

Guidance about objectives

6.7.15 The FCA must give general guidance about how it intends to advance its operational objectives in discharging general functions, in relation to different categories of authorised firms or regulated activity. Before giving or amending this guidance, the FCA must consult the PRA.[326]

6.7.16 Unlike the PRA, the FCA is not under an obligation to publish a separate strategy in relation to its objectives.[327] Nonetheless, for the first time, in its Business Plan 21/22, the FCA noted that for the sake of accountability, it would set itself "consistent topline outcomes and metrics" to enable it to deliver on its statutory objectives, alongside strategic overarching outcomes and metrics for any FCA priorities going beyond statutory objectives[328].

326 Section 1K. For the FCA's approach, see paragraphs 6.7.1 to 6.7.16.
327 Section 2E. However, its Annual Reports contain a strategic report and the FCA has published 'Our Strategy' (8 December 2014) and several documents on topics associated with their overarching strategy, including: 'Data Strategy' (August 2020) and 'Occasional Paper: Ageing population and financial services' (September 2017). The FCA publication 'FCA Mission: Approach to Consumers' (July 2018) explains the framework the FCA uses to deliver its consumer protection objective.
328 Page 22 of the Business Plan 21/22.

6.8 The FCA's approach

Approach documents

6.8.1 As mentioned above, the FCA must give general guidance on how it intends to advance its operational objectives.

6.8.2 The FCA published a "Mission" paper in April 2017, setting out among other things, the framework which the FCA uses to make decisions and the reasoning behind its work[329].

6.8.3 The FCA also publishes more targeted approach documents. In November 2017, the FCA published a consultation paper regarding its future approach to consumers[330]. In response to a wide range of responses to the consultation, the FCA then published an "Approach to Consumers" document in July 2018, setting out its vision for well-functioning markets, the relevant regulatory and legal frameworks, when and how it would act to protect consumers, its policy positions on key issues and its strategy for ensuring it advances its key objectives of consumer protection[331].

6.8.4 The approach document confirms the continued importance of 'Treating Customers Fairly', an FCA initiative which is outcome-focused. The FCA set out a range of baseline expectations in how firms should treat consumers and its supervisory framework in relation to this. The FCA indicates in this approach document that in its supervision, it will take a "forward-looking and strategic" as well as a "data-led" approach, and that any intervention would be at an "appropriate and proportionate" level with the aim of seeking protection and redress for consumers. This is broadly in line with the approach to supervision first published in the FCA Handbook in 2013[332]. The FCA notes that it aims to maintain continuous oversight to identify, reduce and prevent harm to both consumers and markets, and that with such continuous dialogue, conduct risks might be mitigated before they cause significant harm to customers or markets.

6.8.5 In relation to market integrity, the FCA intends to ensure that competition works well, leading to market integrity for consumers, and identifies a number of outcomes it expects to use as a measure for

329 FCA publication 'Our Mission 2017: How we regulate financial services' (April 2017).
330 FCA publication 'FCA Mission: Our Future Approach to Consumers' (November 2017).
331 FCA publication 'FCA Mission: Approach to Consumers' (July 2018).
332 See SUP 1A.3 'The FCA's approach to supervision' in the SUP Manual.

progress including high-quality, good value products and services being made available in a clear, fair and non-misleading manner, as well as appropriate inclusion policies (with emphasis on vulnerable consumers) in consumer access to financial products, and general protection from harm for consumers.

6.8.6 The FCA sets out in its approach document on supervision[333], its role in prudential supervision, namely the aim to avoid disorderly failure and minimise harm to consumers or the UK financial system's integrity[334]. It also published an approach document on competition in 2018[335], setting out its role and decision-making framework in respect of promoting effective competition and explaining its concurrent powers in enforcing against breaches of competition law, alongside the CMA. The four-step decision-making framework illustrates: (a) how harm is identified (whether actual or potential); (b) the diagnostic and remedy tools used in situations where the markets are not functioning properly; and (c) how the success of such remedies is evaluated, to inform future decisions.[336]

Co-ordination with other regulators

6.8.7 The FCA co-ordinates its approach in various areas with other regulators in the UK and overseas, and across a number of UK-based and international bodies. The FCA, following IP Completion Day, continues to co-operate with European authorities — on 1 January 2021, several MoUs came into effect between the FCA and European authorities, covering cooperation and the exchange of information[337]. The Act and the FS Act 2012 further make specific provision for such co-operation. Among other things, there must be a general MoU between the FCA and the PRA, one on with-profits insurers and one (with the Bank) on RIEs and RCHs, MoUs on international organisations and crisis management between the Treasury, the Bank, the FCA and the PRA[338], and MoUs with

333 FCA publication 'FCA Mission: Approach to Supervision' (April 2019).
334 See "The role of prudential supervision" in Chapter 3 of 'FCA Mission: Approach to Supervision' (April 2019).
335 FCA publication 'FCA Mission: Approach to Competition' (October 2018).
336 See also FCA Finalised Guidance FG15/8 'FCA's powers and procedures under the Competition Act 1998' (July 2015), and FG15/9 'Market studies and market investigation references: A guide to the FCA's powers and procedures' (July 2015), the FCA's latest Annual Report on Competition (2018/19) and the 'Memorandum of Understanding between the Competition and Markets Authority and the Financial Conduct Authority — concurrent competition powers' (22 December 2015). The FCA's approach to using its powers to advance its competition objective when supervising recognised investment exchanges is set out in Policy Statement PS14/6 'Competition in the Markets for Services Provided by a Recognised Investment Exchange' (May 2014).
337 These Memoranda of Understanding were signed with National Competent Authorities across the EU/EEA, ESMA, EIOPA and the EBA.
338 Sections 65 and 66 of the FS Act 2012.

the FOS and the CMA. As referenced in paragraph 6.2.17, the FCA noted in its Business Plan 21/22 that it would create a "consumer investment co-ordination group" with the FSCS, FOS and MaPS — it also noted that it would continue to work closely with other regulators[339]. For more information on the relationship between the regulators, see Chapter 7 'Co-ordination between the PRA and the FCA'.

Statements of policy

6.8.8 The FCA also has to publish statements of policy in various areas (usually published after a consultation period) for example, a statement of policy on building operational resilience.[340]

FCA Handbook

6.8.9 More detail on the FCA's approach can be found in the FCA Handbook. For information on the FCA's rules and guidance, and the FCA Handbook, see paragraphs 6.14.1 to 6.14.38, 6.19.1 to 6.19.14 and 6.21.1 to 6.21.4.

6.8.10 The approach of the FCA to regulation has been impacted by EU legislation and the UK's withdrawal from the European Union. Following IP Completion Day, the European Union (Withdrawal) Act 2018 transposed existing EU legislation (that had direct effect in the UK) into UK legislation. In line with these legislative changes, the FCA, PRA, and Bank were granted responsibility for modifying, amending or revoking binding technical standards associated with retained EU legislation[341]. Between October 2018 and February 2019, the FCA launched a series of consultations with the aim of ensuring a functioning regulatory framework, including consultations on the establishment of a temporary permissions regime for EEA entities operating in the UK and on proposed amendments to the FCA Handbook and Binding Technical Standards[342]. On 1 October 2020, the FCA published a notice containing several instruments that amended the FCA Handbook and relevant technical standards[343].

339 Page 16 of the Business Plan 21/22.
340 FCA Policy Statement PS 21/3 'Building operational resilience: Feedback to CP 19/32 and final rules' (March 2021).
341 Section 138P.
342 See FCA Policy Statement PS 19/5 'Brexit Policy Statement: Feedback on CP18/28, CP18/29, CP18/34, CP 18/36 and CP19/2' which sets out the FCA's response to its Brexit-related consultations.
343 FCA publication 'Handbook Notice No 80' (September 2020).

6.9 Upper Tribunal (Tax and Chancery Chamber)

6.9.1 The Act gives affected persons the right to refer certain decisions of the FCA to the Tribunal, as mentioned in various chapters of this Guide. The Tribunal is a specialist judicial body, administered by HM Courts and Tribunals Service, an agency of the Ministry of Justice.

6.9.2 As mentioned previously, the FCA is a "public authority" for the purposes of the Human Rights Act 1998 (see paragraph 6.2.24). The Tribunal is therefore able to consider human rights points, for example, whether the FCA has acted in a way that is incompatible with the European Convention on Human Rights (incorporated into English law by the Human Rights Act 1998). These rights include the right to privacy, the right to peaceful enjoyment of possessions and the right to a fair trial. Following IP Completion Day, and under the EU-UK Trade and Cooperation Agreement[344], the UK committed to continuing to respect and give effect to the rights and principles set out in the European Convention on Human Rights.[345]

6.10 Consumer, Markets and Practitioner Panels

6.10.1 The Act requires the FCA to make and maintain effective arrangements for consulting practitioners and consumers on the extent to which its general policies and practices are consistent with its general duties. Before the FS Act 2012, the Act provided that these arrangements should include the establishment of a Practitioner Panel and a Consumer Panel. Although in practice a Smaller Business Practitioner Panel did also exist, it did not have a statutory footing. Now the Act specifically provides for the establishment and maintenance of the Practitioner Panel, the Smaller Business Practitioner Panel, the Markets Practitioner Panel and the Consumer Panel. The Markets Practitioner Panel is to represent the interests of practitioners who are likely to be affected by the exercise by the FCA of its functions relating to markets, including its functions under Parts 6, 8A and 18 of the Act. The Treasury's approval is required for the appointment or dismissal of the chairman of each panel. The establishment of the panels forms part of the mechanism for oversight of the FCA.[346]

[344] The Trade and Cooperation Agreement between the European Union and the European Atomic Energy Committee, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part (**UK-EU TCA**). This agreement was signed on 30 December 2020 and entered into force on 1 May 2021.
[345] Article 524 (previously Article Law.GEN.3) of the UK-EU TCA.
[346] Sections 1M to 1Q.

6.10.2 The Act requires the FCA to consider representations that are made to it by the panels, and from time to time to publish responses[347]. The requirement is not confined to representations made in response to a formal consultation. Phase II of the FRF review makes a number of proposals relating to the role of the panels. They include, among others, the possible introduction of a new statutory requirement for the regulators to publish information of their engagement with the panels and to maintain a statement on their process for appointing members.

6.11 Complaints scheme

6.11.1 Although the complaints scheme in respect of the regulator used to be provided for in the Act, it is now provided for in the FS Act 2012. Nevertheless, it is convenient to mention it in this Guide.

6.11.2 The FCA, the PRA and the Bank must make arrangements for the investigation of complaints arising in connection with the exercise of, or failure to exercise, any of their relevant functions[348]. The regulators' legislative functions are, however, excluded from the scheme. The scheme must consist of two elements: investigation of the complaint by the regulators themselves and investigation of the complaint by the Complaints Commissioner[349]. The complaints scheme must be designed so that, as far as is reasonably practicable, complaints are investigated quickly. The regulators have adopted a scheme very similar to the previous scheme which operated in respect of the FSA alone[350]. It covers "expression of dissatisfaction" about the manner in which the regulators have carried out (or failed to carry out) their relevant functions, and includes allegations of mistakes and lack of care, unreasonable delay, unprofessional behaviour, bias or a lack of integrity. There are certain exclusions to the scheme, and circumstances when a complaint will not be investigated. In addition, a complaint need not be investigated under the complaints scheme if the regulator reasonably considers it would be more appropriately dealt with in another way (for

347 Section 1R.
348 Section 84 of the FS Act 2012. The "relevant functions" are defined in section 85 of the FS Act 2012 (see also The FS Act 2012 (Relevant Functions in relation to Complaints Scheme) Order 2014 (SI 2014/1195), which discusses the relevant functions of the FCA and PRA. The Bank is subject to the scheme only in respect of its oversight of RCHs, central securities depositories and payment settlement schemes.
349 See the PRA and FCA publication 'Complaints against the Regulators: The Scheme' (updated March 2016).
350 The Bank and the FSA Policy Statement PS13/7 'Complaints against the regulators' (March 2013) and PRA Policy Statement PS14/16 / FCA Policy Statement PS16/11 'Complaints against the Regulators (the Bank of England, the Financial Conduct Authority and the Prudential Regulation Authority)' (March 2016).

example, by referring the matter to the Tribunal or by the institution of legal proceedings)[351].

6.11.3 The Complaints Commissioner is appointed by the regulators, but the terms and conditions on which the investigator is appointed must be such as, in the opinion of the regulators, are reasonably designed to secure that the investigator will be free at all times to act independently of the regulators, and that complaints will be investigated under the complaints scheme without favouring the regulators[352]. Under the FS Act 2012, the approval of the Treasury is required for the appointment or removal of the Complaints Commissioner[353]. Further, although the regulators have the power to determine the terms of the complaints scheme, there are statutory provisions concerning the provisions that must be made under the scheme, such as the requirement for the Complaints Commissioner to prepare an annual report on its investigations under the scheme, with a copy to be sent to each regulator and the Treasury. There is a further requirement for the regulators to publish, in draft form, any alterations or replacements to the scheme's terms – this publication must be done in a way that the regulators believe to be "best calculated" in terms of bringing the draft to the public's attention. Representations on the draft can be made and the regulators must "have regard" to such representations.[354]

6.11.4 In the Complaints Commissioner's Annual Report 2019/20, the Commissioner noted that the complaints scheme "has not been operating well". The causes appeared to be three-pronged: (a) the FCA's complaints team not being able to cope with the complexity and volume of its work; (b) the FCA's investigations not being able to identify significant regulatory issues (in part, the Commissioner surmised, due to work volume overload); and (c) a failure by the regulators to address suggestions for improvement, particularly in terms of clarifying compensation policies[355]. The FCA, PRA and Bank launched a joint consultation in response to this, in July 2020, which proposed to (a) revise language used in the complaints scheme to make it more

351 Section 87(1) of the FS Act 2012.
352 Section 84(5) of the FS Act 2012.
353 Section 84(4) of the FS Act 2012.
354 Sections 87 (as amended by the Small Business, Enterprise and Employment Act 2015) and 86 of the FS Act 2012. See the Bank and the FSA Policy Statement PS13/7 'Complaints against the regulators' (March 2013) and the PRA and FCA Policy Statement PS14/16 / PS16/11 'Complaints against the Regulators (the Bank of England, the Financial Conduct Authority and the Prudential Regulation Authority)' (March 2016).
355 Complaints Commissioner Annual Report 2019/20, "Foreword by the Commissioner" section.

accessible and user-friendly and (b) provide a more detailed description of the approach to *ex-gratia* compensatory payments[356]. It further consulted on general improvements, including proposals on the clarification of the overall approach to compensatory payments. At time of writing, the regulators are jointly analysing the responses to this consultation, with a response expected to be published towards the end of the second quarter of 2021. The scheme's terms may, therefore, change in the near future.

***Ex gratia* payments**

6.11.5 The FS Act 2012 requires that the complaints scheme must provide for the Complaints Commissioner to be able to publish a report (or part of it) if the Complaints Commissioner considers that it should be brought to the attention of the public. This is in addition to the annual report, a copy of which is sent to each regulator and the Treasury. In addition, it gives the Complaints Commissioner power to recommend that the regulator to whom a complaint relates makes a compensatory payment, and/or takes steps to remedy the matter complained of[357]. Where the Complaints Commissioner finds a complaint to be well-founded, or has criticised a regulator in a report, the regulator must inform the Complaints Commissioner and the complainant of the steps it proposes to take in response to the report. The decision whether to make an *ex gratia* payment, therefore, remains with the regulator.[358]

6.11.6 The Complaints Commissioner's Annual Report 2014-2015 contains 'The Commissioner's Approach to Remedies' at Appendix B, which explains how the Complaints Commissioner will consider remedies, including compensation. The annual reports typically include a breakdown of the complaints against the FCA and remedies recommended by the Commissioner.[359]

6.11.7 There is little evidence that the complaints scheme is a major source of redress, especially for firms, who prefer not to complain about their regulator. One recent example of a complaint leading to the Complaints Commissioner making a recommendation to the FCA to make an *ex gratia* payment was on 3 April 2020, where the Complaints

[356] See the FCA and the PRA Consultation Paper CP20/11 / CP8/2020 'Complaints against the Regulators (The Financial Conduct Authority, the Prudential Regulation Authority and the Bank of England)' (July 2020).
[357] Section 87(5) of the FS Act 2012.
[358] Section 87 of the FS Act 2012.
[359] See for example the Complaints Commissioner's 'Annual Report 2020/21' (July 2021). The FCA has also, since July 2016, published a response to these Annual Reports, for example, 'The Financial Conduct Authority's response to the Complaints Commissioner's Annual Report 2020/2021' (July 2021).

Commissioner recommended an *ex gratia* payment of £750 in relation to a seven-part complaint regarding the way the FCA had handled a firm's application to become an authorised representative and a second application for change in control[360]. Between April 2020 and March 2021, of 60 remedies recommended by the Complaints Commissioner, the FCA rejected five and accepted one only in part[361].

6.12 Reviews, inquiries and investigations

6.12.1 There are four provisions in respect of reviews, inquiries and investigations of relevance to the FCA: one in the Act (a power for the Treasury to commission efficiency reviews of the FCA) and three in the FS Act 2012 (a power for the Treasury to arrange independent inquiries, a requirement on the FCA to investigate and report to the Treasury on possible regulatory failure, and a power for the Treasury to require the FCA to undertake an investigation).[362]

Efficiency review

6.12.2 The Treasury is given power to appoint an independent person to conduct a review of the economy, efficiency and effectiveness with which the FCA has used its resources in discharging its functions[363]. Such a review is not to be concerned with the merits of the FCA's general policy or principles in meeting its strategic and operational objectives. This power is included in the Act in addition to the requirement for the FCA's annual accounts to be certified by the Comptroller and Auditor General[364].

Independent inquiry

6.12.3 The Treasury power to order an independent inquiry is exercisable in three cases, the first of which is likely to be most relevant to the FCA. This is where it appears to the Treasury that:

(a) events have occurred in relation to a collective investment scheme, a firm that is or was carrying on a regulated activity

360 See Complaints Commissioner publication 'Final report by the Complaints Commissioner: Complaint number FCA00700' (3 April 2020).
361 Complaints Commissioner Annual Report 2020/21, page 14.
362 Section 1S of the Act; and sections 68, 73 and 77 of the FS Act 2012. See also other reports mentioned in paragraphs 6.12.10 to 6.12.13.
363 Section 1S.
364 Paragraph 15. See also National Audit Office report 'Regulating financial services' (March 2014).

(whether or not as an authorised firm), listed securities or an issuer of listed securities;

(b) which posed or could have posed a serious threat to the stability of the UK financial system or caused or risked causing significant damage to the interests of consumers; and

(c) these events may not have occurred but for a serious failure in the legislative regime for regulation or its operation,

and an inquiry is in the public interest. The Government has said that the type of inquiry provided for by Part 5 of the FS Act 2012 is similar to the Chairman-led inquiry provided for in the Inquiries Act 2005. The Treasury is able to issue directions controlling the scope, timing and conduct of the inquiry, and the making of reports. The costs of an inquiry are to be met by the Treasury out of the money provided by Parliament.[365]

Investigations into possible regulatory failure

6.12.4 The duty of the FCA to investigate and report on possible regulatory failure applies when events have occurred in relation to a "regulated person"[366] or collective investment scheme which:

(a) indicated a significant failure to secure an appropriate degree of protection for consumers;

(b) had (or could have had) a significant adverse effect on the integrity of the UK financial system[367]; or

(c) had (or could have had) a significant adverse effect on effective competition in the interests of consumers[368],

and those events might not have occurred, or the failure or adverse effect might have been reduced, but for a serious failure in the legislative regime for regulation or its operation. The duty applies

365 Section 68(2) of the FS Act 2012 and the Government response to the Treasury Committee's review of reports into the failure of HBOS (October 2016), paragraph 1.14. The second case relates to failures in the system established by Part 18 of the Act for the regulation of clearing houses or central securities depositories. The third case relates to failures in the system established by the Banking Reform Act for the regulation of payment systems. The FCA created the Payment Systems Regulator on 1 April 2014. There is a separate duty on the Payment Systems Regulator to investigate and report on possible regulatory failures relating to regulated payment systems in section 76A of the FS Act 2012.

366 As defined in section 73(5) of the FS Act 2012.

367 This is in accordance with the integrity objective of protecting and enhancing the integrity of the UK financial system, as laid out in section 1(D).

368 The interests of consumers relates to consumers in the markets for services mentioned in section 1E(1).

where the Treasury directs the FCA that the test is met, or where the FCA itself is satisfied that the test is met (unless the Treasury directs it that an investigation is not required).[369]

Investigations in the public interest

6.12.5 In addition, the Treasury has the power, where it considers that it is in the public interest and it does not appear that the FCA is undertaking an investigation, to require the FCA to undertake an investigation into and report to it on "relevant events". "Relevant events" means events that have occurred in relation to a collective investment scheme, a firm that is or was carrying on a regulated activity (whether or not as an authorised firm), listed securities or an issuer of listed securities, or a regulated payment system.[370]

Conduct of investigations

6.12.6 In carrying out an investigation, the FCA must have regard to the desirability of minimising any adverse effect that the carrying out of the investigation may have on the exercise by it of any of its other functions, and may postpone the start of, or suspend, an investigation if it considers it necessary to avoid a material adverse effect, although it must notify the Treasury if it does so. The FCA must also prepare a statement of policy with respect to such investigations, and obtain the consent of the Treasury to its issue.[371]

6.12.7 The Treasury has power to make directions concerning an investigation (such as in relation to the scope or the period), but in exercising this power, must have regard to the desirability of minimising any adverse effect that the carrying out of the investigation may have on the exercise by the FCA of any of its functions[372].

Reports

6.12.8 On completion of an investigation, the FCA must make a written report to the Treasury setting out the result of the investigation, and any lessons learned, and making such recommendations as it considers appropriate.[373]

369 Section 73 of the FS Act 2012.
370 Section 77 of the FS Act 2012.
371 Sections 78(2), 78(3) and 80 of the FS Act 2012.
372 Sections 78(5) and 78(7) of the FS Act 2012. See also the Treasury Committee publication 'Review of the reports into the failure of HBOS' (July 2016), paragraph 1.13, also referenced in footnote 365.
373 Section 79 of the FS Act 2012.

6.12.9 Where a report is made to the Treasury, either as a result of an independent inquiry or as a result of an FCA investigation, the Treasury must publish the report in full, subject to a power to withhold certain material[374]. The Treasury must lay before Parliament whatever is published.

Other reports

6.12.10 In December 2011, the FSA Board published a 450-page report into the failure of the Royal Bank of Scotland which had taken 12 months to prepare[375]. In November 2015, the PRA and the FCA published a report on 'The failure of HBOS plc', which was started in 2012[376]. Both reports were conducted prior to the regime provided for in the 2012 Act, although the latter report did indicate that future reports will be carried out within the statutory framework. The HBOS report was accompanied by a second report, by Andrew Green QC, providing an assessment of the FSA's enforcement actions in relation to the failure of HBOS[377].

6.12.11 One feature of all the above reports was the role played by the House of Commons Treasury Committee in insisting on independent reviews. In addition, the Parliamentary Commission on Banking Standards published a report into HBOS: 'An Accident Waiting to Happen' in April 2013, and the Treasury Committee published its own review of the reports into the failure of HBOS in July 2016. The Treasury Committee also produced a report into Project Verde (the failed acquisition by the Co-operative Bank of 632 Lloyds Bank branches) in October 2014 and into the FCA's press briefing of its Business Plan for 2014/15 (March 2015). In addition, the House of Commons Public Accounts Committee has reported into 'Financial services mis-selling: regulation and redress' (13 May 2016).

6.12.12 More recently in 2020, the Treasury Committee commissioned an independent review into the FCA's regulation of London Capital and Finance and at time of writing, the Treasury Committee is carrying out an inquiry into the "Lessons from Greensill Capital" (following the

374 Section 82 of the FS Act 2012.
375 FSA publication 'The failure of the Royal Bank of Scotland: Financial Services Authority Board' (December 2011).
376 FCA and PRA publication 'The failure of HBOS plc (HBOS): A report by the Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA)' (November 2015).
377 'Report into the FSA's enforcement actions following the failure of HBOS' by Andrew Green QC (November 2015).

firm's filing for insolvency in March 2021), focusing among other things, on the regulatory lessons of Greensill Capital's failure.

6.12.13 Reports that do not seem to have relied on the statutory framework are the Treasury's review of the fairness, transparency, speed and efficiency of the enforcement decision-making of the financial services regulators, announced in May 2014, which reported in December 2014, and the inquiry by the non-executive directors of the FCA into the events of 27/28 March 2014 relating to the press briefing of information in the FCA's 2014/15 Business Plan, concerning the FCA's intention to review certain long-term life assurance products, which culminated in the Davis Report (December 2014). The FCA also produces internal audit reports, some (in the form of summaries or redacted versions) of which have been published at the request of the Treasury Committee.

6.13 Competition scrutiny

6.13.1 As mentioned above, the FCA has a number of operational objectives, one of which is the promotion of effective competition in the interests of consumers. In addition, since 1 April 2015, the FCA has had concurrent competition powers with the CMA. However, the FCA's own rules, general guidance and statements of policy on making recommendations to designated guidance providers, are also put under competition scrutiny[378].

6.13.2 Under the Act, the CMA may in certain circumstances make a recommendation to the FCA (as it can in relation to the PRA) which requires a response (referred to as "section 140B advice")[379]. The CMA must consult the FCA before the advice is given[380]. The FCA must publish a response, within 90 days after receipt of the advice, stating how it proposes to deal with the advice[381]. If, having considered the response, the CMA continues to consider that the regulating provisions or practices of the FCA may cause or contribute to the prevention, restriction or distortion of competition in the supply or acquisition of goods or services in the UK, the CMA may refer the matter to the Treasury[382]. The Treasury may, after consulting the FCA, give a direction to the FCA requiring specific actions to be taken by the FCA[383]. The FCA

[378] Sections 140A to 140H.
[379] Section 140B, where the CMA considers that the regulating provisions or practices of the FCA or the PRA (or a combination of both) may cause or contribute to the prevention, restriction or distortion of competition in the supply or acquisition of goods and services in the UK.
[380] Section 140C.
[381] Section 140G.
[382] Section 140H(2).
[383] Sections 140H(4) to 140H(7).

and CMA have issued a MoU on concurrent competition powers which sets out how they will work together within the framework of competition law, as well as a separate MoU on concurrent powers under consumer protection legislation.

6.14 Rules

General

6.14.1 Since in many respects the Act provides only a framework, the exercise of the FCA's rule-making and related powers (referred to in the Act as the FCA's "legislative functions"[384]) are of great importance to authorised firms. Part 9A of the Act gives the FCA extensive powers in relation to rules and code-making. It also allows the FCA to issue guidance and to grant rule waivers.

6.14.2 As mentioned in paragraph 6.2.9, the FCA's legislative functions must be exercised through the Board.

6.14.3 The basic approach of the legislation is to give the FCA power to make rules to advance one or more of its operational objectives[385] and then to supplement that power in certain areas where the general rule-making power might not be broad enough.

6.14.4 As part of the FRF Review, the Government has proposed to confer responsibility on the regulators, including the FCA, for determining rules that are currently housed in (soon-to-be-repealed) retained EU law, just as they already do in other areas not covered by retained EU law. This is with a view to ensuring "*that there is a consistent approach taken to financial services regulation across UK markets, allowing the development of coherent and user-friendly rulebooks*." It is envisaged that, in many cases, it may be appropriate for the regulators to ensure continuity with the current provisions in retained EU law when exercising this rule-making power. However, there will also be instances where it is appropriate for the regulators to take the opportunity to tailor the rules to reflect the specifics of UK markets, and to make targeted improvements, in line with their objectives.

6.14.5 The regulators will also be empowered to determine the rules that apply to designated activities under the proposed Designated Activities Regime. This would involve a more limited rulemaking power than the

384 Paragraph 8(3).
385 Section 137A.

general rulemaking powers of the regulators in relation to authorised persons. It would allow the relevant regulator to make rules relating to the designated activity only, and not other unrelated activities of the firm.

General rule-making powers

6.14.6 The FCA may make rules (so-called "general rules") applicable to authorised firms. However, general rules may apply to an authorised firm's regulated and non-regulated activities. In addition, the FCA's general rules may contain requirements which take into account, in the case of an authorised firm that is a member of a group, any activity of another member of the group. Furthermore, general rules may make provisions applying to authorised firms even though there is no relationship between the authorised firms to which the rules will apply, and the persons whose interests will be protected by the rules. Examples of rules relating to such a 'non-relationship' given in the Explanatory Notes to the FS Act 2012 are rules that address a firm's behaviour towards its competitors, potential clients or its beneficiaries[386]. However, general rules may only be made if they appear to the FCA to be necessary or expedient for the purpose of advancing one or more of its operational objectives. Further, the FCA's general rules may not modify, amend or revoke any retained direct EU legislation (apart from such retained legislation which takes the form of FCA rules).[387]

6.14.7 Examples of general rules include conduct of business rules (for example, "know your customer", best execution and suitability requirements).

6.14.8 The general rule-making power includes power for the FCA to make:

(a) client money rules (section 137B) (which among other things may make provision which results in clients' money being held on trust in accordance with the rules);

(b) rules in relation to the total cost or duration of credit agreements (section 137C);

386 Explanatory Notes to the FS Act 2012, note 277.
387 Sections 137A(1), 137A(4), 137A(3) and 137A(6). In paragraph 4 of Part 2 of Schedule 2 to the FS Act 2021, Section 137A(6) is made subject to Sections 143C(4) and 143D(6) of the Act, which allow modifications to capital requirements regulations or associated instruments.

(c) product intervention rules (section 137D) (on which see paragraphs 6.14.15 to 6.14.26); and

(d) rules requiring participation in a benchmark[388] (section 137F) (see paragraphs 6.14.11 to 6.14.14 for further detail on the FCA's powers as they relate to benchmarks).

6.14.9 The Act also contains provisions requiring the FCA to make rules with a view to securing an appropriate degree of protection for borrowers against excessive charges of payday lending (section 137C(1A)), requiring disclosure of information about pension scheme transaction costs (section 137FA), requiring disclosure of the availability of pensions guidance (section 137FB), rules about advice on transferring or otherwise dealing with annuity payments (section 137FBA), rules on early exit pension charges (section 137FBB) and ring-fencing rules (section 142H).[389]

6.14.10 The Act contains additional provisions which apply when the FCA makes general rules about:

(a) remuneration (section 137H);

(b) remuneration policies (section 137I); and

(c) recovery plans and resolution packs (sections 137J, 137K and 137L).

Benchmarks

6.14.11 Since 31 December 2020, the Benchmarks Regulation ((EU) 2016/1011) has formed part of retained EU law (**UK BMR**)[390], which places general requirements on benchmark administrators, contributors and supervised entities using benchmarks to ensure that benchmarks are both robust and reliable — the FCA, under the UK BMR, is responsible for supervising these administrators, contributors and supervised entities. The UK BMR further makes the FCA responsible for the authorisation and registration of UK benchmark administrators.[391]

388 Following IP Completion Day, a "benchmark" has the meaning given to it by Article 3 of the EU Benchmarks Regulation 2016.
389 At time of writing, sections 137FA and 137FB are partially in force and in force respectively, each with pending amendments from a date to be appointed.
390 The statutory instrument that made the majority of the on-shoring amendments to the UK BMR was the Benchmarks (Amendment and Transitional Provision) (EU Exit) Regulations 2019 (SI 2019/657).
391 See Articles 34 to 36 of the UK BMR.

6.14.12 At time of writing, LIBOR is the only critical benchmark in use in the UK[392] — and in March 2021, the FCA confirmed that all LIBOR settings would cease by 31 December 2021 (in the case of sterling, euro, the Swiss franc and the Japanese yen) and 30 June 2023 (in the case of the US dollar)[393]. To enable an orderly wind-down of LIBOR as a critical benchmark, the Government introduced provisions under the FS Act 2021 to amend and enhance the FCA's powers under the UK BMR, including provisions allowing the FCA to require the administrator of a critical benchmark to change how a benchmark is determined, rules of the benchmark, and the code of conduct (if the benchmark is based on submissions from contributors) if the benchmark is designated as an "Article 23A benchmark". Under Article 23A of the amended UK BMR, the FCA has the power to designate a critical benchmark (such as LIBOR) which has become, or is at risk of becoming, unrepresentative. Where a critical benchmark is based on submissions from contributors — such as LIBOR — these enhanced powers also allow the FCA to direct a change of methodology such that it is no longer reliant on these contributions, in order to wind it down on an orderly basis before its eventual cessation. The FCA may only exercise this power if it considers it appropriate to do so. The FCA must have regard to the desirability of securing that the cessation of the benchmark takes place in an orderly way, and it is desirable to advance either—or both—of the FCA's objectives of ensuring an appropriate degree of protection for consumers, and protecting and enhancing the integrity of the financial system.[394]

6.14.13 The FS Act 2021 further allows the FCA the power to prohibit new use of benchmarks which are due to be discontinued, and extends transitional periods for third country benchmarks from 31 December 2022 to 31 December 2025[395].

6.14.14 The FCA has published a document setting out the background to, and the details of the amendments and the FCA's additional powers introduced under, the UK BMR as set out in the FS Act 2021. This document refers to relevant and current consultations about the FCA's proposed policies and decisions in respect of these enhanced powers.[396]

392 See paragraph 2.1 of FCA publication 'Benchmarks Regulation and amendments under the Financial Services Act 2021' (June 2021).
393 See FCA press release 'Announcements on the end of LIBOR' (March 2021).
394 See Sections 8 to 21 of, and Schedule 5 to, the FS Act 2021.
395 See, respectively, Sections 10 and 20 of the FS Act 2021.
396 See FCA publication 'Benchmarks Regulation and amendments under the Financial Services Act 2021' (last updated September 2021).

Product intervention rules

6.14.15 Section 137D provides that the FCA's power to make general rules includes the power to make "product intervention rules". According to the Explanatory Notes to the FS Act 2012, these are rules that prohibit authorised firms from exposing consumers to an economic interest in specified products (or prohibit such behaviour unless requirements specified in the rules are satisfied)[397]. This power can only be exercised where the FCA considers it is necessary or expedient for the purpose of advancing the consumer protection objective, the competition objective or, if the Treasury so provides by order (which may be made on FPC advice), the integrity objective.[398]

6.14.16 As mentioned above, the exercise of its general rule-making power falls within the general functions in respect of which the Act requires the FCA to have regard to the principles of good regulation set out in section 3B of the Act. These include proportionality, so the FCA could be expected to consider whether its objectives could be met, for example, by imposing restrictions on a product, rather than banning it outright.

6.14.17 Section 137D is widely drafted, referring to rules which prohibit authorised firms from entering into "specified agreements" with "any person or specified person", where "specified agreements" and "specified persons" mean agreements and persons of a description specified in general rules made by the FCA.

6.14.18 The prohibitions and requirements that the FCA can impose on authorised firms by virtue of product intervention rules are listed in section 137D(2). This includes doing anything that would or might result in the entering into of specified agreements, or the holding of a beneficial or other economic interest in specified agreements, by persons or specified persons.

6.14.19 The requirements that can be specified include, in particular, requirements on the terms and conditions to be included (or not included) in specified or other agreements, and requirements limiting financial promotions[399].

397 Explanatory Notes to the FS Act 2012, note 282.
398 Section 137D of the Act; and section 9P(2)(d) of the BoE Act. See also FCA Policy Statement PS15/14 'Restrictions on the retail distribution of regulatory capital instruments: Feedback to CP14/23 and final rules' (June 2015).
399 Section 137D(6).

6.14.20 The Act specifically provides that it is of no relevance whether the entering into of a specified agreement constitutes the carrying on of a regulated activity, or in the case of doing anything that would or might result in the entering into of specified agreements, whether the specified agreements are with the authorised firm concerned or anyone else[400].

6.14.21 Section 137D(7) provides that the rules may, as an exception to the general rule in section 138E(2)[401], provide for agreements or obligations entered into in contravention of the product intervention rules to be unenforceable. The rules also provide for the potential recovery of money or other property paid or transferred, and for the payment of compensation.

6.14.22 As the Explanatory Notes to the FS Act 2012 make clear, these provisions do not affect contracts entered into before the product intervention rules came into force on 24 January 2013, although consumers who purchased products that were subsequently "banned" or "restricted" would still have whatever rights they had under FSA or FCA rules existing at the time of the sale[402].

6.14.23 The Explanatory Notes to the FS Act 2012 suggest that the power to make product intervention rules in section 137D does not limit the FCA's general rule-making power, and refers to section 415A (which notes that the FCA's powers under a provision of the Act is not limited by any other power arising from another provision in the Act) in support of this[403].

6.14.24 Section 138M gives the FCA power to make "temporary product intervention rules" without public consultation where it considers it necessary or expedient to do so for the purposes of advancing its consumer protection or competition objective (or its integrity objective, if the Treasury has enabled this). The FCA must still, however, consult with the PRA before making the rules. Temporary product intervention rules must specify a period for which they will be in effect, which may not be longer than 12 months, although they may be revoked at any time before the end of the period for which they are stated to apply. Once temporary product intervention rules have been

400 Section 137D(5).
401 Section 138E(2) provides that a contravention of a rule made by the FCA will not, generally, make any transaction void or unenforceable. At time of writing, this section is in force with amendments pending from a date to be appointed.
402 Explanatory Notes to the FS Act 2012, notes 285 and 286.
403 Explanatory Notes to the FS Act 2012, note 282.

made, the FCA cannot make further temporary product intervention rules in substantially the same terms for a period of one year after the time specified for them to end. The FCA must issue a statement of policy with respect to the making of temporary product intervention rules[404].

6.14.25 The statement of policy with respect to the making of temporary product intervention powers, published March 2013, stated that the FCA committee proposing draft rules, and the FCA Board, should consider how the national approach fits within the wider EU legislative framework and that, where appropriate, the FCA committee and the Board would recommend consideration of the same issues at EU level[405]. This statement of policy has since been replaced by FCA-published guidance[406], with general considerations now involving the FCA having due regard to the Equality Act 2010 and certain other factors, such as consumer detriment[407].

6.14.26 The Markets in Financial Instruments Regulation[408] (MiFIR)[409] and the PRIIPs Regulation[410] also contain product intervention powers. These Regulations were retained and form part of UK law (as amended[411]), by virtue of the European Union (Withdrawal) Act 2018.

404 Section 138N(1). See FSA Policy Statement PS13/03 'Making temporary product intervention rules' (March 2013). The FCA first exercised its power to make temporary product intervention rules in August 2014 when it introduced restrictions in relation to the retail distribution of contingent convertible instruments. This was followed by FCA Policy Statement PS15/14 'Restrictions on the retail distribution of regulatory capital instruments' (June 2015). Following the collapse of London Capital & Finance plc, the FCA introduced temporary product intervention rules banning the promotion of high-risk speculative mini-bonds to retail investors (see FCA publication 'Temporary intervention on the marketing of speculative mini-bonds to retail investors' (November 2019)). This was followed by PS20/15 'High risk investments: Marketing speculative illiquid securities (including speculative mini-bonds) to retail investors' (December 2020), which permanently banned such marketing.

405 FSA policy statement PS13/3 'The FCA's use of temporary product intervention rules' (March 2013).

406 See PROD 2.1 'Purpose' of the Product Intervention and Product Governance Sourcebook in the FCA Handbook.

407 PROD 2.6 'General considerations for product intervention rules' of the Product Intervention and Product Governance Sourcebook section in the FCA Handbook.

408 EU Regulation 600/2014.

409 Section 27 of, and Schedule 10 to, the FS Act 2021 amends MiFIR by providing the FCA the power to specify reporting requirements for, and to impose restrictions or prohibitions on, firms that register under MiFIR. The aim is to ensure the FCA has an appropriate degree of oversight over such firms.

410 EU Regulation 1286/2014 and Commission Delegated Regulation (EU) 2016/1904. Section 38 of the FS Act 2021 amends the retained version of the PRIIPS Regulation by enabling the FCA to clarify the scope of the PRIIPS Regulation and address ambiguities in relation to certain investment products, and to further clarify information to be provided in key information documents.

411 These amendments were incorporated by The Markets in Financial Instruments (Amendments) (EU Exit) Regulations 2018 (SI 2018/1403) and The Packaged Retail and Insurance-based Investment Products (Amendment) (EU Exit) Regulations 2019 (SI 2019/403).

Specific rule-making powers

6.14.27 In addition to its general rule-making powers, the FCA may make the following specific rules:

(a) a "*threshold condition code*" (rules supplementing any of the conditions for the time being set out or specified under Schedule 6 to the Act that are expressed to be relevant to the discharge of the FCA's functions);

(b) "*control of information rules*" (rules about the disclosure and use of information held by an authorised firm);

(c) "*price stabilising rules*" (rules as to the circumstances in which, conditions subject to which, and period during which, authorised firms may take action for the purpose of stabilising the price of investments); and

(d) "*financial promotion rules*" (rules applying to authorised firms about the communication by them, or their approval of the communication by others, of financial promotions, including in particular their form and content).[412]

6.14.28 Section 55B provides that the "threshold conditions" in relation to a regulated activity, means the conditions set out in Schedule 6, as read with any threshold condition code made by either regulator.

6.14.29 Statutory provision for making "control of information" rules concerning the non-disclosure and non-use of information held by an authorised firm provide a statutory basis for the use of Chinese walls in the financial services industry by providing that the rules of either regulator can require or allow information to be withheld from, or not used for the benefit of, certain clients.[413]

6.14.30 The FCA has made rules permitting the use of Chinese walls[414]. Compliance with these rules provides a defence:

(a) against prosecution for misleading statements or misleading impressions or misleading statements etc in relation to

412 See, respectively, sections: 137O; 137P; 137Q; and 137R.
413 Section 137P.
414 See, for example, COB 2.4 'Chinese Walls' of the Conduct of Business section and SYSC 10.2 'Chinese Walls' of the Senior Management Arrangements, Systems and Controls (SYSC) section, each in the FCA Handbook.

benchmarks (under sections 89(2), 90(1) and 91(1) of the FS Act 2012); and

(b) against enforcement action, or an action for damages, based on a breach of a requirement to disclose or use the information[415].

6.14.31 Although the Act does not specify that compliance with Chinese walls rules will provide a defence to a claim for breach of a legal duty to disclose or make use of information, the Government has previously expressed the view in Parliament that the courts would be unlikely to hold that a customer could sue an authorised firm where the authorised firm had complied with FSA rules in respect of Chinese walls[416].

6.14.32 The PRA has also made rules under section 137P.

6.14.33 Although the FCA may make price stabilisation rules, these must not apply to transactions, orders, behaviour, actions or omissions to which MAR applies[417].

Evidential rules

6.14.34 Section 138C allows for so-called "evidential" rules to be made. These are rules which provide that contravention does not give rise to any other consequences of rule breaches provided for in other provisions of the Act.

Other rule-making powers

6.14.35 As well as the FCA's rule-making powers conferred in Part 9A, other parts of the Act refer to rules to be made by the FCA. For example, the FCA has the power to make:

(a) rules in respect of controlled functions and specified functions;

(b) rules of conduct;

(c) "Part 6 rules" (including Listing Rules, Prospectus Rules, Transparency Rules and corporate governance rules);

(d) rules in relation to parent undertakings;

415 Sections 89(3), 90(9) and 91(3).
416 Daily Hansard, Volume No. 613 (18 May 2000), Column 421.
417 Section 137Q(2)(aa).

(e) rules establishing a compensation scheme;

(f) compulsory jurisdiction rules for the FOS, and rules requiring industry funding;

(g) exemptions from the restriction on promotion of collective investment schemes;

(h) "trust scheme rules" and "scheme particulars rules" in relation to authorised unit trusts;

(i) rules in relation to open-ended investment companies (**OEICs**);

(j) rules imposing duties or liabilities on the operator of a recognised scheme, or requiring it to maintain facilities in the UK;

(k) rules implementing the UCITS Directive;

(l) rules imposing notification requirements on RIEs;

(m) rules in relation to members of the professions;

(n) "auditors and actuaries" rules;

(o) rules establishing a consumer redress scheme;

(p) rules in relation to fees; and

(q) rules for the recovery of the Treasury's illegal money lending costs.[418]

In this Guide, these rules are covered (where applicable) within the chapters to which they are relevant.

6.14.36 The FSA used to have power under the Act to make "short selling rules", but this was repealed from 1 November 2012[419] following the entry into force of the EU Short Selling Regulation[420] (the **Short Selling Regulation**). The Short Selling Regulation forms part of retained EU law

[418] See, respectively, sections: 59(3) and 63E(2); 64A(1); 73A; 192J, 192JA and 192JB; 213 (at time of writing, this section is in force with amendments pending from a date to be appointed); 226 and 234; 238; 247 and 248; regulations made under section 262; 278 and 283; for example, rules made under 283 and 351A; 293; 332; 340; 404; paragraph 23; and section 333T(2). The FCA has established an Arch Cru consumer redress scheme; see CONRED 2 of the 'Consumer Redress Schemes sourcebook' (**CONRED**), which is contained in the FCA Handbook.

[419] By the Financial Services and Markets Act 2000 (Short Selling) Regulations 2012 (SI 2012/2554).

[420] EU Regulation 236/2012.

in the UK (as amended[421]) by virtue of the European Union (Withdrawal) Act 2018. For more on short selling, see paragraph 6.19.5.

6.14.37 As referenced in paragraph 6.3.3, following IP Completion Day, the FCA (and where relevant, the Bank and PRA) has been granted responsibility for amending and maintaining certain binding technical standards associated with EU laws that now form part of UK law. This power to make technical standards includes the power to modify, amend or revoke any technical standards made by the FCA (or, where relevant, the Bank or PRA) under this power, or any EU tertiary legislation made by an EU entity under the original EU power which forms part of retained EU law. Before the FCA makes a technical standard in which another regulator has an interest, it must consult that regulator. The PRA has an interest in technical standards which apply to PRA-authorised firms, or which might affect the exercise of its functions. The Bank has an interest in technical standards which apply to central, financial or non-financial counterparties within the meaning of the EMIR regulation or to central securities depositories, or which may affect the exercise of the Bank's functions.[422]

6.14.38 Additionally, the FCA (and where relevant, the Bank and PRA) have the power to temporarily waive or modify obligations where such obligations have changed as a result of a statutory instrument made under Section 8 of the European Union (Withdrawal) Act 2018[423]. This power is known as the "temporary transitional power" (**TTP**) and allows UK regulators to grant transitional relief for a period of up to two years from IP Completion Day. The FCA has applied the TTP on a broad two year basis, such that most firms will be able to continue to comply with their pre-existing requirements and adjust to Brexit-related changes in their regulatory obligations up until 31 March 2022. However, the FCA did not grant transitional relief to certain targeted areas[424], including in relation to the changed reporting obligations in respect of MiFID II, EMIR[425] and SFTR.[426]

421 By the Short Selling (Amendment) (EU Exit) Regulations 2018 (SI 2018/1321).
422 Section 138P.
423 Such power was granted by the Financial Services and Markets Act 2000 (Amendment) (EU Exit) Regulations 2019 (SI 2019/632).
424 See the FCA webpage 'Key requirements of firms' (last updated 31 December 2020), which details the relevant requirements where transitional relief is not available.
425 It is worth noting that Section 40 of the FS Act 2021 amends the retained version of the EMIR regulation, providing the FCA powers to make rules as to the satisfaction of fair, reasonable, non-discriminatory and transparent (**FRANDT**) terms, and as to procedures improving the data quality and policies of trade repositories.
426 See generally the FCA's 'Main Transitional Directions' (22 December 2020), together with Annexes A and B which set out how the TTP applies and where TTP does not apply; and the FCA's explanatory note

6.15 Principles

6.15.1 The power in the Act to issue general rules has been exercised in the past to formulate rules at a high level of generality. The Principles for Businesses (**PRIN**) in the FCA Handbook are intended as a general statement of the fundamental obligations of firms and individuals under the regulatory system. The FCA has also made what it calls 'Statements of Principle' which are rules made under section 64A(1)(a) with respect to the conduct of approved persons of certain firms[427].

6.15.2 Although some initial concerns were raised in relation to the power of the regulator to discipline authorised firms and individuals for breaches of very widely drafted principles, this has become commonplace over time. In 2020, for example, the FCA fined Goldman Sachs International £48 million for breaches of Principles 2, 3 and 5 in respect of wholesale conduct in the investment bank sector. In 2021, numerous insurance entities within the Lloyds Banking Group were fined £90 million for breaches of Principles 3 and 7 in respect of customer communications.[428]

6.16 Codes

6.16.1 The Act used to require the FCA to issue a code of conduct concerning market abuse and a code of conduct for approved persons.

6.16.2 The FCA is allowed, but not required, to make a "threshold condition code".[429]

6.16.3 The FCA has made various Remuneration Codes as part of the FCA Handbook tailored to different types of firms, such as the AIFM Remuneration Code and the UCITS Remuneration Code, but these are remuneration rules and general guidance rather than a statutory code.

'Explanatory Note: Directions under Part 7 of the Financial Services and Markets Act 2000 (Amendment) (EU Exit) Regulations 2019 (Transitional Powers of the Financial Regulators)' (December 2020).

427 APER 2.1A 'The Statements of Principle' in the Statements of Principle and Code of Practice for Approved Persons section in the FCA Handbook.

428 See FCA news stories '2020 fines' (last updated 3 March 2021) and '2021 fines' (last updated 19 October 2021).

429 Sections 119 and 64(2) (both now repealed) and Section 137O.

6.17 Rule-making procedures

6.17.1 The Act generally requires the FCA to consult the PRA before making any rules, and thereafter to consult publicly. Drafts of any proposed rules published for public consultation must be accompanied by:

(a) a cost-benefit analysis;

(b) an explanation of the proposed rules' purpose;

(c) an explanation of the FCA's reasons for believing that making the proposed rules is compatible with its general duties in section 1B;

(d) notice that representations about the proposals may be made to the FCA within a specified time; and

(e) if the rules impact authorised firms which are mutual societies and other authorised firms[430], the FCA must prepare a statement setting out whether or not, in its opinion, the impact of the proposed rule on the mutual society will be significantly different from its impact on other authorised firms, and the details of any such differences.[431]

6.17.2 Section 138L contains a general exemption from the duty to consult publicly (but not from the duty to consult the PRA) if the FCA considers that the delay involved would be prejudicial to the interests of consumers[432]. As mentioned in paragraphs 6.14.24 and 6.14.25, section 138M contains an exception, exercisable in certain circumstances, for temporary product intervention rules.

6.17.3 Similar consultation procedures apply in respect of certain statements, such as a statement of fining policy (although the duty to consult the PRA does not apply). A simplified version of section 138I (not including a cost-benefit analysis and feedback statement) applies when the FCA gives general guidance.[433]

[430] Section 138K.
[431] Section 138I. At time of writing, this section is in force with amendments pending from a date to be appointed.
[432] Section 138L. The FCA is not required to consult the PRA where the FCA makes rules in relation to RIEs under Part 18. The word "consumer" is (widely) defined in section 425A.
[433] Section 139A(3). A cost-benefit analysis is not required for certain rules which have the same, or substantially the same, effect as any Consumer Credit Act 1974 provisions; see articles 61(3) and (4) of The Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No. 2) Order 2013 (SI

6.17.4 Although the Act provides for the FCA to consult on new rules, it does not provide a direct mechanism for a firm or individual to challenge any particular rule. Judicial review is available, although traditionally the courts have adopted a cautious approach to the judicial review of regulatory bodies[434].

6.17.5 It has been proposed, as part of Phase II of the FRF Review, that the FCA (and the PRA) should publish and maintain a public version of their cost-benefit analysis framework. The consultation suggests the establishment of a new statutory panel dedicated to supporting the development of the regulators' cost-benefit analyses. The Government has also proposed a new statutory requirement for the PRA and the FCA to publish and maintain a framework for how they conduct rule reviews. This would cover all approaches to assessing the effect of rules, from monitoring to wider evaluation of the impact.

6.18 Rule waivers and modifications

6.18.1 Section 138A of the Act allows for FCA rules (other than rules of conduct, the threshold condition code and certain trust and scheme particular rules[435]) to be waived or modified in particular circumstances[436]. The Government has indicated in the past that these powers may be used to achieve a similar outcome to "no-action" letters in other jurisdictions.

6.18.2 The FCA may grant rule waivers or modifications if it is satisfied that compliance with the rule would be "unduly burdensome", or would not achieve the purpose for which the rule was made. In addition, the FCA will need to be satisfied that the direction would not adversely affect the advancement of any of the FCA's operational objectives. This latter requirement replaces a requirement under the Act as originally enacted that there would be no undue risk to the persons whose interests the rules are intended to protect (for example, consumers).

2013/1881). In paragraph 20 of Part 3 of Schedule 2 to the FS Act 2021, the FCA has the power to 'satisfy' the requirements of Section 138I in relation to Part 9C rules.

434 See *R (on the application of the British Bankers' Association v Financial Services Authority* [2011] EWHC 999 (Admin), and [2011] All ER (D) 222 (Apr), referred to in paragraph 6.2.26.

435 Such scheme rules include rules made by the FCA under section 247 (trust scheme rules), section 248 (scheme particulars rules), section 261I (contractual scheme rules) or section 261J (contractual scheme particulars rules). See section 138A(2).

436 Sections 60(3), 64(4) and 101(8) of the CCA make provision for FCA powers to waive or modify obligations in respect of certain requirements of that Act.

6.18.3 Even if the conditions in section 138A are satisfied, the FCA will consider other relevant factors before granting a waiver[437]. Prior to IP Completion Day, the FCA was required to see if such a waiver would be compatible with EU law and, in practice, it was the need to be compatible with EU legislation, rather than the need to comply with the conditions in section 138A, that formed the major constraint on the grant of waivers. Post-IP Completion Day, the FCA amended its guidance to note that "other relevant factors" will be considered prior to a waiver being given, though no specification as to these factors has been given.

6.18.4 A direction under section 138A must be published by the FCA in a way which is "best calculated" to bring it to the attention of persons likely to be affected by it and other firms likely to make an application for a similar direction, unless the FCA thinks it inappropriate or unnecessary to do so after considering the matters listed in sections 138B(3) and 138B(5). If a direction relates to a PRA-authorised firm, or an authorised firm with an immediate group member authorised by the PRA, the FCA must consult the PRA before publication (or before deciding not to publish such a direction).[438]

6.18.5 The FCA may revoke a waiver at any time, including with immediate effect if the FCA considers it necessary[439].

6.19 Guidance

Overview

6.19.1 Section 139A of the Act gives the FCA wide power to give guidance.

6.19.2 Traditionally, a distinction has been drawn between two kinds of guidance: first, "general guidance", of broad application and available either generally or to a class of "FCA-regulated persons"[440]; and, secondly, "individual guidance", which is not defined in the Act, but is referred to in the FCA Handbook and relates to a particular firm and its own particular circumstances and plans. The FCA has stated that individual guidance will not be published but may at the FCA's

437 SUP 8.3.1AG of the SUP Manual.
438 Section 138B.
439 Section 138A(7). SUP 8.8 of the SUP Manual provides guidance on the revocation of waivers.
440 "General guidance" is defined in section 139B(5). An "FCA-regulated person" is an authorised firm or any person who is otherwise subject to rules made by the FCA (section 139A(9)).

discretion be converted into general guidance and included in the FCA Handbook.[441]

6.19.3 As mentioned at paragraph 6.7.15, the FCA is required to give general guidance about how it intends to advance its operational objectives. In addition, the FCA must give general guidance about the presentation of a reasoned case for super-complaints, references under section 234D and, from a date to be appointed, guidance to regulated entities on the definition of politically exposed persons[442]. In relation to the last requirement, although perhaps not appropriate for guidance, this must include a "requirement" to take a proportional, risk-based and differentiated approach to conducting transactions or business relationships with each category of politically exposed person that may be defined.

6.19.4 In addition to general and specific guidance, there is FCA-confirmed industry guidance, which may be potentially relevant to an enforcement case[443]. However, the Act makes no specific provision for this type of guidance.

Procedure for giving guidance

6.19.5 The FCA is required to consult the PRA and the public on general guidance concerning the application of FCA rules, and on guidance in relation to its functions under the Short Selling Regulation, unless the FCA considers that the delay would be prejudicial to the interests of consumers[444]. The FCA is not required to consult on guidance on "perimeter" issues, such as the scope of the prohibition on carrying on regulated activities without authorisation, or on financial promotions by unauthorised persons[445]. In relation to guidance that does not relate to FCA rules or to its functions under the Short Selling Regulation, the FSA previously stated that it did not usually consult on this type of guidance (although it was published on its website).

441 SUP 9 'Individual guidance' and SUP 9.1.2G of the SUP Manual.
442 Sections 1K(1), 234G and 333U (inserted by section 30 of the 2016 Act). See also FCA Finalised Guidance FG13/1 'Guidance for designated Consumer Bodies on making a Super-Complaint under s234C' (June 2013) and FG13/2 'Guidance for Regulated Persons and The Financial Ombudsman Service on making a reference under s234D' (June 2013).
443 EG 2.9.4 of the Enforcement Guide section in the FCA Handbook. See FCA webpage, 'Industry guidance criteria and process' (last updated 17 May 2018), for guidance on how the FCA grants confirmation and the criteria to be met.
444 Section 139A(5). The word "consumers" is defined in section 1G.
445 Although amendments to the FCA's 'Perimeter Guidance Manual' (**PERG Manual**) are made by legal instruments and may therefore be consulted on.

6.19.6 The FCA is not required to include a cost-benefit analysis with consultations on guidance, but it was the practice of the FSA to include one in appropriate cases. In July 2011, the FSA gave a commitment to consider undertaking and consulting on a cost-benefit analysis based on a single criterion: "*where guidance is likely to result in firms or consumers incurring significant costs that were not formally considered when [the FSA] consulted on the rule to which the guidance relates*"[446]. The FCA notes that the Act "*mandates the provision of [cost-benefit analysis] for new rules but not for guidance*", and that it is the FCA's "*policy to produce a [cost-benefit analysis] for general guidance about rules if a high level assessment of the impact of the proposal identifies an element of novelty which may be in effect prescriptive or prohibitive such that significant costs may be incurred*". The FCA notes further that a cost-benefit analysis will not be produced if the guidance has detailed steps that follow predictably from the rule and are steps one would reasonably expect firms to take to comply with the rule.[447]

6.19.7 In October 2010, the FSA introduced a new process for issuing general guidance relating to FSA rules that was published outside the FSA Handbook. This included, for example, a number of "Dear CEO" letters and practice guides. From this date, guidance consultations were published, and the consultation period would normally last a minimum of two weeks. In August 2011, in response to feedback, the FSA increased the standard consultation period for general guidance relating to rules from two weeks to one month. As mentioned earlier, this procedure greatly increased the transparency and accessibility of FSA guidance. The FCA has been following the same procedure.

6.19.8 Notice of general guidance, and of any changes or revocation, is to be given to the Treasury without delay[448].

Status of guidance

6.19.9 Neither general nor individual guidance has any formal legal status under the Act. However, the FCA has given guidance that if a person acts in accordance with general guidance in the circumstances contemplated by that guidance, then the FCA will proceed as if that

446 The FSA publication 'Change in the FSA criteria for providing cost benefit analysis (CBA) when consulting on guidance' (July 2011).
447 FCA publication 'How we analyse the costs and benefits of our policies' (July 2018). See also the FCA webpage 'Measuring our impact before we intervene' (last updated 13 January 2021), which provides further information, and links to other publications, on how the FCA assesses the likely impact of its policies.
448 Section 139B.

person has complied with the aspects of the rule or other requirement to which the guidance relates[449].

6.19.10 The Supervision Manual in the FCA Handbook (the **SUP Manual**) gives similar guidance in relation to a firm that acts in accordance with current individual written guidance given to it in the circumstances contemplated by that guidance. Individual guidance is usually given in relation to a set of particular circumstances, as discussed at paragraph 6.19.2 and if there has been compliance with individual guidance, then the FCA will also proceed as if there has been compliance with the aspects of the rule or other requirement to which the individual guidance relates. If the circumstances later change, for example, because of a change in the circumstances of the firm, or a change in the underlying rule, and the premises upon which the individual guidance was given no longer apply, the guidance will cease to be effective.[450]

6.19.11 In addition, in the FCA's statement of policy with respect to the imposition and amount of penalties under the Act[451], the FCA states that it will not take action against a firm for behaviour that the firm considered to be in line with guidance or other materials published by the FCA in support of the relevant Handbook or FCA confirmed industry guidance which were current at the time of the behaviour in question.

6.19.12 The FCA states that rights conferred on third parties (for example, a firm's clients) are not affected by FCA guidance. Neither does FCA guidance on rules, the Act or other legislation bind the courts[452]. This is particularly relevant in respect of claims for damages brought by private persons under section 138D, or in respect of "perimeter" issues.

6.19.13 The FCA will take into account FCA-confirmed industry guidance when exercising its regulatory functions[453].

6.19.14 Prior to the entry into force of the Lisbon Treaty[454], the FSA stated in respect of material produced by the so-called 'Level 3 committees' (that is, the former Committee of European Securities Regulators

449 The FCA 'Readers Guide: an introduction to the Handbook' (January 2019), page 11.
450 SUP 9.4.1G and SUP 9.4.2G of the SUP Manual.
451 DEPP 6.2.1G(4) of the 'Decision Procedure and Penalties Manual' (**DEPP**), which is contained in the FCA Handbook.
452 SUP 9.4.4G (in respect of individual guidance) of the SUP Manual.
453 See the FCA webpage 'Confirmed industry guidance' (last updated 12 September 2019).
454 The Lisbon Treaty was signed by the member states on 13 December 2007, and entered into force on 1 December 2009.

(**CESR**) (succeeded by ESMA, CEBS[455] and CEIOPS[456]), that such material was "*not binding on firms or the FSA, but may be relied on by firms and may be relevant in an enforcement case in a similar way to the FSA's own guidance*". Following the entry into force of the Lisbon Treaty and the EU Regulations establishing the ESAs (the **ESA Regulations**), specific provision was made for the ESAs to issue guidelines and recommendations with a view to establishing consistent supervisory practices and ensuring the common application of EU law. It is provided that competent authorities and financial institutions are to make every effort to comply with such guidelines[457]. Following IP Completion Day, the FCA has stated that whilst it will continue to have regard to some such guidelines, others would not be complied with, or would only be complied with partially (for example in relation to the EBA's sound remuneration policies and ESMA's short selling guidelines)[458]. Nonetheless, whilst the UK is no longer subject to the EU treaties and is no longer required to ensure that UK legislation meets the requirements set out in EU Directives, the continuance of financial services between the UK and EU will to a great extent be determined on the basis of regulatory dialogue and equivalence decisions[459].

6.20 Consequences of breaching the FCA's rules

6.20.1 Breach of the FCA's rules is not a criminal offence[460]. However, disciplinary action (for example, fines or public censure) can be taken in relation to a rule breach and ultimately, an authorised firm may have its permission curtailed or cancelled as a result[461].

6.20.2 Contravention of the FCA's rules does not normally, of itself, make any transaction void or unenforceable. The exceptions to this are product intervention rules (as mentioned at paragraph 6.14.24), which may provide for an agreement or obligation to be unenforceable (and may also provide for recovery of money and payment of compensation), rules on the cost of credit and duration of credit agreements under section 137C, and rules on early exit pension charges under section 137FBB. In addition, general rules about remuneration may provide that

455 The former Committee of European Banking Supervisors (succeeded by the EBA).
456 The former Committee of European Insurance and Occupational Pensions Supervisors (succeeded by the EIOPA).
457 Article 16(3) of the respective ESA Regulations.
458 FCA publication 'Brexit: our approach to EU non-legislative materials' (updated 1 October 2020), paragraph 12.
459 See European Parliament briefing 'Guidance by the EU supervisory and resolution authorities on Brexit' (October 2020), page 1.
460 Section 138E(1).
461 DEPP 6.1 'Introduction' of DEPP in the FCA Handbook.

any provision that contravenes a prohibition on persons being remunerated in a particular way is void, and provide for the recovery of any payment made or property transferred. Furthermore, in certain circumstances, a transaction in contravention of FCA rules may be unenforceable under the general law if it is "illegal" or contravenes public policy. In determining the requirements of public policy, a court may be expected to have regard to relevant FCA rules.[462]

6.20.3 Under section 138D(2) of the Act, a contravention by an authorised firm of an FCA rule is actionable at the suit of a "private person" who suffers loss as a result of the contravention[463]. This broadly continues the position under the now-repealed section 150 of the Act as originally enacted (and contrasts with the position of the PRA, where such a rule may provide that contravention is actionable). No claim may be made, however, in respect of any breach of[464]:

(a) rules made under section 64A (rules of conduct);

(b) Part 6 rules;

(c) the threshold condition code (under section 137O);

(d) rules under section 192J (provision of information by parent undertakings); or

(e) a rule requiring an authorised firm to have or maintain financial resources.

6.20.4 The FCA can also provide in its rules that contravention of specified provisions of the rules are not to be actionable. For example, the FCA has provided that a contravention in respect of a breach of the rules in PRIN does not give rise to a right of action by a private person under section 138D[465].

6.20.5 A "private person" is defined in a Treasury Order[466]. It means, first, any individual unless he suffers the loss in question in the course of carrying on any regulated activity, or any activity which would be a regulated

462 Sections 138E(2), 137C(4)(a), 137FBB(5) and 137H(2).
463 Eligible complainants may also have a claim against the firm under the FOS and this may be a more convenient course of action, especially where the damages are less than the maximum award that can be ordered under the scheme, currently £355,000 (for complaints received after 1 April 2019) — see further Chapter 21 'Complaints against authorised firms'.
464 Section 138D(5).
465 PRIN 3.4.4 of the Principles for Businesses, which are contained in the FCA Handbook.
466 Financial Services and Markets Act 2000 (Rights of Action) Regulations (SI 2001/2256). See also the definition of "private person" in the FCA Handbook's Glossary.

activity if he were not an overseas person. Secondly, any person (other than a government, local authority or international organisation) who is not an individual (for example, a charity, company or partnership) unless he suffers the loss in question in the course of carrying on business of any kind. And thirdly, relevant recipients of credit who are not individuals and meet certain requirements[467].

6.20.6 Persons other than "private persons" are also entitled to damages in certain narrowly defined cases[468].

6.20.7 The consequences of breaching the Listing Rules are dealt with elsewhere in this Guide.

6.21 The FCA Handbook

6.21.1 The FSA Handbook came into force on 1 December 2001. At legal cutover, the FSA Handbook was split into the FCA Handbook, containing those provisions of the FSA Handbook designated to apply to FCA-authorised firms, and the PRA Handbook. The latter has now become the PRA Rulebook.

6.21.2 Alongside the FCA Handbook, the FCA has published material on how to interpret it[469].

6.21.3 The FCA Handbook is the sole rulebook applicable to FCA-authorised firms, but dual-regulated firms are subject to both the PRA Rulebook and the FCA Handbook[470].

6.21.4 In certain areas, non-Handbook material will be relevant and should be taken into account, for example technical notes, case studies and "Dear CEO letters". The FCA has clarified that it will not generally amend non-FCA Handbook material relevant to EU law (or EU-derived law) and that firms should continue to take such non-Handbook guidance into account after IP Completion Day if such related EU or EU-derived provisions become, or are retained as, UK law[471].

467 Regulations 3(1) and 6(1) of SI 2001/2256. For cases that considered the meaning of "business of any kind" in this context, see *Titan Steel Wheels Limited v The Royal Bank of Scotland plc* [2010] EWHC 211 (Comm), *Grant Estates Limited v The Royal Bank of Scotland plc* [2012] CSOH 133 and *Bailey and another v Barclays Bank Plc* [2014] EWHC 2882 (QB).
468 Section 138D(4).
469 The FCA 'Reader's Guide: An introduction to the Handbook' (currently January 2019).
470 See the FCA webpage 'Handbook and guidance' (last updated 12 August 2020).
471 See FCA publication, 'Brexit: our approach to non-Handbook guidance where it relates to EU-law or EU-derived law'.

7. CO-ORDINATION BETWEEN THE PRA AND THE FCA

7.1 General

7.1.1 Much criticism was aimed at the Government's initial proposals to create the current UK regulators and to separate prudential and conduct regulation of systemically important firms. The main concerns were and, to some extent, remain that:

(a) there is in practice no clear dividing line between "prudential" and "conduct" matters. This is especially the case when it comes to the crucial issues of senior management quality and culture and a firm's organisation, systems and controls;

(b) if each regulator operates in a separate "silo", there is a risk of regulatory gaps emerging or, conversely, turf wars erupting (the problem of underlap and overlap);

(c) for firms themselves, dual regulation has the potential to be excessively burdensome in time and cost, and to lead to uncertainty or even conflict between regulatory demands, especially when each regulator has developed its own regulatory culture; and

(d) there could be lack of clarity over which regulator is to have the first or last word in key regulatory processes, such as authorisation and disciplinary action.

7.1.2 The UK framework already provides for a range of processes and mechanisms designed to ensure effective co-ordination across the Treasury and other regulatory bodies, including the PRA and the FCA (as noted recently in the Government's response to Phase I of the Call for Evidence on the Financial Services Future Regulatory Framework Review, or FRF Review). The intricate series of measures to ensure proper co-ordination between the regulators are discussed further in this chapter.

7.1.3 As part of Phase I of the FRF Review[472], the Government concluded that the institutional architecture for UK financial services regulation remains appropriate. The Response to the Call for Evidence on Regulatory Co-ordination notes: *"the division of responsibilities*

[472] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/871673/FRF_Phase_I_-_Response_Doc_FINAL.pdf.

between the Bank of England, the PRA, the FCA and the PSR has ensured clear and effective focus on prudential, conduct and economic regulation, addressing many of the regime flaws exposed by the 2007-08 financial crisis." It also recognises, however, that the division of responsibilities between several regulatory bodies risks creating challenges for regulated firms and regulators, if co-ordination is not effective, noting that *"there is scope for the regulators and government to work together to better understand and sequence the impact of new initiatives on firms and consumers."* As a result, a new consolidated forward-look of upcoming regulatory initiatives was proposed in the form of the Regulatory Initiatives Grid. This is designed to provide a more effective structure within which the Treasury and the regulators can work together to identify and address any peaks in regulatory demands made on firms, and to give stakeholders (including industry) a clearer picture of upcoming initiatives so they are better placed to plan for them.

7.2 Structural arrangements

7.2.1 The Act embeds co-ordination into the statutory frameworks governing the PRA and the FCA.

Statutory duty to co-ordinate

7.2.2 An express statutory duty to "co-ordinate the exercise of their respective functions" is imposed on both regulators[473]. Three objectives are specified:

(a) *consultation*: where either regulator proposes to act in a way which may have "a material adverse effect" on any of the objectives of the other, the first regulator must consult with the other;

(b) *information and advice*: where one regulator proposes to act in a "matter of common regulatory interest"[474], it should obtain information and advice from the other, where appropriate; and

(c) *efficient and proportionate use of powers*: where either regulator acts in a "matter of common regulatory interest",

[473] Section 3D.
[474] A "matter of common regulatory interest" occurs where the two regulators exercise similar or related functions in relation to the same persons; or exercise functions which relate to different persons but in respect of similar subject matter; or where one regulator exercises functions which could affect the advancement of the other regulator's objectives (section 3D(3)).

both regulators must ensure that they comply with their duties to act efficiently and in a proportionate manner.

7.2.3 There are two provisos to the duty to co-ordinate[475]. Neither regulator need comply with it to the extent that:

(a) to comply would be incompatible with any of its statutory objectives; or

(b) to comply would impose a burden disproportionate to the benefits of compliance.

7.2.4 The Government expects the co-ordination duty to apply particularly where one or both of the regulators is or are seeking information from a firm, or is or are proposing to take enforcement action.

7.2.5 Both the FCA and the PRA are required to include in their annual reports an account of how they have complied with their duties to co-operate. The 2020/2021 annual reports note that, as of March 2021, there had been no use by the PRA of its power to veto (see paragraph 7.5) any action by the FCA which it considers may threaten financial stability.

7.2.6 The PRA's report also notes positive engagement and co-ordination between the regulators on a number of issues, notably with respect to the Climate Risk Forum; the use of shared IT systems; joint engagement with the European Supervisory Authorities and the Treasury's consultation on the Future Regulatory Framework.

Memorandum of Understanding

7.2.7 The obligation to co-ordinate is further underpinned by a duty to prepare (and review annually) a Memorandum of Understanding (**MoU**) in relation to how the two regulators propose to act in relation to matters of "common regulatory interest" and how they intend to comply with the duty to co-ordinate[476].

7.2.8 The MoU *may* cover a number of specific matters, including:

(a) applications for permission, variations of permission and the imposition of requirements;

[475] Section 3D(2).
[476] Section 3E.

(b) obtaining and disclosing information;

(c) groups containing PRA-regulated firms;

(d) rules and their modification or waiver;

(e) investigations;

(f) control over authorised persons;

(g) Lloyd's;

(h) insolvency of firms; and

(i) fees.

7.2.9 The MoU *must* cover provisions about the co-ordination by the regulators of:

(a) relations with overseas regulators; and

(b) the compensation scheme.

7.2.10 A copy of the MoU and any revision must be given to the Treasury and laid before Parliament.

7.2.11 The latest MoU produced pursuant to these obligations, in 2019, is fairly high level and mainly acknowledges obligations derived from the Act, with a few notable details. It notes that the FCA and PRA will seek to avoid the introduction of incompatible requirements. In the event that such a conflict is a serious prospect and would have a material effect on the achievement of the PRA's and the FCA's respective statutory objectives, the MoU provides for an escalation process to the CEO of the FCA and the Deputy Governor for Prudential Regulation and to the Board of the FCA and Prudential Regulation Committee, if necessary.

7.2.12 The MoU also makes clear that "in normal circumstances", the FCA and the PRA will not conduct their supervisory activities jointly with regards to firms subject to dual regulation. Rather, the MoU sets out how conclusions and key information from supervisory activity which is materially relevant to the other regulator's objectives will be exchanged. It also records the agreement to set up supervisory "colleges" (see paragraph 7.4.2) for the Society of Lloyds and dual-regulated firms, and for routine information sharing of each regulator's findings and measurements concerning dual-regulated firms, where

such information would be material to the other regulator's objectives.[477]

7.2.13 Each of the FCA and the PRA are required to appoint a senior executive responsible for the co-ordination set out in the MoU. The MoU also provides that the regulators are to review the effectiveness and efficiency of co-ordination and co-operation at the end of each quarter and a quarterly report should be prepared for the consideration of the CEO of the FCA and the Deputy Governor for Prudential Regulation, as relevant.[478]

7.2.14 Another MoU, published in April 2013, sets out the respective roles of the FCA and the PRA in relation to the regulation of with-profits insurers[479].

7.2.15 The Bank and the FCA have an MoU (last updated in March 2015) on co-operation with one another in relation to the supervision of markets and market infrastructure, reflecting a requirement in paragraph 1 of Schedule 17A of the Act.

7.2.16 The Financial Services Regulatory Initiatives Forum[480] (the **RIF**) consists of representatives from the Bank, the PRA, the FCA, the PSR and the Competition and Markets Authority (the **CMA**) the Information Commissioner's Office (the **ICO**), the Pensions Regulator and the Financial Reporting Council, with the Treasury as an observer member. Its establishment was announced in March 2020. The RIF manages the Regulatory Initiatives Grid, which provides an indicative two-year forward look at key upcoming regulatory initiatives affecting the financial services sector.

7.2.17 The FCA and the PRA also enter into MoUs with regulators from other jurisdictions. By way of example, in July 2021, the FCA, the Bank and the PRA entered into a MoU with the United States SEC on consultation, co-operation and exchange of information relating to the supervision and oversight of certain cross-border OTC derivatives entities in connection with the use of substituted compliance. This complements a pre-existing MoU from March 2019 already in place between the FCA and the SEC. Such MoUs are common. Indeed, after Brexit, several MoUs

477 MoU between the FCA and the PRA.
478 MoU between the FCA and the PRA, paragraph 87.
479 With-Profits, MoU prepared in accordance with Section 3F of the Act.
480 Terms of Reference available here: https://www.fca.org.uk/publication/corporate/financial-services-regulatory-initiatives-forum-tor.pdf.

came into effect between the FCA and various European authorities covering co-operating and the exchange of information.

Cross-membership of boards

7.2.18 The constitution of each regulator requires that the chief executive of each is to be a board member of the other.[481] However, the chief executives in their *ex officio* capacity are not expected to contribute to those decisions that are not materially relevant to their own organisation.[482]

Back-up Treasury powers

7.2.19 Power is reserved to the Treasury to draw the boundary between the responsibilities of the PRA and those of the FCA[483]. This power would be exercisable by statutory instrument and presumably would only be invoked where the PRA and the FCA have failed to agree on any relevant matter.

7.3 Lead regulator arrangements

7.3.1 In the case of dual-regulated firms, the PRA and the FCA are in principle "separate but equal" regulators, subject to financial stability being the overriding factor in financial regulation considered as a whole. But there are certain critical regulatory functions which are particularly intensive, even though routine — the authorisation of firms, the approval of individuals and the approval of changes of control — and where both regulators have a legitimate interest in being involved. In order to avoid the burden on dual-regulated firms if there were to be concurrent processes, the Act provides for one of the regulators (in practice, almost always the PRA) to be the "lead regulator" for the process concerned, "responsible for managing a single administrative process."[484] The other regulator has rights which vary depending on the process: a right in some cases to give or withhold consent, or in other cases a right to be consulted.

481 Schedule 1ZA(2) in respect of the FCA; and Section 30A Bank of England Act 1998 in respect of the PRA.
482 MoU between the FCA and PRA, paragraph 77.
483 Section 3G.
484 MoU between the FCA and PRA, paragraph 19.

Authorisation of dual-regulated firms

7.3.2 A firm which seeks permission to carry on a PRA-regulated activity must apply to the PRA, regardless of whether it is also seeking permission to carry on an activity which is only regulated by the FCA[485].

7.3.3 The PRA will be responsible for processing the application. However, the application will not be granted unless the FCA consents.[486]

7.3.4 This topic is discussed further in Chapter 9 'Authorisation and permission'.

Variation or cancellation of permission (dual-regulated firms)

7.3.5 The procedure depends on whether it is initiated by a firm or by a regulator[487]:

(a) *if by a firm*, the application is made to the relevant regulator (which is the PRA for a firm which is PRA-authorised or which wishes to undertake a PRA-regulated activity), with both the FCA and the PRA under an obligation to consult each other in respect of any variation;

(b) *if by the FCA*, it must consult the PRA before exercising the power (which may not be in respect of a PRA-regulated activity) and may not add or widen a permission except with the consent of the PRA; or

(c) *if by the PRA*, it must consult the FCA before exercising the power and may not add or widen a permission except with the consent of the FCA.

7.3.6 This topic is discussed further in Chapter 9 'Authorisation and permission'.

Change of control

7.3.7 In respect of a dual-regulated firm, application for approval of change of control must be made to the PRA, which must consult with the FCA. The FCA may make representations to the PRA in respect of the usual

485 Section 55A(2).
486 Section 55F(2).
487 Sections 55H to 55J.

assessment criteria[488]. If the FCA considers that there are reasonable grounds to suspect that in connection with the proposed acquisition money laundering or terrorist financing is being or has been committed or attempted, or the risk of such activity could increase, it may direct the PRA to object to the acquisition or approve the acquisition subject to conditions[489].

7.3.8 Special arrangements apply where the firm concerned is regulated by the FCA alone, but:

(a) it is a member of a group containing a PRA-regulated firm; or

(b) the potential controller is itself a PRA-regulated firm.

7.3.9 In such a case, the FCA must consult the PRA, which may withhold consent on prudential grounds. The FCA must then refuse the application[490].

7.3.10 This topic is discussed further in Chapter 17 'Acquisitions and disposals of financial services businesses'.

Senior Managers (dual-regulated firms)[491]

7.3.11 The MoU provides that the lead responsibility for approving individuals for the Senior Managers and Certification Regime for dual-regulated firms will be split between the FCA and the PRA depending on which regulator's rules designated the relevant Senior Management Function.[492]

7.3.12 The MoU provides that the FCA is responsible for designating SMFs deemed to be materially connected to a firm's interface with customers and is solely responsible for the approval of individuals for such SMFs. The PRA is responsible for designating SMFs in relation to controlled functions which are material to a firm's prudential soundness and will lead and manage a single administrative process for approving individuals for such SMFs.[493]

488 These assessment criteria being contained in sections 185(2) and 186.
489 Section 187A.
490 Section 187B.
491 Sections 59 to 59B, and 63.
492 MoU between the FCA and PRA, paragraph 21.
493 MoU between the FCA and PRA, Annex 1, paragraph 4.

7.3.13 Nevertheless, there are in practice many areas of potential overlap, which the regulators have sought to mitigate:

(a) each regulator must specify which function it regards as within its jurisdiction and consult with each other before designating any controlled function[494]; and

(b) the FCA is under a duty to exercise its power in a way that minimises the likelihood that approval is required by both the FCA and PRA for the performance by a person of an SMF in relation to a dual-regulated firm.[495]

7.3.14 The regulatory approach is discussed further in Chapter 11 'Senior managers and certification regime'.

Directions relating to consolidated supervision of groups

7.3.15 Where either the PRA or the FCA is the consolidated supervisor of a group (under the various onshored EU Directives relating to consolidated supervision), it may give a mandatory direction to the other regulator to take or refrain from taking action in respect of an authorised firm which is a member of the group. The relevant consolidated supervisor may only give a direction where it "considers it necessary to do so for the effective consolidated supervision" of the group in question.[496] There must be prior consultation before any direction is given and compliance is not required where such compliance would be incompatible with any EU or other international obligation of the UK[497].

7.4 Supervision, investigation and enforcement

7.4.1 Although in many areas each of the PRA and the FCA has the power to take action against a dual-regulated firm in furtherance of its statutory objectives, it is nonetheless envisaged that at all levels there is to be consultation and co-ordination.

494 Section 59A(2).
495 Section 59A(1)(b).
496 Sections 3M(4) and 3M(5).
497 Sections 3M to 3O.

Supervisory colleges

7.4.2 Each dual-regulated firm has its own "college" of supervisors drawn from the PRA and the FCA, who will share information[498]. This is designed to make the experience of dual-regulation for firms as seamless as possible. This is in addition to the formal obligations on both regulators to share information.

Investigations — dual-regulated firms

7.4.3 Either regulator may launch an investigation into a dual-regulated firm, but each must notify the other. In a case where the objectives of both regulators are relevant to an investigation, there is a duty to co-ordinate, in particular with regard to the question of whether the investigation should be conducted jointly or by one regulator as "lead".

7.4.4 Each regulator must keep the other updated on the progress of an investigation.

7.4.5 This topic is discussed further in Chapter 16 'Investigations and discipline'.

Enforcement — dual-regulated firms

7.4.6 Either of the FCA or the PRA may separately take enforcement action against a firm, such as cancelling or varying a permission or imposing requirements, subject to consulting with the other regulator[499].

7.4.7 This topic is discussed further in Chapter 16 'Investigations and discipline'.

7.4.8 A similar obligation to consult arises when either regulator proposes to withdraw approval from an approved person[500]. However, only the FCA may withdraw approval in respect of a customer-dealing function[501].

7.4.9 This topic is discussed further in Chapter 11 'Senior managers and certification regime'.

498 MoU between the FCA and the PRA, paragraph 26.
499 Part 14.
500 Section 63.
501 As a consequence of Section 63(1A)(a).

7.5 The PRA veto

7.5.1 Financial stability is the pre-eminent objective of the current financial regulatory system. Accordingly, pursuit by the FCA of its objectives can be halted, at least temporarily, by the PRA in certain limited circumstances when the FCA proposes to take action in respect of a dual-regulated firm if:

(a) such action might threaten UK financial stability or lead to the disorderly failure of a dual-regulated firm in a way that would adversely affect the UK financial system or threaten the continuity of core services provided in the UK (or, in the case of a with-profits insurer, might affect the financial benefits of policyholders); and

(b) the PRA considers it necessary to use its veto to avoid such a risk.

7.5.2 The veto takes the form of a direction given to the FCA by the PRA. There must be prior consultation with the FCA[502].

7.5.3 The veto may not be used in respect of the FCA's consent to an application for permission or variation of permission (see paragraphs 7.3.2 to 7.3.5). Further, the FCA may refuse to comply with the veto if compliance would be incompatible with any international obligation of the UK.

7.5.4 As at the time of writing, the PRA has yet to exercise its veto.

7.6 Co-ordination between the Treasury, the Bank, the PRA and the FCA

7.6.1 The powers of the Bank acting through the FPC, in respect of the PRA and the FCA, are described in Chapter 4 'The Bank of England and the Financial Policy Committee'.

Co-operation between the FCA and the Bank

7.6.2 The FCA is required to take appropriate steps in order to co-operate with the Bank in relation to the Bank's financial stability objective and its duty to notify the Treasury of a possible need for public funds.[503] The

[502] Sections 3I and 3K to 3L.
[503] Section 3Q.

Bank has the power to require the FCA to gather or produce documents for the purposes of its financial stability function.[504]

Financial stability: co-ordination between the Treasury, the Bank and the PRA

7.6.3 The Treasury, the Bank and the PRA are required to co-ordinate their functions in relation to financial stability and so far as they affect the public interest. The Treasury (on the one hand) and the Bank and the PRA (on the other hand) prepared a "resolution planning and crisis management" MoU, published in October 2017, applying where there is the possibility of an emergency call on public funds, and covering the exercise of the relevant powers available to each of those authorities.[505]

Memorandum of Understanding: international organisations

7.6.4 The Treasury, the Bank, the PRA and the FCA were required to put in place a Memorandum of Understanding (**MoU**) relating to dealings with international authorities and bodies. The aim of the MoU is to ensure co-ordination, and consistency of approach, in relation to matters of common interest. The MoU must provide for a committee of all the authorities which will be responsible for co-ordination[506].

7.6.5 The MoU notes that, internationally, several similar or inter-related issues are discussed across different fora and the UK's representation at these fora is spread across the Treasury, the Bank, the PRA and the FCA. Therefore, the MoU provides for the establishment of an "International Co-ordination Committee" which is responsible for ensuring that the various UK authorities act in accordance with certain principles. The MoU provides that the Committee should be comprised of officials from all of the UK authorities and should be chaired by a representative from the Treasury. Pursuant to the MoU, the Committee is obliged to meet at least once a quarter and to provide copies of its meeting minutes to the Chancellor.[507]

7.6.6 The MoU provides that UK authorities should co-ordinate their international engagements with principles of openness, cooperation and coherence and in so doing should:

504 Section 9Y Bank of England Act 1998
505 Sections 64 and 65 of the FS Act 2012.
506 Section 66 of the FS Act 2012.
507 MoU: International Organisations, paragraphs 7 to 10.

(a) keep the other relevant UK authorities informed in relation to matters that concern their respective responsibilities;

(b) where possible, consult other relevant UK authorities and work towards an agreed position before engagement with an international organisation;

(c) share relevant information with other relevant UK authorities;

(d) facilitate the attendance of any other relevant UK authority at the meeting of the international organisation where possible;

(e) consider the other UK authorities' opinions when deciding their own position;

(f) agree consistent objectives with the other relevant UK authorities in relation to matters of common interests in accordance to the relevant authorities' own objectives; and

(g) act consistently with international laws and regulations.[508]

7.7 Co-ordination between the Payment Systems Regulator, the Bank, the PRA and the FCA

Memorandum of Understanding

7.7.1 There is a duty placed on the Payment Systems Regulator, the Bank, the PRA and the FCA to co-ordinate the exercise of their relevant functions. In particular, the regulators were required to prepare and maintain a MoU which describes the role of each regulator and how it intends to comply with the duty of co-ordination[509]. This was published in March 2015 and updated in July 2018.

Power to veto

7.7.2 The Bank, the PRA and the FCA all have the power in certain circumstances to veto the exercise by the Payment Systems Regulator of its powers in relation to a participant in a regulated payment system[510].

[508] MoU: International Organisations, paragraph 11.
[509] Sections 98 and 99 of the Banking Reform Act.
[510] Sections 100 to 102 of the Banking Reform Act.

SLAUGHTER AND MAY/

Part Three: A more detailed analysis of the Financial Services and Markets Act 2000

Back to contents

Part Three: A more detailed analysis of the Financial Services and Markets Act 2000

8. REGULATED ACTIVITIES AND INVESTMENTS

8.1 Overview

8.1.1 The principal purpose of the Act is to set the framework of what is and what is not subject to regulation by the PRA and the FCA (and, to a limited extent, the Bank). This is often referred to as the "regulatory perimeter".

8.1.2 Section 19 of the Act contains the so-called "general prohibition", prohibiting firms from carrying on regulated activities in the UK unless either authorised or exempt under the Act. Contravention of the general prohibition is an offence punishable by up to two years' imprisonment and an unlimited fine[511].

8.1.3 Section 22 specifies what constitutes a "regulated activity" for the purposes of the Act. An activity is regulated if it:

(a) is carried on "by way of business" (the so-called "business test") in the UK[512];

(b) is specified in an order made by the Treasury (the **Regulated Activities Order**[513]); and

(c) either:

(i) relates to a kind of investment specified in the Regulated Activities Order;

(ii) relates to information about a person's financial standing[514];

511 Section 23(1).
512 The position is slightly different for claims management services (see paragraph 8.1.3(c)(iv)), where the territorial scope of the Act is limited to relevant activity carried on by way of business in Great Britain.
513 SI 2001/544 (which, in practice, is the order the Treasury uses to specify activities).
514 Section 22(1A)(a). This provision was introduced by the FS Act 2012 and was the first step towards bringing consumer credit activities within the scope of the Act and therefore subject to the supervision of the FCA.

(iii) relates to administering a benchmark[515]; or

(iv) is, or relates to, claims management services[516].

8.1.4 The list of regulated activities and investments is set out in the Regulated Activities Order.

8.2 The business test

8.2.1 As noted above, section 22 of the Act provides that an activity is a regulated activity only if it is carried on "by way of business". Firms that carry on financial services activities on a non-professional or not-for-profit basis should in general therefore not require authorisation.

8.2.2 The Act allows the Treasury further to refine the business test either generally or in relation to certain types of activity or investments[517]. The Treasury has not exercised this power to refine the business test generally.

8.2.3 However, the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001[518] (the **Business Order**) refines the business test in respect of certain regulated activities as outlined below.

8.2.4 Article 2(1) of the Business Order provides that a person is not to be regarded as accepting deposits "by way of business" if: (a) they do not hold themselves out as accepting deposits on a day-to-day basis; and (b) any deposits they accept are accepted only on particular occasions, whether or not involving the issue of any securities. In determining whether deposits are accepted only on particular occasions, regard is to be had to the frequency of these occasions and to any characteristics distinguishing them from each other.[519]

8.2.5 Article 2(3) of the Business Order furthermore provides that a person is not to be regarded as accepting deposits "by way of business" if: (a) the activity is facilitated by a third party operator of an electronic

[515] Section 22(1A)(c). This provision was originally introduced by the FS Act 2012 but was subsequently amended by the Financial Services and Markets Act 2000 (Benchmarks) Regulations 2018/135 (the **Benchmarks Regulations**) to ensure alignment with the EU Regulation 2016/1011 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds (the **EU Benchmarks Regulations**).

[516] See paragraph 8.8. See also Section 22(1B)(b) of the Act.

[517] Section 419.

[518] SI 2001/1177.

[519] For consideration of the meaning of these provisions, see FSA v Anderson and others [2010] EWHC 599 (Ch).

system in relation to lending; (b) they are not a credit institution or an authorised person; (c) they are not carrying on the business of accepting deposits (for example, if they only use the capital of, or interest on, the deposits received to finance their other business activities); and (d) they do not hold themselves out as accepting deposits on a day-to-day basis (other than where such holding out is facilitated by the third party operator). The intention of this provision, which was introduced in 2018, is to exclude from the scope of the Act persons who accept monies in connection with peer-to-peer lending. Operating a peer-to-peer lending system is itself a regulated activity (see paragraph 8.5.27).

8.2.6 Article 3 of the Business Order provides that a person is not to be regarded as carrying on specified types of investment activity "by way of business" unless they carry on the business of engaging in one or more such activities. The effect is that a person must be engaging in the relevant activity as a business in its own right to be subject to regulation under the Act. The investment activities specified by this article of the Business Order are: dealing in investments (as principal or as agent), arranging deals in investments, operating a multilateral trading facility (**MTF**) or organised trading facility (**OTF**), managing investments, safeguarding and administering investments (that is, safe custody), sending dematerialised instructions, managing or acting as a trustee or depositary of UCITS or an AIF, establishing a collective investment scheme, establishing a pension scheme and advising on investments[520]. The same test applies in respect of arranging and advising on regulated mortgage contracts, regulated home reversion plans, regulated home purchase plans and regulated sale and rent back agreements[521]. For more details on these and other regulated activities, see paragraphs 8.4.1 and 8.5 (generally).

8.2.7 The Business Order also specifies the business test in respect of the day-to-day management of an occupational pension scheme. A firm will, in specified circumstances, require authorisation to act as a manager of an occupational pension scheme even if that management is not carried on "by way of business".[522]

8.2.8 In areas not covered by the Business Order, the Act does not give any further guidance as to whether an activity is carried on "by way of

[520] Article 3 of the Business Order.
[521] Articles 3A to 3D of the Business Order.
[522] Article 4 of the Business Order.

business". FCA Guidance notes that *"[w]hether or not an activity is carried on by way of business is ultimately a question of judgement that takes account of several factors (none of which is likely to be conclusive). These include the degree of continuity, the existence of a commercial element, the scale of the activity and the proportion which the activity bears to other activities carried on by the same [firm] but which are not regulated. The nature of the particular regulated activity that is carried on will also be relevant to the factual analysis".*[523]

8.2.9 The Act does not require a regulated activity to be carried on as a standalone financial services business in order to be regulated as such. Accordingly, if a regulated activity is carried on in the UK by way of business, even if as part of a predominantly industrial or manufacturing firm or group, the firm will require authorisation unless an exemption applies.

8.3 Carrying on regulated activities in the UK[524]

8.3.1 Regulated activities fall within the scope of the Act only to the extent that they are, or are treated as, carried on in the UK[525]. Following IP Completion Day, EEA firms formerly operating through a financial services passport in the UK now require permission under the Act to be able to continue carrying out regulated activities in the UK. However, an opt-in "temporary permissions regime" (**TPR**) was established. EEA firms that opted in to the TPR are allowed to continue operating within the scope of their previous passport permissions for a limited period of time (up to three years)[526]. During this period, EEA firms must seek full authorisation by the PRA or the FCA to continue accessing the UK market. Firms who did not sign up to the TPR were automatically enrolled in the "Financial Services Contracts Regime", which allows EEA firms a limited period of time (five years for non-insurance contracts, 15 years for insurance contracts) to wind down their business and conduct an orderly exit from the UK market[527].

523 PERG 2.3.3G of the FCA 'Perimeter Guidance Manual' (**PERG Manual**) contained in the FCA Handbook.
524 While Gibraltar and the UK were considered, under EU law, a single 'member state' territory, the "United Kingdom" for the purposes of the Act is taken to mean England, Wales, Scotland and Northern Ireland. Following IP Completion Day, and unlike EEA firms, financial services firms based in Gibraltar continue to be able to freely enjoy financial services passport rights through SI 2019/589 (as amended), which preserved such rights for Gibraltarian firms until at least 31 December 2022. Further details about access for financial services firms based in Gibraltar, see Chapter 2 'The Financial Services Act 2021' and Chapter 10 'The overseas framework'.
525 Section 19(1).
526 See the FCA webpages, 'Temporary permissions regime' and 'Considerations for firms leaving the TPR'.
527 See the FCA webpage, 'Financial services contracts regime'.

8.3.2 In many cases, it will be straightforward to assess whether an activity is being carried on in the UK. The Act, however, sets out circumstances where a regulated activity is to be regarded as carried on in the UK where it might not otherwise be regarded as being so carried on.

8.3.3 A firm whose head office is not in the UK but which carries on regulated activities from an establishment maintained by it in the UK will be deemed to carry on regulated activities in the UK and will require authorisation (unless exempt). A firm with its head or registered office in the UK is deemed to carry on regulated activities in the UK (irrespective of where its customers are based) if the day-to-day management of its regulated activity is the responsibility of the registered or head office or another establishment maintained by the firm in the UK. The purpose of these provisions is to catch artificial structures designed to avoid regulation.[528]

8.3.4 The English courts considered the concept of carrying on regulated activities in the UK in the 2005 case of *Financial Services Authority v Fradley and Woodward*[529]. The case was determined solely on its particular facts and Lady Justice Arden stressed that the outcome may vary in other circumstances. Nonetheless, she provided some helpful comments on how a court may assess whether a person operating ostensibly from outside the UK could be said to be carrying on a regulated activity in the UK. She noted: *"In my judgment, it is sufficient if the activities in question which took place in this jurisdiction were a significant part of the business activity of running the [collective investment scheme]… In my judgment [those particular business activities undertaken in the UK] were of sufficient regularity and substance to constitute the carrying on of business here even after Mr Fradley moved his own office to Ireland in April 2003 and gave instructions by post or internet from there."*[530]

8.3.5 A different territorial regime applies in respect of regulated claims management activities, which only fall within scope of the Act if they are carried on by way of business in Great Britain (that is, England, Wales or Scotland). Article 89F(3) of the Regulated Activities Order specifies that this test will be met where either (a) the person carrying on or (b) the recipient of the claims management service is 'ordinarily resident' or constituted in Great Britain. A person is 'ordinarily resident'

528 Sections 418(5) and 418(4), respectively.
529 [2005] EWCA Civ 1183, and [2006] 2 B.C.L.C. 616.
530 *Financial Services Authority v Fradley and Woodward*, official transcript.

if they fulfil the requirements of a 'statutory residence test'[531] either (a) at the time of the facts giving rise to the claim or potential claim or (b) at the time when the regulated claims management activity is carried on in respect of claimant or potential claimant.

8.4 The Regulated Activities Order

8.4.1 The Regulated Activities Order sets out a list of "specified activities". With certain exceptions[532], these activities are only subject to regulation when carried out in respect of a "specified investment" explicitly linked to the activity in the Act. For example, giving investment advice is regulated if the advice relates to an investment that falls within certain categories of specified investments, which include securities, various derivatives, insurance contracts and regulated mortgage contracts. Giving advice in respect of deposit-taking, however, is not a regulated activity because deposits are not specified in relation to the activity of giving investment advice[533].

Relationship with MiFID, the Insurance Distribution Directive and the Mortgage Credit Directive

8.4.2 The list of regulated activities and exclusions in the Regulated Activities Order is not aligned with the activities which are subject to regulation under MiFID (as onshored post-Brexit). It follows that there remain two parallel regimes under the Act. Firms that are classified as investment firms[534] or qualifying credit institutions[535] (together, **MiFID Firms**) will not be able to rely on certain exclusions contained in the Regulated Activities Order, and so may require authorisation even though at first glance they may appear to fall within the scope of an exclusion. There is therefore a so-called "MiFID Override" provision in the Regulated Activities Order, which 'overrides' certain exclusions for MiFID Firms[536]. There are (in certain situations) similar exclusions for MiFID Firms, but

[531] See Schedule 45 to the Finance Act 2013, where references to the "UK" are to be read as if they were expressed as references to "Great Britain" (Article 89F(4) of the Regulated Activities Order).
[532] Namely, specified activities that relate to information about a person's financial standing, administering a benchmark or claims management services (see paragraph 8.1.3).
[533] See also PERG 2.7.2G of the PERG Manual, which notes that "*[in] general, accepting deposits is the only regulated activity that applies to deposits, except for those regulated activities that can apply to property or assets that are not specified investments.*"
[534] That is, firms whose regular occupation or business is the provision or performance of investment services and activities (see paragraph 1 of Part 3 of Schedule 2 to the Regulated Activities Order for a definition of "*Investment services and activities*"). See also paragraph 1 of Schedule 3 to the Regulated Activities Order for a list of persons excluded from the definition of "*investment firm*".
[535] This is, broadly speaking, banks.
[536] Article 4(4) of the Regulated Activities Order. Other references to articles in the footnotes to this chapter are to articles of the Regulated Activities Order, unless otherwise indicated.

these are often more restrictive than the equivalent exclusion in the Regulated Activities Order.

8.4.3 Firms which, for remuneration, take up or pursue insurance or reinsurance distribution in relation to a risk or commitment located in the UK[537] may require authorisation even though at first glance they may appear to fall within the scope of an exclusion in the Regulated Activities Order. There is therefore a so-called "IDD Override" provision in the Regulated Activities Order, which 'overrides' certain exclusions for these insurance distributors[538].

8.4.4 Similarly, certain exclusions are unavailable to mortgage creditors and mortgage intermediaries in respect of contracts entered into on or after 21 March 2016 — the so-called "MCD Override"[539].

Investments regulated under the Act

8.4.5 The Regulated Activities Order lists the following types of investments as being subject to regulation under the Act:

(a) a deposit;

(b) electronic money;

(c) rights under a contract of insurance;

(d) shares or stock in the share capital of: (i) any body corporate (wherever incorporated); or (ii) any unincorporated body constituted under the law of a country or territory outside the UK;

(e) debentures, debenture stock, loan stock, bonds, certificates of deposit and any other instrument creating or acknowledging indebtedness;

(f) rights under a (Sharia-compliant) alternative finance investment bond;

(g) loan stock, bonds and other instruments creating or acknowledging indebtedness, issued by or on behalf of the UK

[537] Or, if the contract of insurance was entered into before IP Completion Day, in the UK or the EEA (see Article 4(4AA) of the Regulated Activities Order).
[538] Article 4(4A).
[539] Article 4(4B).

Government, public and local authorities and various international organisations (subject to some limited exclusions);

(h) warrants and other instruments entitling the holder to subscribe for shares, debentures, alternative finance investment bonds and government and public securities;

(i) certificates or other instruments which confer contractual or property rights (other than options) in respect of shares, debentures, alternative finance investment bonds and government and public securities;

(j) units in a collective investment scheme;

(k) rights under a stakeholder pension scheme, a personal pension scheme or a pension scheme which provides safeguarded benefits;

(l) options to acquire or dispose of a security or contractually based investment, currency of the UK or any other country or territory, palladium, platinum, gold or silver or an option to acquire or dispose of any of the foregoing options and, in certain circumstances, an option to acquire or dispose of certain other options[540];

(m) rights under a contract for the sale of a commodity or property of any description under which delivery is to be made at a future date and at a price agreed on when the contract is made. A contract made for commercial (and not investment) purposes will not be included in this type of investment. In certain cases, neither will particular types of futures or forwards[541];

(n) a contract for differences or any other contract the purpose or pretended purpose of which is to secure a profit, or avoid a loss, by reference to fluctuations in: (i) the value or price of property of any description; or (ii) an index or other factor designated for that purpose in the contract (subject to certain exclusions);

[540] These other options were previously those listed in MiFID but are now those listed in certain paragraphs of Schedule 2 of the Regulated Activities Order (which largely mirrors the list in MiFID).

[541] These futures or forwards were previously those listed in MiFID but are now those listed in certain paragraphs of Schedule 2 of the Regulated Activities Order (which largely mirrors the list in MiFID).

(o) the underwriting capacity of a Lloyd's syndicate and a person's membership (or prospective membership) of a Lloyd's syndicate;

(p) rights under a funeral plan contract;

(q) rights under a regulated mortgage contract;

(r) rights under a regulated home reversion plan;

(s) rights under a regulated home purchase plan;

(t) rights under a regulated sale and rent back agreement;

(u) rights under a credit agreement;

(v) rights under a consumer hire agreement;

(w) greenhouse gas emissions allowances and other emission allowances consisting of any units recognised for compliance with the requirements of the EU emission allowance trading directive, which are auctioned as financial or as two-day spots[542];

(x) rights under a relevant article 36H credit agreement; and

(y) any right to or interest in anything which is specified by any other provision of the Regulated Activities Order (other than a regulated mortgage contract, regulated home reversion plan, regulated home purchase plan, or regulated sale and rent back agreement)[543].

8.5 Activities regulated under the Act

8.5.1 The following paragraphs provide a brief summary of the activities subject to regulation under the Act, together with some of the more important exclusions.

[542] See Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowances trading within the Community, which was transposed into UK domestic law through the Climate Change Agreements (Amendment of Agreements) (EU Exit) Regulations 2018/1205. See also Article 82A.

[543] This also excludes interests under the trusts of an occupational pension scheme and rights and interests acquired as a result of entering into a funeral plan contract.

Deposit-taking

8.5.2 Accepting deposits is a regulated activity if: (a) money received by way of deposit is lent to others; or (b) any other activity of the firm accepting the deposit is financed wholly, or to a material extent, out of the capital of, or interest on, money received by way of deposit[544]. However, as detailed in paragraph 8.2.4, a firm will not be regarded as accepting deposits "by way of business", and therefore will not require authorisation, if it does not hold itself out as doing so and any deposits which it accepts are accepted only on particular occasions.

8.5.3 A deposit is a sum of money paid on terms: (a) under which it will be repaid, with or without interest or premium, and either on demand or at a time or in circumstances agreed by or on behalf of the person making the payment and the firm receiving it; and (b) which are not referable to the provision of property or services, or the giving of security[545].

8.5.4 The Regulated Activities Order sets out a number of exclusions to the definition of deposit. These include sums paid by various governmental and international organisations (for example, the Bank of England or a local authority), sums paid in the course of carrying on a business consisting of lending money and sums paid by any company to another member of the same corporate group. Sums received by solicitors (in the course of their profession), and sums received by firms authorised to deal or arrange deals in investments, manage investments, manage or act as trustee or depositary of a UK UCITS or an AIF, or establish a collective investment scheme or a pension scheme are also excluded (in each case because a different body of rules will regulate the holding of such sums).[546]

8.5.5 There is also an important exclusion in respect of the issuing of debt securities. This exclusion exempts from the definition of a deposit a sum received in consideration for the issue by a firm of debentures or other instruments creating indebtedness, or government securities. The exclusion does not apply to the issue of securities with a maturity of less than one year (that is, commercial paper) unless the paper is issued to investment professionals and the redemption value of the paper and its minimum denomination is at least £100,000. The effect is that the

544 Article 5(1).
545 Article 5(2).
546 Articles 6(1), 7 and 8.

issuing of debt securities (other than some commercial paper) to the public does not constitute regulated deposit-taking.[547]

8.5.6 Other exclusions apply where sums are received (a) in immediate exchange for electronic money, (b) in connection with or for the purposes of managing a UK UCITS or an AIF, or (c) where funds are received from a payment service user by certain authorised payment firms with a view to the provision of payment services.[548]

Issuing electronic money

8.5.7 The authorisation and supervision of electronic money institutions is governed principally by the Electronic Money Regulations 2011, which implemented the EU Electronic Money Directive[549]. However, the issue by certain firms of electronic money is also a specified activity under the Regulated Activities Order. This is the case where the firm issuing the electronic money is: (a) a qualifying credit institution; (b) a credit union; or (c) a municipal bank[550].

Insurance (including insurance risk transformation and Lloyd's)

8.5.8 The Regulated Activities Order provides that effecting or carrying out a contract of insurance as principal is a specified activity. This covers both life and non-life insurance, but excludes funeral plans[551]. There is an exclusion for activity undertaken in connection with or for the purposes of managing a UK UCITS or an AIF and a limited exclusion in respect of motor breakdown insurance.[552]

8.5.9 The Regulated Activities Order, as amended by the Risk Transformation Regulations[553], also provides that it is a specified activity for a "transformer vehicle" to assume a risk from an undertaking where (a) the undertaking assumes the underlying risk under a contract of insurance and (b) the assumption of risk by the transformer vehicle has the legal or economic effect of assuming some or all of the underlying risk to the transformer vehicle[554]. A "transformer vehicle" (known

547 Article 9.
548 Articles 9A, 9AA and 9AB. For the purposes of Article 9AB, the types of authorised payment firms listed are authorised payment institutions, EEA authorised payment institutions and small payment institutions (each as defined in the Payment Services Regulations 2017), and electronic money institutions and EEA authorised electronic money institutions (each as defined in the Electronic Money Regulations 2011).
549 Directive 2009/110/EC.
550 Article 9B.
551 Article 3(1), see the definition of "*contract of insurance*".
552 Articles 10 and 12.
553 SI 2017/1212.
554 Article 13A.

commercially as an insurance special purpose vehicle) is an undertaking that assumes risk from another undertaking and fully funds its exposure to that risk by issuing investments where the repayment rights of the investors are subordinated to its obligations to that other undertaking in respect of the risk[555].

8.5.10 In addition, the Act provides for the regulation of the Lloyd's insurance market. The activities connected with Lloyd's that are regulated are:

(a) advising a person to become, or continue or cease to be, a member of a particular Lloyd's syndicate;

(b) managing the underwriting capacity of a Lloyd's syndicate as a managing agent at Lloyd's; and

(c) arranging deals in contracts of insurance written at Lloyd's.[556]

8.5.11 The result is that members' agents and managing agents require authorisation. See further Chapter 24 'Lloyd's of London'.

Dealing in investments

8.5.12 Buying, selling, subscribing for or underwriting securities[557], derivatives[558] or "qualifying contracts of insurance"[559] (except rights under funeral plan contracts) as principal or agent is a regulated activity. In addition, buying, selling, subscribing for or underwriting structured deposits[560] and rights under other insurance contracts as agent is also a regulated activity. Operating an MTF or an OTF does not constitute this type of regulated activity.[561]

8.5.13 An exclusion is available to a firm dealing as principal in securities or the assignment of a "qualifying contract of insurance" unless the firm:

(a) holds itself out as willing to buy, sell or subscribe for investments of the kind to which the transaction relates at prices determined by the firm generally and continuously rather

555 Section 284A of the Act.
556 Articles 56 to 58.
557 This includes shares, debentures, alternative debentures, government and public securities, warrants, certificates representing certain securities, units, shareholder pension schemes, personal pension schemes, emission allowances, and rights to or interests in these investments.
558 That is, options, futures and contracts for difference.
559 That is, certain long-term insurance contracts (such as life policies, marriage and birth policies and permanent health policies); see Article 3(1) and Part II of Schedule 1 of the Regulated Activities Order.
560 That is, deposits with interest derived from a formula involving factors such as an index, a financial instrument, a commodity, a foreign exchange rate (or any such basket).
561 Articles 14 and 21.

than in respect of each particular transaction (that is, market making);

(b) holds itself out as engaging in the business of buying investments of the kind to which the transaction relates with a view to selling them;

(c) holds itself out as engaging in the business of underwriting investments of the kind to which the transaction relates; or

(d) regularly solicits members of the public with the purpose of inducing them, as principals or agents, to enter into transactions, and the transaction is entered into as a result of the firm having solicited members of the public in that manner.[562]

8.5.14 The intention is to exclude those firms that deal as customers of the market, as opposed to providing a service by offering to deal. Pursuant to the MiFID Override[563], this exclusion is generally not available to MiFID Firms. The MiFID Override does not apply, however, to a range of persons specifically excluded from the definition of investment firms. This includes persons whose only investment service is dealing on own account in financial instruments other than commodity derivatives or emission allowances (or derivatives thereof)[564].

8.5.15 There is also an exclusion in respect of dealings as principal in contractually based investments (which in essence means derivatives and "qualifying contracts of insurance") that are carried out with or through an authorised or an exempt firm[565]. An exclusion also applies to a firm receiving a debenture in respect of a loan it has made, or where a company issues shares or share warrants or deals in its own shares.[566]

8.5.16 A firm dealing as agent in securities or contractually based investments benefits from an exclusion provided that it deals with or through an authorised firm and: (a) the transaction is entered into on advice given by an authorised firm; or (b) it is clear that the client is not seeking advice from the agent as to the merits of the client entering into the

562 Article 15(1).
563 Articles 15(4) and 4(4).
564 Paragraph 1(e) of Part I of Schedule 3 of the Regulated Activities Order. Note that this provision itself has a number of exceptions, including in respect of market makers and high-frequency algorithmic traders (who are considered investment firms subject to the MiFID Override).
565 Article 16; this exclusion is subject to the MiFID Override (Article 16(2) and Article 4(4)).
566 Articles 16, 17, 18 and 18A. The Article 18 exclusion is subject to the MiFID Override (Articles 18(3) and 4(4)).

transaction[567]. This exclusion does not apply to transactions that relate to contracts of insurance, or where the agent receives from anyone except the client a pecuniary reward or other advantage, for which it does not account to the client. Dealings by nominees (in respect of any activities related to dealing in investments as principal) are also generally exempt[568].

8.5.17 There is also an important exclusion for dealings, both as principal and as agent, in derivatives in respect of risk management or hedging transactions. Dealings are excluded if: (a) the transaction relates to futures, options or contracts for difference; (b) neither party is an individual; (c) the sole or main purpose for which the party enters into the transaction is to hedge against identifiable business risks arising otherwise than as a result of carrying on a regulated activity; and (d) the relevant business consists mainly of unregulated activities[569]. The MiFID Override applies to this exclusion, but non-financial corporates can typically use derivatives to hedge business risks without being considered investment firms subject to the MiFID Override[570].

Arranging deals or contracts

8.5.18 The Regulated Activities Order provides that making arrangements for another person (whether as principal or as agent) to buy, sell, subscribe for or underwrite a security, derivative, funeral plan contract, insurance contract or structured deposit is a specified activity. Making arrangements with a view to a person who participates in the arrangements for buying, selling, subscribing for, or underwriting of such investments is also a regulated activity.[571]

8.5.19 It is also a regulated activity under the Regulated Activities Order to make arrangements for another person (whether as principal or as agent) to enter into any of, or make arrangements with a view to a person who participates in the arrangements for entering into any of, a regulated mortgage contract, regulated home reversion plan, regulated home purchase plan or regulated sale and rent back agreement[572].

8.5.20 There are a number of specific exclusions from the regulated activities relating to arranging, including: arranging transactions or contracts to

567 Article 22. This exclusion is subject to the MiFID Override (Articles 22(3) and 4(4)).
568 Article 66(1).
569 Articles 19 and 23.
570 See, for instance, paragraph 8.5.14.
571 Articles 25(1) and 25(2).
572 Articles 25A, 25B, 25C and 25E.

which the arranger is itself a party, and arranging deals with or through authorised firms. Additional exclusions in respect of arranging deals in investments include arranging transactions in connection with lending on the security of insurance policies, arrangements for the taking up of debentures and arranging with the sole purpose of providing finance to enable a firm to buy, sell, subscribe for or underwrite investments.[573]

8.5.21 The Regulated Activities Order makes specific provision for the activity of "introducers". Arrangements where clients are introduced to another firm lawfully carrying on regulated activities in the UK, with a view to the provision of independent advice, or the independent exercise of discretion in relation to investments, are exempt, as long as the arrangements are not related to a contract of insurance[574].

8.5.22 Operating an MTF or an OTF is excluded from the general specified activity of arranging, but this activity is a separate regulated activity in its own right (see paragraphs 8.5.23 and 8.5.24).

Operating an MTF or an OTF[575]

8.5.23 It is a regulated activity to operate an MTF on which shares, debentures, alternative finance investment bonds, government securities, certificates representing securities, units in collective investment schemes, emission allowances, options, futures or contracts for difference are traded[576]. It is also a regulated activity to operate an OTF on which certain other non-equity instruments are traded[577].

8.5.24 The Regulated Activities Order treats operating an MTF or OTF as aligned to — but separate from — the regulated activity of arranging deals or contracts in investments. Many of the exclusions applicable to arranging deals in investments are not applicable to the operation of an MTF or OTF.

Credit broking

8.5.25 There are various credit broking activities that are regulated activities, namely: effecting introductions of individuals to providers of credit or consumer hire agreements, presenting or offering a regulated credit

573 Articles 26 to 29A, 30, 31 and 32.
574 Articles 33 and 33A. There is a separate, more limited exclusion for insurance brokers (see Article 33B).
575 See Chapters 5 and 5A of the FCA's 'Market Abuse Regulation' in the FCA Handbook for guidance on MTF and OTF regulation.
576 Article 25D.
577 Article 25DA.

agreement, assisting an individual by undertaking preparatory work with a view to them entering a regulated credit agreement and entering into a regulated credit agreement on behalf of a lender[578]. There are a number of relevant exclusions, including for off-premises canvassing, non-remunerated credit broking, transactions to which the broker is a party, agreements relating to land and activities carried on by lawyers or registered social landlords[579].

Managing investments

8.5.26 Managing assets belonging to another person, in circumstances involving the exercise of discretion, is a regulated activity if: (a) the assets consist of securities, structured deposits or contractually based investments; or (b) the arrangements for their management are such that the assets may consist of or include such investments, and either the assets have at any time done so, or have at any time been held out as doing so[580].

Operating an electronic system in relation to lending

8.5.27 Operating an electronic system in relation to lending is a regulated activity where it relates to the facilitation of certain types of peer-to-peer credit agreements. Certain ancillary activities in respect of credit agreements entered into in the course of, or in connection with, this regulated activity are also considered to be specified activities for the purposes of the Regulated Activities Order. This is the category of regulated activity commonly undertaken by peer-to-peer lending platforms.[581]

Assisting in the administration and performance of contracts of insurance

8.5.28 Assisting in the administration and performance of a contract of insurance is a regulated activity. An exclusion applies to firms that perform this activity in the course of professionally undertaking expert appraisal, loss adjusting on behalf of an insurer or arranging policy changes on behalf of an insurer. This is the category of regulated activity commonly undertaken by insurance intermediaries.[582]

578 Article 36A.
579 Articles 36B, 36C, 36D, 36E, 36F and 36FA.
580 Article 37.
581 Article 36H.
582 Articles 39A and 39B.

Debt activities

8.5.29 Certain debt-related activities, such as debt adjusting (negotiating or taking over debt on behalf of a borrower), debt-counselling, debt-collecting and debt administration, are regulated activities[583]. There are various exclusions, including for those connected to the underlying agreement (for example, the lender or supplier)[584].

Safe custody

8.5.30 Safeguarding assets belonging to others, and administering those assets, or arranging for another to do so, is a specified kind of activity if the assets concerned consist of, or include, an investment which is a security, a life policy (except long-term care insurance), a derivative, or rights under a funeral plan contract, or if the arrangements for their safeguarding and administration are such that the assets may consist of such investments and either the assets have at any time done so, or the arrangements have at any time been held out as doing so[585].

Sending dematerialised instructions

8.5.31 This activity is concerned with arrangements made for the settlement of transactions relating to uncertificated securities or contractually based investments (for example, derivatives). Sending, or causing to be sent, dematerialised instructions by means of a system recognised under the Uncertificated Securities Regulations 2001[586] (for example, by CREST) is a regulated activity[587].

8.5.32 There are a number of complex exclusions, including in respect of instructions sent by issuers and settlement banks, and instructions sent in connection with takeover offers.[588]

Collective investment schemes

8.5.33 The following activities are regulated under this heading:

583 Articles 39D, 39E, 39F and 39G.
584 Article 39H.
585 Article 40.
586 SI 2001/3755.
587 Article 45.
588 Articles 46, 47, 48 and 49.

(a) establishing, operating or winding up a collective investment scheme;[589]

(b) managing an undertaking for a UK UCITS;[590]

(c) managing an AIF;[591]

(d) acting as trustee or depositary of a UK UCITS;[592] and

(e) acting as trustee or depositary of an AIF.[593]

8.5.34 A firm that has permission to manage an AIF or a UK UCITS will not need a separate permission for establishing, operating or winding up a collective investment scheme in relation to their management activities, even if the AIF or UK UCITS is a collective investment scheme.

8.5.35 Exclusions are included in respect of both the managing and the depositary activities mentioned in (b) to (e) above. To the extent that other regulated activities overlap with those activities, additional permissions are not required.[594] This seeks to avoid a need for firms to apply for multiple overlapping permissions.

8.5.36 For more details on collective investment schemes, see Chapter 14 'Collective investment schemes'.

Pension schemes

8.5.37 Establishing, operating or winding up a pension scheme is a regulated activity[595].

Basic advice on stakeholder products

8.5.38 It is a regulated activity to provide basic advice on a stakeholder child trust fund, rights in a stakeholder pension scheme or certain deposit accounts, units in certain collective investment schemes or certain

589 Article 51ZE.
590 Article 51ZA.
591 Article 51ZC, which implements certain requirements in the Alternative Investment Fund Managers Directive (2011/61/EU) (**AIFM Directive**). As such, certain entities listed in Schedule 8 to the Regulated ~Activities Order, including small registered UK AIFMs, occupational pension schemes, central banks, governmental bodies, holding companies, securitisation SPVs, non-EEA AIFMs and employee participation/savings schemes, will not carry on the activity of managing an AIF.
592 Article 51ZB.
593 Article 51ZD.
594 Article 72AA(2).
595 Article 52.

contracts of long-term insurance to a retail consumer (that is, a person not acting in the course of business)[596].

8.5.39 The Regulated Activities Order defines basic advice as: (a) asking a retail consumer questions to assess the appropriateness of a given stakeholder product; (b) assessing, on the basis of the answers to those questions, that a stakeholder product is appropriate; (c) describing and recommending that product to that retail consumer; and (d) the retail consumer indicating that he has understood the description and recommendation[597].

Advising on investments and certain other regulated products

8.5.40 Advising a person in his capacity as an investor or potential investor, or in his capacity as agent for an investor or a potential investor, is a specified activity if the advice is on the merits of that person (whether as principal or agent): (a) buying, selling, subscribing for, exchanging, redeeming, holding or underwriting a particular investment; or (b) exercising or not exercising any right conferred by such an investment to buy, sell, subscribe for, exchange or redeem such an investment[598]. The investment in question must be a security, a structured deposit, a derivative, rights under an insurance policy or rights under a funeral plan contract. A person who is authorised to carry on another regulated activity can provide investment advice without having specific permission to do so as long as the advice is not a 'personal recommendation' (in other words, as long as it is suitably generic).

8.5.41 It is a regulated activity to provide advice on the merits of a relevant person entering into a regulated mortgage contract, regulated home reversion plan, regulated sale and rent back agreement, regulated home purchase plan or regulated credit agreement for the acquisition of land[599].

8.5.42 It is also a regulated activity to provide advice on the conversion or transfer of pension benefits[600].

8.5.43 The Regulated Activities Order explicitly excludes advice contained in a newspaper, journal, magazine or other periodical publication, or which

596 To the extent that any such products meet the criteria in the Financial Services and Markets Act 2000 (Stakeholder Products) Regulations 2004 (SI 2004/2738).
597 Article 52B.
598 Article 53.
599 Articles 53A to 53DA.
600 Article 53E.

is given by way of a service comprising regularly updated news or information, if the principal purpose of the publication or service, taken as a whole and including any advertisements or other promotional material contained in it, is not the giving of investment advice or leading or enabling persons to buy, sell, subscribe for or underwrite the relevant investment or enter the relevant regulated contract, plan or agreement[601]. The same applies in respect of broadcast television or radio programmes. This exclusion does not apply to personal recommendations[602].

8.5.44 Advice given in respect of regulated mortgage contracts, regulated home reversion plans, regulated home purchase plans and regulated sale and rent back agreements is excluded where the relevant regulated contract is administered by an authorised firm and the unauthorised person does nothing to administer the regulated contract himself[603].

Administering a benchmark

8.5.45 It is also a regulated activity to administer a benchmark as defined in the EU Benchmarks Regulation[604].[605]

Entering as provider into funeral plans

8.5.46 Entering as provider into a funeral plan contract or carrying out a funeral plan contract as provider (including persons who are providers as a result of the novation, assignment or lawful transfer of an existing funeral plan contract) is a regulated activity.[606]

Entering into and administering mortgages

8.5.47 The following are regulated activities in relation to certain mortgage products:

(a) entering into a regulated mortgage contract as lender;

(b) administering a regulated mortgage contract by way of business on or after 31 October 2004; and

601 Article 54.
602 See Article 53(1A) for a description of personal recommendations.
603 Article 54A.
604 Regulation EU 2016/1011 of the European Parliament and of the Council.
605 Article 63S.
606 Article 59.

(c) administering a regulated mortgage contract by way of business before 31 October 2004, where that contract was a regulated credit agreement prior to 21 March 2006.[607]

8.5.48 A "regulated mortgage contract" is a contract under which: (a) a firm (the "lender") provides credit to an individual or to trustees (the "borrower"); (b) the contract provides for the obligation of the borrower to repay to be secured by a mortgage on land in the UK[608] ; and (c) at least 40 per cent. of that land is used, or is intended to be used, as or in connection with a dwelling (and, if provided to a corporate trustee, as or in connection with a dwelling by an individual who is a beneficiary of the trust or a close relative of such beneficiary)[609]. The Regulated Activities Order also contains a helpful list of mortgage contracts that are excluded from regulation, including for example, investment property loans[610].

8.5.49 Administering a regulated mortgage contract means either or both of: (a) notifying the borrower of changes in interest rates or payments due under the mortgage, or of other matters of which the borrower is required to be notified; and (b) taking any necessary steps for the purposes of collecting or recovering payments due from the borrower. However, the enforcement of a mortgage is not administering for the purposes of the Regulated Activities Order. Neither does a firm require authorisation if it arranges for another, authorised, firm to administer the mortgage, or administers the mortgage pursuant to an agreement with an authorised firm that has permission to carry on that activity.[611]

Entering into regulated home reversion plans, regulated home purchase plans and regulated sale and rent back agreements

8.5.50 Entering into regulated home reversion plans, regulated home purchase plans and regulated sale and rent back agreements are each regulated activities. Administering such plans or agreements is also a regulated activity.[612]

8.5.51 Exclusions apply in each case where a firm arranges for another, authorised, firm to administer the plan or agreement or that firm

607 Articles 61(1) and (2).
608 If a contract was entered into before IP Completion Day, land is taken to mean both land in the United Kingdom and land in the EEA.
609 Article 61(3)(a).
610 Article 61A.
611 Articles 61(3)(b), 62 and 63.
612 Articles 63B(1), 63B(2), 63F(1), 63F(2), 63J(1) and 63J(2).

administers the plan or agreement pursuant to an agreement with an authorised firm that has permission to carry on that activity[613].

Managing dormant account funds

8.5.52 The meeting of repayment claims and the management of dormant accounts by a reclaim fund is a regulated activity[614]. In accordance with the Dormant Bank and Building Society Accounts Act 2008, a reclaim fund is a company which only functions to meet repayment claims, to manage dormant account funds in order to meet such claims as it is prudent to anticipate and to transfer surplus funds in dormant accounts (subject to some exceptions) to the "Big Lottery Fund", which in turn distributes those monies for social or environmental purposes[615]. The dormant asset scheme is beyond the scope of this Guide, but it is worth noting that the Government has introduced a Bill to expand the dormant assets scheme to a wider range of dormant assets, which is currently working its way through Parliament[616].

Consumer credit activities

8.5.53 Certain activities relating to rights under credit agreements and rights under consumer hire agreements, as well as ancillary activities related to the provision of credit to consumers, are also regulated activities. These are dealt with in the separate paragraphs 8.7.1 to 8.7.5, which detail the consumer credit regime.

Agreeing to carry on regulated activities

8.5.54 Agreeing to carry on a regulated activity is itself a regulated activity (with the exception of agreeing to accept deposits, to issue electronic money, to carry out or effect insurance, to operate an MTF, to establish a collective investment scheme or a pension scheme, or to meet claims or manage dormant accounts as a reclaim fund).[617]

613 Articles 63C, 63G, 63K (on arranging administration by an authorised person; and Articles 63D, 63H and 63L (on administration pursuant to an agreement with an authorised person).
614 Article 63N.
615 Sections 5 and 16(1) of the Dormant Bank and Building Society Accounts Act 2008.
616 The Dormant Assets Scheme Bill 2021.
617 Article 64.

8.6 General exclusions in the Regulated Activities Order

8.6.1 There are a number of generic exclusions that are applicable to some or all regulated activities. The more important of these are briefly outlined below.

Trustees and personal representatives

8.6.2 There is a general exclusion in respect of certain activities undertaken by trustees and personal representatives (including arranging deals, managing investments, assisting in the administration and performance of contracts of insurance, safeguarding assets, administering safeguarded assets, advising on investments and advising on certain agreements such as regulated mortgage contracts).[618] However, this exclusion is lost if the person in question is separately remunerated for what they do.[619] This exclusion is subject to both the IDD and MCD Overrides.[620]

Activities incidental to a profession or non-investment business

8.6.3 Dealing as agent, arranging, assisting in the administration and performance of contracts of insurance, safeguarding assets, administering safeguarded assets, advising on investments and advising on certain agreements such as regulated mortgage contracts are each excluded from regulation if the activity is carried on in the course of any profession or business which does not otherwise consist of the carrying on of regulated activities in the UK, and may reasonably be regarded as a necessary part of other services provided.[621] Again, there must be no separate remuneration.[622] This exclusion is subject to the MiFID, IDD and MCD Overrides.[623]

Activities connected with the sale of goods and supply of services

8.6.4 The Regulated Activities Order contains somewhat complex and relatively narrow exclusions in respect of the performance of certain

618 Article 66.
619 Article 66(7).
620 Articles 66(8), 4(4A) and 4(4B).
621 Article 67.
622 Article 67(2).
623 Articles 67(3), 4(4), 4(4A) and 4(4B).

regulated activities incidental to the sale of goods or the supply of services[624]. This exclusion is subject to the MiFID Override.[625]

Groups and joint enterprises

8.6.5 Exclusions are available in respect of dealing in investments as principal or agent, arranging deals, safeguarding and administering investments, sending dematerialised instructions, managing investments and providing investment advice where the parties to the arrangements are members of the same group or they are, or propose to be, participators in a joint enterprise[626]. Again, this exclusion is subject to the MiFID Override[627] but a firm is not considered a MiFID Firm (and is therefore not subject to the MiFID Override) if it provides investment services exclusively for its parent undertakings, for its subsidiaries or for other subsidiaries of its parent undertakings[628].

Sale of company

8.6.6 Dealing in investments as principal is excluded from the category of regulated activities if the transaction is one to acquire or dispose of shares in a body corporate (other than an OEIC), or is entered into for the purposes of such an acquisition or disposal and either:

(a) the shares consist of or include 50 per cent. or more of the voting shares in the body corporate or the shares, together with any already held by the person acquiring them, consist of or include at least that percentage and, in either case, the acquisition or disposal is between parties each of whom is a body corporate, a partnership, a single individual or a group of connected individuals; or

(b) the object of the transaction may reasonably be regarded as being the acquisition of day-to-day control of the affairs of the body corporate[629].

8.6.7 Dealing as agent, arranging deals and the giving of investment advice in connection with a transaction coming within this exclusion is also excluded (except where the transaction is for the sale and purchase of

624 Article 68.
625 Articles 68(12) and 4(4).
626 Article 69 paragraph 1(c) of Schedule 3 to the Regulated Activities Order.
627 Articles 69(13) and 4(4).
628 Paragraph 1(c) of Part I of Schedule 3 of the Regulated Activities Order.
629 Articles 70(1) and 70(2).

a contract of insurance)[630]. The exclusion therefore has very wide application, although it is subject to the MiFID Override.[631]

Employee share schemes

8.6.8 Various exclusions exist in respect of transactions and safe custody in connection with employee share schemes[632].

Overseas persons

8.6.9 An "overseas person" is a person that carries on certain regulated activities[633] , but does not do so, or offer to do so, from a permanent place of business maintained by the firm in the UK. Such a person is excluded from carrying on the regulated activity of dealing as principal where it: (a) enters into a transaction as principal with or through an authorised firm, or an exempt firm acting in the course of a business comprising a regulated activity in relation to which it is exempt; or (b) enters into a transaction as principal with a person in the UK, if the transaction is the result of a legitimate approach[634].

8.6.10 There is also an exclusion for transactions entered into as agent. An overseas person is excluded where it: (a) enters into a transaction as agent for any person with or through an authorised firm or an exempt firm; or (b) enters into a transaction with another party as agent for any person, other than with or through an authorised firm or an exempt firm, unless such persons are in the UK and the transaction is the result of an approach (other than a legitimate approach) made by or on behalf of, or to, such UK person[635].

8.6.11 The operating of an MTF or OTF and the making of arrangements by an overseas firm with an authorised firm, or an exempt firm, are each likewise excluded. The giving of advice by an overseas firm is excluded, provided that it is the result of a legitimate approach. Certain exclusions also apply to the arranging by overseas firms of regulated mortgage contracts, regulated home reversion plans, regulated home purchase plans and regulated sale and rent back agreements.[636]

630 Articles 70(4) to 70(6).
631 Articles 70(8) and 4(4).
632 Article 71.
633 The relevant regulated activities are those in articles 14, 21, 25, 25A, 25B, 25C, 25D, 25DA, 25E, 37, 39A, 40, 45, 53, 53D, 61, 63B, 63F and 63J and, so far as it is relevant to any of those articles, article 64.
634 Article 72(1).
635 Article 72(2).
636 Articles 72(3), 72(5), and 72(5A) to 72(5F).

8.6.12 A "legitimate approach" for these purposes is: (a) an approach made to the overseas firm which has not been solicited by the firm in any way or has been solicited by the firm in a way which does not contravene the restrictions on financial promotion[637]; or (b) an approach made by or on behalf of the overseas firm in a way which does not contravene the financial promotion regime[638].

8.6.13 The exclusion does not apply to a MiFID Firm that is providing investment services on a professional basis and whose home state is the UK[639].

Activities carried on by goods and services providers

8.6.14 The Regulated Activities Order contains exclusions in respect of regulated activities that relate to the provision of particular contracts of insurance by firms that supply non-motor goods or services and/or provide services relating to travel in a professional capacity[640].

Incidental provision of information

8.6.15 Arranging, managing investments, safe custody and assisting the administration or performance of insurance contracts are excluded in relation to contracts of insurance where the only relevant activity of the firm concerned consists of the provision of information, in the course of its business or profession, which does not otherwise consist of carrying on regulated activities, to an actual or potential policyholder and the provision of that information may be reasonably regarded as being incidental to the firm's business or profession[641].

Large risks contracts

8.6.16 Dealing as agent, arranging deals in investments, assisting in the administration and performance of insurance contracts and advising on investments are excluded where carried on in relation to a "large risks" contract of insurance, if the risk is located outside the UK. "Large risks" contracts of insurance relate to, for instance, aircrafts, ships, railway

637 See Section 21 of the Act for the relevant restrictions on financial promotion.
638 Article 72(7).
639 Article 72(8). The exclusion similarly does not apply to certain types of third-country MiFID Firms subject to equivalence decisions (Articles 72(10A)-(12)).
640 Article 72B.
641 Article 72C.

rolling stock and other forms of liability of businesses of a certain size.[642]

Business Angel-led Enterprise Capital Funds

8.6.17 Businesses which operate "Business Angel-led Enterprise Capital Funds" are excluded from the regulated activities of dealing as agent, arranging deals in investments, managing investments, safeguarding and administering investments, operating a collective investment scheme and advising, to the extent that these activities are undertaken by, on behalf of, or in relation to assets or investments belonging to participants in a Business Angel-led Enterprise Capital Fund. The exclusion applies to a UK limited company that operates a Business Angel-led Enterprise Capital Fund, which only invests in certain investments, such as unlisted securities or alternative finance investment bonds issued by an unlisted company and whose participants and members are business angels, such as sophisticated investors, high net worth individuals and companies and trustees of high value trusts.[643]

8.7 The consumer credit regime

8.7.1 Historically the regulation of consumer credit business in the UK was governed by the CCA and overseen by the OFT. The provisions of the CCA which related to the licensing of consumer credit activities have now been repealed and supervisory responsibility for consumer credit was transferred from the OFT to the FCA with effect from 1 April 2014. Many of the provisions of the CCA and its secondary legislation have, however, been retained. Consumer credit activity is now a regulated activity within the meaning of section 22 of the Act.

Specified investments relating to consumer credit

8.7.2 The following credit-related investments are specified investments for the purposes of the Regulated Activities Order:

(a) rights under a credit agreement (that is, an agreement between an individual or a relevant recipient of credit[644] and any other

642 Article 72D.
643 Articles 72E and 72F.
644 This includes a small partnership (consisting of two or three persons not all of whom are bodies corporate); see the definition of "*relevant recipient of credit*" in Article 60L.

person in which that other person provides the individual with credit of any amount, or a green deal plan);[645] and

(b) rights under a consumer hire agreement (that is, an agreement between an individual or a relevant recipient of credit[646] and any other person for the bailment of that other person's goods, which is not a hire-purchase agreement and is capable of subsisting for more than three months).[647]

8.7.3 Entering into a regulated credit agreement as lender is a regulated activity.[648] A regulated credit agreement is a credit agreement (as defined above) that is not exempt. Credit agreements may be exempt for these purposes as a result of:

(a) the nature of the agreement (for example, a contract for the provision of credit worth more than £25,000 will be an exempt agreement where carried on for the business purposes of the borrower);

(b) the fact that it relates to the purchase of land for non-residential purposes;

(c) the nature of the lender (for example, a local authority);

(d) the number of repayments which have to be made;

(e) the total charge for the credit; or

(f) the nature of the borrower.[649]

8.7.4 Entering into a regulated consumer hire agreement as owner is also a regulated activity. For these purposes, a regulated consumer hire agreement is a consumer hire agreement (as defined above) that is not exempt. Consumer hire agreements may be exempt for these purposes due to:

(a) the nature of the agreement;

645 Article 88D. See also the definition of "*credit agreement*" in Article 60B(3).
646 See footnote 645 above.
647 Article 88E. See also the definition of "consumer hire agreement" in Article 60N(3).
648 Article 60B.
649 For more details see articles 60C to 60H.

(b) the fact that the agreement relates to the supply of essential services; or

(c) the nature of the hirer.

8.7.5 The following are all also regulated activities under the Regulated Activities Order:[650]

(a) exercising, or having the right to exercise, or enforcing the lender's rights under a regulated credit agreement;

(b) performing duties under a credit agreement on behalf of the lender;

(c) exercising, or having the right to exercise, or enforcing the owner's rights and duties under a regulated consumer hire contract;

(d) performing duties under a consumer hire agreement on behalf of the owner;

(e) debt adjusting (whether in relation to debts due under a credit agreement or a consumer hire agreement);

(f) debt counselling (whether in relation to the liquidation of a debt due under a credit agreement or a consumer hire agreement); and

(g) debt collecting (whether in relation to debts due under a credit agreement or a consumer hire agreement).

Regulated activities relating to information about a person's financial standing

8.7.6 The following activities, which relate predominantly to the business of credit reference agencies that provide credit scoring and information on and to individuals, are also now regulated activities:

(a) *providing credit references*: this activity involves furnishing a person with information that: (i) is relevant to the financial standing of persons other than bodies corporate; and (ii) is collected for that purpose by the firm furnishing it;[651] and

650 Articles 39D to 39G.
651 Article 89B.

(b) *providing credit information services*: this activity involves taking steps on behalf of, or giving advice about taking steps to, a person other than a company in connection with information relevant to that person's financial standing that is or may be held by a credit information agency.[652]

8.8 The claims management regime

8.8.1 Historically, claims management companies (**CMCs**) were regulated by the Claims Management Regulator, a unit of the Ministry of Justice.

8.8.2 However, following an independent review completed in 2016, responsibility for the regulation of CMCs transferred to the FCA on 1 April 2019 under Part 2 of the Financial Guidance and Claims Act 2018[653].

8.8.3 An activity that is: (a) carried on by way of business in Great Britain (see paragraph 8.3.5); and (b) is, or relates to, claims management services, is a regulated activity for the purposes of section 22 of the Act[654].

8.8.4 'Ordinary residence' is to be determined with reference to the Statutory Residence Test set out in Schedule 45 to the Finance Act 2013[655], at the time of the facts giving rise to the claim (whether actual or potential) or at the time a regulated activity is carried out in respect of a claimant (whether actual or potential). Therefore, persons outside of Great Britain who are dealing with claimants ordinarily resident in, or constituted under the laws of, Great Britain may require authorisation for carrying on regulated claims management activities[656]. An example of a regulated claims management activity being carried on by way of business in Great Britain, to which no exclusion applies, is a company incorporated in France advising a person who is ordinarily resident in England in relation to a financial services claim[657].

8.8.5 A person carries out a regulated claims management activity when (in respect of the claims outlined in paragraph 8.8.6):

652 Article 89A.
653 See the FCA's webpage, 'Claims management companies: our regulation'.
654 Section 22(1B).
655 References to the "*UK*" are to be construed as references to "*Great Britain*" in this Statutory Residence Test (Article 89F(4)).
656 See PERG 2.7.20MG of the PERG Manual.
657 See PERG 2.4A.4G of the PERG Manual.

(a) seeking out persons who may have a claim, identifying (a) a claim or claimant (whether actual or potential), or referring details of a claim or claimant (whether actual or potential) to another person, including persons with a right to conduct litigation[658]; and

(b) advising a claimant (or potential claimant)[659], investigating a claim, or representing a claimant.[660]

8.8.6 The following types of claims are within scope[661]:

(a) personal injury;

(b) financial services;

(c) financial products;

(d) housing disrepair;

(e) claims for a specified benefit (such as industrial injury);

(f) criminal injury; and

(g) employment-related claims (for example, in relation to wages or redundancy).[662]

8.8.7 Certain exclusions apply when a regulated claims management activity is carried out by:

(a) legal professionals[663];

(b) charities or not-for-profit agencies[664];

(c) persons appointed by statutory or other public bodies (such as an Independent Complaints Reviewer)[665];

658 Article 89G.
659 See PERG 2.7.20N(2)G of the PERG Manual, which notes that the activity of 'advising' includes advice as to the merits or on the procedure, best presentation, or possible means of challenging an unsatisfactory outcome, of a claim.
660 Articles 89H to 89M.
661 See Article 89F for the definitions and/or underlying statutory references relating to each of these claims.
662 Article 89G(2) and Articles 89H to 89M.
663 Article 89N.
664 Article 89O.
665 Article 89P.

(d) the Motor Insurers' Bureau[666];

(e) a medical defence union (for example, the Medical Protection Society Limited)[667];

(f) an independent trade union[668];

(g) a students' union[669]; or

(h) an insurance intermediary[670].

8.8.8 Other exclusions apply where a regulated claims activity is carried on in connection with a counterclaim.[671]

8.8.9 In relation to the regulated activity of referring the details of a claim or claimant (whether actual or potential) to another person, an exclusion applies if the person referring such details (the "introducer") carries on no other regulated claims management activity, such a referral is incidental to the introducer's main business and the details are only referred to certain persons, including: (a) authorised persons within the meaning of the Act, (b) legal practitioners, or (c) a firm, organisation or body corporate that provides claims management activities through legal practitioners. For claims referred to such persons, the introducer must only be paid (in money or money's worth), for no more than 25 claims per calendar quarter.[672]

8.9 The PRA-Regulated Activities Order

8.9.1 The Financial Services and Markets Act 2000 (PRA-Regulated Activities) Order 2013[673] (the **PRA-Regulated Activities Order**) specifies that certain activities contained in the Regulated Activities Order will be "PRA-regulated activities"[674]. Firms carrying on these specified activities will be subject to prudential regulation by the PRA and conduct of business supervision by the FCA. For more information on the dual regulation of firms by the PRA and the FCA, see Chapter 7 'Co-ordination between the PRA and the FCA'.

666 Article 89Q.
667 Article 89R.
668 Article 89S.
669 Article 89T.
670 Article 89U.
671 Article 89W.
672 Article 89V.
673 SI 2013/556.
674 Article 2 of the PRA-Regulated Activities Order.

8.9.2 Article 2 of the PRA-Regulated Activities Order specifies that the following activities (further details of which appear in the Regulated Activities Order) are PRA-regulated activities:

(a) accepting deposits;

(b) effecting and/or carrying out a contract of insurance as principal;

(c) the activity carried out by a "transformer vehicle" when it assumes a risk from an undertaking (see paragraph 8.5.9);

(d) managing the underwriting capacity of a Lloyd's syndicate as a managing agent at Lloyd's;

(e) the arranging, by a Lloyd's Act 1871-incorporated society by the name of Lloyd's, of deals in contracts of insurance written at Lloyd's or any other activity carried on by such a society in connection with, or for the purpose of, such arranging; and

(f) dealing in investments as principal, to the extent that:

(i) the particular firm: (A) is authorised to carry on the activity of dealing in investments as principal; or (B) has applied for Part 4A permission to carry on that activity;

(ii) the particular firm: (A) is an investment firm required to hold initial capital of EUR 730,000; (B) would be such a firm if it was granted the relevant Part 4A permission; or (C) is established outside the UK but would be such a firm if it were established in the UK and had obtained the necessary authorisation in the UK for its business; and

(iii) the PRA considers it desirable, having regard to its objectives.[675] The PRA's statutory objectives are detailed in Chapter 5 'The Prudential Regulation Authority'.

8.9.3 In determining whether a particular firm will be designated as an investment firm which is carrying on PRA-regulated activities, the PRA must have regard to the assets of the firm and, where it is a member of

[675] See, respectively: articles 5; 10(1) and 10(2); 57; 58; and 3(1) of the PRA-Regulated Activities Order.

a group, the assets of any other members of the group that meet the criteria in paragraphs 8.9.2(f)(i) and 8.9.2(f)(ii)[676]. Designation of a firm as an investment firm under the PRA-Regulated Activities Order is effected by the PRA sending a notice to the affected firm stating, among other things, the reasons for the designation and the date when the designation will take effect[677].

8.9.4 The PRA can only designate specific firms as investment firms falling within the scope of its supervisory jurisdiction. The PRA published a statement of policy in March 2013[678] which set out the approach it will take to the designation of investment firms. The PRA has recently consulted on minor changes to this policy[679].

8.9.5 The PRA also publishes an annual list of designated investment firms (which, at the time of writing, was last updated on 4 January 2021)[680]. This tailored approach distinguishes the supervision of investment firms by the PRA from its supervision of deposit-takers, insurers, transformer vehicles and Lloyd's managing agents, each of which are categories of firm regulated by the PRA by virtue of the regulated activities they undertake.

8.9.6 The effect of this is that the PRA regulates a relatively small number of investment firms that it considers could present significant risks to the stability of the UK financial system. In the list published on 4 January 2021, only eight firms were listed as designated firms. The PRA has published an approach document which sets out how it will advance its statutory objectives in relation to deposit-takers and designated investment firms. In this approach document, the PRA indicated that its approaches would not change in light of Brexit[681].

8.10 Designated activities

8.10.1 The proposals for reform set out in Phase II of the FRF Review propose the creation of a new Designated Activities Regime (**DAR**). The DAR will be a mechanism to allow the regulation of certain activities which are not regulated activities for the purposes of the Act and which apply to a broader range of entities than authorised persons. The DAR will mirror

676 Article 3(4) of the PRA-Regulated Activities Order.
677 Article 4 of the PRA-Regulated Activities Order.
678 The PRA Statement of Policy 'Designation of investment firms for prudential supervision by the Prudential Regulation Authority' (March 2013).
679 PRA Consultation Paper CP 15/21. The results of this consultation have not yet been announced.
680 See the PRA's 'List of Designated Firms Compiled by the Bank of England as at 04 January 2021'.
681 The PRA 'The Prudential Regulation Authority's approach to banking supervision' (last updated October 2018).

the existing approach for the Regulated Activities Order, with the Government to determine the activities that are in scope (via secondary legislation, within a framework established in primary legislation), while the regulators determine the rules that apply to the conduct of these activities.

8.10.2 Designated activities will not fall within the perimeter set by the Regulated Activities Order and will be a more limited regime, because it will relate to certain designated activities only, and not the wider activities of those who carry out designated activities. It is envisaged that there would, however, be appropriate enforcement mechanisms and penalties for failure to comply with the relevant rules relating to that activity.

8.10.3 The Government intends to use the DAR to replicate activities currently covered by retained EU law, at least initially. At the time of writing it is noted in the proposals for reform, there are many pieces of retained EU law which set the rules for a kind of activity, product, or conduct which are not regulated activities for the purposes of the Act, and which apply to a broader range of entities than persons authorised under the Act. Some examples include the Short Selling Regulation, which sets out the rules which apply to the activity of short selling, or margin rules that apply to certain types of derivative transactions. However, the consultation makes clear that the DAR will not be constrained by this context and that it will be possible to designate, in the future, new types of activity for the purposes of this regime.

9. AUTHORISATION AND PERMISSION

9.1 Overview

9.1.1 Parts 3 and 4A of the Act deal with the granting of authorisation and permission for firms to carry on regulated activities. Authorisation must be sought from either the FCA or the PRA, depending on the nature of the regulated activities the firm wishes to undertake. Each regulator is obliged to consult, and in some cases obtain the prior consent of, the other before granting authorisation.

9.1.2 The Act is structured so that if a firm receives permission from the FCA or the PRA to carry on one or more regulated activities (for example, deposit-taking or giving investment advice), that firm will become an authorised firm as a result of obtaining the permission. Such permission can be restricted by being made subject to limitations or requirements. If a firm's permission to carry on all regulated activities is cancelled, then the relevant regulator must withdraw the firm's authorisation. The Act also provides a number of exemptions from the authorisation requirement.

9.1.3 Part 12B of the Act deals with the approval by the PRA of certain bank and investment firm holding companies. Part 12B requires certain holding companies of PRA-authorised and designated investment firms established in the UK to apply to the PRA for approval. The bank and designated investment firm holding company regime is considered further at paragraph 9.11.

9.1.4 Now that the UK has left the EEA, passporting rights for EEA firms to establish themselves in the UK or become automatically authorised to carry on activities in the UK have ended. Passporting rights for Gibraltarian firms have, however, been extended until 31 December 2021 and may be further extended until such time as the permanent arrangements of the new permanent markets access regime (the **Gibraltar Access Regime**) are in place. The Gibraltar Access Regime is considered further in the paragraphs below and in Chapter 2 'The Financial Services Act 2021' and Chapter 10 'The overseas framework'. There is a temporary permissions regime and temporary marketing regime in place to allow certain EEA firms and funds to continue to operate in or be marketed into the UK on a temporary basis following the cessation of passporting rights for EEA firms (the **TPR**). The TPR is considered further at paragraph 9.14.

9.2 Authorisation and exemption

9.2.1 The Act contains a "general prohibition" that makes it unlawful for a firm to carry on a regulated activity in the UK unless it is either an authorised firm or an exempt firm[682].

9.2.2 There are two categories of authorised firms: (a) firms holding a permission granted by the PRA or the FCA under Part 4A of the Act; and (b) firms otherwise directly authorised under the Act.[683] Prior to the amendments made by the FS Act 2012, Lloyd's was directly authorised under the Act, but this is no longer the case.

9.2.3 Certain Gibraltarian firms qualify for authorisation by exercise of passport rights (detailed in Schedule 3 to the Act). The Gibraltar Access Regime has been introduced into the Act (detailed in Schedule 2A), so as to provide for Gibraltarian financial services firms to access the UK market, however a date for its taking effect has yet to be appointed. When that regime takes effect, Gibraltarian firms holding a Schedule 2A permission will make up a third category of authorised firm under the Act.[684] Further details are set out at paragraph 9.13, in Chapter 2 'The Financial Services Act 2021', and Chapter 10 'The overseas framework'.

9.2.4 Certain EEA firms operating in the UK through a branch or on a cross-border basis under the TPR are treated as if they have permission to carry on a regulated activity in the UK under Part 4A of the Act. Further details of the TPR are set out below.

9.2.5 Apart from firms authorised in Gibraltar (which must comply with the requirements set out in Schedule 3), and firms which rely on the TPR (which must comply with the requirements set out in that regime) a firm must obtain authorisation by applying for a Part 4A permission.

9.2.6 Further, as explained in the paragraphs below, certain holding companies (of banks and designated investment firms) must be approved by the PRA under Part 12B of the Act.

9.2.7 There are a number of exemptions from the authorisation requirement. These are set out in a Treasury order.[685] The order distinguishes between firms exempt in respect of any regulated activity other than insurance business, firms exempt in respect of accepting deposits, and firms

682 Section 19.
683 Section 31.
684 Section 31(1)(aa).
685 The Financial Services and Markets Act 2000 (Exemption) Order 2001 (SI 2001/1201).

exempt in respect of investment business and specific exemptions for particular activities. Most of the exemptions are for domestic or international governmental and public authorities and similar organisations. However, there are also specific exemptions for particular business enterprise schemes, charities, trade unions, social housing schemes and certain activities in respect of the gas and wholesale electricity industries.

9.2.8 There are also exemptions for appointed representatives and, subject to restrictions, for professionals who undertake regulated activities incidental to their non-regulated activity profession. These exemptions are considered in the paragraphs below. Article 72 of Regulated Activities Order provides an exclusion from the general prohibition for "overseas persons" in respect of regulated activities specified in that provision. This is discussed further in Chapter 8 'Regulated activities and investments'.

9.3 Consumer credit firms

9.3.1 Responsibility for consumer credit regulation passed from the OFT to the FCA with effect from 1 April 2014. A firm conducting a consumer credit activity for which it was licensed by the OFT prior to that date had until 31 March 2014 to register with the FCA for "interim permission" to continue to carry on that activity after the transfer of such regulation to the FCA, rather than have to apply for full authorisation from the date the FCA took over consumer credit regulation.

9.3.2 All firms with interim permission were required to make an application for full authorisation (or cease conducting consumer credit-related regulated activities) by 31 March 2016.

9.4 Appointed representatives

9.4.1 Appointed representatives who are appointed by an authorised principal under a contract that complies with the requirements of the Act and relevant regulations made under the Act are exempt from the general prohibition in relation to the activities for which they are appointed. The authorised principal must take responsibility for the regulated activities carried on by the appointed representative under the appointment agreement. A principal cannot appoint an appointed representative to undertake any regulated activity for which the principal does not itself hold a Part 4A permission. Authorised firms

cannot be appointed representatives, except in very limited circumstances.[686]

9.4.2 The relevant regulations provide that appointed representatives may benefit from an exemption in respect of the following activities (among others) effected on behalf of their principal: dealing as agent (in relation to contracts of insurance that are not long-term care contracts or certain long term insurance contracts), arranging deals in investments, arranging deals in or advising on regulated mortgage contracts, regulated home reversion plans or regulated home purchase plans, assisting in the administration and performance of insurance contracts, safeguarding and administering investments (where arranging for one or more other persons to safeguard and administer), providing basic advice on stakeholder products, and advising on investments. The regulations also set out requirements in respect of the terms that must be included in an appointment agreement between the principal and appointed representative.[687] Failure to include the prescribed terms in an appointment agreement will mean that the appointed representative's appointment is ineffective for the purposes of the Act and any regulated activity carried on by an appointed representative pursuant to such an ineffective appointment will be a breach of the general prohibition and will amount to criminal behaviour.

9.4.3 Where an appointed representative's principal is an investment firm, credit institution, or exempt investment firm and the activities for which the principal has taken responsibility constitute investment services business[688], or selling or advising on structured deposits, the appointed representative will only be an exempt person if he is entered on the official register of such firms. A similar requirement exists where the appointed representative's activities relate to certain mortgage intermediation activities and to certain insurance mediation services.[689]

9.4.4 If an appointed representative subsequently seeks a Part 4A permission from a relevant regulator for another regulated activity, its application is deemed to relate to all the regulated activities the appointed

686 Sections 39(1), 39(1C), 39(1E) and Regulation 5(2) of the Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001 (SI 2001/1217) (as amended) (**Appointed Representative Regulations**). At the time of writing the FCA is consulting (CP21/34) on improving the appointed representatives regime, while HM Treasury has published a call for evidence to gather information on how market participants use the regime, how effectively it works in practice and possible future reforms.

687 Article 3 of the Appointed Representative Regulations.

688 As defined at section 39(8) FSMA.

689 Section 39(1A) of the Act; and articles 3(4) and 3(5) of the Appointed Representative Regulations.

representative undertakes (including those regulated activities it undertakes as an appointed representative for a principal)[690].

9.5 Professionals

9.5.1 The Regulated Activities Order provides an exclusion in respect of dealing as agent, arranging activities, assisting in the administration and performance of insurance contracts, safe custody and advising on investments if the relevant activity:

(a) is carried on in the course of carrying on any profession or business which does not otherwise consist of regulated activities; and

(b) may reasonably be regarded as a necessary part of other services provided in the course of that profession or business.[691]

9.5.2 The activities in question must not be separately remunerated. The exclusion does not apply to: Investment Firms[692]; credit institutions; persons other than ancillary insurance intermediaries (that is, broadly, persons — other than a credit institution or an Investment Firm — who perform insurance distribution activity on a basis complementary to their principal professional activity) performing (re)insurance distribution for remuneration; or persons acting as a mortgage creditor or a mortgage intermediary, who are arranging regulated mortgage contracts, credit broking, advising on regulated mortgage contracts, advising on regulated credit agreements for the acquisition of land, entering into regulated credit agreements as lender or exercising the rights of a lender under a regulated credit agreement, or entering into and administering regulated mortgage contracts.[693]

9.5.3 Firms whose activities fall outside this exclusion are entitled to benefit from a separate professionals exemption, provided that certain strict conditions are met. These conditions include that:

(a) the regulated activities carried on by the professional must be incidental to the person's professional activities (for example, a solicitor can recommend, in the context of divorce work, that

690 Section 55G(2).
691 Article 67(1) of the Regulated Activities Order.
692 Defined in Article 3 of the Regulated Activities Order.
693 Articles 4(4), 4(4A), 4(4B), 67(2) and 67(3) of the Regulated Activities Order.

certain shares held by a spouse should be sold, but cannot hold himself out as giving discrete investment advice)[694];

(b) the person must be a member of a profession (or be controlled or managed by persons who are)[695];

(c) the regulated activity must not relate to sensitive activities or products[696].

9.5.4 The relevant "sensitive activities" include deposit-taking, issuing electronic money, insurance, dealing as principal, establishing a collective investment scheme, establishing a pension scheme, providing basic advice on stakeholder products, acting as a managing agent of Lloyd's, administering a benchmark, bidding in emissions auctions, acting as a trustee, depositary or manager of an alternative investment fund or a collective investment scheme, and entering as provider into funeral plan contracts. Dealing as agent and arranging deals in investments is non-exempt so far as the activity relates to a transaction for the sale or purchase of rights under an insurance contract and is not carried out by a registered insurance intermediary. Similarly, assisting in the administration and performance of insurance contracts is non-exempt if carried on by a firm that is not a registered insurance intermediary. Managing investments (so far as it consists of buying or subscribing for a security, contractually based investment, or structured deposit) is also non-exempt unless all day-to-day management decisions are taken by an authorised firm, or pursuant to advice given by an authorised firm. Giving advice on investments and regulated mortgage contracts, regulated home reversion plans, regulated home purchase plans and regulated sale and rent back agreements are also non-exempt in a number of circumstances. Further, advising a person to become a member of a particular Lloyd's syndicate is non-exempt save for where that endorses the advice of an appropriately authorised or exempt

694 Where the relevant activity is the provision of one of the investment services and activities specified in Part 3 of Schedule 2 to the Regulated Activities Order in relation to a financial instrument specified in Part 1 of Schedule 2 to the Regulated Activities Order, the professional activity concerned must be the provision of professional services (that is, services which do not constitute a regulated activity, and the provision of which is supervised and regulated by a designated professional body) — Section 327.

695 The Financial Services and Markets Act 2000 (Designated Professional Bodies) Order 2001 (SI 2001/1226) (as amended). This designates as professional bodies the Law Societies, the Institutes of Chartered Accountants, the Association of Chartered Certified Accountants, the Institute of Actuaries, the Council for Licensed Conveyancers and the Royal Institution of Chartered Surveyors.

696 Section 327; and the Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activity) Order 2001 (SI 2001/1227).

person. Typically, a firm wishing to give such advice will need authorisation from the FCA.[697]

9.5.5 The entry into and administration of regulated mortgage contracts, regulated home reversion plans, regulated home purchase plans, and regulated sale and rent back agreements are also generally non-exempt, except in certain circumstances.

9.5.6 The exemptions detailed in paragraphs 9.5.3 to 9.5.6 also do not apply to the carrying on of regulated claims management activity in Great Britain.[698]

9.6 Applications for permission

9.6.1 A firm must seek permission to carry on one or more regulated activities from its relevant regulator. This will be either the PRA or the FCA. Where the regulated activities of the firm consist of or include PRA-regulated activities, then the relevant regulator from which to seek permission will be the PRA (save for applications for permission to carry on the regulated activity specified in Article 63S of the Regulated Activities Order (administering a benchmark), for which the relevant regulator will always be the FCA[699]). This will be the case for deposit-takers, insurers, certain specified large investment firms, and in respect of firms performing certain Lloyd's related activities. This is the case even if only some of a firm's regulated activities are PRA-regulated activities. For more detail on what constitute PRA-regulated activities, see paragraphs 8.9.1 to 8.9.6. In all other cases, the relevant regulator from which to seek permission will be the FCA. The FCA supervises all firms in respect of conduct of business matters.

9.6.2 Parent financial and mixed holding companies of certain PRA-authorised firms will also be required to seek approval from the PRA (see paragraph 9.11).

9.6.3 Except in certain cases noted below, the two regulators are required to consult one another during the permission-granting process. Where the PRA is the relevant regulator, it must obtain the FCA's consent before granting a permission. The FCA can make the giving of its consent conditional on the manner in which the PRA exercises its power to impose certain limitations or restrictions on the permissions it grants to

697 Articles 4, 4A, 5A, 5, and 6 to 6H of SI 2001/1227.
698 Section 327.
699 Article 55A(2B).

an application. Where the FCA is the relevant regulator, it need only consult the PRA if the application is being made by a member of a group which contains a PRA-authorised firm, or where an application for permission to carry on the regulated activity specified in Article 63S of the Regulated Activities Order (administering a benchmark) has been made by a person who is a PRA-authorised person otherwise than by virtue of a Part 4A permission. In any case, the FCA is not required to obtain the PRA's consent before granting permission.[700]

9.6.4 The Act requires applications for permissions and variations to be made in such a manner and contain such information as required by the relevant regulator[701]. The PRA approach documents[702] have confirmed that, for dual-regulated firms, there will be a single administrative process.

9.6.5 All applications under Part 4A must be determined by the relevant regulator within six months from the date of receiving the completed application. In the case of an incomplete application, a regulator may determine the application if it decides it would be appropriate to do so, and must in any event determine such an application within 12 months from receipt. Any consent required from the other regulator also needs to be obtained within these time frames.[703] Rules regarding timing and procedure which apply to the determination of applications for approvals of holding companies subject to the regime set out in Part 12B of the Act are discussed below at paragraph 9.11.

9.6.6 Where a firm accidentally applies to the wrong regulator, the firm must reapply to the correct regulator. The Act requires the second regulator to process any such application with regard for the desirability of minimising additional work and time taken.[704]

Threshold conditions

9.6.7 In giving permission for a firm to carry on one or more regulated activities (or varying permission, or imposing or varying a requirement, or giving consent), the relevant regulator must ensure that the applicant will satisfy, and will continue to satisfy, in relation to all

700 Sections 55F(2), 55F(5), 55E(3) and 55E(3A).
701 Section 55U(4).
702 The PRA 'The Prudential Regulation Authority's approach to insurance supervision' (October 2018), Box 3; and the PRA 'The Prudential Regulation Authority's approach to banking supervision' (October 2018), Box 3.
703 Sections 55V(1) to 55V(3).
704 Sections 55G(5) and 55G(6).

proposed regulated activities, the "threshold conditions" set out in Schedule 6. This duty does not, however, apply to the regulated activity specified in Article 63S of the Regulated Activities Order (administering a benchmark).[705] A regulated firm must continue to meet the threshold conditions after it has received authorisation.

9.6.8 Each regulator applies a different set of threshold conditions, designed to reflect that regulator's area of responsibility. There are four main sets of threshold conditions, which will be applied by the relevant regulator as applicable. The sets of conditions are:

(a) conditions for firms authorised and regulated by the FCA only;

(b) FCA-specific conditions for firms authorised by the PRA and subject to dual-regulation;

(c) PRA-specific conditions for banks and investment firms; and

(d) PRA-specific conditions for insurance companies[706].

9.6.9 The threshold conditions are designed to provide a clear, relevant and unambiguous set of standards which regulated firms are required to meet and upon which the regulators will base their regulatory judgements. They are also intended to support the forward-looking approach of the PRA and the FCA and to reflect and support each of the regulators' statutory objectives, duties and functions.

9.6.10 The threshold conditions require that each firm must be capable of being supervised effectively by its regulator. The term "effective supervision" is not more specifically defined.

9.6.11 The threshold conditions also provide, among other things, that each regulated firm should be a fit and proper person having regard to all circumstances including whether its managers act with "probity" and the nature of that firm's compliance when complying with requests from, or obligations imposed by, its regulator.

9.6.12 Section 137O gives each of the regulators the power to make rules supplementing the threshold conditions, which rules will be referred to as "threshold condition codes". The threshold conditions must be read in conjunction with any threshold condition codes, so that the threshold

705 Section 55B(5).
706 The PRA-specific conditions for insurance companies also apply to Lloyd's and Lloyd's managing agents with modifications.

condition codes will have the same legal force as the provisions in Schedule 6[707].

9.6.13 Neither the PRA nor the FCA has yet issued a threshold condition code, on the basis that the threshold conditions in Schedule 6 are now far more detailed than before the passing of the FS Act 2012.

9.6.14 Some guidance about how the FCA will apply the FCA-specific threshold conditions, as well as the conditions themselves, can be found in the FCA 'Threshold Conditions sourcebook' (COND). The PRA sets out its supervisory approach in its banking and insurance approach documents.

9.7 Imposition of requirements

9.7.1 The relevant regulators may grant permissions on what is effectively a conditional basis. In particular, the terms of a Part 4A permission may require the authorised firm concerned to take specified action, or to refrain from doing so. Permissions may also include requirements relating to an authorised firm's non-regulated activities or its relationship with members of its corporate group.[708]

9.7.2 Each of the PRA and the FCA can use its own-initiative power to impose, vary or cancel requirements on a firm's Part 4A permission[709] where: (a) the authorised firm fails or is likely to fail to meet the threshold conditions; (b) the firm has not carried on any regulated activity to which its permission relates for at least 12 months; or (c) the relevant regulator considers it desirable to exercise its powers in order to advance its objectives. The PRA or the FCA may also impose requirements at the request of, or in order to assist, an overseas regulator. The regulators can also impose, vary or cancel a requirement on a Part 4A permission at the request of the authorised firm.[710]

9.7.3 Following the acquisition of "control" over a UK-authorised firm (that is, the acquisition of a 10 per cent. or greater stake in the shares or voting rights of, or significant influence over, a UK-authorised firm, or 10 per cent. or greater stake in the shares or voting rights in a parent undertaking of that firm) the FCA or, if the authorised firm is PRA-authorised, the PRA may impose or vary a requirement on that firm if the relevant regulator considers that the likely effect of the acquisition

707 Sections 55B(1) and 55B(2).
708 Sections 55N(1) to 55N(3).
709 Save that the PRA may not exercise powers to impose a requirement relating to the regulated activity of administering a benchmark – Section 55M(6A).
710 Sections 55L(2), 55L(3), 55M(2), 55M(3), 55Q(1), 55L(5) and 55M(5).

would be "uncertain"[711]. Each regulator is required to consult the other and where necessary obtain its consent before imposing or varying such a requirement. The effect of this power is to enable the relevant regulator to take action following a change of control even in circumstances where the own-initiative powers are not applicable (for example, even where this change has no effect on the ability of the firm to satisfy the threshold conditions).[712]

9.7.4 One form of requirement that a relevant regulator may impose is an "assets requirement". This can prohibit or restrict the authorised firm's disposal of assets, or require the transfer (to a trustee appointed by the regulator) of the firm's assets, or assets belonging to consumers but held by the authorised firm. Any such trustee who deals with the assets without the consent of the relevant regulator commits an offence. The Act provides that the effect of such a requirement is that the authorised firm's bank will not be in breach of contract if it refuses to transfer sums from the authorised firm's accounts, where it reasonably believes that this would be incompatible with the requirement. Any charge that an authorised firm attempts to create over its assets subject to an assets requirement will be void against the firm's creditors or a liquidator.[713]

9.8 Variation and cancellation of permission

Variation or cancellation at a firm's request

9.8.1 An authorised firm can apply to its relevant regulator for a variation of its Part 4A permissions, if it wishes to add to, reduce or change the regulated activities it undertakes, and may apply to its relevant regulator if it wishes to cancel its permission. Variation can involve the relevant regulator adding or removing regulated activities to which the permissions relate or varying the description of those regulated activities.[714]

9.8.2 Where the authorised firm is PRA-authorised, it must apply to the PRA to vary its permissions to undertake additional regulated activities, even if those additional activities are not of themselves PRA-regulated activities (save for the addition, removal, or variation of the description of the regulated activity of administering a benchmark — which

711 Save that the PRA may not exercise powers to impose a requirement relating to the regulated activity of administering a benchmark — Section 55M(6A).
712 Sections 55O(2), 55O(4) and 181.
713 Sections 55P(4), 55P(7), 55P(10), 55P(6) and 55P(8).
714 Sections 55H(2) and 55I(1).

variations may be made by the FCA, after consulting the PRA, on the application of a PRA-authorised person). Where a firm authorised only by the FCA seeks to vary its permissions in a way that will add a PRA-regulated activity to its permissions, it must seek that permission from the PRA. The PRA must consult and obtain the consent of the FCA before varying a Part 4A permission. The PRA and the FCA can refuse to vary a Part 4A permission — and the FCA can withhold its consent to a variation — if either regulator considers this desirable in pursuit of its statutory objectives. The PRA need only consult the FCA ahead of cancelling a Part 4A permission of a PRA-authorised firm, either at the request of the firm (save for where the only regulated activity to which the permission related is administering a benchmark) or where, following a variation, a PRA-authorised firm no longer has any permissions to carry on any regulated activities.[715]

9.8.3 If the FCA is the relevant regulator, it has no obligation to consult the PRA unless the authorised firm is a member of a group which contains a PRA-authorised firm[716]. The PRA's prior consent is not required for the FCA to vary or cancel a firm's permissions.

Variation or cancellation on the initiative of the regulator

9.8.4 Either regulator may also vary an authorised firm's permissions under its own-initiative power where: (a) the authorised firm fails or is likely to fail to meet the threshold conditions; (b) the authorised firm has not carried on any regulated activity to which the permission relates for at least 12 months (or, in respect of investment firms[717], six months); or (c) the relevant regulator considers it desirable to exercise its powers in order to advance its objectives. The regulators may also exercise their power in respect of an investment firm that: obtained its Part 4A permission by false statements or other irregular means; no longer meets the requirements for authorisation in relation to a regulated activity which is an investment service or activity for which it has a Part 4A permission; has infringed the operating conditions set down in any retained direct EU legislation or provisions of the Act in relation to a regulated activity which is an investment service or activity for which it has a Part 4A permission; has not conducted a regulated investment service or activity for which it has a Part 4A permission in the previous

715 Sections 55I(1) to 55I(6), and 55H(4).
716 Section 55H(5).
717 Defined for these purposes in Section 424A, broadly: a person whose regular occupation or business is the performance of one or more investment services to third parties or the performance of one or more investment activities on a professional basis. These investment services and activities are listed in Part 3 of Schedule 2 to the Regulated Activities Order.

six months; or has seriously or systematically infringed the retained markets in financial instruments regulation[718]. The FCA and the PRA may also vary or cancel a Part 4A permission at the request of, or in order to assist, an overseas regulator.[719] Further, the FCA has powers to remove or cancel a firm's Part 4A permission to administer a benchmark in certain circumstances[720]. The regulators hold powers to cancel the Part 4A permission of firms that are: full scope UK AIFMs; mortgage intermediaries; authorised UCITS managers; or insurance undertakings, on the initiative of the relevant regulator, in certain circumstances.[721]

9.8.5 Where a relevant regulator proposes to cancel or vary a firm's permissions under its own initiative, it must provide the firm with a written notice containing certain information specified in the Act. Similar notices must be produced when a regulator proposes and — where relevant — decides to cancel a firm's permission.[722]

9.8.6 As well as the own-initiative power described in paragraph 9.8.4, the FCA has additional powers to vary or cancel an FCA-authorised firm's Part 4A permission where it appears to the FCA that the firm is carrying on no regulated activity to which the permission relates[723]. Where the FCA proposes to use its additional powers to vary or cancel a firm's part 4A permissions, it must give a written notice to the firm specifying that it appears to the FCA that the firm is carrying on no regulated activity to which the relevant permission relates[724] and may then subsequently vary or cancel the relevant permission through the service of 14 days' notice[725]. This additional variation and cancellation power is described further in Chapter 2 'The Financial Services Act 2021'.

9.8.7 The FCA may cancel any Part 4A permission or remove any regulated activity from a Part 4A permission, but it may only add a regulated activity or vary the description of an activity if the activity in question is not a PRA-regulated activity. Only the PRA can add or vary PRA-regulated activities to a Part 4A permission. The regulators are required

718 Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012, as it forms part of domestic law by virtue of section 3 of the EU (Withdrawal) Act 2018, and as it is modified from time to time.
719 Sections 55J(1), 55J(2), 55J(4), 55J(6), 55K and 55Q(1).
720 Section 55J(7ZC), namely where it appears to the FCA that the firm has expressly renounced the authorisation, obtained the authorisation or endorsed a benchmark by making false statements or by any other irregular means, no longer meets the conditions under which it was authorised, or has seriously or repeatedly infringed the provisions of the UK BMR.
721 Section 55J.
722 Sections 55Y(4) to 55Y(8), and 55Z.
723 Section 55JA and Schedule 6A.
724 Schedule 6A, paragraphs (1) and (2).
725 Schedule 6A, paragraph 2(1) to 2(5).

to consult before effecting a variation, and each must obtain the other's consent before adding or widening the description of an activity in a Part 4A permission (although the FCA only needs to obtain the PRA's consent for the addition, or widening of the description, of activities of a PRA-authorised firm — and does not require the PRA's consent when exercising its powers in relation to the regulated activity of administering a benchmark).[726]

9.8.8 An applicant who is aggrieved by the determination of an application for permission can refer the matter to the Tribunal, as can an authorised firm aggrieved by the exercise by either regulator of an own-initiative variation or requirement power[727]. In the case of an application for permission to permission to carry out the specified activity of benchmark administration, the applicant must first request a review of the decision, and may then refer the determination made on that review to the Tribunal.[728]

9.9 Consequences of carrying on regulated activities without the appropriate permission or authorisation

If a firm is authorised, but does not have the appropriate permission

9.9.1 If an authorised person carries on a regulated activity which is not covered by its permission, this is deemed to be a breach of a requirement imposed by the relevant regulator[729] and can give rise to disciplinary proceedings by the FCA (or, in the case of a PRA-authorised firm, the FCA and the PRA). Sanctions may include a fine, public censure and possibly even a loss of authorisation. However, the general position is that this conduct is not a criminal offence and contracts entered into with customers are not rendered unenforceable as a result. The exception to this is where an authorised firm carries on a specified consumer credit-related regulated activity outside its relevant permission[730]. That conduct constitutes a criminal offence and contracts entered into with customers are unenforceable. The customer is entitled to recover any money paid or property transferred by him

726 Sections 55J(2) to 55J(5).
727 Sections 55Z3(1) and 55Z3(2).
728 Sections 55XA and 55Z3(3).
729 Section 20.
730 The activities are specified in SI 2014/334 and essentially include only lending and debt collection activities.

under the contract, as well as compensation for loss suffered as a result of that payment or property transfer.[731]

9.9.2 The FS Act 2012 brought in a new regime to allow such contracts, entered into on or after 1 April 2014, to be "validated". The firm needs to meet certain criteria and the FCA needs to consider it "just and equitable" to issue a written notice[732] [733]. That notice can provide for the contract to be enforceable or for any money paid or property transferred under the contract to be retained.[734]

9.9.3 In addition, section 20 of the Act gives the Treasury the power to prescribe by order circumstances where, if an authorised firm breaches the terms of its permission, persons who suffer loss as a result may claim compensation. The relevant order[735] states that a contravention of a requirement, other than a requirement imposed by the PRA or the FCA to maintain adequate resources, is actionable by a private person (or a person acting in a fiduciary or representative capacity on behalf of a private person) who suffers loss as a result of that contravention[736]. A "private person" is defined as any individual unless he suffers the loss in question in the course of carrying on any regulated activity, or any activity which would be a regulated activity if he were not an overseas person. A "private person" also includes, among other persons, any person who is not an individual (for example, a charity, company or partnership) unless he suffers the loss in question in the course of carrying on business of any kind.[737]

9.9.4 In addition to penalties imposed under the Act, an injunction or a restitution order under Part 25 of the Act may be made. These orders are described in more detail in Chapter 26 'Miscellaneous'.

If a firm is not authorised (or exempt in relation to the activity concerned)

9.9.5 If a firm carries on regulated activities in the UK by way of business without being authorised or exempt, that firm commits a criminal offence and is liable to an unlimited fine. If the offence is shown to

731 Sections 20(1), 20(1A), 20(2), 23(1A) and 26A.
732 The term "written notice" is used in the Act, section 28A. The FCA has adopted the term "validation order" due to industry familiarity with the term.
733 The same test applies in relation to credit and hire agreements and ancillary service contracts made unenforceable by the Act and which were entered into before 1 April 2014 (that is, before the FCA took over responsibility for consumer credit regulation).
734 Section 28A.
735 SI 2001/2256.
736 Regulation 4 of SI 2001/2256.
737 Regulation 3 of SI 2001/2256.

have been committed with the consent or connivance of an officer of the firm, or to be attributable to any neglect on the part of an officer, the officer will be liable to imprisonment for up to two years and an unlimited fine. However, it is a defence if the firm can show that it took all reasonable precautions and exercised all due diligence to avoid committing the offence.[738] This is clearly a high standard. In practice, seeking timely FCA guidance and legal advice is relevant to the availability of this defence.

9.9.6 In addition, any agreement made by a firm in the course of carrying on a regulated activity (other than accepting deposits) in contravention of the general prohibition is unenforceable against the other party to the agreement. In a commercial context, this may be a greater concern in some cases than the threat of prosecution. Similar rules of unenforceability apply to most agreements made by authorised firms in consequence of something said or done by a firm acting in contravention of the general prohibition (for example, insurance contracts entered into as a consequence of the acts of an unauthorised insurance intermediary).[739]

9.9.7 In addition to unenforceability, the other party is entitled to recover any money or other property paid or transferred under the agreement, together with compensation for losses sustained by them as a result of having parted with it. However, the unauthorised firm may apply to the court for an order allowing the agreement to be enforced if it is "just and equitable in the circumstances of the case". The court is required to have regard to whether the firm reasonably believed that it was not contravening the general prohibition. An unauthorised firm may also apply to the FCA for an order allowing a credit-related agreement to be enforced if it is "just and equitable in the circumstances of the case". The FCA must consider the same things a court would have to consider in relation to agreements that are not credit-related agreements.[740]

9.9.8 The Act makes special provision in relation to deposits taken without authorisation. If the deposit is not repayable on demand, the depositor may apply to the court for an order directing the unauthorised firm to return the deposit, which the court will make if it considers it to be

738 Sections 23(1), 23(3) and 400. "Officer" has a wide definition and includes, in relation to a firm that is a body corporate, a director, member of the committee of management, chief executive, manager, secretary or other similar officer of the body, or a person purporting to act in any such capacity, and any individual who is a controller of the body. The definition also extends to partners of firms that are partnerships, and officers/members of firms that are unincorporated associations.

739 Sections 26(1), 26(4) and 27(1).

740 Sections 26(2), 27(2), 28(3) to 28(5), and 28A(3) to (6).

just and equitable. However, there is no automatic right to repayment on demand.[741]

9.9.9 More generally, it is an offence for an unauthorised firm to describe itself or hold itself out as being an authorised firm[742]. Similar provisions apply to firms describing or holding themselves out as being exempt in relation to activities for which they have no exemption. It is also an offence for a firm to behave in a manner which indicates or is understood as indicating that it is authorised or exempt.

9.9.10 In addition to penalties imposed under the Act, an injunction or a restitution order under Part 25 of the Act may be made. These orders are described in more detail in Chapter 26 'Miscellaneous'.

9.10 Benchmarks

9.10.1 As set out in Chapter 8 'Regulated activities and investments', the administration of a benchmark is a specified activity, and administering a benchmark is a regulated activity for the purposes of the Act when carried on by way of business[743].

9.10.2 The retained version of the EU Benchmarks Regulation[744] has applied in the UK since the end of the Brexit transition period (referred to as IP Completion Day) (the **UK BMR**).

9.10.3 Among other things, the UK BMR imposes requirements on administrators of benchmarks that are within the scope of that regulation, contributors to those benchmarks, and regulated firms that use benchmarks provided in the UK, including requirements for firms intending to act as benchmark administrators to apply to the FCA for authorisation or registration.[745] The regime makes provision for the use of benchmarks provided by administrators located in third countries.

9.10.4 Further consideration of the application and requirements of the benchmarks regime is beyond the scope of this Guide.

741 Section 29.
742 Section 24.
743 Section 22(1A)C, and Article 63S of the Regulated Activities Order.
744 Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014 (Text with EEA relevance) (Retained EU Legislation).
745 Article 34 UK BMR. The criteria for determining whether authorisation or registration is appropriate are set out in Articles 34 to 36 of UK BMR.

9.11 Holding companies of banks and designated investment firms

9.11.1 Certain holding companies of PRA-regulated bank and designated investment firm subsidiaries established in the UK must apply to the PRA for approval or exemption from the requirement for approval, under Part 12B of the Act.[746]

9.11.2 The approval requirements apply to: (i) 'parent financial holding companies'; (ii) 'parent mixed financial holding companies'; and (iii) financial holding companies and mixed financial holding companies which are required to comply with the requirements of CRD IV on a sub-consolidated basis, unless they are exempt from the requirement for approval.[747]

Parent Financial Holding Company

9.11.3 For these purposes, a 'parent financial holding company' is a financial holding company[748] (that is, a financial institution[749] the subsidiaries of which are exclusively or mainly financial institutions or institutions[750], which is not itself a mixed financial holding company[751]) which is not the subsidiary of a bank or investment firm authorised in the UK, or of a financial holding company or mixed financial holding company set up in the UK.[752]

746 Section 192P(1).
747 Section 192(P); 'parent financial holding company' is defined at section 192O(2), by reference to Article 4(1)(30) of the Capital Requirements Regulation (Regulation (EU) No. 575/2013) as it forms part of UK domestic law pursuant to the European Union (Withdrawal) Act 2018 (**UK CRR**).
748 Defined in Section 192O(1) by reference to Article 4(1)(20) of UK CRR.
749 Defined by reference to Article 4(1)(26) of UK CRR, as: an undertaking other than a bank or investment firm, the principal activity of which is to acquire holdings or to pursue one or more of the financial services activities listed in points 2 to 12 and point 15 of Annex I to Directive 2013/36/EU, including a financial holding company, a mixed financial holding company, a payment institution within the meaning of Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market, and an asset management company, but excluding insurance holding companies and mixed-activity insurance holding companies as defined in point (g) of Article 212(1) of Directive 2009/138/EC.
750 Broadly, banks or investment firms (other than banks, local firms, and firms that are authorised only to perform only one or more of a limited set of investment services (that is, reception and transmission of orders, execution of orders on behalf of clients, portfolio management, and investment advice), and which are not authorised to provide safekeeping and administration of financial instruments for the account of clients)(Article 4(1)(2) UK CRR).
751 As defined below.
752 The subsidiaries of a financial institution are mainly institutions or financial institutions where at least one of them is an institution and where more than 50% of the financial institution's equity, consolidated assets, revenues, personnel or other indicator considered relevant by the competent authority are associated with subsidiaries that are institutions or financial institutions (Article 4(20) UK CRR).

Parent Mixed Financial Holding Company

9.11.4 For these purposes, a 'parent mixed financial holding company'[753] is a mixed financial holding company[754] (that is, an undertaking, other than a regulated entity, which together with its subsidiaries, at least one of which is a regulated entity[755] which has its head office in the UK, and other entities, constitutes a financial conglomerate[756]) which is not itself the subsidiary of a bank or investment firm authorised in the UK, or of a financial holding company or mixed financial holding company set up in the UK.[757]

Exemption

9.11.5 A company is exempt from the requirement for approval under section 192P(1) if it is a parent financial holding company whose principal activity is to acquire holdings in subsidiary undertakings, or a parent mixed financial holding company whose principal activity with respect to institutions and financial sector institutions is to acquire holdings, and: (i) the Bank of England has not identified it as a resolution entity in a group resolution plan; (ii) a credit institution or a designated investment firm in its group has been designated by the PRA as responsible to ensure the group's compliance with prudential requirements on a consolidated or sub-consolidated basis, and has the power to discharge those obligations effectively; (iii) it does not take any management, operational or financial decisions affecting the group or any of its subsidiaries which are institutions or financial institutions; and (iv) the PRA is satisfied that this arrangement does not impede effective supervision of the group.[758]

753 Section 192O(2), defined by reference to Article 4(1)(32) of UK CRR.
754 Defined in Section 192O(1) by reference to Article 4(1)(21) of UK CRR, which itself refers to Regulation 1(2) of the Financial Conglomerates and Other Financial Groups Regulations 2004/1862 (SI 1862/2004) (as amended).
755 Defined in Article 1(2) of the Financial Conglomerates and Other Financial Groups Regulations 2004/1862 (SI 1862/2004) (as amended) (broadly, a bank, insurance or reinsurance undertaking, UCITS management company, investment firm, or an alternative investment fund manager).
756 Broadly, groups, or sub-groups, that operate in the insurance sector as well as in the banking and/or investment services sector that meet certain thresholds set out in the Financial Conglomerates and Other Financial Groups Regulations 2004/1862 (SI 1862/2004) (as amended) in relation to the significance of the group's activities in the insurance and banking and investment sectors, and (in certain circumstances) the ratio of the group's activities in the financial and non-financial sector.
757 Section 192O(1); Article 4(1)(21) of UK CRR; Regulation 1(2) of the Financial Conglomerates and Other Financial Groups Regulations 2004/1862 (SI 1862/2004) (as amended).
758 Section 192P(2) and section 192P(3).

Applying for approval

9.11.6 An application for the PRA's approval as a parent financial holding company or a parent mixed financial holding company established in the UK must be made by the applicant undertaking and must contain the information specified in section 192Q(3) of the Act (which relates to the structural organisation and distribution of tasks within the group and information about directors of the undertaking). The PRA may only approve the applicant where the conditions set out in section 192R of the Act are satisfied. Where the PRA proposes to refuse approval, or to reject an application, it must give the applicant a warning notice within four months from the date on which it received the application.[759] Where the PRA decides to refuse approval, or to reject an application for an exemption, it must give the applicant a decision notice within six months of the date on which it received which the application.[760]

9.11.7 The failure of a parent financial holding company or mixed financial holding company to receive confirmation of exemption from the approval requirement under Part 12B from the PRA, or approval from the PRA under Part 12B, will result in its contravention of a requirement imposed by Part 12B. The PRA may impose a penalty of such amount as it considers appropriate on the company in respect of this contravention, or on any person knowingly concerned in the contravention,[761] and it may publish a public statement censuring the company or any such person.[762]

Consequences of approval

9.11.8 The new Part 12B holding company regime applies new requirements for holding companies of bank and PRA-designated investment firms that are subject to the regime to be held directly responsible for consolidated prudential requirements, without subjecting them to additional prudential requirements on an individual basis. The PRA has the power to supervise, makes rules in respect of, monitor, exercise discretions, impose additional requirements (such as fees) and enforce breaches of obligations in respect of holding companies that are subject to the Part 12B holding company regime. Further consideration of the

759 Section 192R(7).
760 Section 192R(8).
761 Section 192K(2).
762 Section 192Y.

application of the Part 12B holding company regime is beyond the scope of this chapter.

Transitional provisions

9.11.9 A parent financial holding company or parent mixed financial holding company that was established in the UK as of 29 December 2020 and that requires approval or confirmation of an exemption from the PRA under section 192P is treated as having the requisite approval under transitional provisions, provided that it submitted an application for approval or exemption on or before 28 June 2021. This transitional approval lapses on the earlier of the date on which its application under section 192Q is finally determined, or 31 December 2021.[763]

9.11.10 Further, pending the final determination of the application for approval, the PRA has the power to designate one or more financial holding companies, mixed financial holding companies, or institutions within the group of which the holding company or institution forms part as being responsible for ensuring that the group complies with the requirements laid down in Directive 2013/36/EU (as implemented into UK law).[764]

9.12 Holding companies of FCA-regulated investment firms

9.12.1 The UK intends to introduce a revised prudential regime for FCA-authorised investment firms (the **Investment Firms Prudential Regime**) on 1 January 2022, which will be in large part based on the EU Investment Firms Regulation[765] and Investment Firms Directive (2019/2034). The FS Act 2021 inserted a new Part 9C of the Act, which defines investment firm for the purposes of the Investment Firms Prudential Regime and sets out the legislative framework governing the FCA's role in making rules concerning the regime. The Investment Firms Prudential Regime will revise the prudential categorisation of, and requirements for, FCA-authorised investment firms and will apply requirements to investment firm groups (containing at least one FCA-authorised investment firm) on a consolidated basis. Detailed

763 Regulation 5(3) of The Financial Holding Companies (Approval etc.) and Capital Requirements (Capital Buffers and Macro-prudential Measures) (Amendment) (EU Exit) Regulations 2020 (SI 2020/1406).
764 Regulation 5(5) of The Financial Holding Companies (Approval etc.) and Capital Requirements (Capital Buffers and Macro-prudential Measures) (Amendment) (EU Exit) Regulations 2020 (SI 2020/1406).
765 Directive (EU) 2019/2034 on the Prudential Supervision of Investment Firms.

consideration of the Investment Firms Prudential Regime is beyond the scope of this chapter[766].

9.13 Gibraltar Access Regime

9.13.1 The Gibraltar Access Regime will, when it comes into effect, provide for Gibraltarian financial services firms to access the UK market as authorised persons under the Act, through the provision of services or through performing activities through a branch in the UK.[767] The PRA and the FCA (as applicable) will have powers to impose requirements, or to vary or cancel a permission under the Gibraltar Access Regime, in certain circumstances. The date for the regime's coming into effect has yet to be appointed.

9.14 Temporary Permissions Regime

9.14.1 The TPR enables certain EEA firms and funds to continue to operate in or be marketed into the UK on a temporary basis, following the cessation of passporting rights for EEA firms at the end of the Transition Period, during which time firms may apply for full authorisation (or recognition in the case of funds) from the Bank of England, PRA and/or FCA (as applicable)[768].

9.14.2 The TPR can be used by:

(a) firms that had a passport into the UK under Schedule 3 to the Act immediately prior to the end of the Transition Period;

(b) firms that qualified for authorisation under Schedule 4 to the Act immediately prior to the end of the Transition Period; and

(c) payment institutions, registered account information service providers and electronic money institutions that were exercising their passporting rights under the second EU Payment Services

766 The FCA has published final rules forming part of the Investment Firms Prudential Regime: (i) the Investment Firms Prudential Regime Instrument 2021 (FCA 2021/38); and (ii) the Investment Firms Prudential Regime (Consequential Amendments to other Prudential Sourcebooks) Instrument 2021 (FCA 2021/39). A further policy statement is expected before the end of 2021.

767 Section 31(1)(aa). HM Treasury will specify UK regulated activities for which market access is granted and the corresponding activities that a Gibraltarian firm wishing to carry on those activities in the UK must be authorised to carry on in Gibraltar by the Gibraltar Financial Services Commission (paragraphs 5 and 6 of Schedule 2A).

768 The TPR is set out in four Statutory Instruments: (i) the EEA Passport Rights (Amendment, etc., and Transitional Provisions) (EU Exit) Regulations (as amended) (2018/1149); (ii) The Electronic Money, Payment Services and Payment Systems (Amendment and Transitional Provisions) (EU Exit) Regulations 2018 (2019/1201); (iii) The Collective Investment Schemes (Amendment etc.) (EU Exit) Regulations 2019 (as amended) (2019/325); and (iv) The Alternative Investment Fund Managers (Amendment etc.) (EU Exit) Regulations 2019 (2019/328).

Directive[769] or the EU Electronic Money Directive[770] (as applicable) immediately prior to the end of the Transition Period; and

(d) EEA domiciled UCITS schemes and notified sub-funds, and UK and EEA-domiciled alternative investment funds (AIFs) managed by EEA-authorised managers.[771]

9.14.3 Credit rating agencies, trade repositories, and data reporting services providers do not fall within the TPR. There are conversion and temporary registration regimes for credit rating agencies and trade repositories, and a temporary authorisation regime for data reporting services providers, however further consideration of those regimes is beyond the scope of this chapter.

9.14.4 In order to rely on the TPR, firms must have: (i) notified the PRA or the FCA that they wanted to join the TPR prior to the end of the Transition Period; or (ii) submitted (and not withdrawn) an application for permission, or the variation of a permission, under Part 4A of the Act, before the end of the Transition Period[772].

9.14.5 Firms which, immediately prior to the end of the Transition Period, passported into the UK pursuant to Schedule 3 or 4 to the Act (and which comply with the requirements set out in paragraph 9.14.4) are treated as having a Part 4A permission to carry out the regulated activity that they were permitted to carry out immediately prior to the end of the Transition Period[773].

9.14.6 Unless a firm's temporary permission under the TPR is cancelled or varied by the relevant regulator, or the firm receives a Part 4A permission, the TPR will be available for three years from the end of the Transition Period.[774] Firms must seek appropriate authorisation by the PRA or the FCA (as applicable) in order to continue to perform regulated activities in the UK beyond the end of this period.

769 Directive (EU) 2015/2366.
770 Directive 2009/110/EC.
771 The application of the TPR to payment institutions, registered account information service providers, electronic money institutions, EEA domiciled UCITS schemes and notified sub-funds and UK and EEA-domiciled alternative investment funds managed by EEA-authorised managers is outside the remit of this guide and is therefore not considered further in this chapter.
772 Regulation 14(1)(a) and (b) of Regulation 2018/1449 (as amended).
773 Regulation 8(1) of Regulation 2018/1449 (as amended).
774 Regulation 17(1)(a) of Regulation 2018/1149 (as amended).

9.14.7 The three year period is extendable by the Treasury in 12-month increments "if the Treasury considers it necessary" subject to the submission to the Treasury by the FCA and PRA of a joint assessment as to the effect of extending the TPR.[775]

[775] Regulation 27(1)(b) of Regulation 2018/1149 (as amended).

10. THE OVERSEAS FRAMEWORK

10.1 The end of passporting

10.1.1 Prior to the UK's exit from the EU, the passporting process allowed firms relying on a right provided by an EU Single Market Directive to carry on regulated activities in another EEA member state. The activities could either be in the form of operating a branch in the host member state or providing cross-border services without a physically established presence. If a firm was authorised under a Single Market Directive — broadly speaking — they will have had the right to passport into any other EEA member state. The financial services passport depended upon a legal framework, provided for in the Act, which allocated regulatory responsibilities and imposed duties of cooperation between the authorities of the EEA home state and the authorities of the UK.

10.1.2 When the Brexit transition period ended on 31 December 2020, the UK left the EU single market. Passporting between the UK and EEA states ended and the temporary permissions regime (the **TPR**) came into effect for those firms and funds that notified the regulators that they wanted to enter this regime.

10.1.3 The UK's participation in the passporting system and EU Treaty-derived inward access was implemented via section 31(1)(b) and (c), Schedule 3, and Schedule 4 of the Act. At the point of exit, references in UK legislation giving effect to the EEA passporting regime became deficient and were repealed by the EEA Passport Rights (Amendment, etc., and Transitional Provisions) (EU Exit) Regulations 2018, SI 2018/1149 (the **EEA Passport Rights Regulations**) as well as certain other statutory instruments made under the EUWA. This is discussed further in Chapter 1 'Brexit, Onshoring and the Future Regulatory Framework'.

10.1.4 Following the UK's decision to leave the EU, the UK and EU entered into a EU-UK Trade and Co-operation Agreement (the **TCA**) which came into effect on 1 January 2021. This has not replicated passporting rights. The UK now faces a patchwork of national regimes for market access into the EU, coupled with a very limited set of equivalence determinations under the EU's existing third country regimes for financial services.

10.2 The UK's framework for third country firms

10.2.1 In December 2017, the Treasury announced that it would introduce the TPR for inbound passporting EEA firms. EEA firms who notified the FCA

that they wished to enter the TPR can continue to issue new business in the UK. Once in the TPR these firms are treated as having a UK Part 4A permission. This means that they fall within the full scope of the regulators' supervision and rule-making powers. There are also certain carve-outs that allow third country firms to do business without, for example, the need to become authorised in the UK. One of these is the Overseas Persons Exclusion (the **OPE**) which, as noted further in Chapter 8 'Regulated Activities and Investments', offers a solution for overseas firms looking to carry on certain cross-border operations without the need to obtain UK regulatory permission. Another significant carve-out is the investment services equivalence regime under the UK's version of the Markets in Financial Instruments Regulation (**UK MiFIR**), and the regime for recognized overseas investment exchanges.

10.2.2 At the end of 2020, the Treasury launched a Call for Evidence to gather information on how the UK's current overseas framework supports the UK's position as a global financial centre, which ran until 11 March 2021[776]. A background chapter noted:

"*Leaving the EU provides an important opportunity to look at our overseas framework, and the regimes within it, to ensure that they continue to work effectively and support UK consumers, firms and markets. Our full framework for overseas access to UK markets includes many elements that cover mechanisms agreed as a part of the UK's membership of the EU and those developed and implemented domestically. Having developed over time, the regimes within the framework allow firms to access UK markets in different ways depending on the sector, type of activity, type of consumers, and the nature of the approach to the customer. In certain cases, access relies on arrangements determined both on a jurisdictional and firm basis — for example, as permitted through equivalence and recognition regimes. Others, such as the overseas persons exclusion provide for access by overseas firms without requiring any form of authorisation, recognition or registration. The overseas branching policies operated by the regulators — the Financial Conduct Authority (FCA) and Prudential Regulation Authority (PRA) — are other aspects of the framework.*"

10.2.3 The Call for Evidence forms part of the UK's broader ongoing review of the future UK financial services framework, which considers what the

[776] https://www.gov.uk/government/publications/call-for-evidence-on-the-overseas-framework.

UK's regulatory framework for financial services should look like in a post-Brexit environment. Whilst third country regimes based on equivalence may continue to form an important part of the UK regulatory framework, the Treasury expects this to be just one of a range of tools that it can use to support the openness of the UK's international financial markets and facilitate cross-border financial services and activities.

10.2.4 A response to the Call for Evidence was published in July 2021. In light of the submissions received the Treasury, working closely with the FCA, the Bank and the PRA, has begun a review of the overseas regulatory perimeter. The Government is expected to consult on potential changes to the UK's regime for overseas firms and activities in the fourth quarter of 2021. In particular, it will look to consult on proposed changes to the overseas regulatory perimeter and the OPE, including the option to remove the overlap between the OPE and equivalence provisions under MiFIR. The consultation is also expected to cover the more general question of whether the current operation of the regime appropriately balances openness whilst mitigating risks to the resilience and safety of financial markets, the protection of consumers and market integrity, and the promotion of competition.

10.2.5 This has the potential to give rise to a number of changes to the Act, at least in relation to provisions relating to the circumstances in which overseas firms may access the UK market for financial services.

11. SENIOR MANAGERS AND CERTIFICATION REGIME

11.1 Overview

11.1.1 The primary obligation to comply with the Act and with the rules of the PRA and the FCA lies with authorised firms. The UK regulatory framework recognises, however, that the suitability and competence of the individuals who perform key functions within a firm are key to achieving compliance by that firm. For this reason, the Act provides for a Senior Managers and Certification Regime (the **SMCR**) which aims to reduce harm to consumers and strengthen market integrity by creating a system that enables both firms and regulators to hold people to account.

11.1.2 The SMCR has now replaced the previous regime for regulating individuals within the financial services industry, the approved persons regime (the **APR**). This is with the notable exception of appointed representatives, to whom the APR still applies.

11.1.3 The SMCR seeks to encourage staff to take personal responsibility for their actions, improve conduct at all levels, and make sure that firms and staff clearly understand and can show who does what. This is achieved via a three part regime, which applies on a legal entity basis:

(a) the Senior Managers Regime, which focuses on individuals who hold key roles or have overall responsibilities for whole areas of firms;

(b) the Certification Regime, which applies to other staff who could pose a risk of significant harm to the firm or any of its customers; and

(c) the Conduct Rules, which are high level requirements that hold individuals to account.

11.1.4 The driver for the introduction of the SMCR was a report by the Parliamentary Commission on Banking Standards in July 2013[777], which found that the existing APR for banks had not been sufficient to hold to account the senior managers of failed banks and which recommended a series of measures to restore trust and improve culture in banks. A new framework was proposed to require senior individuals to take greater

[777] http://www.publications.parliament.uk/pa/jt201314/jtselect/jtpcbs/27/27.pdf.

responsibility for their actions, and to make it easier for both firms and regulators to hold those individuals to account.

11.1.5 Following that report the SMCR has, in an incremental fashion, come to replace the APR for PRA and FCA regulated firms. It has also eclipsed the short-lived Senior Insurance Managers Regime, which came into force on 7 March 2016. What was once a landscape crowded with a patchwork of regimes has, therefore, been simplified; in the vast majority of cases, it is the SMCR that will apply.

11.1.6 Pursuant to this piecemeal change, the SMCR has applied to:

- UK banks, building societies, credit unions, branches of third-country banks operating in the UK and the largest investment firms since 7 March 2016;
- dual-regulated insurers, and branches of third-country insurers, since 10 December 2018;
- FCA solo-regulated firms, including asset managers, insurance intermediaries, mortgage lenders and brokers, claims management companies and consumer credit firms, as well as branches of third-country firms with permission to carry out regulated activities in the UK, since 9 December 2019; and
- benchmark administrators which are authorised in the UK and that do not undertake any other regulated activities since 7 December 2020, following their categorisation as authorised persons under the European Benchmarks Regulation 2016/1011 (the BMR)[778].

11.1.7 Firms that are not authorised under FSMA, such as payment services firms, are not covered by the SMCR. This may, however, be subject to change, as highlighted in the 'Future reform' section at paragraph 11.4. As highlighted at paragraph 11.1.2, the regime that the SMCR has replaced — the APR — still applies to appointed representatives.

11.1.8 This chapter provides an overview of the SMCR, and a brief summary of the APR for those (rare) instances where it remains the appropriate regime. It is important to note, however, that much of the detail of the

[778] This is with the exception of the Certification Regime, as provisions in the BMR which outline governance and conflict of interest requirements should ensure a similar outcome. See FCA Policy Statement: Extending the Senior Managers Regime to benchmarks administrators: final rules (PS20/5) June 2020, paragraph 2.3.

SMCR is found in the FCA Handbook, the PRA Rulebook and PRA Supervisory Statements which are outside the scope of this Guide.

11.2 The senior managers and certification regime

General

11.2.1 The Act requires authorised persons to take reasonable care to ensure that no person performs a senior management function (SMF) without approval by the FCA or PRA, as appropriate[779].

11.2.2 Senior management functions cover those roles in which persons are responsible for managing one or more aspects of the firm's affairs relating to a regulated activity and those aspects involve, or might involve, a risk of serious consequences for the firm, or for business or other interests in the UK[780]. People who hold SMFs will be the most senior people in a firm with the greatest potential to cause harm or impact upon market integrity. The reference to "managing" is understood to involve taking decisions, or participating in the taking of decisions, about how one or more aspects of those affairs should be carried on.

11.2.3 The Act gives the FCA and the PRA the power to specify particular roles as SMFs in their rules[781], and each senior management function is labelled with an "SMF" number. These functions are not set out in the Act but are contained in PRA and FCA rules[782]. Some SMFs will be relevant to most firms, large or small, such as the chief executive function, chief finance function, and chief risk function. Others will apply only to a limited group of firms; for example, the PRA credit union function applies to small credit unions.

11.2.4 Non-executive director roles which are not SMFs do not need to be approved, but are subject to the conduct rules (see paragraphs 11.2.26 to 11.2.29) as well as ongoing fitness and propriety assessments (see paragraphs 11.2.12 to 11.2.19).

779 Section 59(1), 59(6), 59(6A).
780 Sections 59ZA.
781 Section 59(3).
782 SMFs designated by the PRA are set out in the Senior Management Functions Part, Insurance – Senior Management Functions Part, Non-Solvency II Firms — Senior Management Functions Part and the Large Non-Solvency II Firms — Senior Management Functions Part. SMFs designated by the FCA are in its Supervision Manual (SUP) at SUP 10C.

Taking a proportionate approach

11.2.5 When the senior managers regime was extended to insurers and FCA solo-regulated firms, it was clear that a 'one size fits all approach' — simply applying to these firms what had applied to banks — was inappropriate. Instead, a proportionate approach has been taken.

11.2.6 The rules that will apply to an FCA solo-regulated firm will depend on whether the firm has been classified as a 'Limited Scope', 'Core' or 'Enhanced' firm. Core firms will have a baseline of SMCR requirements applied, consisting of the senior managers regime, certification regime and conduct rules. The majority of FCA solo-regulated firms will fall within this category.

11.2.7 Limited scope firms are subject to fewer requirements than core firms, and this category covers firms that would have been subject to a limited application of the APR (such as limited permission consumer credit firms). Firms which meet the criteria of enhanced firms, determined by size and complexity, will have to apply extra rules. Only a small proportion of solo-regulated firms will meet this criteria.

11.2.8 A similar approach is taken in the insurance sphere, where an enhanced regime is applied to Solvency II firms and large Non-Directive firms (**NDFs**). A more streamlined regime is applied to small NDFs, small run-off firms and insurance special purpose vehicles (**ISPVs**).

Prescribed Responsibilities

11.2.9 There are over 30 "prescribed responsibilities" specified by either the PRA or the FCA which authorised persons must allocate to individuals holding senior management functions (unless the firm is a FCA solo-regulated limited scope firm)[783]. This is designed to ensure that there is individual accountability for the fundamental responsibility inherent in a particular function. Certain prescribed responsibilities are designed to be assigned to executives, while others reflect non-executive roles. Not all of the prescribed responsibilities will be relevant to all authorised persons: certain prescribed responsibilities apply only in specific circumstances (such as banks that carry out proprietary trading, or firms to which the FCA's Client Assets Manual (CASS) applies).

[783] The PRA prescribed responsibilities are set out in the Allocation of Responsibilities, Insurance — Allocation of Responsibilities, Large Non-Solvency II Firms — Allocation of Responsibilities, and Non-Solvency II Firms — Allocation of Responsibilities Parts of the PRA Rulebook. The FCA prescribed responsibilities are set out in the FCA Systems and Controls Manual (**SYSC**) at SYSC 24.2.6R.

11.2.10 In general, each prescribed responsibility should be allocated to one individual, although the FCA and the PRA have recognised that the sharing of responsibilities may be necessary in limited circumstances — for example, where departing and incoming senior managers work together temporarily as part of a handover.

Statement of Responsibilities

11.2.11 All applications for individuals to perform a senior management function must be accompanied by a "statement of responsibilities", a statement which sets out the areas of business for which the individual will be responsible[784]. If there are any significant changes to a senior manager's areas of responsibility, a revised statement of responsibilities must be provided to the appropriate regulator[785]. In addition, SMCR banking firms, Solvency II insurers, large NDFs and enhanced FCA solo-regulated firms are required to produce a "responsibilities map", a single document that describes their management and governance arrangements.

Qualifications for approval: fitness and propriety

11.2.12 Before an authorised person may make an application for regulatory approval it must be satisfied that the individual is "fit and proper" to perform the senior management function effectively. This assessment must then be conducted at least annually following approval, and is based on the individual's qualifications, training, competence and personal characteristics[786]. In carrying out this assessment, authorised persons must also obtain employer references for at least the previous six years and conduct criminal records checks.

11.2.13 The FCA or the PRA may approve an individual to carry out a senior management function only if it too is satisfied that they are a fit and proper person to perform the relevant function. The Act provides that in making that determination the regulator may have regard to an individual's qualifications, training, competence and personal characteristics[787]. In the FCA's view, the most important considerations will be the individual's:

- honesty, integrity and reputation;

784 Sections 60(2A) to 60(2B).
785 Section 62A.
786 Sections 60A and 63(2A).
787 Sections 61(1) to 61(2).

- competence and capability; and
- financial soundness.

11.2.14 For senior management functions specified as PRA functions, relevant individuals need to be approved by the PRA with the FCA's consent. For senior management functions specified as FCA functions, individuals require approval by the FCA only. The PRA has stated that where it has an interest in an FCA-designated function it will inform the FCA that it is aware of an application on which it wishes to express a view.

11.2.15 The FCA and/or the PRA have discretion to interview any candidate for a senior management function[788], and this decision is fundamentally risk-based. It is particularly likely that an interview will be arranged if a candidate has not previously been approved under the SMCR, or if they are seeking approval for a role of a type for which they have not previously been approved.

11.2.16 The FCA or the PRA may grant approval subject to any conditions it considers appropriate or only for a limited period[789]. Where approval is granted subject to conditions, the Act allows the authorised firm to apply to the appropriate regulator to vary the approval by varying, removing or imposing a new condition[790]. The FCA and the PRA also have the power to vary a senior manager's approval at its own initiative where it considers it desirable to do so in order to advance one or more of its operational objectives[791].

11.2.17 Rejected candidates will be given feedback and the opportunity to amend their applications. Appeals can be referred to the FCA's Regulatory Decisions Committee or the relevant PRA decision-making committee and, ultimately, to the Upper Tribunal (Tax and Chancery Chamber), which is independent from the regulators and is able to review their decisions in their entirety[792].

788 For a more detailed discussion of SMF interviews, see our practical guide on SMF interviews which can be found on our website https://my.slaughterandmay.com/insights/viewContent.action?key=Ec8teaJ9VappXX5%2Bn4uGbK%2FdwZ0l6NkpBiaRvcQ1%2B0trYQ6QELAnKE%2BuQ3%2BHDx%2Bw2KrC1KhpPe4%3D&nav=FRbANEucS95NMLRN47z%2BeeOgEFCt8EGQ0qFfoEM4UR4%3D&emailtofriendview=true&freeviewlink=true.

789 Section 61(2B). The PRA has published a statement of policy on conditions, time limits and variations of approval https://www.bankofengland.co.uk/prudential-regulation/publication/2015/conditions-time-limits-and-variations-of-approval. The equivalent FCA guidance is contained in Chapter 10C of the SUP Manual.

790 Section 63ZA.

791 Sections 63ZB to 63ZE.

792 Section 62(4).

11.2.18 Re-approval need not be sought where a person performing an SMF takes 'long-term leave', that is, temporary leave for more than 12 weeks. Any interim SMF covering the role will, however, need to be approved, which can be time-limited to cover only the period of absence[793].

Duty of responsibility

11.2.19 All senior managers are subject to a statutory duty of responsibility which requires them to take reasonable steps to prevent regulatory contraventions occurring in their area of responsibility. To establish a breach of this duty, the PRA or the FCA, or both, must show that the senior manager with the relevant responsibility did not take such steps as a person in their position could reasonably have been expected to take to avoid the contravention occurring[794].

Certification regime

11.2.20 The certification regime applies to employees of authorised persons who are employed in positions where they could pose a risk of significant harm to the firm or any of its customers[795], other than employees in firms carrying out benchmark activities[796]. The FCA-specified significant harm functions include proprietary traders and algorithmic traders[797]. The criteria to determine the PRA-specified significant harm functions are available in its rulebook[798].

11.2.21 Individuals performing significant harm functions are not subject to approval by the PRA or the FCA. Authorised firms are, however, required to certify that the individuals are fit and proper for their roles, both at the point of recruitment and on an ongoing basis[799]. This is designed to ensure that the fitness and propriety of a broader range of individuals is subject to assessment by firms rather than the regulators. A certificate is valid for 12 months from the date on which it is issued[800].

793 PRA Policy Statement, 'Strengthening accountability: Temporary, long term absences' (PS 11/21), June 2021, FCA Handbook Notice No 88 (May 2021).
794 Sections 66A(5) and 66B(5).
795 Section 63E(5).
796 See footnote 566.
797 See the Senior Management Arrangements, Systems and Control (SYSC) Manual of the FCA Handbook at SYSC 27.
798 See the Certification, Insurance — Certification, Non-Solvency II Firms — Certification, Large Non-Solvency II Firms — Certification, Parts of the PRA Rulebook.
799 Sections 63E(1) and 63F(1).
800 Section 63F(5).

11.2.22 Where it believes that an individual within the scope of the certification regime fails to meet the requisite standards, an authorised firm must refuse to renew that individual's certificate of fitness and propriety. A record of every employee who has a valid certificate must be maintained[801], and responsibility for compliance with the certification regime must be allocated to a senior manager.

Directory of certified and assessed persons

11.2.23 Pursuant to the Act the Financial Services Register provides a public record, maintained by the FCA, of the senior managers approved by the PRA and/or FCA[802].Following substantial feedback on the public value of the FCA maintaining an additional central public directory of certified staff[803], in November 2020 the FCA introduced a directory of certified and assessed persons on the Financial Services Register. This enables consumers and professionals to check the details of key individuals working in financial services.

11.2.24 Certified and assessed persons consist of all certified staff under the SMCR, directors who are not performing SMFs (both executive and non-executive) and other individuals who are sole traders or appointed representatives where they are undertaking business with clients and require a qualification to do so. All authorised firms are now required to submit such 'directory persons' data to this register.

Conduct rules

11.2.25 The Act allows the FCA and the PRA to make conduct rules for employees of authorised firms[804]. The FCA's conduct rules apply to all individuals approved as senior managers or covered by the certification regime, as well as all other employees (other than certain ancillary staff who perform a role that is not specific to the financial service business of the firm)[805]. The PRA's conduct rules apply to individuals approved as senior managers, those covered by the certification regime, key function holders and NEDs in dual-regulated SMCR firms[806].

11.2.26 Both the FCA and the PRA's conduct rules are split into two tiers, namely, those that apply to all individuals within the scope of the

801 Section 63F(7).
802 Section 347.
803 See FCA PS19/7: Finalising the Directory. https://www.fca.org.uk/publications/policy-statements/ps19-7-finalising-directory.
804 Sections 64A(1) and 64A(2).
805 See the COCON manual of the FCA Handbook.
806 See the Conduct Rules in the relevant parts of the PRA Rulebook.

conduct rules, and those that apply only to senior managers. The conduct rules cover issues such as acting with integrity and due skill, care and diligence; observing proper standards of market conduct; and dealing openly and co-operatively with regulators.

11.2.27 Authorised persons must also provide training to all officers and employees on the conduct rules and must notify the PRA or the FCA of actual or suspected breaches and where it is taking formal disciplinary action against an individual for breach[807].

11.2.28 Breach of a rule of conduct (or being knowingly concerned in a contravention of the Act or FCA or PRA rules) could result in a fine being imposed on an individual and/or a public censure being issued. It could also result in the removal or restriction of their approval, or prohibition from carrying on any controlled function in the UK[808]. Breaches of the SMCR are considered in further detail at paragraphs 11.3.1 to 11.3.13.

Reckless misconduct in the management of a financial institution

11.2.29 Senior managers of financial institutions who take decisions that cause a financial institution to fail may be guilty of a criminal offence. The offence is established where the senior manager took a decision, or failed to take steps to prevent a decision, which caused a financial institution to fail, if they were aware that the decision might cause the institution to fail and their conduct fell far below what could reasonably be expected of a person in that position[809].

International application

11.2.30 There are no territorial limitations for overseas branches of UK firms or UK firms providing services into or out of the UK on a cross-border basis. Conversely, the SMCR does not apply to an overseas firm other than in relation to an establishment maintained by it or its appointed representative in the UK.

11.2.31 A modified regime applies in respect of UK branches of overseas firms, otherwise known as incoming branches. Prior to the UK's exit from the EU, the application of the SMCR would vary depending on whether the UK branch was that of an EEA firm (EEA branches), or of a third-country firm (third-country branches). Now, subject to the availability of the

807 Sections 64B and 64C.
808 Section 66(3).
809 Section 36 of the Financial Services (Banking Reform) Act 2013.

temporary permissions regime — the effects of which differ depending on whether the EEA-branch is under the purview of the PRA — there is one category, that of third country branches.

The approved persons regime

11.2.32 Since 7 December 2020 the APR has only applied to appointed representatives of authorised firms. Given its limited application, only a brief flavour of the regime is provided here.

11.2.33 The Act requires appointed representatives to take reasonable care to ensure that individuals and contractors performing "controlled functions" in relation to their regulated activities have the prior approval of the FCA[810]. The controlled functions for appointed representatives include so-called 'governing functions', covering (among other roles) the director function, chief executive function and non-executive function, as well as a customer-dealing function[811].

11.2.34 The FCA may approve an individual to carry out a controlled function only if it is satisfied that they are a "fit and proper" person to perform the relevant function. The Act provides that in making that determination the regulator may have regard to an individual's training, competence and qualifications[812].

11.2.35 In addition, approved persons must comply with the FCA conduct rules and report anything that could affect their ongoing suitability to both the FCA and the authorised firm.

11.3 Consequences of breach

Disciplinary action against firms

11.3.1 If a firm fails to take reasonable care to ensure that it does not employ unapproved persons to carry out controlled functions — where senior management functions are a sub-set of controlled functions — the appropriate regulator can carry out an investigation and take disciplinary action against the firm[813]. Disciplinary action can include a fine and the suspension of permission to carry on regulated activities.

810 Sections 59(1) and 59(4).
811 SUP 10A.4.4R.
812 Sections 61(1) and 61(2).
813 Part 14.

11.3.2 A "private person" is also entitled to compensation for losses suffered as a result of a failure by an authorised firm to take reasonable care to ensure that:

(a) no function in relation to the carrying on of a regulated activity is performed by a person who is prohibited by the FCA or the PRA from doing so; or

(b) no person performs a controlled function who has not been approved by the appropriate regulator[814].

11.3.3 The definition of "private person" has been prescribed by a Treasury order[815], and refers to any individual unless they suffer the loss in question in the course of carrying on any regulated activity, or any activity which would be a regulated activity if they were not an overseas person. The order also confirms that a "private person" can be a legal person (for example, a charity, company, partnership or unincorporated association) provided that person does not suffer the loss in the course of carrying on business of any kind. However, the definition does not include a government, a local authority (in the UK or elsewhere) or an international organisation.

Liability of persons who perform controlled functions without approval

11.3.4 Under the Act, the appropriate regulator can impose a penalty of such an amount as it considers appropriate on persons who:

(a) at any time perform a controlled function without approval; and

(b) knew, or could reasonably be expected to have known, that they were performing a controlled function without approval.[816]

11.3.5 The appropriate regulator cannot impose a penalty after the expiry of a defined limitation period, unless it issues a warning notice to the person concerned under section 63B(1) before expiry of this period. The limitation period is currently set at three years, beginning with the first day the regulator knew the person was performing a controlled function without approval.

11.3.6 The FCA and the PRA must issue statements outlining their policies in determining whether a penalty should be imposed and what amount the

814 Section 71(1).
815 Regulation 3 of SI 2001/2256.
816 Section 63A.

penalty should be[817]. The policies take into account factors such as the level of knowledge of the person involved, how long the function was exercised for without approval, whether the person being penalised is a natural person, and that person's conduct.

Liability for misconduct

11.3.7 The FCA or the PRA may take action against a person if it appears to the regulator that the person is guilty of misconduct and the regulator is satisfied that it is appropriate in all the circumstances to take action against them[818]. This is regardless of whether it was responsible for approving the person. For these purposes, a person is guilty of misconduct if they have been knowingly concerned in the contravention of a requirement imposed by or under the Act (and, in the case of a senior manager, was at that time responsible for the management of the authorised person's activities in relation to which the contravention occurred and did not take such steps as a person in the senior manager's position could reasonably have been expected to take to avoid the contravention occurring)[819].

11.3.8 The FCA or the PRA may impose a penalty of such amount as it considers appropriate, suspend or impose conditions on the approval (having effect up to a maximum of two years), limit the period of the approval or publish a statement of the misconduct[820]. The regulator cannot take action after the expiry of a defined limitation period. The limitation period is currently set at six years if the misconduct occurred after 7 March 2016, beginning on the first day the regulator knew the person was performing a controlled function without approval. For misconduct which occurred before 7 March 2016, the limitation period is three years[821].

The power to withdraw approval

11.3.9 The Act enables the FCA and the PRA to withdraw an individual's approval to perform a specified controlled function if it considers that the individual is not fit and proper (but the PRA's power may only be exercised if the PRA granted the approval or the function is a senior management function). The regulators must consult each other before

817 Section 63C(1).
818 Section 66(1).
819 Sections 66A and 66B.
820 Section 66(3).
821 Sections 66(4), 66(5) and 66(5ZA).

withdrawing an approval and must give the individual a warning notice[822].

The power to ban individuals

11.3.10 The Act enables the FCA and the PRA to prohibit an individual from performing a specified controlled function if it considers that the individual is not fit and proper (but the PRA's power may only be exercised in respect of a PRA-authorised firm or a firm that is an exempt firm in respect of a PRA-regulated activity). Prohibitions may be made in respect of specified regulated activities, a class of regulated activities or all such activities. The regulator that has made the prohibition order has the power to vary or revoke it, so in some cases the prohibition may only be temporary. If the FCA wishes to vary or revoke an order which would either prohibit or allow a person to perform a function of interest to the PRA, then the FCA must consult the PRA. The PRA must consult the FCA over any variation or amendment it makes to a prohibition order[823].

11.3.11 Individuals who breach a prohibition order will commit an offence (punishable by fine), and those firms falling within section 56(3A) of the Act will have a duty to take reasonable care to ensure that no function in relation to the carrying on of a regulated activity is performed by a person who is prohibited from performing it[824]. However, regardless of which authority led on an application for approval, both the FCA and the PRA have the power to ban an approved person working in a dual-regulated firm.

Right of appeal

11.3.12 Where a regulated firm or individual continues to disagree with a decision (such as a proposed ban, or a restriction on or removal of approval) that one of the regulators has made, Part 5 of the Act provides rights for such persons to refer the matter to the Tribunal[825].

11.3.13 A person who is refused permission to carry on any regulated activity, or is only given permission to carry on a regulated activity subject to conditions or for a limited period (or both), may also apply to the

822 Sections 63(1) to 63(6).
823 Sections 56(1), 56(1A), 56(2), 56(3), 56(3A) and 56(7) to 56(7C).
824 Sections 56(4) and 56(6). The firms falling within section 56(3A) are authorised firms, exempt firms and firms to whom as a result of Part 20 (Provision of financial services by members of the professions) the general prohibition does not apply in relation to a regulated activity.
825 Sections 58(5) and 67(7).

Tribunal. Any "interested party" (the individual or the firm in question) can make the application.[826]

11.4 Future reform

11.4.1 In December 2020 the PRA published a report setting out its findings of a review of the operation of the SMCR against the regime's original objectives. It also examined whether the SMCR has resulted in unintended consequences[827]. The report found that the vast majority of senior managers who participated in the survey observed that the SMCR had brought about positive changes to behaviours.

11.4.2 Nevertheless, the report identified several areas for potential reform, highlighting concerns that (among other things):

- conduct notifications are only being used to a limited extent;
- risk aversion might prompt some firms to appoint senior managers with similar profiles to existing executives; and that
- approving senior managers on a time-limited and conditional basis has been used much less than envisaged.

11.4.3 Actions to iron out wrinkles identified in the report are under consideration. Significantly, the PRA also observed that medium-sized and smaller firms were less likely to believe the SMCR regime is proportionate, and has welcomed further feedback on how proportionality might be enhanced.

11.4.4 The PRA and FCA introduced a number of temporary measures during 2020 offering firms additional flexibility in applying the SMCR and APR in the context of the COVID-19 pandemic. The measures, the majority of which came to an end on 7 January 2021 (with the remainder ending on 30 April 2021), recognised that significant changes to responsibilities under senior management functions may be required owing to sickness or any other temporary situations as a result of the coronavirus. The measures also covered temporary SMF arrangements and the furloughing of SMFs.

11.4.5 In July 2021, the Treasury published a consultation paper on its proposal to introduce a SMCR for financial market infrastructures under the

826 Sections 62(4) and 62(5).
827 PRA Report 'Evaluation of the Senior Managers and Certification Regime', (December 2020).

oversight of the Bank of England. The regime, the requirements of which would mirror closely the existing SMCR for other parts of the financial services sector, would cover central counterparties; central securities depositories; payment systems recognised under the Banking Act 2009; and specified service providers to those recognised payment systems. The consultation closed in October 2021, and feedback is currently being analysed.

11.4.6 In October 2021 the FCA further suggested that it could extend the SMCR to those firms that are not authorised under FSMA, that is, payments and emoney firms, recognised investment exchanges and credit ratings agencies[828].

[828] FCA Perimeter Report 2020/2021, pp.41-42.

12. FINANCIAL PROMOTION

12.1 Overview

12.1.1 The regime governing financial promotion by unauthorised persons is set out in a combination of the Act and delegated legislation. It applies to promotions of all types by unauthorised persons including (among others) overseas firms wishing to market financial services in the UK.

12.1.2 The regime restricts all types of financial promotion unless they are made or approved by an authorised firm or an exemption is available.

12.1.3 Following an amendment made by the Financial Guidance and Claims Act 2018 which came into force on 6 October 2018, the restriction on financial promotions also applies to engaging in claims management activities[829].

12.1.4 The Act is designed to make the basic restriction on financial promotion technology-neutral, so that it can cover future developments, such as the increasing use of the internet and digital media as tools for marketing financial services.

12.1.5 Complementing this technology-neutral outlook, in March 2015 the FCA published finalised guidance on its supervisory approach to financial promotions in social media to address the changing ways in which firms communicate[830]. The FCA has also commented on the use of social media and influencers in the promotion of contracts for difference and other high-risk investment products to retail clients[831].

12.1.6 This is an area subject to ongoing regulatory scrutiny. The Treasury has consulted on proposals to bring the promotion of certain types of cryptoassets,[832] and all promotions for buy-now pay-later credit agreements,[833] within the scope of financial promotions regulation. The FCA is considering strengthening its financial promotion rules in the case of high-risk investments, on which it is expected to consult in December 2021,[834] and setting out clear responsibilities for firms that

829 The amendment was brought into force by the Financial Guidance and Claims Act 2018 (Commencement No.4) Regulations 2018, SI 2018/1045. See further Chapter 8 'Regulated activities and investments' for further detail on claims management activities.
830 FCA Finalised Guidance FG15/4 'Social media and customer communications — The FCA's supervisory approach to financial promotions in social media' (March 2015) (**Social Media Guidance**).
831 FCA Perimeter Report 2020/2021, p.29.
832 HM Treasury Consultation: Cryptoasset Promotions (July 2020).
833 HM Treasury Regulation of Buy-Now Pay-Later Consultation (October 2021) p.19.
834 FCA Regulatory Initiatives Grid (November 2021), p.19.

approve financial promotions for unauthorised persons to monitor these promotions on an ongoing basis[835].

12.1.7 The FCA has also suggested that online platforms may, in future, bear clear legal liability for the financial promotions they pass on to consumers[836], and is further considering reforming the thresholds for exemptions relating to 'high net worth' and 'sophisticated' investors (as well as reforming the ability for consumers to self-certify) in order to prevent their abuse[837]. See paragraphs 12.5.44 to 12.5.54 for more information about these exemptions.

12.1.8 Finally, in June 2021 the Treasury confirmed its intention to introduce a new regulatory 'gateway' for firms approving financial promotions for unauthorised persons[838]. This will enable the FCA to assess whether an authorised firm has the necessary competence and expertise to act as an approver before they can approve financial promotions for unauthorised persons. The gateway will not apply to intra-group approvals or the approval of authorised firms' own promotions for communication by unauthorised persons, such as by appointed representatives. The FCA hopes to consult on the gateway in December 2021, and it is thought that the gateway should 'open' by March 2023[839].

12.1.9 The rules covering financial promotion by authorised persons as set out in the FCA Handbook are beyond the scope of this Guide.

12.2 The basic financial promotion restriction

12.2.1 The Act states that an unauthorised person must not, in the course of business, communicate an invitation or inducement to engage in investment activity or engage in claims management activity[840].

12.2.2 The restriction does not apply if:

835 FCA Discussion Paper 'Strengthening our financial promotion rules for high-risk investments and firms approving financial promotions' (DP21/1), April 2021.

836 FCA Perimeter Report 2019/20, paragraph 3.30.
837 FCA Perimeter Report 2020/21 pp.27-28.
838 HM Treasury Consultation Response: Regulatory Framework for Approval of Financial Promotions (June 2021).
839 FCA Regulatory Initiatives Grid (November 2021), p.19.
840 Section 21(1).

(a) the content of the communication is approved for the purposes of section 21 of the Act by an authorised firm in accordance with the relevant FCA rules[841]; or

(b) an exemption applies. The exemptions are set out in the Financial Services and Markets 2000 (Financial Promotion) Order 2005[842] (the **Financial Promotion Order**).

12.2.3 Firms which are authorised under the Act are not subject to the prohibition, but are instead required to comply with the relevant FCA rules on financial promotion, a discussion of which is beyond the scope of this Guide. The Act expressly permits the FCA to make rules relating to the form and content of communications (although the Treasury can restrict this rule-making power)[843].

12.2.4 The FCA's rules on financial promotion are set out in the FCA Handbook. For example, COBS 4 of the 'Conduct of Business Sourcebook' (COBS) (the **COBS Rules**) applies to communications relating to designated investment business, while CONC 3 of the 'Consumer Credit Sourcebook' (CONC) (the **CONC Rules**) applies to communications relating to a credit agreement, credit broking and operating an electronic system in relation to lending. Although these rules apply to FCA-regulated firms, the FCA has also produced guidance on the financial promotion regime generally in PERG 8 of the FCA 'Perimeter Guidance Manual' (**PERG Manual**)[844].

12.2.5 Contravention of the financial promotion restriction is a criminal offence, punishable by up to two years' imprisonment and an unlimited fine. There is a defence, however, if the person: (a) believed on reasonable grounds that the content of the communication was prepared or approved by an authorised firm for the purposes of section 21; or (b) took all reasonable precautions and exercised all due diligence to avoid committing the offence[845].

12.2.6 An agreement entered into by a person as a customer in consequence of an unlawful financial promotion is unenforceable against them. The

841 Section 21(2).
842 SI 2005/1529.
843 Section 137R.
844 PERG 8 provides guidance on the restriction on financial promotion under section 21 of the Act, the circumstances in which persons involved in making or helping others to make financial promotions may be conducting regulated activities, as well as the marketing requirements of an alternative investment fund under the Alternative Investment Fund Managers Regulations 2013 (SI 2013/1773). The marketing of funds is discussed briefly in Chapter 14 'Collective investment schemes'.
845 Sections 25(1) and 25(2).

customer is also entitled to recover any money or other property paid or transferred under the agreement together with compensation for any losses sustained by them as a result[846].

12.2.7 Although in some cases it will be obvious which party is a "customer", as there is no general definition of "customer" for the purposes of the Act[847], there may be some ambiguity as to how the term should be interpreted in other cases.

12.2.8 If, in consequence of an unlawful financial promotion, a person exercises any right conferred by a controlled investment (see paragraphs 12.3.5 to 12.3.7), no obligation to which that person is subject as a result of exercising that right is enforceable against them. That person is also entitled to recover any money or property transferred by them under the obligation together with compensation for losses sustained by them as a result[848].

12.2.9 This sanction applies regardless of whether the person entering into the agreement, or dealing with the customer, knew that the relevant financial promotion was unlawful. The court has the power, however, to permit the agreement or obligation to be enforced if it is satisfied that it is just and equitable to do so[849].

12.3 Financial promotions and Brexit

12.3.1 The regime governing financial promotion, like many areas of financial services law, has been shaped by the UK's departure from the EU. More specifically, there have been two material changes to the parameters of the regime.

12.3.2 First, some of the exemptions which were set out in the Financial Promotion Order — previously in place to take account of the UK's membership of the EU — are no longer available[850]. For example, there is no longer an exemption to section 21 permitting other EEA nationals to issue financial promotions in the UK in connection with regulated activities carried on by them in their home state[851]. Similarly,

846 Section 30(2).
847 The term "customer" is, however, defined for the purposes of the FCA Handbook.
848 Section 30(3).
849 Section 30(4).
850 PERG 8.2.9G.
851 Regulation 137 Financial Services and Markets Act 2000 (Amendment)(EU Exit) Regulations (SI 2019/632). Previously, Article 36.

prospectuses approved in an EEA state are no longer exempt from the section 21 restriction[852].

12.3.3 Prior to the UK's departure from the EU, specific rules applied to the regulation of "electronic commerce communications"[853] which originated in or were directed at EEA member states. One effect of these rules was to exempt electronic communications made from an establishment in an EEA state, other than the UK, from the restriction in section 21. These rules have, however, now fallen away[854]. Significantly, this means that many social media firms are now required to comply with section 21 for the first time when providing any value adding services.

12.3.4 Second, the Treasury has made transitional provision so that a communication will not breach the restriction in section 21 if the communication was required under a contract entered into before the end of the Brexit transition period on 31 December 2020 (**IP completion day**), and would have not constituted a breach if it had been made before IP completion day[855].

Investment activities

12.3.5 The financial promotion regime applies to invitations or inducements to engage in "investment activity" or "claims management activity".

12.3.6 Turning to the former, a person engages in investment activity if they:

(a) enter or offer to enter into an agreement the making or performance of which by either party constitutes a "controlled activity"; or

(b) exercise any rights conferred by a "controlled investment" to acquire, dispose of, underwrite or convert a controlled investment[856].

12.3.7 Controlled activities and controlled investments are defined in the Financial Promotion Order[857], and are broadly similar to the list of

852 Regulation 26(a) Prospectus (Amendment etc.) (EU Exit) Regulations 2019/1234, amending Article 70.
853 Communications which fell under the scope of the EU Electronic Commerce Directive 2000/31/EC.
854 Regulations 165 and 167-169 Financial Services and Markets Act 2000 (Amendment)(EU Exit) Regulations (SI 2019/632).
855 Regulation 162 Financial Services and Markets Act 2000 (Amendment) (EU Exit) Regulations (SI 2019/632). See also PERG 8.2.9G.
856 Section 21(8).
857 Schedule 1 to the Financial Promotion Order.

regulated activities and specified investments in the Regulated Activities Order. The main difference is that the exemptions available in respect of particular regulated activities (for example, dealing as principal) are generally not reproduced in the Financial Promotion Order in respect of controlled activities. The result is that the restriction on financial promotion is, in some respects, wider than the scope of regulation under the Act.

12.3.8 Insurance and deposit advertisements are, in theory, subject to the same restriction as other types of financial services promotions. However, the Financial Promotion Order contains broad exemptions in respect of promotions of deposits and general insurance, with the result that promotions of deposits and general insurance are generally permitted subject to minimum disclosure requirements[858].

12.3.9 Since 1 April 2014, additional controlled activities and investments have been included in the Financial Promotion Order to cover regulated consumer credit and consumer hire activities[859]. The exemptions in Part IV and a number of the exemptions in Part VI of the Financial Promotion Order also apply to financial promotions concerning relevant consumer credit and consumer hire.

Claims management activities

12.3.10 As set out at paragraph 12.3.5, the financial promotion regime also applies to invitations or inducements to engage in "claims management activity".

12.3.11 A person engages in claims management activity if they enter, or offer to enter, into an agreement the making or performance of which by either party constitutes a controlled claims management activity[860].

12.3.12 An activity is a controlled claims management activity if it is: (i) an activity of a specified kind; (ii) it is — or relates to — claims management services; and (iii) it is carried on in Great Britain[861].

12.3.13 The activities which have been specified are those set out in Part 1A of the Financial Promotion Order, and are the same as the activities which

858 Articles 21 to 26 of the Financial Promotion Order. References to articles in the footnotes to this chapter are to articles of the Financial Promotion Order, unless otherwise indicated.
859 Paragraphs 4B, 4C, 5A, 5B, 10BA and 10BB of Part I of Schedule 1 to the Financial Promotion Order and paragraphs 26D and 26E of Part II of Schedule 1 to the Financial Promotion Order.
860 Section 21(10A).
861 Section 21 (10B).

have been specified in the Regulated Activities Order as regulated claims management activities. The exclusions set out in the Regulated Activities Order in relation to regulated claims management activities are set out as exemptions in in the Financial Promotion Order in relation to controlled claims management activity[862].

Invitations or inducements to engage in investment activity or claims management activity

12.3.14 Although the Act describes section 21 as relating to "restrictions on financial promotion", the word "promotion" does not appear anywhere in the substantive text of the section. Instead, the basic restriction relates to communicating (or causing the communication of) an "invitation or inducement" to engage in investment activity or a claims management activity[863].

12.3.15 The FCA PERG Manual states that there must be an element of persuasion, incitement or a promotional element both to an "invitation" and an "inducement". The PERG Manual also proposes an objective test: "*would a reasonable observer, taking account of all the circumstances at the time the communication was made: (i) consider that the communicator intended the communication to persuade or incite the recipient to engage in investment activity or to engage in claims management activity, or that that was its purpose; and (ii) regard the communication as seeking to persuade or incite the recipient to engage in investment activity? It follows that a communication which does not have any element of persuasion or incitement will not be an invitation or inducement under section 21*"[864]. The omission of 'claims management activity' in the second limb of this objective test, as set out in PERG, appears to be an error.

12.3.16 Where a person advertises the services of a firm which carries on a regulated claims management activity with a view to seeking out customers, the person is likely to be communicating an invitation or inducement to engage in claims management activity[865].

862 See PERG 8.7A.2G.
863 Sections 21(1) and 21(13).
864 PERG 8.4.4G of the PERG Manual.
865 PERG 8.7A.6G of the PERG Manual.

In the course of business

12.3.17 The restriction only applies to promotions made "in the course of business". This limitation generally prevents communications relating to investment activity between friends and relatives from being criminalised.

12.3.18 While the Treasury has the power[866] to define what acting "in the course of business" means in the context of financial promotions, it has so far not exercised this power. The phrase, therefore, should be given its ordinary and natural meaning, which means that "business" means any business, not just regulated business, and that the making of financial promotions need not be a business in its own right[867].

Territorial scope

12.3.19 The restriction in section 21 applies to communications which originate within the UK and which are sent within the UK. It also applies in principle to: (a) communications which originate within the UK and are sent to overseas persons (outward communications)[868]; and (b) communications which originate outside the UK but are capable of having an effect in the UK (inward communications)[869].

12.3.20 Section 21 permits the Treasury to amend the territorial scope of the financial promotion restriction by order, either generally or on a more specific basis.

Collective investment schemes

12.3.21 The financial promotion restriction also applies to the promotion of collective investment schemes, although different statutory provisions apply to the promotion of collective investment schemes by authorised firms. This separate regime is considered briefly in Chapter 14 'Collective investment schemes'. Chapter 14 'Collective investment schemes' also refers to rules in relation to the marketing of alternative investment funds (**AIFs**).

866 Section 21(4).
867 PERG 8.5.1G and PERG 8.5.2G of the PERG Manual.
868 Although see the exemption for communications to overseas persons at paragraphs 12.5.8 to 12.5.15.
869 Section 21(3).

12.4 Exemptions from the financial promotion restriction: basic concepts

12.4.1 The exemptions are contained in the Financial Promotion Order. The Financial Promotion Order uses a number of very specific terms and it is necessary to understand this terminology in order to understand the application of the exemptions.

Real time and non-real time

12.4.2 A distinction is drawn between "real time" and "non-real time" communications.

12.4.3 A "real time communication" is any communication made in the course of a personal visit, telephone conversation or other interactive dialogue. A "non-real time communication" is any other communication[870]. The Financial Promotion Order provides that non-real time communications include communications made by letter or email, or which are contained in a publication[871]. The Financial Promotion Order lists a number of factors that indicate that a particular communication is not real time:

(a) the communication is made to or directed at more than one recipient in identical terms (save for details of the recipient's identity);

(b) the communication is made or directed by way of a system which in the normal course constitutes or creates a record of the communication to which the recipient can refer at a later time; and

(c) the communication is made or directed by way of a system which in the normal course does not enable or require the recipient to respond immediately.[872]

12.4.4 The essential element of a real time communication is "interactive dialogue", whereby the communicator is able to engage in persuasive discussion with the recipient. Where there is no interactive dialogue, there is no real time communication within the meaning of the Financial Promotion Order, even if the communication is "live". For example, someone who is addressing a large meeting will not normally

870 Articles 7(1) and 7(2).
871 Article 7(3).
872 Article 7(5).

be in interactive dialogue with the persons present unless the speaker starts addressing any of the attendees individually in response to a question or intervention. Similarly, the practice of allowing interested persons (for example shareholders) to dial in to (but not to participate in) a conference call which a company is holding with investment analysts will not involve those investors being the recipients of a real time communication. The PERG Manual endorses this view[873]. The FCA has indicated in its Social Media Guidance that it would consider a tweet to be a non-real time promotion[874].

Solicited and unsolicited real time communications

12.4.5 The second important distinction drawn by the Financial Promotion Order is between "solicited" and "unsolicited" real time communications. No distinction is made between solicited and unsolicited non-real time communications.

12.4.6 A real time communication is solicited where it is made in the course of a personal visit, telephone call or other interactive dialogue if that call, visit or dialogue: (a) was initiated by the recipient of the communication; or (b) takes place in response to an express request from the recipient of the communication. A communication is solicited only if it is clear from all the circumstances that during the course of the visit, call or dialogue communications will be made concerning the kind of controlled activities or investments to which the communications in fact made relate[875].

12.4.7 An unsolicited real time communication is a real time communication other than as described in paragraph 12.4.6[876].

12.4.8 Generally exemptions are only available in respect of non-real time and solicited real time communications. An authorised firm is expressly prohibited under the COBS Rules and CONC Rules from approving real time communications made by an unauthorised person and the making of unsolicited real time communications by authorised firms is strictly controlled[877].

873 PERG 8.10 of the PERG Manual.
874 Paragraph 1.21 of the Social Media Guidance.
875 Articles 8(1) and 8(3)(b).
876 Article 8(2).
877 COBS 4.10.4R, COBS 4.8.2R and COBS 4.8.3R of the COBS Rules; CONC 3.11.2R and CONC 3.10.2R of the CONC Rules.

Communications that are "made to" or "directed at" persons and "recipients"

12.4.9 The availability of many exemptions also depends on the persons to whom a communication is made. The Financial Promotion Order distinguishes between communications that are "made to" a person and those that are "directed at" persons generally[878].

12.4.10 A communication is "made to" another person if it is addressed, whether orally or in legible form, to a particular person or persons (for example, where it is contained in a telephone call or letter)[879]. Thus communications will only be treated as being made to a person where the communication is addressed to or directed at a particular person or class of persons targeted individually by the communication.

12.4.11 The concept of communications being "directed at" persons is designed to catch other more widely disseminated communications, and in particular a communication addressed to persons generally (for example, where it is contained in a television broadcast, newspaper advertisement or unrestricted website)[880].

12.4.12 The question of whether a particular communication is "made to" or "directed at" a person is a question of fact and will depend on the circumstances of the particular communication. In certain cases there is room for ambiguity. For example, a statement made at a public meeting may be made to a particular individual (for example, in response to a question) or class of individuals. However, at some point the class will be so large that it may be said to be directed at (a section of) the audience. Difficulties also exist in respect of advertising. Is an advertisement on premises to which the public have no right of access made to or directed at those able to see it? Is a circular pushed through a person's letter box, or a letter sent to them as part of a general mailing, made to or directed at them? The latter appears to be the better view where there is no individual targeting of the customer.

12.4.13 A further concept elaborated on by the Financial Promotion Order is that of a "recipient". The Financial Promotion Order provides that a "recipient" is the person to whom the communication is made or, in the

878 Article 6.
879 Article 6(b).
880 Article 6(c).

case of a non-real time communication which is directed at persons generally, any person who reads or hears the communication[881].

12.5 Exemptions from the financial promotion restrictions: specific exemptions

12.5.1 Some of the exemptions set out below are not available in respect of controlled claims management activities. Where this is the case, this is indicated within the description of the specific exemption.

12.5.2 A set of exemptions under the Financial Promotion Order take most deposit and general insurance advertising outside the scope of the financial promotion regime.

Exemptions for deposit-taking

12.5.3 The Financial Promotion Order contains a general exemption for all real time communications (that is, both solicited and unsolicited) relating to deposit-taking, provided that the deposit is not a structured deposit[882]. Such promotions will, however, be subject to control under the general law (for example, if they are misleading or fraudulent). FCA rules on banking and conduct of business and banking industry codes of practice may also be relevant[883].

12.5.4 Non-real time communications (that is, advertising) are also exempt provided that the deposit is not a structured deposit, and specified information is disclosed (for example, the name of the deposit-taker, the country where the deposit-taker is based and whether the deposit-taker is regulated)[884].

12.5.5 These two exemptions constitute the framework under which UK representative offices of banks incorporated outside the UK are able to carry on promotional activities on behalf of their overseas bank.

Exemptions for general insurance

12.5.6 The Financial Promotion Order likewise contains an exemption for solicited and unsolicited real time communications in respect of general insurance[885]. Such promotions will, however, be subject to regulation

881 Article 6(e).
882 Article 23.
883 Such as the FCA 'Banking: Conduct of Business sourcebook' (BCOBS).
884 Article 22(2).
885 Article 26.

under the general law and FCA rules[886] and industry codes of practice will also be relevant[887].

12.5.7 There is also an exemption for non-real time communications provided that specified information about the insurer is provided[888].

Communications made to overseas recipients

12.5.8 The restriction on financial promotion in the Act applies to all communications made from the UK, as well as promotions from outside the UK that are capable of having an effect in the UK. However, this is cut back by an exemption in the Financial Promotion Order in respect of promotions — other than in respect of a controlled claims management activity[889] — targeted at recipients outside the UK where specified conditions are met. Thus a promotion is exempt if it:

(a) is made (whether from inside or outside the UK) to a person who receives the communication outside the UK; or

(b) is only directed at (whether from inside or outside the UK) persons outside the UK[890].

12.5.9 The Financial Promotion Order sets out five tests that indicate whether a communication made from the UK is "directed at" persons outside the UK. Where the first four conditions are met the Financial Promotion Order provides a safe harbour.[891] Communications that satisfy these four conditions will therefore be outside the scope of the financial promotion regime. There is no corresponding safe harbour for communications that are "made to" persons outside the UK, presumably on the grounds that as such communications are individually targeted at the recipient it will be possible to prevent the communication being made to persons in the UK inadvertently, so no safe harbour is necessary.

12.5.10 The four conditions for a communication directed at persons outside the UK to fall within the safe harbour are:

886 Such as the COBS Rules.
887 For example, issued by the Association of British Insurers.
888 Article 24. A separate exemption is available to promotions in respect of reinsurance and large risks (article 25).
889 Article 12(7).
890 Article 12(1).
891 Articles 12(4) and 12(3)(a).

(a) the communication is accompanied by an indication that it is directed only at persons outside the UK;

(b) the communication is accompanied by an indication that it must not be acted upon by persons in the UK;

(c) the communication is not referred to in, or directly accessible from, any other communication which is made to a person or directed at persons in the UK by or on behalf of the same person; and

(d) there are in place proper systems and procedures to prevent recipients in the UK (other than those to whom the communication might otherwise lawfully have been made) engaging in the investment activity to which the communication relates with the person directing the communication, a close relative of his or a member of the same group[892].

12.5.11 The first two conditions require the inclusion of appropriate disclaimers and rubrics on promotional material. This is not generally onerous in practice. However, to satisfy the latter two requirements the firm making the promotion must put in place systems and controls to ensure that the promotion is not referred to in, or accessible from, communications made in the UK and that steps are taken to prevent persons in the UK from acting on it. This can sometimes present difficulties in respect of promotions made on websites, although appropriate use of rubrics and "click to confirm" pop-ups can assist.

12.5.12 The Financial Promotion Order contains a second safe harbour for communications directed from a place outside the UK[893]. This covers the situation where the person making the communication is outside the UK, but is brought within the financial promotion restriction because the communication is capable of having an effect in the UK[894]. In this case, the communication is exempt if only the conditions at paragraphs 12.5.10(c) and 12.5.10(d) are satisfied. The intention is to avoid overseas persons committing a criminal offence in the UK by, for example, issuing information about investments published abroad, or placing advertisements in a newspaper circulating outside the UK.

892 Articles 12(4)(a) to 12(4)(d).
893 Article 12(3)(b).
894 Section 21(3).

12.5.13 Where the conditions for the two safe harbours cannot be satisfied (for example, in respect of a website where it is impractical to prevent access by persons in the UK), the Financial Promotion Order states that satisfaction of one or more of the conditions is to be taken into account in determining whether or not the communication is directed only at persons outside the UK[895]. A further factor to be taken into account in this case is whether the communication is included in:

(a) a website, newspaper, journal, magazine or periodical publication which is principally accessed in or intended for a market outside the UK; or

(b) a radio or television broadcast or teletext service transmitted principally for reception outside the UK.[896]

12.5.14 A communication may still be directed at persons outside the UK if it is also directed at persons in the UK, provided that the recipients in the UK are limited to either or both of investment professionals and high net worth companies (as defined in articles 19 and 49 of the Financial Promotion Order)[897].

12.5.15 The overseas persons exemptions do not apply to an unsolicited real time communication unless it is made from a place outside the UK for the purposes of a business which is carried on outside the UK and which is not carried on in the UK[898]. It follows that unsolicited real time communications (for example, cold calls) made from the UK to overseas investors will not benefit from this exemption.

Overseas communicators

12.5.16 The Financial Promotion Order also includes a group of four exemptions for overseas persons that do not carry on investment activities from a permanent place of business maintained in the UK (such a person is referred to as an "overseas communicator")[899]. These exemptions cover: (a) solicited real time communications; (b) non-real time communications to previously overseas customers; (c) unsolicited real time communications to previously overseas customers; and (d) unsolicited real time communications to experienced investors. These

895 Article 12(3)(c).
896 Article 12(4)(e).
897 Article 12(5).
898 Article 12(2).
899 Articles 30 to 33.

exemptions do not apply, however, to any communication in respect of a controlled claims management activity.

12.5.17 The first exemption applies to any solicited real time communication which is made by an overseas communicator from outside the UK in the course of, or for the purposes of, carrying on the business of engaging in relevant investment activities outside the UK[900].

12.5.18 The second exemption applies to non-real time communications by an overseas communicator from outside the UK to a previously overseas customer[901]. This is intended to permit an overseas communicator that established a customer relationship with a person outside the UK to continue to make financial promotions to that person when they are in the UK.

12.5.19 The third exemption applies to unsolicited real time communications which are made by an overseas communicator from outside the UK to a previously overseas customer. As the communication is both real time and unsolicited the requirements are more strict, and the relationship must have involved a reasonable expectation that such communications would be made. There is also an obligation on the communicator to give certain risk warnings[902].

12.5.20 The fourth exemption applies to unsolicited real time communications to experienced investors. The overseas communicator must believe on reasonable grounds that the recipient is sufficiently knowledgeable to understand the risks and also is obliged to give the recipient specified risk warnings. It is also necessary for the investor to have been given a proper opportunity to consider the risks and to signify clearly that they understand the risk warnings and accepts the relevant risks[903].

Other general exemptions

12.5.21 It is outside the scope of this Guide to describe all the exemptions available under the Financial Promotion Order. There follows a summary of the more important general exemptions.

900 Article 30.
901 Article 31.
902 Article 32.
903 Article 33.

Follow up communications

12.5.22 As drafted, the Act restricts every single communication in a series even if the series was lawfully begun. It is therefore necessary to include an exemption permitting the making of follow up communications. Where a person makes or directs a communication which is exempt from the financial promotion restriction, then (subject to certain conditions) subsequent non-real time or solicited real time communications are excluded from the financial promotion restriction[904]. This exemption applies to all controlled activities (including relevant consumer credit activities, and controlled claims management activities).

Introductions

12.5.23 Subject to certain conditions, the financial promotion restriction does not apply to any communication which is made with a view to, or for the purpose of, introducing the recipient to an authorised firm or an exempt firm[905]. This exemption does not apply where the firm carries on the controlled activities of credit broking, operating an electronic system in relation to lending, or agreeing to do either[906]. It also does not apply to a controlled claims management activity[907].

12.5.24 A separate introducing exemption applies to real time communications relating to certain credit-related controlled activities (including in relation to relevant consumer credit agreements). This exemption applies where the communication is made with a view to, or for the purpose of, introducing the recipient to an authorised firm, subject to certain information requirements being met[908]. In addition, the introducer must not receive any money from the recipient of the communication in connection with a transaction entered into as a result of the introduction (other than money legitimately due for services rendered to the borrower).

Generic promotions

12.5.25 The financial promotion restriction does not apply to any communication which: (a) does not identify a firm that provides the controlled investment to which the communication relates; (b) does not identify any firm as a firm that carries on a controlled activity in

904 Article 14.
905 Article 15.
906 Article 15(1A)(a)-(c).
907 Article 15(1A)(d).
908 Article 28B.

relation to that investment; and (c) does not identify any person as a person who carries on a controlled claims management activity[909]. This permits generic promotions of particular types of investments, for example describing the advantages of holding shares or bonds considered generally.

Mere conduits

12.5.26 The Financial Promotion Order includes an important exemption for "mere conduits". The intention is to provide an exemption for, among others, publishers and internet service providers. A person (P) acts as a mere conduit if:

(a) P communicates a financial promotion in the course of an activity carried on by them, the principal purpose of which is transmitting or receiving material provided to P by others;

(b) the content of the communication is wholly devised by another person; and

(c) the nature of the service provided by P in relation to the communication is such that P does not select, modify or otherwise exercise control over its content.[910]

12.5.27 There is a similar "conduit" exemption in respect of electronic commerce communications which fall within the "mere conduit", "caching" and "hosting" provisions of the Electronic Commerce (EC Directive) Regulations 2002 and comply with the conditions therein[911].

Investment professionals

12.5.28 The financial promotion restriction does not apply to any communication which is made only to recipients whom the person making the communication believes on reasonable grounds to be "investment professionals" or may reasonably be regarded as directed only at such recipients, provided that the communication is not in respect of a controlled claims management activity. The definition of an investment professional includes authorised firms, governments and

909 Article 17.
910 Articles 18(1) and 18(2).
911 Article 18A.

local authorities and other persons whose ordinary activities involve carrying on controlled activities[912].

12.5.29 The Financial Promotion Order includes a safe harbour which provides that communications will be "directed at" investment professionals provided that the following conditions are met:

(a) the communication is accompanied by an indication that it is directed at persons having professional experience in matters relating to investments and that any investment or investment activity to which it relates is available only to such persons, or will be engaged in only with such persons;

(b) the communication is accompanied by an indication that persons who do not have professional experience in matters relating to investments should not rely on it; and

(c) there are in place proper systems and procedures to prevent recipients (other than investment professionals) engaging in the investment activity to which the communication relates with the person directing the communication, a close relative of theirs or a member of the same group.[913]

12.5.30 If one or more (but not all) of these conditions is satisfied, that fact is to be taken into account in determining whether the communication is directed at investment professionals[914].

Journalists

12.5.31 A special exemption is included for non-real time communications made by journalists[915]. There are a number of conditions, and the "principal purpose" of the publication or broadcast in which the relevant communication appears must not be the giving of investment advice[916].

One-off communications

12.5.32 The financial promotion restriction does not apply to a one-off communication which is either a non-real time communication or is a solicited real time communication. The Financial Promotion Order

912 Articles 19(1) and 19(5).
913 Articles 19(2) and 19(4).
914 Articles 19(3) and 19(4).
915 Article 20.
916 Article 20(5)(b).

includes a safe harbour which provides that a communication will be "one-off" if:

(a) the communication is made only to one recipient, or only to one group of recipients in the expectation that they would engage in any investment activity or controlled claims management activity jointly;

(b) the identity of the product or service to which the communication relates has been determined having regard to the particular circumstances of the recipient; and

(c) the communication is not part of an organised marketing campaign.[917]

12.5.33 As with a number of other exemptions, the fact that some or none of these conditions are met does not mean that the exemption cannot apply[918], and when one or more of the conditions are met this should be taken into account when determining if a communication is "one-off".

12.5.34 There is also an exemption for one-off unsolicited real time communications. In addition to satisfying the above conditions, the communicator must believe on reasonable grounds that the recipient understands the risks associated with the investment activity to which the communication relates. Further, at the time that the communication is made, the communicator must have reasonable grounds to believe that the recipient would expect to be contacted in relation to the investment activity to which the communication relates[919]. The intention behind this provision is to enable unsolicited tailored communications to be made to expert investors. This exemption does not apply, however, to any communication in respect of a controlled claims management activity.

Joint enterprises

12.5.35 This exemption exists for all types of communications between joint venture partners made in connection with, or for the purposes of, that enterprise. A joint enterprise, in general terms, is an arrangement entered into by two or more persons (the "participators") for commercial purposes related to a business (other than the business of

[917] Articles 28(1) to 28(3).
[918] Article 28(2).
[919] Article 28A.

engaging in a controlled activity or a controlled claims management activity) that they carry on together. Participators include potential participators and other members of a group of which a participator is a member[920].

Participants in certain recognised collective investment schemes

12.5.36 There is an exemption for non-real time communications or solicited real time communications made by the operator of certain recognised schemes[921] where the communications by such recognised scheme operators to participants in the UK relate only to such recognised schemes or to units in such schemes (and therefore only after they have been established)[922].

Communications to existing members and creditors

12.5.37 There are also important exemptions for promotions made to members and creditors of bodies corporate and to OEICs[923]. The promotion in question must be communicated by the entity concerned and must relate to securities issued by that entity or (except in the case of an OEIC) by a member of its group.

Group companies

12.5.38 There is an exemption for communications made from one body corporate to another within the same group[924].

Persons in the business of disseminating information

12.5.39 The Financial Promotion Order includes an exemption which applies to unsolicited or solicited real time and non-real time communications which are made to a recipient whom the person making the communication believes on reasonable grounds to be:

(a) a person who receives the communication in the course of a business which involves the dissemination of information concerning controlled activities or controlled claims management activities through newspapers, journals,

920 Article 39.
921 Schemes recognised under section 272 'Individually recognised overseas schemes'.
922 Article 40.
923 Articles 43 and 44. Article 20A also exempts company directors and others that make real time communications about their company in the course either of speaking in a television or radio programme or via an equivalent electronic medium, or engage in an interactive written exchange in response to a question from a recipient of the communication.
924 Article 45.

magazines, periodical publications, websites, television, radio or teletext services;

(b) a person while acting in the capacity of director, officer or employee of a person falling within (a) above being a person whose responsibilities when acting in that capacity involve them in the business referred to in (a) above; or

(c) any person to whom the communication may otherwise lawfully be made[925].

12.5.40 This exemption would apply to financial promotions in company statements or briefings which are communicated to members of the press.

Sale of body corporate

12.5.41 This exemption is intended for corporate finance activity involving the sale of a company. The exemption is available in respect of communications relating to a transaction to acquire or dispose of shares in a body corporate (other than an OEIC), or which is entered into for the purposes of such an acquisition or disposal. The exemption is available provided that:

(a) the shares consist of or include 50 per cent. or more of the voting shares in the body corporate; or

(b) the shares, together with any already held by the person acquiring them, consist of or include at least that percentage of such shares; and

(c) in either case, the acquisition or disposal is, or is to be, between parties each of whom is a body corporate, a partnership, a single individual or a group of connected individuals.[926]

12.5.42 Even where these tests are not met the exemption is available if the object of the transaction may nevertheless reasonably be regarded as being the acquisition of day-to-day control of the affairs of the body corporate[927].

925 Article 47.
926 Articles 62(1), 62(2)(a), 62(2)(b)(i) and 62(3).
927 Article 62(2)(b)(ii).

Takeovers of unlisted companies

12.5.43 There is a group of exemptions in respect of communications relating to takeovers of unlisted companies[928]. To benefit from these exemptions the offer must relate to all the shares or debentures of the unlisted company and must be accompanied by extensive information.

Certified high net worth individuals

12.5.44 There is an exemption to enable non-real time and solicited real time communications to be made to wealthy individuals[929]. This exemption is of particular relevance to the area of venture capital.

12.5.45 The exemption applies to communications to "certified high net worth individuals". A person is a certified a high net worth individual if they have signed a statement that they:

(a) have, during the financial year immediately preceding the date on which the certificate is signed, an annual income of not less than £100,000; or

(b) held, throughout the financial year immediately preceding the date on which the certificate is signed, net assets (which exclude the value of their home) to the value of not less than £250,000[930].

12.5.46 The Financial Promotion Order permits the making of non-real time or solicited real time communications provided that:

(a) the recipient of the promotion has signed a current "statement for certified high net worth individuals" which gives written consent (in a prescribed form) to receive financial promotions. Once signed, the certificate is valid for one year;

(b) the communication relates only to specified investments in unlisted companies and collective investment schemes investing wholly or predominantly in stocks, shares and debentures of unlisted companies;

928 Articles 63 to 66.
929 Article 48.
930 Article 48(2) and Part I of Schedule 5 to the Financial Promotion Order.

(c) the investment to which the communication relates must not be one under which the investor can incur a liability or obligation to pay more than they committed by way of investment; and

(d) the communication is accompanied by specified risk warnings and disclosures[931].

Sophisticated investors

12.5.47 Even if a person does not fall within the "high net worth" category, promotions may still be made to them if they are a sophisticated investor[932]. The procedure for being designated a sophisticated investor requires the person to obtain a certificate from an authorised firm to the effect that they are sufficiently knowledgeable to understand the risks associated with the particular type of investment, and have themselves signed a statement in a prescribed form. Once given, the certificate is valid for one year.

12.5.48 The Financial Promotion Order permits the making of any communication (including an unsolicited real time communication) to certified sophisticated investors which:

(a) does not invite or induce the recipient to engage in investment activity with the person who has signed the certificate;

(b) relates only to a description of investments in respect of which that investor is certified; and

(c) is accompanied by specified risk warnings and disclosures[933].

12.5.49 Unlike the exemption for high net worth individuals, the sophisticated investors exemption is available for all types of investment and not restricted to certain investments in unlisted companies.

Self-certified sophisticated investors

12.5.50 This exemption was introduced to allow for self-certification of sophisticated investors in relation to promotions of investments in

931 Articles 48(4) to 48(7). Article 48(8) sets out the investments to which the exemption relates. The prescribed form of the written consent is set out in Part I of Schedule 5 to the Financial Promotion Order.
932 Article 50.
933 Articles 50(2) and (3).

unlisted companies and is similar to the exemption for high net worth individuals (see paragraphs 12.5.44 to 12.5.46)[934].

12.5.51 Under this exemption it is possible to communicate a financial promotion to an individual whom the person making the communication believes on reasonable grounds to be a self-certified sophisticated investor provided a number of conditions are met, including the communication of various risk warnings and disclosures.

12.5.52 To rely on the exemption the recipient of the promotion must have signed a "statement for self-certified sophisticated investors" which gives written consent (in a prescribed form[935]) to receive financial promotions. Once signed, the certificate is valid for one year.

High net worth companies, unincorporated associations and trusts

12.5.53 This exemption applies to any communication (including an unsolicited real time communication) which:

(a) is made only to recipients whom the person making the communication believes on reasonable grounds to be high net worth entities; or

(b) may reasonably be regarded as directed only at such persons[936].

12.5.54 An entity falls within this category if it is:

(a) a body corporate with a called-up share capital or net assets of at least £5 million or, if it has more than 20 members or is a subsidiary undertaking of a parent undertaking that has more than 20 members, £500,000;

(b) an unincorporated association or partnership which has net assets of not less than £5 million;

(c) the trustee of a trust which has gross assets of at least £10 million (assessed at any point in the year prior to the date of the communication);

934 Article 50A.
935 The form is prescribed by Part II of Schedule 5 to the Financial Promotion Order.
936 Article 49(1).

(d) a director, officer or employee of any of the foregoing whose responsibilities involve them in engaging in investment activity; or

(e) any person to whom the communication may otherwise lawfully be made[937].

12.5.55 The Financial Promotion Order provides a safe harbour specifying that a communication will be "directed at" high net worth entities if a number of conditions are met[938]. In particular, for this safe harbour to apply, specified disclaimers must be included and the person making the communication is required to have in place proper systems and controls to prevent other persons from engaging in investment activity as a result of the communication[939].

12.5.56 This exemption does not, however, apply to any communication in respect of a controlled claims management activity.

Associations of high net worth or sophisticated investors

12.5.57 There is a special exemption for non-real time and solicited real time communications made to associations of certified high net worth individuals, certified or self-certified sophisticated investors and high net worth companies, unincorporated associations and trusts[940]. This exemption is designed to facilitate promotions made to so-called investment clubs or business angel networks.

Communications incidental to the provision of other services

12.5.58 The Financial Promotion Order includes an exemption for certain non-real time and solicited real time communications which are made by a supplier to a customer incidental to the supply of non-investment goods and services[941]. This exemption is not available for communications which relate to certain types of regulated consumer credit activities.

12.5.59 Similar exemptions permit members of the professions to make communications that are incidental to the provision of professional services[942].

937 Article 49(2).
938 Article 49(3).
939 Article 49(4).
940 Article 51.
941 Article 61.
942 Articles 55 to 55A.

Consumer credit exemptions

12.5.60 The Financial Promotion Order includes an exemption for communications made to or directed at bodies corporate in relation to regulated mortgage lending and consumer credit lending[943].

12.5.61 There is a specific exemption for any communication relating to the controlled activities of providing relevant consumer credit or consumer hire or operating an electronic system in relation to lending[944]. This exemption only applies where the communication indicates that the person is willing to engage in the relevant activity for the purposes of the recipient's business (which does not include a business carried on by the person making the communication or by a person who is a credit broker in relation to the agreement to which the promotion relates) and not where it indicates, expressly or otherwise, that the person is willing to engage in the relevant activity for any other purpose.

Miscellaneous exemptions

12.5.62 The width of the restriction on financial promotion means that there is a need for exemptions designed to permit communications which are already subject to sufficient regulation. These include exemptions for the making of communications in connection with securities listed on UK markets, the publication of listing particulars and prospectuses, and promotions required or permitted by the rules of financial markets[945].

12.6 Power of the FCA to require withdrawal of misleading financial promotions

12.6.1 The FCA has a statutory power, introduced by the FS Act 2012, to require an authorised firm to withdraw a misleading financial promotion and to publish the fact that it has done so. The intention is that the FCA is equipped to address any problems identified in relation to a financial promotion at an early stage and in an effective manner, in order to minimise potential consumer detriment.

Use of the power

12.6.2 In order to exercise its power to require the withdrawal of a financial promotion, the FCA must consider that an authorised person has made (or proposes to make) a communication or has approved (or proposes to

943 Article 46.
944 Article 46A.
945 Articles 67 to 71; COBS 4 of the COBS Rules; CONC 3 of the CONC Rules.

approve) another person's communication and there has been or is (or is likely to be) a contravention of the financial promotion rules. Where this condition is satisfied the FCA may, with immediate effect, direct the authorised firm to:

(a) withdraw the communication or approval;

(b) refrain from making the communication or giving the approval;

(c) publish details of the direction; and/or

(d) do anything else that the FCA may direct (for example, contacting customers who may have acted on the promotion).[946]

12.6.3 While the regulator had the ability to take action in relation to misleading financial promotions under the legacy FSA regime, the Government has made it clear that the core purpose of the FCA's power is to "*ensure that the regulator can make public the fact that it has required a financial promotion to be withdrawn*"[947].

12.6.4 When making a direction against a firm in relation to a financial promotion, the FCA is required to give written notice to:

(a) the authorised firm subject to the direction; and

(b) in a case where the authorised firm is involved in approving the promotion, where practical, to the person seeking approval of the promotion[948].

12.6.5 The recipient(s) of the notice may make representations to the FCA. The notice must inform the recipient(s) of this right, and must also contain the details of the direction, the FCA's reasons for giving the direction and the period of time during which representations can be made by the recipient(s)[949]. During this period, the FCA is not permitted to publish any details relating to the direction.

12.6.6 After considering any representations made by the recipient(s), the FCA will either: (a) amend; (b) revoke; or (c) confirm its original direction. The FCA must provide a written notice of its decision. Where the original direction is not revoked, the notice must give the FCA's reasons

946 Sections 137S(1) and 137S(2).
947 The Treasury policy document 'A new approach to financial regulation: securing stability, protecting consumers' (January 2012), Cm 8268, paragraph C.86.
948 Sections 137S(5) and 137S(12).
949 Section 137S(6).

for amending or confirming the direction. The recipient of the decision is then able to refer the matter to the Tribunal should this be considered appropriate.[950]

12.6.7 Following the decision, the FCA may publish details it considers appropriate about the direction — even if the direction was revoked in response to successful representations by the recipient(s) of the direction[951].

12.6.8 Despite concerns raised during the initial stages of the Financial Services Bill that publishing details of a revoked direction may expose firms to adverse publicity in circumstances where the FCA's direction to withdraw a promotion has proved unfounded, the Government nonetheless granted this power to the FCA, suggesting that the FCA will only consider publishing what it considers is appropriate, and will therefore exercise its discretion. In addition, the Government believes that the purpose of publishing revoked directions is to increase the accountability of the regulator itself (that is, it needs to acknowledge where it has made mistakes) and to assist authorised firms by making known the regulator's view on the acceptability (or otherwise) of particular types of promotion[952].

950 Sections 137S(7) to 137S(10).
951 Section 137S(11).
952 The Treasury policy document 'A new approach to financial regulation: securing stability, protecting consumers' (January 2012), Cm 8268, paragraph C.87.

13. BANKING STRUCTURAL REFORM

13.1 Summary of main changes made by the Banking Reform Act

13.1.1 The Banking Reform Act implemented — through amendments to the Act — most of the final recommendations of the ICB, in particular in relation to ring-fencing requirements for banks and a requirement that ring-fenced banks do not, and cannot, become liable for pension liabilities of (i) the wider banking group in which they sit, or (ii) other entities. It also introduced powers for the Government to impose minimum primary loss-absorbing capacity requirements on banks, to ensure they are more resilient to turbulent economic conditions.

13.1.2 In addition, the Banking Reform Act formed part of the legislative response to recommendations made by the PCBS appointed by Parliament following the financial crisis and certain banking-related scandals to consider professional standards in, and the culture of, the UK banking sector, as well as lessons which might be learned by banks about corporate governance and transparency.

13.1.3 Some of the other key amendments to the Act brought about by the Banking Reform Act included providing the FCA and the PRA with increased powers in relation to unregulated parent companies of authorised firms and in relation to the operation and governance of the FSCS. The Banking Reform Act also revised other legislation, including in relation to the new bail-in stabilisation tool within the SRR, which has been implemented through amendments to the Banking Act 2009, and the new depositor preference in relation to FSCS-insured deposits on an insolvency, which has been implemented through amendments to the Insolvency Act 1986.

13.1.4 The Banking Reform Act also introduced new provisions in relation to the senior managers and certification regime, a new special administration regime for certain financial market infrastructures, and new competition powers and objectives for the FCA and the PRA respectively.

13.1.5 A number of these amendments, revisions, and new provisions are dealt with in other relevant chapters of this Guide. This chapter focuses on the bank ring-fencing regime, and associated matters of pension liabilities and primary loss-absorbing capacity requirements.

13.2 Background to the ring-fencing regime

13.2.1 The ICB was established in June 2010 with a remit to consider the structure of the UK banking sector and to look at structural and non-structural measures to reform the banking system and promote competition in the UK. It published its final report in September 2011, which recommended that UK banks should hold their retail and SME deposit-taking businesses in separate independent and ring-fenced entities which would only be permitted to carry on a limited range of banking activities and should thus be better insulated from problems elsewhere in the same group and in the broader financial system.

13.2.2 This recommendation was broadly accepted by the UK Government, which subsequently included a modified version of the ICB's proposals in this area in what became the Banking Reform Act. In short, rather than requiring complete separation of retail and SME banking from other banking activity, the Banking Reform Act has implemented changes which mean that an independent ring-fenced bank (that is, one that takes retail and SME deposits) cannot conduct certain activities and must exist as a separate entity, but may exist within a group that also contains one or more banks that carry on activities that ring-fenced banks will not be permitted to conduct.

13.2.3 A detailed discussion of the operation of the ring-fencing regime is outside the scope of this Guide, although a description of the fundamental provisions is included below.

13.3 Main features of the UK ring-fencing regime

13.3.1 The ring-fencing provisions contained within the Banking Reform Act apply only to banks incorporated in the UK and are intended to separate core activities that are critical to retail and SME clients from wholesale and investment banking services.

13.3.2 The policy rationale for this separation is that such wholesale or investment banking activities involve a greater degree of risk, and can expose entities undertaking them to problems originating elsewhere in the global financial system and it is, therefore, not suitable for banks serving retail and SME depositors to be exposed to such risks.

13.3.3 The ring-fencing regime is primarily set out in Part 9B of the Act, although much of the detail of the regime is set out in secondary legislation. That secondary legislation specifies, among other things, which entities will accept "core deposits", and therefore will be ring-fenced banks for the purposes of the regime, and precisely which

activities and services such banks may, and may not, conduct. The relevant secondary legislation is:

(a) the Financial Services and Markets Act 2000 (Ring-fenced Bodies and Core Activities) Order 2014[953] (**Core Activities Order**), which defines the circumstances when accepting a deposit is not a core activity and the conditions under which certain deposits can be held outside the ring-fence;

(b) the Financial Services and Markets Act 2000 (Excluded Activities and Prohibitions) Order 2014[954] (**Excluded Activities Order**), which sets out the activities which in principle may not take place within the ring-fence, along with exemptions from those overarching prohibitions; and

(c) the Financial Services and Markets Act 2000 (Banking Reform) (Pensions) Regulations 2015[955] (the **Pensions Regulations**), which sets out when a ring-fenced bank will be able to have exposures to contribute to group pension schemes.

Core activity

13.3.4 A "ring-fenced body" (an **RFB**) is defined for the purposes of the Act as any UK institution which carries on at least one "core activity" for which it has been given Part 4A permission. At present, the only activity that is designated as a core activity and which, accordingly, must be ring-fenced, is the regulated activity of accepting deposits[956].

13.3.5 Under the Core Activities Order, a bank will only be deemed to be carrying out the core activity of accepting deposits if it accepts any deposit that is a "core deposit" which, broadly, is a deposit taken from a retail or SME customer at a branch within the EEA[957]. This means that, within the banking groups that will be subject to the ring-fencing regime, the only UK banks which will be able to accept such deposits will be RFBs.

953 SI 2014/1960, made on 23 July 2014. The Core Activities Order came into force on 1 January 2015.
954 SI 2014/2080, made on 23 July 2014. Key sections of the Excluded Activities Order will come into force on 1 January 2019.
955 SI 2015/547 made on 4 March 2015. The Pensions Regulations came into force on 5 March 2015.
956 Sections 142A and 142B(2).
957 Article 2(1), Core Activities Order.

13.3.6 There are certain exceptions whereby credit institutions/deposit-takers may take deposits from retail customers or SMEs even though they are not RFBs. Such institutions include, most notably:

(a) certain deposit-takers with a blanket exemption from ring-fencing, such as building societies and credit unions;

(b) deposit-takers in groups where the aggregate core deposits taken in the UK and elsewhere in the EEA by all UK deposit-takers in the relevant group does not exceed £25 billion. This means in effect that the ring-fencing regime will only apply to banking groups that take deposits in excess of this core deposits threshold; and

(c) deposit-takers that fall within the scope of the ring-fencing regime as a consequence of the exercise of powers under the special resolution regime set out in Part 1 of the Banking Act 2009 (although this only applies for a period of four years after the exercise of such powers).

Excluded activities and prohibitions

13.3.7 RFBs are prohibited from conducting certain excluded activities under section 142D of the Act. They are also subject to a number of prohibitions specified in the Excluded Activities Order.

13.3.8 The regulated activity of dealing in investments as principal as set out in the Regulated Activities Order is an excluded activity for RFBs pursuant to the Act, whether carried on in the UK or elsewhere. For the purposes of determining whether a bank deals as principal for these purposes, most of the exemptions available under the Regulated Activities Order should be disregarded. Dealing in commodities is also an excluded activity, pursuant to the Excluded Activities Order.

13.3.9 In principle, these activities may not take place within the ring-fence, except in exempted circumstances specified in the Excluded Activities Order. These exemptions enable RFBs to carry on, among others, the following activities as long as specified additional conditions are met:

(a) to enter into transactions as principal (including in relation to derivatives) for the purpose of managing certain of their own risks (specifically, interest rate, exchange rate, commodity price, default and liquidity risk) or similar risks of certain connected parties;

(b) to sell certain "simple" derivative products to their customers, subject to safeguards relating to the volume and purpose of the derivatives being sold; and

(c) to deal in investments as principal with central banks.

13.3.10 A further prohibition set out in the Excluded Activities Order prevents RFBs from incurring exposures to a wide range of "relevant financial institutions" except in certain exempted situations. Relevant financial institutions are defined to include banks, global systemically important insurers, certain investment firms, certain holding companies of financial institutions, certain securitisation-related companies, UCITS management companies, alternative investment fund managers and a wide range of funds and other investment vehicles. An exposure in this context includes an exposure to loss for the RFB caused by a counterparty default or a loss in value of assets as further set out and explained in the UK CRR.

13.3.11 Certain institutions, including ring-fenced banks, building societies and investment firms that do not have permission to carry on the regulated activities of dealing as principal or dealing as agent in the UK or elsewhere in the EEA, are excluded from the definition of "relevant financial institution" for the purposes of the Excluded Activities Order.

13.3.12 Exceptions to the prohibition on RFBs having exposures to relevant financial institutions are also set out in the Excluded Activities Order.

13.3.13 One of these exemptions will allow an RFB to have exposures to relevant financial institutions in its group, provided that the transaction concerned is a commercial transaction on arm's length terms and conforms with regulatory rules applicable to such an exposure.

13.3.14 In addition to the prohibition on financial institution exposures, the Excluded Activities Order also prohibits RFBs from establishing branches or subsidiaries (other than certain service companies) in any country or territory which is not in the UK or the EEA.

13.3.15 Beyond the restrictions stated above, RFBs are permitted, but not required, to carry on a very wide range of other activities. However, the way in which RFBs control, organise and operate their businesses is heavily influenced by regulatory rules relating to ring-fencing (see paragraphs 13.3.25 to 13.3.29).

13.3.16 If an RFB carries on an excluded activity, or purports to do so, or contravenes a prohibition made under section 142E of the Act, it is

deemed to have contravened a requirement imposed by the PRA[958]. This means that the PRA may take enforcement action against the RFB, such as imposing financial penalties on it or exposing it to public censure, as a result of that contravention.

13.3.17 A breach of the ring-fencing requirements is not, however, a criminal offence, nor does it make a transaction entered into void or unenforceable. Moreover, a breach does not give rise to any action for breach of statutory duty, unless the Treasury has specified by order that the breach in question is actionable at the suit of a person who suffers loss as a result of the breach.

"Electrification of the ring-fence"

13.3.18 The Act confers on the PRA a power to "electrify" the ring-fence by requiring banking groups to restructure their operations if the PRA deems that the ring-fence within a group is proving ineffective (for example, the RFB is being unduly influenced by the other members of its group)[959].

13.3.19 Such restructuring can include requiring:

(a) authorised group members to dispose of shares in the RFB;

(b) authorised group members to dispose of shares in any other group member;

(c) the RFB to apply to the court for a transfer of all or part of its business to a person outside the group; or

(d) group members to apply to the court for a transfer of all or part of their business to a person outside the group.

Creation of the ring-fence

13.3.20 The Banking Reform Act modified Part 7 of the Act to provide for a new "ring-fencing transfer scheme". These schemes are more flexible versions of Part 7 banking business transfer schemes and were used by RFBs and other members of their groups to effect the reorganisations required to comply with the ring-fencing regime ahead of that regime coming into force in January 2019.

[958] Section 142G(1).
[959] Section 142K.

13.3.21 Many of the procedural aspects of these schemes are similar to those of traditional Part 7 banking business transfer schemes, with certain material differences including the requirement for a scheme report to be made by a person nominated or approved by the PRA, which report should address the likely effect of the transfer on persons other than the transferor.

13.3.22 See further Chapter 18 'Powers exercisable in relation to parent undertakings'.

Regulation of RFBs and members of the group

13.3.23 The Act makes provision for the PRA (or the FCA, if appropriate[960]) to make a range of detailed ring-fencing rules, including those intended to achieve legal, economic and operational separation between RFBs and other members of their groups. Certain rules also apply to authorised persons that are members of an RFB's group for certain purposes, referred to as the "group ring-fencing purposes"[961].

13.3.24 The rules made by the PRA under this provision[962] cover (among other matters):

(a) transactions and payments between the RFB and other members of its group;

(b) governance requirements for RFBs (including independence requirements regarding the boards of RFBs);

(c) the dividend policies of RFBs;

(d) risk management policies of RFBs;

(e) human resources and remuneration policies of RFBs; and

(f) independent capitalisation and liquidity requirements for RFBs.

13.3.25 These provisions do not limit the Treasury's power to specify further matters that must be dealt with in ring-fencing rules or to require the

960 The appropriate regulator will be the PRA in relation to PRA-authorised persons and the FCA in relation to all other cases. As accepting deposits (currently the only regulated activity that is a core activity) is a PRA-regulated activity, the only firms that will be RFBs are PRA-authorised firms.
961 Section 142H.
962 These rules are principally found in the Ring-fenced Bodies part of the PRA Handbook.

PRA to make rules in other areas, if this is necessary to ensure the independence of the RFB from other members of its group.

13.3.26 PRA rules also require RFBs to have appropriate arrangements in place for the supply to it of services and activities required in the carrying on of a core activity.

13.3.27 The PRA rules on ring-fencing should be read in conjunction with a Supervisory Statement[963], which sets out the PRA's expectations of an RFB and members of its group in relation to the ring-fencing of core activities and services and the PRA's rules in respect of the same.

Shareholding and voting power in other entities

13.3.28 The Act also provides the PRA with a power to limit the shares and the voting power that an RFB may have in another company. This power is not restricted by the Treasury's power to impose prohibitions on RFBs from holding shares or voting powers in other companies in specified circumstances[964]. The PRA has not made any rules in this area but has set out that its expectation is that an RFB will not have any ownership interest in an entity which conducts any activity which the RFB itself would not be permitted to undertake[965].

Objectives of the PRA

13.3.29 The continuity of (ring-fenced) core services is a central pillar of the PRA's general objective under the Act: promoting the safety and soundness of PRA-authorised firms.

13.3.30 That objective is advanced by the PRA discharging its general functions in relation to ring-fencing matters in three ways, by ensuring:

(a) first, that RFBs do not carry on business in a way that may adversely affect the continuity of the provision in the UK of "core services";

(b) secondly, that RFBs are protected from risks; and

963 Supervisory Statement SS8/16, Ring-fenced Bodies (SS8/16).
964 Section 142H(2).
965 Paragraph 2.3 of PRA SS8/16.

(c) thirdly, that the failure of an RFB (or the failure of a member of an RFB's group) does not put at risk the continuity of core services.

13.3.31 These "core services" are broader than the core activity of accepting deposits and extend to facilities for making payments from, and providing overdrafts in connection with, deposit accounts.

13.4 Pension liabilities

13.4.1 The ICB recommended that RFBs should not have liabilities to group-wide pension schemes.

13.4.2 The Act gives the Treasury power to make regulations to require that RFBs ensure as far as possible that they are not and cannot become liable for the pensions liabilities of entities within their group which are not ring-fenced (except in cases prescribed by the Treasury)[966]. In exercise of this power, the Treasury made the Pensions Regulations, which came into force on 5 March 2015.

13.4.3 The Pensions Regulations require RFBs to ensure that, among other things, they do not participate in multi-employer pension schemes, or share pension liabilities, with entities that are not: (a) wholly-owned subsidiaries of the RFB; (b) other RFBs in the same group as the RFB; or (c) wholly-owned subsidiaries of other RFBs in the same group as the RFB[967]. These restrictions will apply to the pension arrangements of RFBs from 1 January 2026 or, if later, five years after the body became an RFB.[968] There are no current plans to publish further guidance, although the Treasury has issued an explanatory memorandum to the Regulations.[969]

13.5 Additional primary loss-absorbing capacity requirements

13.5.1 Pursuant to a new section of the Act, the Treasury was given power to include in secondary legislation requirements for a range of firms to hold loss-absorbing capacity in addition to capital held to satisfy their capital requirements[970]. These reforms were originally intended to

966 Section 142W.
967 Regulation 2 of the Pensions Regulations.
968 *Ibid.*
969 Explanatory Memorandum to the Financial Services and Markets Act 2000 (Banking Reform) (Pensions) Regulations 2015 (SI 2015/547) (2015 No. 547).
970 Section 142Y.

implement recommendations of the ICB relating to Primary Loss-Absorbing Capacity (**PLAC**) requirements and the resolution buffer.

13.5.2 While a draft version of a statutory instrument which would have imposed such requirements on relevant firms was published in July 2013, that statutory instrument was never passed. Rather, requirements relating to PLAC were effectively superseded by the UK implementation of the minimum requirement for eligible liabilities (**MREL**) contained in the Bank Recovery and Resolution Directive (**BRRD**)[971] and the fact that that implementation reflected the requirements as to total loss-absorbing capacity (**TLAC**) published by the Financial Stability Board in 2015 and the associated consultation paper on the prudential treatment of banks' investments in holdings of TLAC by the Basel Committee on Banking Supervision[972].

13.6 Looking ahead

13.6.1 The Banking Reform Act requires the Treasury to appoint an independent panel to review the operation of the legislation relating to ring-fencing and make recommendations as it sees fit. Within this broad mandate, the panel is required to examine how the ring-fencing regime meets its intended purpose of supporting financial stability and minimising risks to public finances through the effective separation of core banking services. It is also required to assess the impact of the ring-fencing legislation on, among other things, competition in the banking sector and the UK mortgage market, as well as the international competitiveness of the UK banking sector. The terms of reference for the Panel were published in February 2021 and a call for evidence issued in April 2021. The deadline for responses was 13 June 2021.

13.6.2 The outcome of the review is, at the time of writing, unclear, but could conceivably result in a raising of the entry threshold and a tiered system of requirements in the regime. This could, in turn, see smaller established banks expand more easily and encourage new entrants into the sector.

971 The Bank Resolution and Recovery Directive 2014/59/EU.
972 Basel Committee on Banking Supervision 'Consultative Document on TLAC Holdings' (BCBS342) (November 2015).

14. COLLECTIVE INVESTMENT SCHEMES

14.1 Overview

14.1.1 Part 17 of the Act deals with the regulation of collective investment schemes. It has remained broadly constant in much of its detail since the FS Act 1986. The FS Act 2012 introduced minor changes to the regime and allocated responsibility for the regulation of collective investment schemes to the FCA. A significant amendment was subsequently made in June 2013 with the introduction of a new form of scheme in the UK: authorised contractual schemes, and more recently changes have been made to account for the UK's departure from the EU.

14.1.2 The Act deals with four types of approved collective investment schemes: authorised unit trusts, OEICs, authorised contractual schemes and recognised overseas schemes. Provision is also made for the treatment of other, non-approved, schemes, which are subject to restrictions on marketing and, consequently, such schemes are effectively limited to expert and institutional investors only.

14.1.3 The definition of "collective investment scheme"[973], which has perhaps caused the most difficulty in this area of the law, remains unchanged since the relevant section of the Act entered into force[974].

14.1.4 The key elements of the definition are:

(a) "collective investment scheme" means any arrangement with respect to property of any description, including money, the purpose or effect of which is to enable persons taking part in the arrangements (whether by becoming owners of the property or any part of it or otherwise) to participate in or receive profits or income arising from the acquisition, holding, management or disposal of the property or sums paid out of such profits or income;

(b) the arrangements must be such that the persons who are to participate ("participants") do not have day-to-day control over

[973] Section 235.
[974] The High Court decision in *The Secretary of State for Business, Innovation and Skills v Sky Land Consultants PLC* [2010] EWHC 399 (Ch) has, however, provided some welcome judicial clarification on the application of section 235. More recently, in April 2016, the UK Supreme Court issued its judgment in the case of *Asset Land Investment plc v FCA* [2016] UKSC 17, adding some further guidance.

the management of the property, whether or not they have the right to be consulted or to give directions; and

(c) the arrangements must also have either or both the following characteristics:

(i) the contributions of the participants and the profits or income out of which payments are to be made to them are pooled; and/or

(ii) the property is managed as a whole by or on behalf of the operator of the scheme[975].

14.1.5 The Treasury has the power by order to specify that a scheme that would otherwise be a collective investment scheme should not be treated as such[976]. This has been done in an order that sets out a list of arrangements that do not amount to collective investment schemes[977]. This order includes exemptions for enterprise initiative schemes, schemes not operated by way of business, schemes connected with securitisations and similar debt issues, certain employee share schemes, certain schemes entered into for commercial purposes and, most recently, regulated peer-to-peer lending platforms.

14.1.6 There is also an important exclusion for bodies corporate incorporated in the UK and bodies corporate incorporated elsewhere (other than OEICs)[978]. The sale of the shares or equity interests in such bodies are instead subject to the financial promotion regime and, if applicable, the prospectus requirements in respect of public offers. The definition of an OEIC[979] remains complex and is discussed in more detail below.

14.1.7 The status of limited partnerships (**LPs**) is particularly complex. An English LP is not a body corporate. However, the situation is less clear-cut as regards Scottish LPs, Delaware LPs and Guernsey LPs that are (or may be) bodies corporate. Section 417 of the Act defines "body corporate" as including "*a body corporate constituted under the law of*

975 This is a particularly thorny aspect of the definition. The High Court in *Financial Conduct Authority v Capital Alternatives Ltd & Others* [2014] EWHC 144 (Ch) had held that, when determining whether property is managed "as a whole", the test is whether the element of individual management is "substantial". If so, the property is not managed as a whole. The Court of Appeal ([2015] EWCA Civ 284) subsequently rejected that test and held that, in determining whether there is "management as a whole", the court should focus on the investment objectives of the arrangements.

976 Section 235(5).

977 The Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001 (SI 2001/1062).

978 Paragraph 21 of Schedule 1 to SI 2001/1062. The carve-out for bodies corporate does not apply to limited liability partnerships that may, therefore, be collective investment schemes.

979 Section 236.

a country or territory outside the United Kingdom". The FCA interprets section 417 as having the effect that whether any particular overseas person is a body corporate will depend on the law applicable in the country or territory in which it is constituted[980].

14.1.8 The Act maintains the basic concept that unless a collective investment scheme has been authorised or approved, it cannot be marketed to retail investors or to the public at large. This is the case for both unauthorised persons and authorised firms. Marketing by unauthorised persons is subject to the general financial promotion regime under section 21, whereas marketing by authorised firms is subject to the regime applying specifically to the promotion of collective investment schemes under section 238.

14.1.9 This chapter does not address in detail the financial promotion regime applicable to collective investment schemes, but the marketing provisions in Part 17 of the Act (which apply only to authorised firms) are broadly in line with similar provisions applying more generally under section 21. Therefore many of the issues discussed in Chapter 12 'Financial promotion' in relation to the financial promotion restriction will be relevant.

14.1.10 Exemptions from the restriction on the promotion of unauthorised collective investment schemes by authorised firms are set out in an exemption order[981] and in the COBS Rules[982]. These include follow-up communications, introductions, generic promotions, one-off non-real time and solicited real time communications, communications to investment professionals, communications to existing participants in an unregulated scheme and communications to certified high net worth individuals, certified sophisticated investors and high net worth entities. Since 1 January 2014, the exemptions regime for the promotion of unauthorised collective investment schemes, together with certain close substitutes referred to collectively as "non-mainstream pooled investments", has been significantly restricted.

14.1.11 To avoid unnecessary regulation of overseas promotions (that is, UK schemes that are marketed overseas), the exemption order contains an exemption in respect of communications that are made (whether from inside or outside the UK) to a person who receives the communication

980 PERG 9.3.6G of the PERG Manual.
981 The Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001 (SI 2001/1060).
982 COBS 4.12 of the COBS Rules.

outside the UK, or that are directed (whether from inside or outside the UK) only at persons outside the UK[983]. Various tests are set out in the exemption order for determining whether the latter test is met. As with financial promotions, there is no exemption for unsolicited real time communications that are made from the UK.

14.2 Unit trusts

14.2.1 Significant amendments were made to the Act, more specifically sections 242 to 261B, in 2011 in order to implement the master-feeder fund structures that were introduced under the UCITS Directive. A number of aforementioned sections have since been amended by the Money Market Funds Regulations 2018 (SI/2018/698). These amendments make provision for an authorised unit trust scheme to also be authorised as a money market fund (MMF) and enable the proposed manager and/or trustee of a unit trust scheme to make a simultaneous application to the FCA for such unit trust scheme to be authorised as both an authorised unit trust scheme and a MMF. Additionally, section 243 was also amended in December 2020, the effect of which is that the manager and trustee of an authorised unit trust scheme must be, among other things, body corporates incorporated in the UK, rather than body corporates incorporated in any EEA state.

14.2.2 The FCA has the power to approve changes to an authorised unit trust's investment and borrowing powers and hence to widen the range of UK unit trusts that can be authorised[984].

14.3 Open-ended investment companies

General

14.3.1 Much of the legislation concerning OEICs is dealt with by regulations and FCA rules. Accordingly, the OEIC provisions in the Act are very short.

14.3.2 Treasury regulations have been made that establish the special corporate code for OEICs as well as the requirements for the formation,

983 Article 8 of SI 2001/1060.
984 Section 251.

supervision and control of OEICs[985]. The FCA performs the registration function for OEICs[986].

Definition of OEIC

14.3.3 The definition of an OEIC is contained in section 236. This definition was intended to be more flexible and less prescriptive than the definition that applied under the FS Act 1986, by looking in part to an investor's expectation whether his investment would be realisable within a reasonable period of time, but it has proved to be not without its own difficulties.

14.3.4 Under section 236, an OEIC is a collective investment scheme that satisfies both the "property condition" and the "investment condition". Note, therefore, that if an entity does not constitute a collective investment scheme for the purposes of section 235, it cannot be an OEIC.

14.3.5 The "property condition" is that the property belongs beneficially to, and is managed by or on behalf of, a body corporate having as its purpose the investment of its funds with the aim of: (a) spreading investment risk; and (b) giving its members the benefit of the results of the management of those funds by or on behalf of that body.

14.3.6 The "investment condition" is that, in relation to the body corporate, a reasonable investor would, if he were to participate in the scheme: (a) expect that he would be able to realise, within a period appearing to him to be reasonable, his investment in the scheme; and (b) be satisfied that his investment would be realised on a basis calculated wholly or mainly by reference to the value of property in respect of which the scheme makes arrangements.

14.3.7 The application of this definition in practice can be complex, and the FCA has issued extensive guidance in the PERG Manual[987]. In particular, PERG 9.3.5G states that the FCA understands that the aim of the definition in section 236 of the Act is to include any body corporate that, looked at as a whole, functions as an open-ended investment vehicle. The definition could apply equally to bodies corporate formed outside the UK, with varying corporate forms and subject to different

985 The Open-Ended Investment Companies Regulations 2001 (SI 2001/1228); and the FCA 'Collective Investment Schemes sourcebook' (COLL) (the **COLL Rules**).
986 SI 2001/1228.
987 PERG 9.

laws; PERG 9.7.5G notes that "*a closed-ended company can become open-ended and vice versa, on account of significant changes to the way in which the operation of the company and its constitution are structured and which push the company over the boundary between the two types*".

14.3.8 A further difficulty has been whether companies, or bodies corporate, that are established for a limited period of time (but otherwise do not redeem or repurchase their securities) constitute OEICs. The FCA's view is that they do not, because such entities are by "nature" closed-ended, albeit of limited life[988].

14.3.9 UK companies that redeem their shares under the relevant Companies Act provisions do not become OEICs simply as a result of such redemption. In respect to non-UK jurisdictions, the Treasury retains the power to specify that redemptions under the laws of other jurisdictions fall outside the OEIC provisions, and to amend the definition of an OEIC by way of secondary legislation.[989]

14.4 Authorised contractual schemes

14.4.1 The Collective Investment in Transferable Securities (Contractual Scheme) Regulations 2013[990], which came into force on 6 June 2013, introduced a new form of authorised collective investment scheme into the Act: authorised contractual schemes. Unlike authorised unit trusts and OEICs, authorised contractual schemes are tax-transparent collective investment vehicles, meaning that income and gains are attributed directly to the investors as they arise and tax is only paid once.

14.4.2 An authorised contractual scheme is defined in the Act as a contractual scheme that is authorised in accordance with Section 261D[991]. The FCA may authorise a contractual scheme if:

(a) it is satisfied that the scheme complies with the requirements of Sections 261D and 261E;

(b) the requirements of contractual scheme rules (set out in the **COLL Rules**) are met; and

988 PERG 9.11.1G.
989 Sections 236(4) and 236(5).
990 SI 2013/1388.
991 Section 237(3).

(c) it has been provided with a copy of the contractual scheme deed and a certificate signed by a solicitor stating that the scheme complies with the necessary requirements.

14.4.3 Under section 235A, an authorised contractual scheme may take the form of a co-ownership scheme or a partnership scheme. Broadly, a co-ownership scheme is a contractual scheme that does not constitute a body corporate, a partnership or a limited partnership (**LP**) and in which the scheme property is held by, or to the order of, a depositary and is beneficially owned by the participants as tenants in common[992]. A partnership scheme is a contractual scheme established as a LP which is not designated as a private fund LP under section 8(2) of the Limited Partnerships Act 1907, and which fulfils the conditions set out in section 235A(6). Such partnerships must, at any time, have only one general partner and, on formation, only one limited partner. The partnership deed must provide, among other things, that the partnership is not dissolved upon any person ceasing to be a limited partner, provided there remains at least one limited partner.

14.4.4 The general restriction on the promotion of collective investment schemes does not apply to authorised contractual schemes. However, to protect retail investors, the scheme must not allow retail investors to be participants in the scheme unless they make an investment of not less than £1 million[993].

14.5 Recognition of overseas schemes

14.5.1 The Act previously contained a regime for the recognition of schemes established in any EEA state other than the UK. However, as a consequence of the UK's departure from the EU, this is no longer the case. Rather, as at the date of publication, the Act now only contains a regime for individually recognised overseas schemes; these are schemes managed outside of the UK but which nevertheless are permitted to be marketed directly to UK retail investors providing the FCA are satisfied that certain criteria, as set out in section 272, are met. In general terms, the overarching theme of the criteria set out in section 272 is to ensure that any scheme affords adequate protection for investors.

14.5.2 The Financial Services Act 2021 (**FS Act**), however, provides for the establishment of a new regime for schemes authorised in approved

992 Section 235A(2) and (3).
993 Section 261(E).

countries (referred to colloquially as the overseas funds regime). Consequently, new sections 271A-271S have been inserted into the Act, which, at the time of publication, have not yet come into force as the Treasury as of yet has not appointed a date via legislation. Broadly, these sections set out the conditions which must be met before an overseas collective investment scheme authorised in a jurisdiction outside the UK can be a "recognised scheme" under this new regime, which shall be a requirement in order for a fund to be marketed to retail and/or professional investors in the UK. Such conditions include, among other things, an equivalence determination in respect of a jurisdiction by the Treasury and subsequently a recognition order by the FCA in relation to an individual collective investment scheme. At present, no firm indication has been provided on which jurisdictions will be granted equivalence for these purposes. It has been confirmed, though, that funds capable of being recognised under the overseas funds regime cannot be recognised alternatively under section 272 of the Act. The FS Act also extended the temporary marketing permissions regime as set out in the Collective Investment Scheme (Amendment etc) (EU Exit) Regulations 2019 (SI 2019/325) from three years to five years.

14.5.3 There was previously, under section 270, an additional category of "schemes authorised in designated countries or territories" that met criteria similar to authorised unit trusts and OEICs. This section was repealed from 22 July 2013 by the AIFM Regulations at which point existing regimes recognised under section 270 were treated as individually recognised schemes under section 272.

14.6 Undertakings for collective investment in transferable securities

14.6.1 The provisions in Part 17 of the Act that are derived from the UCITS regime have undergone various amendments since the Act came into force. Of those amendments, the two most significant updates took place: (i) in July 2011 in connection with the implementation of the UCITS Directive; and (ii) in connection with the implementation of the Collective Investment Schemes (Amendment etc.) (EU Exit) Regulations 2019/325 (the **CIS EU Exit Regulations**). As well as technical amends which include replacing references to the EU with references to the UK, the changes brought about by the CIS EU Exit Regulations were primarily in the areas set out below.

Definition of UCITS

14.6.2 Under a new section 236A, the definition of UCITS is now provided for within the Act as being an undertaking established in the UK or an EEA member state:

(a) with the sole object of collective investment, operating on the principle of risk-spreading, in transferable securities or other liquid financial assets mentioned in subsection (3), of capital raised from the public; and

(b) with units which are, at the request of holders, repurchased or redeemed, directly or indirectly, out of the undertaking's assets.

14.6.3 It should also be noted that section 237 of the Act provides that a UK UCITS is an undertaking which satisfies the criteria listed above and additionally falls within the definition for authorised unit trust schemes, authorised contractual schemes or authorised OEICs. Relatedly, within the Act a new definition has been provided for EEA UCITS; this term means a UCITS which is authorised pursuant to Article 5 of the UCITS Directive in an EEA member state.

Cross-border and domestic mergers

14.6.4 Since the end of the Brexit transition period, cross-border mergers between UK UCITS and EEA UCITS are no longer possible. However, the CIS EU Exit Regulations, while repealing the sections of the Act which permitted such cross-border mergers, retained the provisions enabling mergers between UK UCITS where one UK UCITS had submitted — before exit day — a passporting notification to provide services in an EEA member state.

Information sharing

14.6.5 The UCITS Directive introduced the ability for a UCITS to operate as a feeder fund; that is, to invest the majority of its assets in another UCITS, known as the "master fund". Sections 283A, 283B, 252A, 258A, 261A and 261B of the Act were enacted to introduce the master-feeder structure into the UK's UCITS regime. Section 261A and section 261Z4, which required the provision of certain information to the home state regulator of a feeder EEA UCITS, were repealed by the CIS EU Exit Regulations.

14.7 Alternative investment funds

14.7.1 The AIFM Directive entered into force on 21 July 2011 and was implemented in the UK by the AIFM Regulations, which came into force on 22 July 2013, together with FCA rules and guidance contained in the Investment Funds sourcebook (**FUND Rules**). Implementation of the AIFM Directive was subject to a one-year transitional period that ended on 22 July 2014. The AIFM regime was onshored via the Alternative Investment Fund Managers (Amendment) (EU Exit) Regulations SI 2019/238 (**AIFMD EU Exit Regulations**) with certain amendments to reflect the UK's departure from the EU.

14.7.2 The Alternative Investment Funds Managers Directive (**AIFM Directive**) regulates fund managers that manage alternative investment funds (**AIFs**). The provisions of the AIFM Directive, therefore, apply to AIFMs and, other than in limited circumstances, not directly to the AIFs that they manage. However, the definition of an AIF is central to determining which entities will be AIFMs and, consequently, which funds will be managed within the scope of the AIFM Directive. Moreover, the regime introduced by the AIFM Directive overlaps with, but does not mirror exactly, the UK regime regulating collective investment schemes under Part 17 of the Act.

14.7.3 An AIF is a collective investment undertaking that: (i) "raises capital from a number of investors with a view to investing it in accordance with a defined investment policy for the benefit of those investors"; and (ii) is not a UK UCITS[994]. While not without its own difficulties, this definition of an AIF is arguably clearer than the definition of a collective investment scheme in section 235 of the Act. The FCA has published considerable guidance on the scope of the AIFM Directive, including in relation to the definition of collective investment undertaking. To note, an AIF, following Brexit-related updates to relevant legislation, is a collective investment undertaking that has not been authorised as a UK UCITS. The key practical consequence of this is that any investment fund that is not subject to the UK's UCITS regime shall be regarded as an AIF; this includes EEA UCITS[995]. As a result, once the temporary marketing permissions regime falls away the manager of an EEA UCITS will, in order to continue its marketing activities in the

[994] Regulation 3(1) AIFM Regulations (SI 2013/1773).
[995] See paragraph 14.6.3.

UK, be required to comply with the requirements of the UK's onshored AIFMD regime.

14.7.4 The AIFM Regulations introduced into the Regulated Activities Order the new regulated activity of "managing an AIF"[996]. A full-scope AIFM[997] that is authorised for this activity is not also required to obtain permission for the regulated activity of establishing, operating or winding up a collective investment scheme, or to obtain the other MiFID permissions typically held by fund managers (such as managing and advising on investments), in respect of its fund management activities, even where the AIF(s) being managed also meet the definition of a collective investment scheme. The AIFM Regulations also amended the permissions regime in respect of managers of UCITS funds to bring it in line with that introduced for AIFMs, with the addition of a further new regulated activity of "managing a UK UCITS"[998].

14.7.5 Two new regulated activities were introduced for entities that safeguard fund assets: acting as trustee or depositary of a UCITS and acting as trustee or depositary of an AIF[999]. These replace the former regulated activities of acting as trustee of an authorised unit trust scheme and acting as a depositary of an OEIC.

14.7.6 Various consequential amendments were made to the Act pursuant to the AIFM Regulations. In particular, section 55V was amended to provide that applications for permission under Part 4A that relate to the regulated activity of managing an AIF (which would result in the applicant becoming a full-scope UK AIFM) shall be determined in accordance with Regulation 5 of the AIFM Regulations. Unlike other applications for permission under Part 4A, such AIFM applications must be determined by the FCA within three months from receipt of the complete application, although this may be extended for a further three months if the FCA considers it necessary due to the specific circumstances of the case.

14.7.7 The AIFM Regulations contain restrictions on the marketing of an AIF. "Marketing" in this context is defined as "*a direct or indirect offering*

996 Article 51ZC of the Regulated Activities Order.
997 A full-scope AIFM is an AIFM to which the full AIFM Directive provisions apply. There is a part exemption for managers of portfolios of AIFs the value of which does not exceed EUR 100 million, or EUR 500 million if each AIF is unleveraged and has a lock-in period of five years or less, referred to as "small AIFMs". Small AIFMs are subject only to certain reporting and notification requirements and, depending on the type of AIF, are required either to apply to the FCA for authorisation or simply to register with the FCA.
998 Article 51ZA (as amended by the Financial Services and Markets Act 2000 (Amendment) (EU Exit) Regulations 2019/632).
999 Articles 51ZB and 51ZD.

or placement of units or shares of an AIF"[1000]. Such marketing may also fall within section 21 of the Act (restrictions on financial promotion) or section 238 of the Act (restrictions on promotion of collective investment schemes). A communication that does not constitute marketing under the AIFM Regulations may well still be a promotion under section 21.

14.7.8 A detailed discussion of the marketing regime under the AIFM Directive is outside the remit of this Guide. In short, however, marketing and management passports are not currently available to non-EEA managers of AIFs or EEA managers in respect of non-EEA AIFs though the Directive envisages that they will ultimately be extended to such entities. Marketing of these funds to professional investors is currently permitted under national private placement regimes (likely to be available for three years after the third country passport is introduced).

14.7.9 The AIFMD EU Exit Regulations create a transitional and temporary marketing regime under which: (i) EEA AIFMs can continue to market certain AIFs in the UK; and (ii) UK AIFMs can continue to manage and market AIFs in the UK on the same terms as immediately before 31 December 2020. Annex A of the FCA's temporary transitional directions applies the standstill direction to amendments made by the AIFMD EU Exit Regulations to Regulation 54 and 57 of the AIFM Regulations. The effect of this is that: (i) a UK AIFM can continue to market an EEA AIF that was being marketed in the UK immediately before 31 December 2020 in accordance with Regulation 54, as if it still had the same effect as it did immediately before that date; and (ii) an EEA AIFM can continue to market an AIF in accordance with Regulation 57, as if it still had the same effect as it did immediately before 31 December 2020.

[1000] Regulation 45 AIFM Regulations.

15. MARKET ABUSE AND FINANCIAL CRIME

15.1 Overview

15.1.1 Part 8 of the Act gives the FCA the power to impose unlimited "civil" fines on individuals and firms that commit market abuse. The civil market abuse regime was originally introduced in the UK when the Act came into force on 1 December 2001. Significant amendments were made to the regime in order to implement the Market Abuse Directive (2003/6/EC) (**MAD**) in 2005, and the regime was overhauled by the Market Abuse Regulation (596/2014/EU) (**EU MAR**), which came into force on 3 July 2016. EU MAR has since been retained under the EU (Withdrawal) Act 2018 (**UK MAR**).[1001]

15.1.2 EU MAR, together with the EU Directive on Criminal Sanctions for Market Abuse (2014/57/EU) (**CSMAD**), formed part of the legislative package (sometimes referred to as MAD 2), which introduced an updated and strengthened EU market abuse regime and repealed and replaced MAD and its implementing legislation with effect from 3 July 2016.

15.1.3 As a Regulation, EU MAR has direct effect in all EU member states and was directly applicable in the UK prior to IP completion day. The participating member states were required to transpose CSMAD by 3 July 2016. The UK Government decided not to opt in to CSMAD. The UK was therefore not bound by, or subject to, the application of CSMAD, and was not required to publish legislation implementing that Directive. UK criminal law already covers all the market abuse offences, including capturing market abuse that is committed recklessly as well as market abuse committed intentionally (which goes beyond the scope of CSMAD).

15.1.4 MAD was primarily implemented in the UK through Part 8 of the Act and Chapters 2 and 3 of the Disclosure and Transparency Rules (**DTRs**) of the FCA Handbook. From 3 July 2016, EU MAR replaced many of the market abuse provisions in Part 8 of the Act. In addition, substantial changes have been made to the Model Code in Chapter 9 of the Listing Rules as well as to other parts of the FCA Handbook, including the Code of

[1001] Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC (Text with EEA relevance) (Retained EU Legislation).

Market Conduct Sourcebook and Chapters 2 and 3 of the DTRs. As of 31 December 2020 (IP completion day), UK MAR applies in the UK.

15.1.5 The market abuse regime applies to both authorised firms and unauthorised persons, including customers and end-users of the market. The regime also applies to persons outside the UK.

15.1.6 Following the implementation of the EU MAR, the scope of the market abuse regime was extended to cover new markets (such as organised trading facilities (**OTFs**)), additional financial instruments (such as emission allowances and related auctioned products) and trading strategies (such as algorithmic trading and high frequency trading). EU MAR also extended the application of the market manipulation offence to include attempted market manipulation. No material changes have been made to the scope of the market abuse regime under the EU (Withdrawal) Act 2018 or related onshoring legislation.

15.1.7 UK MAR applies to financial instruments that are:

(a) admitted to trading on a UK regulated market, Gibraltar regulated market or an EU regulated market (or for which a request for admission to trading has been made);

(b) traded on a UK multilateral trading facility (**MTF**), Gibraltar MTF or an EU MTF admitted to trading on an MTF or for which a request for admission to trading on an MTF has been made;

(c) traded on a UK OTF, Gibraltar OTF or an EU OTF.

As such, the UK MAR regime covers behaviour both within and outside the UK in relation to instruments meeting any of the criteria above.

15.1.8 UK MAR defines market abuse in broad terms, but applies to three main types of abusive conduct:

(a) insider dealing;

(b) unlawful disclosure; and

(c) market manipulation.

For more detail on the definition of market abuse, please refer to paragraph 15.2.1.

15.1.9 The market abuse regime supplements (but is not co-extensive with) the criminal offences of insider dealing[1002] and market manipulation[1003]. The offence of market manipulation is considered at paragraphs 15.4.1 to 15.4.4. The market abuse regime also complements the regulation of authorised firms (for example, the Principles for Businesses state that firms must observe proper standards of market conduct[1004]).

15.1.10 A number of amendments to UK MAR were made under section 30 of the FS Act 2021 with effect from 29 June 2021. In particular, revisions were made to Article 18 of UK MAR to clarify who is required to maintain an insider list, establishing that issuers and any person acting on their behalf or on their account are all required to maintain such a list. In addition, Article 19 of UK MAR was amended so as to adjust the timetable within which issuers are required to disclose transactions by their senior managers (that is, persons discharging managerial responsibilities, or PDMRs) to the public.

15.2 Definition of market abuse

General

15.2.1 The behaviours which amount to market abuse are set out in UK MAR:

(a) insider dealing (see Article 8 of UK MAR);

(b) unlawful disclosure of inside information (see Article 10 of UK MAR); and

(c) market manipulation (see Article 12 of UK MAR).

15.2.2 The conduct must occur in relation to financial instruments[1005], commodity derivatives[1006] or UK or EU emission allowances[1007] (or auctioned products based thereon).

1002 Part 5 of the Criminal Justice Act 1993 (a discussion of which is beyond the scope of this Guide).
1003 Part 7 of the FS Act 2012.
1004 Principle 5 (set out in PRIN 2.1.1R of the Principles for Businesses).
1005 As defined in Part 1 of Schedule 2 to the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, read with Part 2 of that Schedule.
1006 As defined in point (30) of Article 2(1) of Regulation (EU) No 600/2014 of the European Parliament and of the Council.
1007 UK emission allowance" means an allowance created under the Greenhouse Gas Emissions Trading Scheme Order 2020; "EU emission allowance" means an emission allowance recognised for compliance with the requirements of Directive 2003/87/EC.

Territorial scope

15.2.3 UK MAR covers behaviours both within and outside the UK in relation to financial instruments admitted to trading on a UK regulated market, Gibraltar regulated market or an EU regulated market (or for which a request for admission to trading has been made) (see Article 2(4) of UK MAR). The market abuse regime also applies to financial instruments traded on MTFs and OTFs and certain OTC activities (including derivatives and credit default swaps).

15.3 Penalties

Fines and censure

15.3.1 Under the Act the FCA may (without applying to the court) impose an unlimited fine on any person (including an individual or a company not authorised under the Act) that engages or has engaged in market abuse, or has required or encouraged another person to do so. Further, where the FCA applies to the court under the Act for an injunction or a restitution order in relation to market abuse it may also request the court to consider whether a penalty should be imposed on the person to whom the application relates. This enables the FCA to apply to the court to impose a fine at the same time as it is seeking other remedies for market abuse.[1008]

15.3.2 As an alternative to imposing a fine, the FCA may publish a statement to the effect that a person has engaged in market abuse[1009]. The rationale appears to be that in some cases the publication of a finding that a person has committed market abuse will in itself amount to sufficient punishment.

Other administrative sanctions

15.3.3 Alongside its powers to impose fines and issue censure, the FCA has a host of enforcement powers at its disposal. These include:

(a) a power to require issuers and persons discharging managerial responsibilities (and persons closely associated with them) to provide any information the FCA reasonably requires for the

[1008] Sections 123(1) and 129.
[1009] Section 123(3).

purposes of protecting the interests of users of, or the orderly operation of, financial markets and exchanges in the UK[1010];

(b) a general power, by notice in writing, to require any person to provide specific information or information of a specific description or to provide specified documents or documents of a specified description[1011];

(c) a power to enter premises under a warrant to obtain documents or information[1012];

(d) a power to require an issuer (or any other person) to publish information and corrective statements[1013];

(e) a power to cancel or suspend trading in financial instruments[1014];

(f) where the FCA is satisfied that a person has contravened (or, in some circumstances, has been knowingly concerned in the contravention of) Article 14 of UK MAR (prohibition of insider dealing and of unlawful disclosure of inside information), Article 15 of UK MAR (prohibition of market manipulation) or has contravened a requirement imposed under any of the powers described in (a), (b), (d) or (e) above:

(i) as regards individuals, a power to impose a temporary or a permanent prohibition on (i) the individual holding an office or position involving responsibility for taking decisions about the management of a named investment firm, an investment firm of a specified description or any investment firm or (ii) the individual acquiring or disposing (directly or indirectly) of financial instruments, whether on his own account or the account of a third party, on dealing in financial instruments[1015]; and

[1010] Section 122A(1)(a). Information gathering powers also extend to any information or explanation the FCA reasonably requires to verify whether Article 17 (public disclosure of inside information) or Article 19 (managers' transactions) of UK MAR is being, or has been, complied with (see Section 122A(1)(b)).
[1011] Section 122B. In addition, the FCA has a power to take copies, or extracts from, any document produced in response to section 122B request or to require the person producing the document (or any other relevant person) to provide an explanation of the document (see section 122C).
[1012] Section 122D. See also section 122E which provides for a power to retain documents taken under section 122D of the Act.
[1013] Sections 122G and 122H.
[1014] Section 122I.
[1015] Section 123A.

(ii) as regards authorised persons, a power to suspend (for a period of up to 12 months) Part 4A permission of any authorised person to carry on regulated activities or to impose such limitations or restrictions on the authorised person's permissions as the FCA considers appropriate[1016].

Failure to comply with the FCA's enforcement powers described in (b) and (c) above may amount to a criminal offence.[1017]

15.3.4 Section 124 of the Act requires the FCA to publish a statement of its policy with respect to the type and level of administrative sanctions it may impose on a relevant person (as defined in section 124(10) of the Act). For these purposes, "administrative sanction" means a penalty or statement of censure imposed or published under section 123 of the Act, a prohibition imposed under section 123A (described in 15.3.3(f)(i)) or a suspension or restriction imposed under section 123B of the Act (described in 15.3.3(f)(ii)).

15.3.5 As part of the EU MAR implementation process, the FCA made (following a customary consultation procedure) amendments to the FCA Handbook, including to its decision-making procedure in DEPP 2 and statements of policy in DEPP 6 and DEPP 6A to include new powers under Part 8 of the Act and to set out how the FCA policy would apply to contraventions of EU MAR and the FCA's new powers under Part 8 of the Act. These provisions have been retained with UK MAR.

Procedure

15.3.6 Where the FCA intends to impose an administrative sanction, it must first serve a warning notice on the person setting out the terms of the proposed sanctions[1018]. If the FCA does not consider that a fine or a public statement is necessary it may instead issue a private warning. Following the issue of a warning notice the person may make representations that he has not engaged in market abuse, or that no penalty should be imposed on him. If, having considered the representations, the FCA decides to impose an administrative sanction, it must then issue a decision notice setting out the details of the

[1016] Section 123B.
[1017] Section 122F.
[1018] Section 126(1).

proposed sanction(s), which may differ from those in the warning notice[1019].

15.3.7 In certain circumstances, the FCA must consult with the PRA before giving a warning notice or a decision notice in relation to a person who is a PRA-authorised person or a member of a PRA-authorised person's immediate group.[1020]

15.3.8 The person subject to the decision notice has a right to refer the case to the Tribunal which will consider whether market abuse has occurred as well as the imposition and, if relevant, the level/terms of any sanction. There is a further right of appeal on a point of law (with leave) to the Court of Appeal or (in Scotland) the Court of Session.

Right to appeal

15.3.9 There is a right of appeal against a finding of market abuse, or against the imposition or level of a fine, to the Tribunal[1021]. The Tribunal is independent of the FCA and has the power to determine whether market abuse has occurred as well as the imposition or level of any fine.

15.4 Other forms of financial crime

15.4.1 Part 7 of the FS Act 2012 sets out three offences in relation to financial services[1022]:

(a) making misleading statements;

(b) creating misleading impressions; and

(c) making misleading statements in relation to benchmarks.

15.4.2 The first offence covers the publication of false or deceptive statements and the dishonest concealment of material facts. Examples of such behaviour are the inclusion of misleading statements or forecasts in an offering circular and the deliberate concealment of the impending insolvency of an issuer of securities[1023].

1019 Section 127(1).
1020 Section 127A.
1021 Section 127(4).
1022 Repealing and replacing section 397 of the Act as originally enacted.
1023 Section 89 of the FS Act 2012.

15.4.3 The second offence covers the creation of a false or misleading impression as to the market in or the price of relevant investments[1024].

15.4.4 The third offence covers misleading statements made in the course of arrangements for the setting of a "relevant benchmark" (currently LIBOR, but the prohibition may be extended to other benchmarks)[1025].

15.4.5 The Act does not affect other legislation concerning financial crime. Accordingly, legislation setting criminal penalties for insider dealing and money laundering continues to apply[1026]. Other provisions of the criminal law may also be relevant in cases of misconduct by participants in the financial markets, for example, offences of theft.

15.5 The FCA as a prosecuting authority

15.5.1 The Act confers rights on the FCA to prosecute specific offences. It may (except in Scotland) institute criminal proceedings for offences under:

(a) the Act or any statutory instruments made under it (with the exception of certain provisions for which the PRA is the relevant regulator)[1027];

(b) the insider dealing provisions of the Criminal Justice Act 1993;

(c) regulations relating to money laundering (that is, the Money Laundering Regulations 2007); and

(d) the terrorist financing and money laundering provisions in the Counter-Terrorism Act 2008.

[1024] Section 90 of the FS Act 2012.
[1025] Section 91 of the FS Act 2012.
[1026] Part 5 of the Criminal Justice Act 1993, Part 7 of the Proceeds of Crime Act 2002, and the Money Laundering Regulations 2007 (SI 2157/2007).
[1027] Section 401(3A).

16. INVESTIGATIONS AND DISCIPLINE

16.1 Overview

16.1.1 From 2008, the FSA markedly increased its use of information-gathering and other investigatory powers to supervise firms, and to ensure the effective and timely completion of remedial actions that it required firms to perform. Alongside this more intrusive supervisory approach, the FSA's enforcement team demonstrated its commitment to the stated policy of "credible deterrence", with the number and size of financial penalties imposed increasing each year.

16.1.2 Following the financial crisis, global financial regulators, including the FSA, saw their public profiles adversely affected by the perception that they had failed to take effective action to supervise firms and to impose appropriately heavy penalties in response to misconduct and other breaches of regulatory rules and standards.

16.1.3 The rebalancing of this perception, which the FSA commenced, has been continued by the FCA and, to a lesser extent given its predominantly prudential focus, by the PRA, since their inception. Each regulator indicated its intention early on to expand upon the themes of appropriately intrusive supervision and credible deterrence, with a greater emphasis on early involvement and intervention in firms' decision-making processes. In its first year, the FCA committed significant resources to its enforcement activity, and has demonstrated consistently since then that consequences will be serious for firms that fail to demonstrate adequate judgements, and for all persons that fail to comply with the regulatory standards that apply to them.

16.1.4 This has been demonstrated by the enforcement action taken against, and penalties imposed on, a number of banks in relation to market manipulation and the disciplinary action and proceedings that followed. The Senior Managers Regime for banks (see more in Chapter 11 'Senior managers and certification regime') gave the FCA and the PRA additional enforcement powers against individuals and firms. In 2019, the FCA commenced the senior managers and certification regime for solo-regulated firms[1028] and published associated guidance.[1029] The FCA and the PRA reviewed the regime in 2019 and 2020, respectively, and the FCA has taken the view that, although the regime does not

[1028] https://www.fca.org.uk/firms/senior-managers-certification-regime/solo-regulated-firms.
[1029] https://www.fca.org.uk/publication/policy/guide-for-fca-solo-regulated-firms.pdf.

eliminate the risk of breaches by firms, it has brought about profound changes in the way that firms allocate responsibilities, align those responsibilities to relevant controls and ensure oversight in respect of the operation of those controls[1030].

16.1.5 The ability of the PRA and the FCA to take such effective action against firms is reflected in the Act, which grants each regulator similar, albeit in certain respects expanded and bolstered, powers of investigation and enforcement to those previously held by the FSA.

16.1.6 The scope of the regulators' powers of enforcement has continued to widen, with the FCA taking over regulation of the consumer credit industry from the now defunct OFT in 2014, assuming powers to enforce competition law concurrently with the CMA in 2015[1031], being given a range of enforcement powers in relation to the UK Market Abuse Regulation (**UK MAR**)[1032], and powers to enforce the senior managers regime[1033]. The PRA was also provided with disciplinary powers over external auditors and actuaries in 2015.[1034] See Chapter 23 'Auditors and actuaries' for further information.

16.1.7 The FCA and the PRA implemented a number of changes to improve their enforcement decision-making processes and arrangements following the Treasury's enforcement review report and recommendations at the end of 2014[1035] and Andrew Green QC's report in November 2015[1036]. The FCA also made a number of policy changes

1030 https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/report/evaluation-of-smcr-2020.pdf?la=en&hash=151E78315E5C50E70A6B8B08AE3D5E93563D0168; https://www.fca.org.uk/publications/multi-firm-reviews/senior-managers-and-certification-regime-banking-stocktake-report and https://www.fca.org.uk/news/speeches/compliance-culture-and-evolving-regulatory-expectations-mark-steward.

1031 Sections 234I to 234O. Inserted by the Banking Reform Act and the Financial Guidance and Claims Act 2018.

1032 2014/596/EU. See paragraph 16.3.4 and Chapter 15 'Market abuse and financial crime'.

1033 See paragraph 16.3.5 and Chapter 11 'Senior managers and certification regime'.

1034 The Financial Services and Markets Act 2000 (Regulation of Auditors and Actuaries) (PRA Specified Powers) Order 2015 (SI 2015/61). See also PRA PS1/16 'Engagement between external auditors and supervisors and commencing the PRA's disciplinary powers over external auditors and actuaries' dated January 2016.

1035 Treasury final report 'Review of enforcement decision-making at the financial services regulators: final report' dated December 2014. See also FCA and PRA CP16/10, CP14/16 'Proposed implementation of the Enforcement Review and the Green Report', FCA and PRA PS17/1, PS2/17 Implementation of the Enforcement Review and the Green Report, PRA PS/EDMC2018 and PRA Regulatory investigations guide April 2019.

1036 Andrew Green QC's report 'Report into the FSA's enforcement actions following the failure of HBOS' (November 2015).

following the report of the independent investigation into the FCA's regulation of London Capital & Finance plc.[1037]

16.2 Investigations and gathering information

16.2.1 The Act provides both the PRA and the FCA with extensive powers to investigate, and to gather information relating to, the conduct of authorised firms and certain unauthorised persons. These powers can be exercised by either regulator in the following ways:[1038]

(a) by requiring an authorised firm to provide information or documents to the relevant regulator and, where necessary, to verify or authenticate such documents or information;

(b) by requiring an authorised firm or a member of the authorised firm's group (or any person who has at any relevant time been an authorised firm or a member of an authorised firm's group) to commission a report by an appropriately "skilled person" who is approved or nominated by the relevant regulator;

(c) by appointing an appropriately skilled person to produce a report relating to an authorised firm or a member of the authorised firm's group (or any person who has at any relevant time been an authorised firm or a member of an authorised firm's group);

(d) where an authorised firm has contravened a requirement in the relevant regulator's rules to collect or keep up to date certain information, by appointing, or requiring the appointment by the relevant authorised firm of, a skilled person to collect or update the information concerned; and

(e) by appointing competent persons to carry out an investigation.

16.2.2 While all of these powers are essentially investigative in nature, only the exercise of the final power gives rise to a "formal" investigation by, or on behalf of, the relevant regulator into the affairs of an authorised firm.

[1037] Report of the Independent Investigation into the Financial Conduct Authority's Regulation of London Capital & Finance plc — The FCA Response.
[1038] Sections 165 to 168.

Information-gathering powers

16.2.3 Both the PRA and the FCA have the power to exercise information-gathering powers against any authorised firm, provided such power is used to exercise the relevant regulator's functions and, in the case of the PRA, is reasonably required by the Bank in pursuance of the financial stability objective[1039]. These powers are also subject to the overriding requirement that each regulator must act in a manner that is compatible with, or advances, its respective statutory objectives.[1040] Consequently, while it may be unlikely that the PRA would exercise information-gathering powers against a firm that is regulated only by the FCA, it could do so in circumstances where the information might be relevant to the safety and soundness of PRA-authorised firms (such as in cases where the relevant firm is a member of a group containing a PRA-authorised firm).

16.2.4 The Act extends the regulators' powers to require information and documents from or in respect of authorised firms, giving both regulators powers to gather information and documents in additional circumstances that are likely to be relevant to their statutory objectives. In particular:

(a) the PRA can, subject to certain safeguards, also exercise the first information-gathering power to require information or documents from:

(i) persons connected to authorised persons;

(ii) investors in, and managers of, investment funds holding financial instruments that are traded in the UK or are issued by a body incorporated in the UK (and persons connected with them);

(iii) persons that provide services to authorised firms (and persons connected with them); and

(iv) persons that provide services to insurance and reinsurance undertakings[1041],

[1039] Section 165(4)(a) and (b). Inserted by the Bank of England and Financial Services Act 2016 (**2016 Act**), section 16, from 1 March 2017.
[1040] Section 1B, 2B, 3B.
[1041] Section 165(7)(e). Inserted by the Solvency 2 Regulations 2015 (SI 2015/575) from 1 January 2016.

where the PRA considers that the information or documents are, or might be, relevant to the stability of one or more aspects of the UK financial system[1042] or are reasonably required by the Bank in pursuance of its financial stability objective[1043]; and

(b) the FCA can exercise the first information-gathering power to require information from:

(i) persons connected to authorised firms;

(ii) the trustee, operator or depository of certain overseas regulated collective investment schemes;

(iii) RIEs, and persons connected to RIEs[1044];

(iv) persons that provide, or have provided, services to an FCA-authorised investment firm or to a relevant parent undertaking of such a firm;[1045] and

(v) persons that provide services to insurance and reinsurance undertakings[1046].

16.2.5 The PRA and the FCA have specified certain procedural rules and guidance setting out how, and in which circumstances, each would be likely to exercise its powers to require the production of a skilled persons report. These procedural rules and guidance are set out in the 'Use of skilled persons' part of the PRA Rulebook[1047] and SUP 5 of the SUP Manual of the FCA Handbook, respectively.

16.2.6 The procedural rules and guidance on the use of skilled person reports in SUP 5 of the SUP Manual of the FCA Handbook clarify, among other things, that the decision by either regulator to require the production of a report by a skilled person will normally be prompted by a specific requirement for information, analysis of information, expert advice or by a decision to seek assurance in relation to a regulatory return. Such a decision may also be part of the risk mitigation programme applicable to a firm, the result of an event or development relating, or relevant

1042 Sections 165A and 165B.
1043 Section 165A(3)(b). Inserted by the 2016 Act, section 16, from 1 March 2017.
1044 Section 165(7).
1045 Section 165(7)(da). Inserted by the Financial Services Act 2021 from 1 July 2021.
1046 Section 165(7)(e). Inserted by the Solvency 2 Regulations 2015 (SI 2015/575) from 1 January 2016.
1047 This part appears in each section of the PRA Rulebook relating to authorised persons, namely CRR and non-CRR Firms, and SII and non-SII Firms.

to, a firm, prompted by a need for verification of information provided to the FCA or part of the FCA's regular monitoring of a firm.

16.2.7 The Investigatory Powers Act 2016 further increased the information-gathering powers available to public authorities by allowing certain public authorities, including the FCA, to obtain communications data for the purposes of preventing or detecting crime and in the interests of the economic wellbeing of the UK in circumstances where those interests are also relevant to the interests of national security.[1048]

Investigatory powers

16.2.8 If the PRA or the FCA considers that there is a good reason for doing so, either regulator may appoint a competent person to carry out an investigation into the affairs of an authorised firm.[1049] The Act does not provide a definition of "competent person" for these purposes, but, generally speaking, the relevant regulator could appoint appropriately skilled members of its own staff, a third party (such as an auditor or law firm), or a combination of both.

16.2.9 The FCA has published investigation opening criteria, as well as its approach to enforcement and an enforcement information guide.[1050] The criteria explain that the FCA will open an investigation where it has reason to believe that serious misconduct may have taken place (and set out a non-exhaustive list of factors which the FCA may take into account in determining whether serious misconduct may have occurred or may occur). Further information can be found in the Enforcement Guide (**EG**) of the FCA Handbook.

16.2.10 An investigation can be either "general" (that is, an investigation into the nature, state or any particular aspect of the business of an authorised firm) or focused on a specific concern or circumstance. The latter type of investigation can be initiated by either regulator where it appears to that regulator that there are circumstances to suggest any of the following[1051]:

(a) that, among certain other matters, any person may have:

[1048] Section 60A and schedule 4 Investigatory Powers Act 2016.
[1049] Sections 167 and 168.
[1050] https://www.fca.org.uk/about/enforcement/investigation-opening-criteria; https://www.fca.org.uk/publication/corporate/our-approach-enforcement-final-report-feedback-statement.pdf; https://www.fca.org.uk/publication/corporate/enforcement-information-guide.pdf.
[1051] Sections 168(1) to 168(4).

(i) acted in contravention of the general prohibition;

(ii) committed market abuse or an insider dealing offence;

(iii) committed an offence in the context of a regulatory investigation (such as deliberately falsifying, concealing or destroying relevant documents) or otherwise provided misleading or inaccurate information to a regulator; or

(iv) committed an offence under anti-money laundering or anti-terrorist financing regulations;

(b) that, among certain other matters, an authorised firm may have:

(i) carried on a regulated activity without holding an appropriate permission; or

(ii) failed to ensure that individuals carrying on controlled functions were approved to do so, or appointed an individual to a function where the individual is the subject of an applicable prohibition order; or

(c) that an individual may have performed a function in breach of a prohibition order, or may not be a fit and proper person to perform a function for which he is approved.

16.2.11 The relevant investigating authority may require:

(a) any person under investigation, or anyone connected with such a person; or

(b) where the person under investigation is an FCA-authorised investment firm or the parent undertaking of an FCA-authorised investment firm, any person who provides, or has provided, a service to the firm or to the parent undertaking of the firm,

to attend before the investigator at a specified time and place to answer questions or otherwise to provide such information as the investigator may require, provided the investigator reasonably

considers that such questions, information or documents are relevant to the purposes of its investigation.[1052]

16.2.12 An investigator may also require a third party to attend and answer questions, provide documents, or otherwise provide any assistance in connection with the investigation that the relevant third party is reasonably able to give.[1053]

16.2.13 Any document produced to the investigating authority can be retained as long as it is necessary to do so for the purposes for which it was requested, or until the conclusion of any related legal proceedings (if the investigator believes that the document might need to be produced as part of those proceedings and that it might otherwise become unavailable)[1054].

16.2.14 Failure to co-operate with an investigator can be enforced as a contempt of court[1055]. While a statement made to an investigator is admissible in evidence in any proceedings, there is a specific "Saunders" carve-out[1056] in respect of criminal proceedings or proceedings in respect of market abuse. There are also exemptions for information subject to a banker's duty of confidentiality and communications subject to legal professional privilege[1057].

16.2.15 Moreover, the Act provides that in certain, fairly wide, circumstances, where the Secretary of State, the PRA or the FCA requests it, a warrant can be issued to allow the police to enter and search premises and to take documents. Any document of which possession is taken under a warrant can be retained for as long as is necessary to retain it (rather than copies of it) in the circumstances. The owner of the relevant document(s) can, however, apply to court to request its return.[1058]

[1052] Sections 171.
[1053] Sections 171 to 173.
[1054] Sections 175(2A) and 175(2B).
[1055] Section 177.
[1056] With the result that compelled evidence cannot be used against the person giving it. This derives from the judgment of the European Court of Human Rights in *Saunders v United Kingdom* [1997] 23 EHRR 313.
[1057] Sections 174 and 175. A lawyer may be obliged to supply the name and address of their client. The exception preserving the banker's duty of confidentiality does not apply, *inter alia*, in respect of the person under investigation (or a member of its group), or if the person to whom the duty of confidence is owed consents to the bank making disclosure, or if the imposition of a requirement with respect to such information has been specifically authorised by the investigating authority.
[1058] Sections 176 and 176A.

Co-ordination by the PRA and the FCA

16.2.16 The information-gathering and investigatory powers described above can be carried out by either the PRA or the FCA (or both) in respect of any authorised firm. The PRA and the FCA have agreed, however, that they will consult with each other before initiating any information-gathering or investigatory action, to ensure that the investigation is carried out by the most appropriate regulator and to identify whether or not a joint investigation should be carried out.

16.2.17 A joint investigation may be appropriate where either the FCA or the PRA identifies circumstances that suggest that an authorised firm has committed misconduct that might adversely affect both regulators' statutory objectives. In these circumstances, the PRA and the FCA will determine whether a co-ordinated investigation should be carried out, or whether it would be a more efficient use of resources for one regulator to carry out the investigation while keeping the other informed[1059].

16.2.18 In order to ensure that each regulator's supervisory judgements in respect of a firm reflect all relevant information, the regulators will, subject to their respective legal obligations, share certain information concerning dual-regulated firms and firms within dual-regulated groups.[1060] The MoU agreed between the FCA and the PRA in July 2019 indicates that:

(a) the PRA will routinely share with the FCA any conclusions arising from its assessment of a firm's recovery plans and the position of a firm within the PRA's Proactive Intervention Framework; and

(b) the FCA will routinely share with the PRA any findings on key conduct risks that are materially relevant as to whether a firm is prudently managed (or are otherwise materially relevant to the safety and soundness of the firm), as well as any findings in relation to material prudential risks concerning the subsidiaries of groups which contain one or more dual-regulated firms.

[1059] This principle, and the general agreement of the regulators to consult the other before taking investigative action are reflected in the MoU between the FCA and the PRA (updated in July 2019), the FCA 'Enforcement Guide' (**EG**) (see, in particular, paragraph 2.5.2), and the PRA Policy Statement 'The PRA's approach to enforcement: statutory statements of policy and procedure' (April 2013, updated October 2019 and September 2021) (see, in particular, chapter 2, paragraph 3(h)(i)-(iii)).

[1060] MoU between the FCA and PRA dated July 2019.

Investigations relating to recognised bodies

16.2.19 As explained in Chapter 20 'Recognised investment exchanges and recognised clearing houses', RIEs and RCHs are not authorised firms under the Act. Accordingly, in so far as the Act provides for information-gathering and/or investigative powers to be exercisable in respect of authorised firms only, such powers cannot be exercised in respect of these recognised bodies.

16.2.20 However, the Act expressly extends the application of the FCA's powers under section 166 such that it can appoint, or require the appointment of, a skilled person to produce a report into any matter relating to an RIE, all other members of an RIE's group, a partnership of which an RIE is a member and any firm that has, at any point in time, been any of the foregoing[1061].

16.2.21 Similarly, the FCA's powers under section 167 to appoint a competent person to carry out a general investigation can be exercised in respect of an RIE, all other members of an RIE's group, a partnership of which an RIE is a member and any person that has, at any point in time, been any of the foregoing.

16.2.22 The Bank is responsible for the supervision and regulation of RCHs, and the Act provides that the majority of the information-gathering and investigatory powers can be exercised (with certain slight amendments) by the Bank in respect of RCHs and persons connected to RCHs. In particular, the Bank is capable of exercising the following powers in relation to such entities:[1062]

(a) the power to request information and documents (whether or not verified or authenticated) under sections 165(1) and 165(3) of the Act, in so far as the information or documents:

(i) are relevant to the exercise by the Bank of functions conferred on it by Part 2 of Schedule 17A of the Act or its functions in pursuance of its financial stability objective;

[1061] Sections 166(10) and 166(11) and SUP 1.1B of the FCA Supervision Manual (**SUP Manual**) relating to the procedure for carrying out a skilled person report. See also Chapter 20 'Recognised investment exchanges and recognised clearing houses' for further information on the Bank's powers in relation to RCHs.

[1062] Part 2 of Schedule 17A, in particular paragraphs 11 to 16.

(ii) may enable or assist the FCA in discharging its functions under the Act;

(iii) are reasonably required by the Bank in exercise of its functions under the EMIR regulation, the CSD Regulation (or any EU regulation originally made under the CSD Regulation which is retained direct EU legislation, or any subordinate legislation made under the CSD Regulation on or after IP completion day) or Article 4 or 15 of the SFT Regulation (or any subordinate legislation made under the SFT Regulation on or after IP completion day).

(b) the power to appoint, or require the appointment of, a skilled person to produce a report under section 166 of the Act;

(c) the power to appoint competent persons to carry out a general or specific investigation under sections 167 and 168(5), 172 and 173 of the Act[1063]; and

(d) the power to apply to a magistrate under section 176(1) of the Act for permission to enter, search and gather information from the premises of an RCH.

Assistance to overseas regulators

16.2.23 The PRA or the FCA may, at the request of an overseas regulator, exercise its power to require information or documents from a person (under section 165 of the Act) or to appoint one or more competent persons to conduct an investigation (under section 168 of the Act)[1064].

16.2.24 Where the investigator is appointed by the FCA and the appointment is in response to a request to the FCA to investigate a possible contravention by a person of Article 14 or Article 15 of UK MAR, the investigator has the same powers as an investigator appointed under section 168(3) of the Act.

16.2.25 In deciding whether to exercise an investigative power, the relevant regulator may take into account matters including:

[1063] Although it should be noted that the power to appoint a competent person to carry out a general investigation under section 167 cannot be exercised in respect of a recognised overseas clearing house.
[1064] Section 169.

(a) whether the country or territory concerned would give corresponding assistance to a UK regulatory authority;

(b) whether the case concerns the breach of a law, or other requirement, which has no close parallel in the UK or involves the assertion of a jurisdiction not recognised by the UK;

(c) the seriousness of the case and its importance to persons in the UK; and

(d) whether it is otherwise appropriate in the public interest to give the assistance sought.

16.2.26 Where either regulator has appointed an investigator in response to a request from an overseas regulator and, as part of any such investigation, an interview is conducted with any person, the relevant regulator may direct the investigator to permit a representative from the overseas regulator to attend and take part in the interview. Both regulators have published statements of policy with respect to the conduct of interviews in relation to which a direction to permit a representative from an overseas regulator has been made[1065].

16.2.27 Moreover, the PRA may, at the request of an overseas regulator, exercise a corresponding power under section 165A of the Act to require the provision of information or documents that it considers are, or might be, relevant to the stability of the financial system of the country or territory of the overseas regulator[1066].

16.3 Disciplinary powers

16.3.1 The Act sets out the framework for the disciplinary powers that may be exercised by the PRA and the FCA, although much of the detail is set out in separate statements of procedure that each regulator is required to publish.

16.3.2 There is considerable overlap between the disciplinary measures that may be imposed by, or are otherwise available to, either regulator, and also between the notification procedures that must be followed to

[1065] Section 169. It should be noted that the UK regulator must be satisfied that the overseas regulator will operate with equivalent safeguards on the use of information received from the interview as would be the case under the UK regime. See also the EG (particularly paragraphs 4.11.9 to 4.11.11) and Appendix 6 'Statement of policy on the conduct of interviews pursuant to section 169(7) of the Act' to the PRA Policy Statement 'The PRA's approach to enforcement: statutory statements of policy and procedure' (April 2013, updated October 2019 and September 2021).

[1066] Section 169A.

inform a person that it is to be the subject of disciplinary action. These disciplinary measures include:[1067]

(a) refusing or varying a Part 4A permission;

(b) refusing or withdrawing approval from an individual;

(c) issuing a prohibition order against an individual;

(d) imposing a fine or public censure on a person, or requiring the person to make restitution payments; and

(e) disqualifying an auditor or actuary.

16.3.3 As discussed in more detail in Chapter 21 'Complaints against authorised firms', the FCA also has the power to require an authorised firm, payment service provider or electronic money issuer (or a group of such bodies) to establish and operate a consumer redress scheme, pursuant to which the relevant firm or firms must: (a) investigate whether through a breach of regulatory requirements they have caused detriment to consumers; and (b) if they determine that this is the case, make appropriate redress payments to such consumers.[1068]

16.3.4 As more fully explained in Chapter 15 'Market abuse and financial crime', the UK's civil market abuse regime was significantly overhauled following the implementation of MAR[1069] on 3 July 2016. In particular, the Act was amended to provide the FCA with enforcement powers to investigate breaches, and impose sanctions for contravention, of MAR.[1070] Further information on these powers is provided in Chapter 15 'Market abuse and financial crime'.

16.3.5 In addition, the senior managers regime and certification regime, which came into force in March 2016, saw the regulators' enforcement powers under the Act extended to cover breaches of the new requirements. These include disciplinary action against individuals who breach the new conduct standards of each regulator, and against senior managers found responsible for a contravention in their respective business

1067 See, respectively: sections 55J to 55P; 56; 61 and 63; 57; 205, 206 and 384; and 345.
1068 Section 404.
1069 2014/596/EU.
1070 Sections 122A–G and 123A-C. Inserted by the Financial Services and Markets 2000 (Market Abuse) Regulations 2016 (SI 2016/680).

areas.[1071] See Chapter 11 'Senior managers and certification regime' for a full explanation of the regime.

Decision-making procedures and statutory notices

16.3.6 Each regulator is required under the Act to publish a set of procedures setting out its approach to taking disciplinary measures. These regulatory decision-making procedures, which form the mechanism by which each regulator takes its disciplinary actions, differ between the two regulators. A common theme of the two sets of procedures is, however, that a decision to give any notice (including in respect of disciplinary proceedings) is taken by either:

(a) a person who was not directly involved in establishing the evidence on which the decision is based; or

(b) two or more persons who include a person not directly involved in establishing the evidence on which the decision is based.[1072]

16.3.7 The process by which a person is informed of disciplinary action being taken against him is also largely consistent between the two regulators.

16.3.8 If either regulator, acting through its appropriate decision-making committee or using applicable procedures[1073], decides to take disciplinary action, in most cases it will be obliged to give the person concerned a warning notice. The warning notice must set out reasons for the proposed action, allowing access both to the material upon which the regulator relied in coming to its decision and to any "secondary material" that might undermine that decision. The regulator issuing the notice may, however, refuse access to material where in its opinion allowing access to the material would not be in the public interest or would not be fair, having regard to the likely significance of the material to the person who is the subject of the warning notice and to the potential prejudice to a third party that might be caused by the disclosure of the material.[1074]

[1071] Sections 66, 66A and 66B.
[1072] Section 395.
[1073] See DEPP 2 Annex 1 and DEPP 4.1 and page 6 of the Prudential Regulation Authority's approach to enforcement: statutory statements of policy and procedure September 2021 https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/statement-of-policy/2019/the-pras-approach-to-enforcement-statutory-statements-of-policy-and-procedure-sop-sep-21.pdf?la=en&hash=A0FFD6CF99BD205D1F8464A3CE29996CE6511FCD.
[1074] Sections 387 to 394. In *Macris v FCA* [2017] UKSC 19, the court found that a person was identified in a notice under s.393(1)(a) if he was identified by name or by a synonym, such as his office or job title. In the case of a synonym, it had to be apparent from the notice itself that the synonym could apply to only

16.3.9 The warning notice must specify a reasonable period (which must not be less than 14 days) within which the person to whom it is given may make representations to the relevant regulator.

16.3.10 If the relevant regulator considers that disciplinary action should be taken against the person concerned, it must issue that person with a decision notice giving reasons for the decision and setting out that there is a right to have the matter referred to the Tribunal. If the person concerned decides not to appeal the decision, a final notice will be issued setting out the details of the disciplinary action and when it will take effect.[1075]

16.3.11 The PRA is required to consult with the FCA before taking certain enforcement actions, referred to as "qualifying steps". The FCA is required to consult with the PRA before taking any qualifying step against a PRA-authorised firm, a member of a PRA-authorised firm's immediate group or, where relevant, a person performing a relevant senior management function under an arrangement entered into by a PRA-authorised firm. The Act specifies an exhaustive list of enforcement actions that are "qualifying steps", which includes:[1076]

(a) the giving of a warning notice or decision notice regarding either the exercise of disciplinary powers against an individual[1077] or the performance of a senior management function by an individual without approval[1078];

(b) the giving of a warning notice or decision notice relating to market abuse[1079] or contravention of rules relating to short selling[1080]; and

(c) the giving of a warning notice or decision notice in relation to a contravention of a requirement imposed by or under the Act.

16.3.12 The specific regulatory decision-making arrangements, which differ for each regulator, are explained in more detail below.

one person and that person had to be identifiable from information which was either in the notice or publicly available elsewhere. It is not permissible to resort to additional facts about the person so described so that if those facts and the notice were placed side by side it became apparent that they referred to the same person. The relevant audience is the public at large. See also EG 5.4.

1075 Section 390.
1076 Section 415B.
1077 Section 415B(3)(b).
1078 Section 415B(3)(a).
1079 Section 415B(3)(h).
1080 Section 415B(3).

PRA decision-making

16.3.13 Decisions by the PRA on whether to give a statutory notice are taken by the appropriate decision-making committee within the PRA, which is also responsible for ancillary matters including the time for making representations, whether copies of the notice should be shared with any third party, and whether the notice should be publicised.[1081]

16.3.14 There are five decision-making committees responsible for the giving of such statutory notices, which committees are as follows:

(a) the Prudential Regulation Committee (**PRC**) (excluding the FCA chief executive officer);

(b) the Supervision, Risk, and Policy Committee (**SRPC**);

(c) the Supervision and Assessment Panel (**SAP**);

(d) the Panel of Heads of Departments and Managers (**HMP**); and

(e) the Enforcement Decision Making Committee (**EDMC**).[1082]

16.3.15 The PRA has divided its statutory notice decisions into the following four categories:

(a) *Type A Decisions*, which the PRA expects to have a significant impact on a firm's ability to carry out its business effectively, or which the PRA considers could have a significant impact on its objectives;

(b) *Type B Decisions*, which the PRA expects to have a moderate impact on a firm's ability to carry out its business effectively, which the PRA considers could have a moderate impact on its objectives or which may set a sensitive precedent but which would otherwise have fallen under Type C;

(c) *Type C Decisions*, which the PRA expects to have a low impact on a firm's ability to carry out its business effectively, which the PRA considers could have a low impact on its objectives, or

[1081] Page 7 of https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/statement-of-policy/2019/the-pras-approach-to-enforcement-statutory-statements-of-policy-and-procedure-sop-sep-21.pdf?la=en&hash=A0FFD6CF99BD205D1F8464A3CE29996CE6511FCD.

[1082] See page 6 of https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/statement-of-policy/2019/the-pras-approach-to-enforcement-statutory-statements-of-policy-and-procedure-sop-sep-21.pdf?la=en&hash=A0FFD6CF99BD205D1F8464A3CE29996CE6511FCD.

which relate to matters in respect of which a precedent has already been set; and

(d) *Type EDMC Decisions*, which are statutory notice decisions in contested enforcement cases. All Type EDMC decisions will be made by the EDMC, regardless of impact. The procedures set out in the document 'Procedures — The Enforcement Decision Making Committee' will apply.

16.3.16 The PRC makes key supervisory decisions in relation to the largest firms the PRA supervises. The EDMC was created by the Court of the Bank of England to help the Bank discharge its responsibilities and strengthen its enforcement processes by ensuring a functional separation between the Bank's investigation teams and the Bank's decision makers in contested enforcement cases. The EDMC acts for and with the full authority of the PRC and also reports to the PRC in matters related to the PRA within its remit.[1083]

16.3.17 The PRA has divided all firms that it supervises into five 'categories of impact'. For insurers, these categories reflect a firm's potential to adversely affect the PRA's objectives, and for banks, these categories reflect a firm's potential to adversely affect the stability of the financial system (in each case, by failing, coming under operational or financial stress, or because of the way in which the firm carries out its business).

FCA decision-making

16.3.18 The FCA Decision Procedure and Penalties Manual (**DEPP**) clarifies that statutory notice decisions will be taken either by a senior staff committee or by an individual FCA staff member under the FCA's executive procedures or settlement decision procedure.

16.3.19 DEPP clarifies that, where a decision is to be made by an FCA executive, the decision will not be made by a person directly involved in establishing the evidence on which the decision is based. Generally, where the decision is made by an individual FCA staff member, the relevant individual will be an executive director of the FCA Board (or

[1083] https://www.bankofengland.co.uk/-/media/boe/files/paper/2018/procedures-the-enforcement-decision-making-committee.pdf?la=en&hash=CC93A7C1C6252F9D3B1E37AA617BA17D8B5BDA52.

their delegate), acting on recommendations and legal advice provided by appropriately senior FCA staff[1084].

16.3.20 The Regulatory Decisions Committee (**RDC**), which is a committee of the FCA Board, takes certain decisions on behalf of the FCA relating to enforcement.

16.3.21 In July 2021, the FCA published Consultation Paper CP21/25[1085] on issuing statutory notices, in which it proposed revising the decision-making remit of the RDC as a means of streamlining decision making and governance.

16.3.22 The FCA has proposed that the decision to issue a statutory notice relating to:

(a) authorisations (refusal of permission);

(b) straightforward cancellations; and

(c) interventions (variation of permission and imposition of requirements)

should be made under the FCA's executive procedures rather than by the RDC. In addition, the FCA proposed that decisions on whether to commence civil or criminal proceedings through the court should also be made under executive procedures. The changes proposed in that consultation were confirmed in a Policy Statement PS21/16 and came into force on 26 November 2021.

16.3.23 As a result of these changes, the RDC now focuses on contentious enforcement cases and significant misconduct cases, specifically in circumstances where a wrongdoer needs to be penalised for a harm which has already materialised.

Co-ordination of disciplinary powers

16.3.24 Similar to the position in respect of the co-ordination of regulatory investigations, the most likely area of potential overlap between the exercise of disciplinary powers by the PRA and the FCA is in respect of dual-regulated firms and, possibly to a lesser extent, other firms that are members of the same group as a dual-regulated firm. There are

[1084] DEPP 4.1.
[1085] https://www.fca.org.uk/publication/consultation/cp21-25.pdf.

likely to be other areas, however, in which an investigation, and subsequent enforcement action, could be brought by either (or both) regulators, including cases involving a breach of the general prohibition by a person carrying on both PRA and FCA regulated activities without any Part 4A permission.

16.3.25 The PRA and the FCA have agreed in their MoU that, where a matter being considered engages the objectives of both regulators, they will determine whether any investigation against a relevant firm should be carried out by the FCA, by the PRA, or jointly, and how they should co-ordinate any investigation and subsequent proceedings (including co-ordination between the EDMC and the RDC).[1086]

16.3.26 Each regulator will consult the other when it has reached a view in principle regarding the action it plans to take and before it takes a decision to issue a warning notice or a decision notice. If a decision is made by either regulator to take action, the regulators should consider whether it is possible and would be appropriate to co-ordinate publication of applicable enforcement announcements so that both regulators publish the outcome of their investigations simultaneously. Each regulator will also endeavour to give the other appropriate notice of any press release or other public statement it intends to make relating to enforcement cases in which the other may have an interest.[1087]

Publication of statutory notices

16.3.27 The Act describes the circumstances in which statutory notices and/or information regarding statutory notices may be made public by the relevant regulator or the person to whom the notice was given. Broadly speaking, the position is as set out below.

Warning notices

16.3.28 As a general rule, neither the regulator giving the notice nor a person to whom it is given is permitted to publish a warning notice[1088].

16.3.29 The regulator giving the warning notice may, however, after consulting the person to whom the notice is given, publish such information about the matter to which the warning notice relates as it considers

1086 https://www.bankofengland.co.uk/-/media/boe/files/memoranda-of-understanding/fca-and-bank-prudential-july-2019.pdf, paragraph 49.
1087 See 2019 MoU above, paragraphs 51 to 52.
1088 Section 391(1).

appropriate.[1089] The FCA has clarified, however, that it will exercise this power only in circumstances where the warning notice proposes that a financial penalty, public censure, suspension or restriction should be imposed. Accordingly, the FCA is unlikely to exercise this power in circumstances where the warning notice proposes that another type of penalty should be imposed (for example, a prohibition order or withdrawal of approval).[1090]

16.3.30 The FCA could, therefore, make public the fact that a warning notice relating to a specific type of regulatory failure for which a financial penalty is proposed has been issued to a particular person. This is, however, subject to an exception described below for information that is considered to be unfair or prejudicial.

Decision notices and final notices

16.3.31 The regulator that gives a decision notice or a final notice must publish such information as it considers appropriate about the matter to which the notice relates.[1091] This is, however, subject to an exception described below for information that is considered to be unfair or prejudicial.

16.3.32 The PRA and the FCA have both stated their intention, as a general rule and subject to the exception mentioned above, ordinarily to publicise enforcement action where this has resulted in a decision notice or a final notice being given.[1092]

Information relating to statutory notices

16.3.33 Neither regulator is permitted to publish information relating to a statutory notice if, in its opinion, publication of that information would be unfair to the person with respect to whom the action was taken (or was proposed to be taken). Moreover, the FCA is also not permitted to publish information relating to a statutory notice if, in its opinion, such publication would be prejudicial to the interests of consumers or detrimental to the stability of the UK financial system, and the PRA is not permitted to publish information relating to a statutory notice if it

1089 Section 391(1)(c).
1090 See FCA Enforcement Guide (EG), paragraph 6.2.3.
1091 Section 391(4).
1092 https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/statement-of-policy/2019/the-pras-approach-to-enforcement-statutory-statements-of-policy-and-procedure-sop-sep-21.pdf?la=en&hash=A0FFD6CF99BD205D1F8464A3CE29996CE6511FCD, chapter 5 paragraph 14; EG 6.2.12.

considers that to do so would be prejudicial to the safety and soundness of PRA-authorised firms[1093].

16.3.34 The circumstances in which either regulator would consider itself unable to publish information relating to a statutory notice are likely to be rare, and, accordingly, it is difficult to conceive of many examples of such circumstances. One specific example where this restriction could arise is where, during a period of general market instability, a regulator reaches the view that publishing information regarding an investigation into a systemically important financial institution (such as a large bank) could cause or accelerate specific or general stability concerns at that financial institution and, as a consequence, threaten the stability of the financial system as a whole.

16.4 Misleading financial promotions

16.4.1 See Chapter 12 'Financial promotion' for a discussion of the FCA's power to require the withdrawal of misleading financial promotions.

16.5 Upper Tribunal (Tax and Chancery Chamber)

16.5.1 The Tribunal is a wholly independent judicial body that was established by the Tribunals, Courts and Enforcement Act 2007[1094], and has a mandate to hear references arising from certain decisions and supervisory notices made by the PRA or the FCA.[1095]

16.5.2 Where a person who is the subject of a decision by the FCA or the PRA to take disciplinary measures refers that matter to the Tribunal, the Tribunal has the following powers:

(a) the Tribunal can uphold the decision made by the PRA or the FCA; or

(b) the Tribunal can determine what other appropriate action should be taken by the PRA or the FCA in relation to the matter and, accordingly, remit the matter to the relevant regulator with such directions as it considers appropriate for giving effect to its determination[1096].

[1093] Sections 391(6) and 391(6A).
[1094] https://www.gov.uk/tax-upper-tribunal and section 3(2) of the Tribunals, Courts and Enforcement Act 2007.
[1095] https://www.gov.uk/guidance/refer-a-financial-service-or-energy-market-decision-to-a-tribunal.
[1096] Section 133(5).

16.5.3 Using this mechanism, the Tribunal is able formally to uphold a decision on disciplinary measures taken by the PRA or the FCA or, if it chooses not to uphold such a decision, to direct the PRA or the FCA to revoke or vary the amount of a financial penalty or otherwise to exercise disciplinary powers in a different manner.

16.5.4 This power of the Tribunal to override decisions of the regulators is limited to disciplinary matters and to certain other matters relating to third party rights. In all other cases where the Tribunal chooses not to uphold a decision taken by a regulator, the Tribunal is able only to direct the relevant regulator to reconsider the decision taking into account certain relevant findings made by the Tribunal.

16.5.5 The Tribunal may, on the application of a party or on its own initiative, summon any person to attend as a witness at a hearing or order any person to answer any questions or provide any documents relating to any issue in the proceedings[1097].

16.5.6 The Tribunal has only limited powers to make costs awards when considering a reference in relation to a decision by the PRA or the FCA. In such cases, the Tribunal may make an order in respect of costs only in cases where the Tribunal considers that:

(a) a party or its representatives has acted unreasonably in bringing, defending or conducting the proceedings; or

(b) the decision in respect of which the reference was made was unreasonable.[1098]

16.5.7 Appeals on points of law against the Tribunal's decision may be made, with leave of either the Tribunal or the relevant appellate court on an application by the relevant party, to the Court of Appeal in England and Wales, the Scottish Court of Session or the Court of Appeal in Northern Ireland (whichever appears to the Tribunal as being most appropriate)[1099].

16.6 Destination of income from financial penalties

16.6.1 The Act requires the PRA and the FCA to pay to the Treasury the amount of financial penalty receipts received by each regulator in each

[1097] Rule 16 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 (L. 15)).
[1098] Rule 10.
[1099] Section 13 of the Tribunals, Courts and Enforcement Act 2007.

financial year, after deducting costs incurred in bringing enforcement action. Each regulator is required under the Act to prepare and operate a scheme for ensuring that the amount of financial penalties that it retains (that is, as a result of its retention of costs incurred in bringing enforcement action) is applied for the benefit of the firms that it regulates. These schemes must ensure that firms that have become liable to pay a penalty to the relevant regulator in a financial year do not receive any benefit under the scheme in the following financial year.[1100]

16.6.2 The Treasury has wide discretion to decide how to apply its receipts from financial penalties imposed by the regulators, and has on occasion publicised how it intends to apply certain specific receipts. The substantial amounts that it received following the imposition of financial penalties in the context of the LIBOR fixing controversy have been, for example, applied partly to support certain charities, support groups and state schools.

[1100] Schedule 1ZA, paragraphs 20 and 21 (in respect of the FCA); and Schedule 1ZB, paragraphs 28 and 29 (in respect of the PRA).

17. ACQUISITIONS AND DISPOSALS OF FINANCIAL SERVICES BUSINESSES

17.1 Overview

General

17.1.1 The Act deals with acquisitions and disposals of financial services businesses in two main ways. Firstly, it contains provisions dealing with acquisitions and disposals of certain interests in UK authorised firms. Secondly, the Act makes special provision to facilitate the transfer of insurance and banking businesses from one entity to another as part of a court-sanctioned transfer scheme.

17.1.2 This chapter focuses on these two regimes but, in practice, other provisions of the Act may also be relevant to acquisitions of financial services businesses. For example:

(a) an acquisition may result in changes to the individuals performing controlled functions in respect of the authorised firms, which are discussed at Chapter 11 'Senior managers and certification regime';

(b) in a banking context, an acquisition may result in the application of, or be otherwise impacted by, the ring-fencing rules, which are discussed at Chapter 13 'Banking structural reform';

(c) an acquisition may involve the creation of a new holding company for a bank or an investment firm that requires prior PRA approval under Part 12B, which is discussed at Chapter 9 'Authorisation and permission'; and

(d) an acquisition or disposal of holdings in a listed company may require notification under Chapter 5 of the DTRs, which govern the notification of major shareholdings in issuers.

Change of control

17.1.3 Part 12 requires any person who decides to acquire or increase control over a UK authorised firm to notify the FCA or the PRA, and obtain their approval, prior to making the acquisition. Reductions and cessations of control over UK authorised firms must be notified to the FCA or the PRA prior to the disposition being made, but no prior approval is required. Completion of such changes of control without complying with these

approval and notification requirements is a criminal offence under the Act.

17.1.4 For the purposes of determining whether or not a change of control has occurred, in some circumstances, certain holdings of shares or voting rights in the authorised firm (or its parent undertaking) are aggregated (for example, when the acquirers are acting in concert[1101]) or disregarded (for example, small holdings of shares — representing no more than 5 per cent. of total voting power — held by a qualifying credit institution or an investment firm for trading book purposes[1102]).

17.1.5 A modified version of the 'change of control' regime set out in Part 12, as set out in secondary legislation[1103], applies in respect of changes of control over authorised building societies, certain friendly societies, certain consumer credit firms and other "non-directive" firms (which include insurance intermediaries, mortgage intermediaries, AIFMs and certain other authorised firms that are subject to regulation under the Act but were not covered by the EU's qualifying holdings regime). The Act's change in control regime for recognised investment exchanges is discussed at Chapter 20 'Recognised investment exchanges and recognised clearing houses'.

Business transfers

17.1.6 Part 7 deals with the transfer of the whole or part of a banking or insurance business carried on in the UK to another body. Such schemes can be a useful tool to effect corporate transactions, such as the merger of two distinct businesses into a single legal entity following an acquisition. This chapter focuses on these banking and insurance business transfer schemes. However, Part 7 also deals with transfers of reclaim fund business and ring-fencing transfer schemes. A court order is required to sanction a scheme that falls within Part 7[1104].

17.2 Change of control

17.2.1 Any person who decides to acquire or increase control over a UK authorised firm must notify the appropriate regulator (which, for PRA-authorised firms is the PRA and for other firms, is the FCA) in writing

[1101] Sections 178(2) and 422(3).
[1102] Sections 184(5) and 422A(5).
[1103] The Financial Services and Markets Act 2000 (Controllers) (Exemption) Order 2009 (as amended) (SI 2009/774).
[1104] Sections 104, 107 and 111.

before making the acquisition[1105]. Prior approval from the FCA or PRA (as applicable) is required before the acquisition or increase proceeds.

17.2.2 There is also a requirement for persons who decide to reduce their, or cease to have, control over a UK authorised firm to notify the appropriate regulator in writing before making the disposition, though there is no requirement for PRA or FCA approval for such a transaction.[1106]

17.2.3 A person acquires control over a UK authorised firm if the person holds 10 per cent. or more of the shares or voting power in the UK authorised firm or its parent undertaking or shares or voting power in the UK authorised firm or its parent undertaking as a result of which the person is able to exercise significant influence over the management of the UK authorised firm. A person ceases to have control over a UK authorised firm when they cease to meet these thresholds. Increases of control occur when the percentage of shares or voting power held reaches or exceeds the following thresholds: 20 per cent., 30 per cent. and 50 per cent., or the acquirer becomes a parent undertaking of the UK authorised firm. A person reduces their control over a UK authorised firm when their holdings fall below these thresholds.[1107]

17.2.4 As explained in paragraph 17.1.5, pursuant to secondary legislation[1108], a modified version of the 'change of control' regime set out in Part 12 applies to certain UK authorised firms. Certain friendly societies are exempted from the change of control notification and approval requirements altogether[1109], while the requirements for authorised building societies and certain "non-directive" firms (which include insurance intermediaries, mortgage intermediaries, AIFMs and certain other authorised firms that are subject to regulation under the Act but were not covered by the EU's qualifying holdings regime) are triggered at a single 20 per cent. threshold[1110] (for example, a person would only need to notify and seek approval for acquiring control in a UK insurance intermediary if they acquired 20 per cent. or more of the shares or voting power in the intermediary or its parent undertaking or shares or voting power in the intermediary or its parent undertaking resulting in

1105 Section 178(1).
1106 Sections 191D(1).
1107 Sections 181, 182 and 183.
1108 SI 2009/774.
1109 Article 6 of SI 2009/774.
1110 Articles 4 and 5 of SI 2009/774. For authorised building societies, the threshold applies to holdings of "capital", which consists of deferred shares falling within the scope of section 119 of the Building Societies Act 1986 and the general reserves of the building society.

the person being able to exercise significant influence over the management of the intermediary), with no separate thresholds for increases or reductions in control.

17.2.5 In addition, the change of control notification and approval requirements are triggered at a single 33 per cent. threshold for consumer credit firms carrying out regulated activities that consist solely of certain lower risk credit activities, such as entry into regulated consumer hire agreements and credit broking in relation to certain hire agreements.[1111]

17.2.6 The regulator responsible for assessing a proposed acquisition or increase in control will be the FCA, unless the UK authorised firm is a PRA-authorised firm, in which case the PRA will have responsibility for assessing the acquisition (the "appropriate regulator").[1112]

17.2.7 In assessing a proposed acquisition of control, the appropriate regulator must, among other things, consider the suitability of the person seeking to acquire control and the financial soundness of the acquisition to ensure the sound and prudent management of the relevant UK authorised firm. Under the Act, the appropriate regulator may only object to an acquisition of control if there are reasonable grounds for doing so on the basis of prescribed assessment criteria or if the information provided by the proposed controller is incomplete. The assessment criteria include matters such as the reputation of the proposed controller and whether there are reasonable grounds to suspect that the risk of money laundering or terrorist financing activity could increase as a result of the acquisition.[1113]

17.2.8 The appropriate regulator has the power to approve an acquisition of control on a conditional basis but only in certain circumstances, which include circumstances in which the appropriate regulator would otherwise propose to object to the acquisition. The appropriate regulator is not permitted to impose a condition specifying a particular level of holding to be acquired and may vary or cancel the conditions.[1114]

17.2.9 Having received notification of a proposed acquisition of control, the appropriate regulator may, no later than the 50th working day of the

[1111] Article 6A of SI 2009/774.
[1112] Section 178(2A).
[1113] Sections 185(2), 185(3) and 186.
[1114] Section 187.

assessment period (which begins when the regulator acknowledges receipt of the notification[1115]), require the proposed controller to provide "any further information necessary to complete its assessment". On the first request for information, the assessment period may be interrupted for a maximum of 20 working days (or 30 working days, in certain instances, such as where the proposed controller is situated or regulated outside the UK or Gibraltar) while the information is provided. Further requests for information by the appropriate regulator do not result in interruptions to the assessment period.[1116]

17.2.10 Within 60 working days of acknowledging receipt of the notification, plus any interruption period, the appropriate regulator must either approve (conditionally or unconditionally) or object to the proposed acquisition. Notice of the decision should be given to the proposed controller within two working days of the appropriate regulator making its decision and no later than the expiry date of the assessment period.[1117]

17.2.11 If the appropriate regulator proposes to approve the acquisition subject to conditions or object to the acquisition, it must serve a warning notice. If the appropriate regulator then decides to approve an acquisition subject to conditions or to object to the acquisition, it must serve a decision notice following which the applicant can refer the matter to the Tribunal.[1118]

17.2.12 Under the Act, where the PRA is the appropriate regulator, the PRA is required to consult with the FCA before deciding to approve an acquisition of control (conditionally or unconditionally) or to object to an acquisition. The FCA may make certain representations to the PRA regarding the change of control assessment criteria described in paragraph 17.2.7. The FCA may also direct the PRA to object to an acquisition (or direct that approval is subject to certain conditions) if there are reasonable grounds to suspect that the acquisition is connected with money laundering or terrorist financing (or could increase the risk of such activity).[1119]

[1115] Section 189(1).
[1116] Section 190, in particular, sub-sections 190(1), 190(2), 190(3), 190(4) and 190(5).
[1117] Sections 185(1), 189(1) and 189(4).
[1118] Sections 189(4)(b), 189(7) and 189(8).
[1119] Sections 187A(1) and 187A(3).

17.2.13 Similarly, where the FCA is the appropriate regulator, the FCA is required to consult with the PRA in cases where the UK authorised firm that is the subject of a change of control notification has a PRA-authorised firm in its "immediate group" or if the proposed controller is a PRA-authorised firm[1120]. The PRA may make certain representations to the FCA regarding the change of control assessment criteria described above. The PRA may also direct the FCA not to approve the acquisition without conditions on the basis of specific change of control assessment criteria, including, concerns regarding the ability of the UK authorised firm to comply with its prudential requirements[1121]. The mutual duty of consultation reflects the co-operative approach of the FCA and the PRA in respect of the regulation of groups and dual-regulated firms, as set out more fully in the MoU between the FCA and the PRA and further described in Chapter 7 'Co-ordination between the PRA and the FCA'.

17.2.14 Consultation obligations between the FCA and the PRA also arise in connection with the following powers that are conferred on the appropriate regulator under the change of control regime:

(a) the variation or cancellation of approval conditions that have been imposed on the direction of the FCA or the PRA (as described in paragraphs 17.2.12 and 17.2.13)[1122];

(b) the issuance of a warning notice regarding an objection to a proposed controller's control over a UK authorised firm[1123];

(c) the issuance of a restriction notice (under which the appropriate regulator can direct that the shares or voting power held by a controller are subject to certain restrictions, such as restrictions on transfers of relevant shares or voting power)[1124]; and

(d) applications for a court order for the sale of shares or disposition of voting power held by a controller[1125].

17.2.15 The PRA must give a copy to the FCA of any notice it receives of any acquisition of control pursuant to section 178 and any reduction of

[1120] Section 187B(1). "Immediate group" (as set out in section 421ZA) means, in relation to a person ("A"): (i) A: (ii) a parent undertaking of A; (iii) a subsidiary undertaking of A; (iv) a subsidiary undertaking of a parent undertaking of A; and (v) a parent undertaking of a subsidiary undertaking of A.
[1121] Sections 187B(3) and 187B(4).
[1122] Section 187C.
[1123] Section 191A.
[1124] Section 191B.
[1125] Section 191C.

control pursuant to section 191D[1126]. The FCA must do the same if the notice relates to a UK-authorised firm that has, as a member of its immediate group, a PRA-authorised firm, or if it is given by a PRA-authorised firm[1127].

17.2.16 In addition to "straightforward" acquisitions and disposals of interests in UK authorised firms, difficult issues can arise in relation to certain situations, such as: stakebuilding exercises where the target or one of its subsidiaries is a UK authorised firm, joint ventures involving regulated businesses, group reorganisations involving UK authorised firms and in respect of fund managers that may acquire or dispose of shares in UK authorised firms as part of their investment mandate. In the latter case, fund managers are subject to a special pre-notification regime under the FCA Handbook[1128], pursuant to which acquisitions of control over an authorised firm may be pre-approved for period lasting up to a year subject to certain conditions, thereby mitigating some of the practical issues inherent in obtaining prior approval for acquisitions of control during the course of fund management activity.

17.2.17 Acquiring or reducing control without complying with the notification and (in the case of acquisitions and increases of control) approval provisions of Part 12 (including the modified version of that regime for certain UK authorised firms) is an offence, carrying penalties of up to a maximum of two years' imprisonment and/or a fine[1129]. As noted in paragraph 17.2.14, the Act also contains powers allowing the FCA or the PRA to restrict a person's rights with regard to shareholdings or voting power (or to apply for a court order requiring the shares to be sold) if a person acquires or holds the shares or voting power in breach of a notice of objection, or any conditions set out in an FCA or PRA approval[1130].

17.2.18 The Treasury has powers to provide for exemptions from the notification requirements, to alter the circumstances and shareholding levels at which they apply and to change the definition of "controller" in the Act.[1131]

[1126] Sections 187A(5) and 191D(1A).
[1127] Sections 187B(5) and 191D(1B).
[1128] SUP 11.3.5AG to SUP 11.3.5CG of the SUP Manual.
[1129] Section 191F.
[1130] Sections 191B and 191C.
[1131] Section 192.

17.3 Business transfers

Banking business

17.3.1 Part 7 provides a statutory framework for transfers of a banking business by way of a court-sanctioned scheme. To fall within Part 7 (as it applies to banking business transfers), the transfer must relate to a deposit-taking business. It must also either relate to the transfer of the business of a UK-incorporated authorised deposit-taker or to the transfer of the business of a non-UK incorporated authorised deposit-taker carried on in the UK (such as the UK deposit-taking branch of an overseas bank) where the transferee will carry on the business in the UK.[1132]

17.3.2 The banking business transfer procedure set out in Part 7 is not available for building societies (for which special provision is made under the Building Societies Act 1986 and the Mutual Societies (Transfers) Order 2009 (SI 2009/509)), credit unions, ring-fencing transfer schemes or for transfers involving schemes constituting a compromise or arrangement to which Part 27 of the Companies Act 2006 applies[1133].

17.3.3 Unlike insurance business transfer schemes, the banking business transfer scheme regime is not compulsory[1134], with the result that a transfer of a banking business may still be carried out by way of an asset sale, a scheme of arrangement or a private Act of Parliament if this is considered more appropriate.

Ring-fencing transfer schemes

17.3.4 As discussed in further detail in Chapter 13 'Banking structural reform', the Banking Reform Act contains provisions requiring UK banks to separate their core retail and SME banking activities from their wholesale and investment banking services. The Banking Reform Act has also amended Part 7 to introduce a new ring-fencing transfer scheme that allows a bank to transfer all or part of its business to another body in order to comply with the ring-fencing regime, without the need to obtain the consent of all customers whose deposits are affected by the

[1132] Sections 106(1) and 106(2).
[1133] Section 106(1)(c) and (3).
[1134] Section 104.

transfer[1135]. Such a scheme must be made for certain ring-fencing purposes that are specified in the Act[1136].

Insurance business

17.3.5 Part 7 provides for transfers of insurance business pursuant to a court-sanctioned scheme, without the need to obtain consents from all policyholders or other contractual counterparties. There are also requirements for disclosure and the giving of information to policyholders to enable policyholders to object to the court if they would be adversely affected by the proposed scheme.

17.3.6 The Act applies to the transfer of long-term business (such as life assurance) and general insurance business carried on in the UK by an authorised person who has permission to effect or carry out contracts of insurance to another body if that results in the business transferred being carried on from an establishment of the transferee in the UK or Gibraltar but excludes certain types of schemes from the transfer provisions, including transfers by friendly societies (for which special provision is made in the Friendly Societies Act 1992).[1137]

Procedure

17.3.7 An insurance business transfer scheme or banking business transfer scheme carried out under Part 7 will only be effective if a court order sanctioning the scheme has been applied for and obtained. Applications for such an order may be made by the person whose business is to be transferred (the transferor), by the transferee, or by both the transferor and transferee[1138]. Applications for an insurance business transfer scheme must be accompanied by a scheme report on the application, written by a skilled person[1139]. The skilled person must be nominated or approved by the appropriate regulator, and the form of the scheme report must also be approved by the appropriate regulator. Where the appropriate regulator is the PRA, it must consult the FCA before making a nomination or granting approval. Where the appropriate regulator is the FCA and the transferee is a PRA-authorised firm or the authorised firm concerned or the transferee has a PRA-

[1135] Paragraph 5 of Schedule 1 to the Banking Reform Act, introducing section 106B to Part 7.
[1136] Section 106B(3).
[1137] Section 105.
[1138] Section 107(2).
[1139] Section 109(1).

authorised firm as a member of its immediate group, it must consult the PRA before making a nomination or granting approval.[1140]

17.3.8 Schedule 12 sets out requirements for certificates as to margins of solvency (for insurance business transfers) and certificates as to financial resources (for banking business transfers). The court must be of the opinion that the transferee has the requisite authorisations to carry on the business and that, taking into consideration all the circumstances of the case, it is appropriate to sanction the scheme. The FCA, (in the case of a scheme where a PRA-authorised firm is the transferee or the transferor or where a PRA-authorised firm is a member of the immediate group of the transferor or transferee) the PRA and any person who alleges that they would be adversely affected by the scheme (including depositors or policyholders) are entitled to be heard on an application made to the court.[1141]

17.3.9 If the court agrees to sanction the scheme, the Act enables the court to make consequential orders transferring the whole or any part of the undertaking concerned to the transferee and any property and liabilities of the transferor concerned.[1142]

17.3.10 Regulations have been made imposing certain publicity requirements before the court may sanction a banking or insurance business transfer scheme.[1143]

1140 Sections 109(2)(b), 109(3), 109(4), 109(5) and 109(6).
1141 Sections 110 and 111.
1142 Section 112.
1143 The Financial Services and Markets Act 2000 (Control of Business Transfers) (Requirements on Applicants) Regulations 2001 (SI 2001/3625).

18. POWERS EXERCISABLE IN RELATION TO PARENT UNDERTAKINGS

18.1 Overview

18.1.1 Part 12A and Schedule 17A of the Act confer powers on the Bank, the PRA and the FCA to direct an unregulated parent undertaking of a PRA-authorised firm, investment firm, UK RIE, UK RCH or RCSD in prescribed circumstances or to require such a parent undertaking to provide information or documents to the regulators.

18.1.2 The aim of these powers is to ensure that a consistent and effective level of oversight and supervisory powers can be applied to a group that includes authorised firms, irrespective of the legal structure of the group. It was the Government's intention when introducing the powers that they be used rarely and only when tools available at the level of the authorised firm would be ineffective[1144]. As such, the powers are subject to a test of proportionality[1145].

18.1.3 In addition, the Treasury introduced a new Part 12B of the Act as part of the UK implementation of the CRD V Directive[1146], which has since been amended by the FS Act 2021. This new Part 12B sets out the powers of the PRA with respect to the approval and consolidated supervision of parent undertakings that exercise effective control of credit institutions and certain large investment firms.

18.2 Power to direct

General

18.2.1 The Bank, the PRA and the FCA have powers to direct certain parent undertakings incorporated, or having their place of business, in the UK, to take, or refrain from taking, specified action or to remedy past actions. These powers may be exercised by the FCA to advance one of more of its operational objectives or by the PRA to advance any of its objectives.[1147]

18.2.2 These powers may also be exercised for the purpose of the effective consolidated supervision of certain firms' groups further to the implementation of various EU Directives (the CRD IV Directive[1148], the

[1144] The Treasury consultation document 'A new approach to financial regulation: the blueprint for reform' (June 2011), Cm 8083, paragraph 2.177.
[1145] Section 192C(5) and paragraph 17(3)(c) of Schedule 17A.
[1146] Directive (EU) 2019/878.
[1147] Section 192C(2).
[1148] Directive 2013/36/EU.

Financial Conglomerates Directive[1149], the Solvency II Directive and the BRRD)[1150]. Furthermore, the Bank may exercise its powers for the purpose of the effective regulation of RCHs and RCSDs in the group of a relevant parent undertaking[1151].

18.2.3 To fall within the scope of the power to direct, the parent undertaking must be a parent of a PRA-authorised firm, an investment firm, a UK RIE, an RCH (other than an overseas clearing house) or an RCSD. The parent undertaking itself must not be an authorised firm, an RIE, an RCH or an RCSD and must be a financial institution of a kind prescribed by the Treasury by order[1152].

18.2.4 The Treasury order[1153] prescribes the following financial institutions for the purposes of defining what constitutes a "qualifying parent undertaking": (i) insurance holding companies; financial holding companies; mixed financial holding companies in relation to the parent undertakings of PRA-authorised persons and investment firms; and (ii) all types of financial institution (undefined) in relation to the parent undertakings of UK RIEs, RCHs and RCSDs (which includes an entity that itself provides financial services or that operates financial market infrastructure or whose business involves the ownership, or management, of such entities)[1154].

Procedure

18.2.5 The PRA is under a duty to consult the FCA before giving notice of any proposed directions. Similarly, the FCA must consult the PRA before giving notice of any proposed directions where they relate to the parent undertaking of a PRA-authorised firm. Before any directions are given to a parent of an RCH or an RCSD, the Bank will also be consulted by the FCA.[1155] Similarly, the Bank must also consult the FCA before giving a direction to a parent undertaking of an authorised person or RIE.[1156]

18.2.6 The notifying regulator is under a duty to give written notice to the parent undertaking and any authorised firm, RIE, RCH or RCSD that it considers will be significantly affected by any proposed directions. Directions may be stated to take effect immediately. The recipient of

[1149] Directive 2002/87/EC.
[1150] See sections 192C(1), 192C(3), 192C(4) and 3M(3).
[1151] Section 192C and paragraph 17(3)(a) of Schedule 17A.
[1152] Section 192B and paragraph 17(2) of Schedule 17A.
[1153] The Financial Services and Markets Act 2000 (Prescribed Financial Institutions) Order 2013 (SI 2013/165).
[1154] Article 2 of SI 2013/165.
[1155] Section 192F.
[1156] Paragraph 17(6) of Schedule 17A.

the notice will be able to make representations to the notifying regulator within a period specified in the notice asking it to revoke the direction. All persons notified have a right to refer the matter to the Tribunal.[1157]

18.2.7 Each of the Bank, the PRA and the FCA is required to prepare and issue statements of policy with respect to the giving of directions to parent undertakings[1158]. According to the PRA's statement of policy[1159], the PRA will issue a direction to advance its objectives or to take necessary action to protect authorised firms from the adverse effects of being part of a group, where taking action at the parent undertaking level is considered more effective than at the authorised firm level. The statement of policy contains a non-exhaustive list of directions that the PRA may consider making and possible scenarios in which it may exercise its power of direction.

18.2.8 The FCA envisages that it would issue a direction which is designed to bring an entity and its group back into compliance with its regulatory requirements, or to prevent the parent undertaking from taking action that might lead to disorderly failure of the entity or its group. The FCA's policy statement contains a non-exhaustive list of directions that the FCA may consider making and possible scenarios in which it may exercise its power of direction.[1160]

18.2.9 The Bank has stated in the context of UK RCHs that it does not intend to use its powers to create an unlimited liability for a parent undertaking though it would expect it to act as a source of financial strength for any regulated subsidiary. The Bank's policy statement contains a non-exhaustive list of directions that the Bank may consider making and possible scenarios in which it may exercise its power of direction.[1161]

18.2.10 Each of the Bank, the PRA and the FCA has powers to censure or to impose a fine of such amount as it considers appropriate for failure to act in accordance with a direction. The regulators have prepared and issued a statement of policy relating to when they will impose penalties

1157 Sections 192E and 192G, paragraph 17(1) and (4) of Schedule 17A.
1158 Section 192H.
1159 The PRA Statement of Policy 'The power of direction over qualifying parent undertakings' (April 2013).
1160 Appendix 1 'FCA statement of policy on the use of the power to direct qualifying parent undertakings' to the FSA Policy Statement PS13/5 'The new FCA Handbook: Feedback on Regulatory Reform proposals relating to the FCA Handbook, including final Handbook rules' (March 2013).
1161 The Bank's Policy Statement 'The giving of directions to qualifying parent undertakings of UK recognised clearing houses' (April 2013).

and the amount of any fines[1162]. The notifying regulator must first provide a warning notice should it decide to impose a penalty on a qualifying parent undertaking. If a penalty is imposed, the parent undertaking has a right to refer the matter to the Tribunal[1163].

Banking Reform Act

18.2.11 The Banking Reform Act amends the Act to allow the PRA to give directions to, among others, qualifying parent undertakings of banks to which the ring-fence applies to restructure their groups if the ring-fencing arrangements effected by that group have been determined to have been ineffective in protecting retail deposits[1164]. The PRA is not permitted to use its Part 12A powers for these purposes.

18.2.12 The Banking Reform Act also amends Part 1 of the Banking Act 2009, which introduces a new bail-in tool to assist regulators in the resolution of failing banks. If certain conditions are met, this stabilisation power may be exercised by the Bank in respect of an unregulated entity within the same group as the regulated bank, including a subsidiary or parent undertaking.[1165]

18.3 Rules to require provision of information

18.3.1 Each of the Bank, the PRA and the FCA may make rules requiring qualifying parent undertakings to provide information or documents. If they decide to do so, the rules governing the exercise of these powers, and the formal requirements for information or documents provided by parents, will be issued separately by the Bank, the PRA and the FCA[1166]. However, at the time of writing, neither the Bank, the PRA nor the FCA has stated that it has plans to exercise this rule-making power.

18.3.2 If such rules are made, the Bank, the PRA and the FCA have powers to censure or impose a fine of such amount as they consider appropriate for failure to provide information or documents. The regulators will prepare and issue a statement of policy relating to when they will impose penalties and the amount of any fines. As in respect of failures to act in accordance with directions, the notifying regulator must first

[1162] The Bank's Policy Statement 'Financial penalties imposed by the Bank under the Financial Services and Markets Act 2000 or under Part 5 of the Banking Act 2009' (April 2013); the PRA Statement of Policy 'The Prudential Regulation Authority's approach to enforcement: statutory statements of policy and procedure' (September 2021); and DEPP 6 of the DEPP.
[1163] Section 192L and paragraph 17(1) of Schedule 17A.
[1164] Sections 142K to 142V.
[1165] Sections 81BA and 81CA of the Banking Act 2009.
[1166] Section 192J and paragraph 17(1) of Schedule 17A.

provide a warning notice should it decide to impose a penalty on a qualifying parent undertaking. If a penalty is imposed, the parent undertaking has a right to refer the matter to the Tribunal[1167].

18.4 Approval of certain holding companies

Requirement for approval

18.4.1 PRA approval is required to establish a UK parent financial holding company or mixed financial holding company (a **"holding company"**) of a subsidiary credit institution or a designated investment firm, unless the PRA has confirmed that it is exempt from the requirement for approval.

18.4.2 To be exempt from approval, the following conditions must be met:

(a) the holding company's principal activity is to acquire holdings in subsidiary undertakings;[1168]

(b) the holding company is not defined as a resolution entity by the Bank in a group resolution plan;

(c) the holding company has a subsidiary credit institution or designated investment firm which has been designated by the PRA as responsible for compliance with prudential requirements on a consolidated or sub-consolidated basis and has the power to discharge those obligations effectively;

(d) the holding company does not take any management, operational or financial decisions affecting the group as a whole or any subsidiary undertakings which are institutions or financial institutions; and

(e) the PRA is satisfied there is no impediment to the effective supervision of the group on a consolidated or sub-consolidated basis.[1169]

18.4.3 These conditions describe the circumstances in which a parent undertaking will not be regarded by the PRA as having effective control over its group or any relevant institutions.

[1167] Section 192L and paragraph 17(1) of Schedule 17A.
[1168] Sections 192P(2)(a) and 192P(2)(b).
[1169] Section 192P(3).

18.4.4 In the event the PRA identifies that a holding company, which it has previously confirmed is exempt, no longer satisfies the conditions detailed at paragraph 18.4.2, it must direct that holding company to apply for approval.[1170]

Application to the PRA

18.4.5 The application seeking approval from the PRA (or confirmation of an exemption from the requirement for approval) must be submitted by the relevant holding company and the application must include certain information specified in the Act.[1171]

18.4.6 By way of example, the application must include an overview of the group's structural and internal organisation, as well as information on at least two individuals who are directors of the holding company and a description as to how they comply with requirements pertaining to their good repute, and how they possess sufficient knowledge, skills and experience to perform their duties.

18.4.7 Once the PRA receives an application it can decide to: (i) approve the holding company, as described further in paragraph 18.4.8; (ii) confirm that the parent undertaking qualifies for an exemption, detailed at paragraph 18.4.2; or (iii) take one or more of the measures detailed in paragraph 18.4.11.[1172]

18.4.8 The PRA must consult the FCA before approving an application.[1173] To approve the holding company certain conditions must be met, including that: (i) the internal arrangements and distribution of tasks within the group must be adequate and effective; (ii) the structural organisation of the group must not prevent the effective supervision of subsidiary and parent institutions; and (iii) the PRA must have received specified information which forms part of the application process.[1174]

18.4.9 Any holding company that is subject to the requirement for PRA approval is under an ongoing duty to notify the PRA in writing of any change in the structural organisation of its group and to provide any

[1170] Section 192T(3)
[1171] Sections 192Q.
[1172] Section 192R.
[1173] Section 192W.
[1174] Section 192R.

other information required of it. A parent undertaking which is exempt from the requirement for approval is under the same ongoing duty.[1175]

Powers to take measures and create rules

18.4.10 In the event that the PRA determines that the conditions upon which a holding company's approval is based are not met or have ceased to be met, the PRA must take appropriate measures to ensure the continuity and integrity of the consolidated or sub-consolidated supervision of the holding company's group and to ensure that the holding company's group complies with the requirements in the CRD IV Directive (as implemented in UK law), the UK CRR and the PRA rules[1176], which may be made under Part 12B where it appears necessary or expedient to advance any of the PRA's objectives.[1177]

18.4.11 The Act sets out a non-exhaustive list of measures that the PRA can issue including a direction: (i) suspending exercise by the holding company of voting rights in shares of specified subsidiaries; (ii) requiring the holding company to transfer holdings in subsidiaries to its shareholders; and (iii) restricting or prohibiting distributions or interest payments to shareholders.[1178]

Procedure

18.4.12 If the PRA proposes to give a direction, it must give written notice to the holding company and any authorised person or recognised investment exchange that it considers will be significantly affected by the relevant measure.[1179] Directions may be stated to take effect immediately, at a date specified in the notice or if no date is specified, when the matter to which the notice relates is no longer open for review. Any holding company notified in this way has a right to refer the matter to the Tribunal.[1180]

18.4.13 The PRA is required to issue a statement of policy with respect to the taking of measures and directions, and the imposition and amount of penalties.[1181] In its policy, the PRA has stated that it may, in certain

[1175] Section 192S.
[1176] Section 192T(1).
[1177] Section 192XA.
[1178] Section 192T(2).
[1179] Section 192U(1).
[1180] Sections 192U(3) and 192U(4).
[1181] Section 192Z2(1).

cases, choose to exercise its powers of direction at an early stage, and not merely as a last resort.[1182]

18.4.14 The PRA has powers to censure or to impose a fine of such amount as it considers appropriate on a holding company that has contravened Part 12B of the Act (including any directions and rules made under it) or the UK CRR or an instrument made under it. The PRA must first provide a warning notice should it decide to impose a penalty or censure a holding company.[1183] If a penalty is imposed, the holding company has a right to refer the matter to the Tribunal.[1184]

[1182] The PRA Statement of Policy, 'Supervisory measures and penalties in relation to financial holding companies' (September 2021). See also the PRA Statement of Policy 'The Prudential Regulation Authority's approach to enforcement: statutory statements of policy and procedure' (September 2021).
[1183] Sections 192Y.
[1184] Section 192Z(7).

19. OFFICIAL LISTING

19.1 Basic framework

19.1.1 Part 6 of the Act provides the framework under which the FCA is responsible for:

(a) the maintenance of, and admissions to, the list of securities admitted to listing (the **Official List**); and

(b) monitoring compliance with the requirements imposed on issuers of securities (and other relevant persons) by or under Part 6 of the Act and, to the extent applicable, retained EU law.

19.1.2 The UK Listing Authority is the name given to the FCA when acting in its capacity as the competent authority for the purposes of Part 6 of the Act.

19.1.3 When originally enacted, Part 6 was drafted to be a self-contained section of the Act. The rationale for this was that, at the time of enactment, the Government had yet to decide whether the FSA would take on the functions of the UK Listing Authority. Part 6 was therefore drafted so that powers conferred under it were to be exercised by the "competent authority". The FSA (as it was then) was previously designated as the competent authority under Part 6 of the Act. The Treasury originally had the power to change this and to confer some or all of the powers under Part 6 on another body. The Treasury no longer has this power and the FCA now exercises the powers conferred under Part 6 of the Act. Furthermore, the general duties of the competent authority (which were set out in section 73 of the Act) have been removed. The FCA's general duties must now apply when it is discharging its functions and exercising its powers under Part 6 of the Act.

19.1.4 So that it can discharge its responsibilities under Part 6 of the Act, the FCA has the power to make rules. These rules are known collectively as "Part 6 rules" but the Act provides that Part 6 rules made for certain purposes will be known by more specific names (for example, Part 6

rules that are expressed to relate to the Official List are known as Listing Rules).[1185]

19.2 Official listing

19.2.1 The FCA may admit to the Official List "*such securities and other things as it considers appropriate*", subject to:

(a) the requirement that the instrument concerned must only be admitted in accordance with Part 6 of the Act; and

(b) the Treasury's power to specify any description or category of things that may not be admitted.[1186]

Applying for admission to the Official List

19.2.2 Admission to the Official List is only to be granted if the application is made in the manner prescribed in the Listing Rules and therefore the FCA may only approve an application for admission to the Official List where it is satisfied that the applicant has complied with the requirements of the Listing Rules.[1187] Applications must also be made by, or with the consent of, the issuer of the relevant securities, and must comply with any other requirement that the FCA has imposed in relation to the application.[1188]

19.2.3 In addition to refusing an application for listing because, for example, the requirements of the Listing Rules have not been met, the FCA may also refuse an application if, for a reason relating to the issuer, it considers that granting permission would be detrimental to the interests of investors.[1189]

Determination of an application for listing

19.2.4 The FCA must inform the applicant of its decision on an application for listing within six months (beginning with the date on which the FCA received the application). The six-month period can, however, be stopped if the FCA requires further information from the applicant, in

[1185] Sections 73A(1) and 73A(2). Other Part 6 rules include Prospectus Rules, Transparency Rules, and Corporate Governance Rules. From 3 July 2016, the Disclosure Rules were renamed as "Disclosure Guidance" to implement the EU Market Abuse Regulation (MAR) (Regulation EU 596/2014).
[1186] Sections 74(1) to 74(3).
[1187] Sections 75(1) and 75(4)(a).
[1188] Sections 75(2) and 75(4)(b).
[1189] Section 75(5).

which case the six-month period begins on the day when the applicant provides the FCA with that supplementary information.[1190]

19.2.5 Where the FCA approves an application for listing it must give the applicant written notice. If, on the other hand, the FCA proposes to refuse an application for listing it must issue a warning notice to the applicant, followed by a decision notice if, after taking into account any representations made by the issuer, it decides to go ahead and refuse the application. The applicant may then refer the matter to the Tribunal.[1191]

19.2.6 Once admitted to the Official List, the legitimacy of any securities' admission may not be challenged on the grounds of non-compliance with any relevant requirement or condition for admission.[1192]

Requirement for a prospectus

19.2.7 An approved prospectus will usually be required where admission to the Official List involves offering "transferable securities" to the public in the UK.[1193] Offers falling within Articles 1(2) to 1(4) of the retained EU law version of the EU Prospectus Regulation (**UK Prospectus Regulation**) (including offers made to or directed only at qualified investors) and offers in respect of which the total consideration for the transferable securities being offered in the UK cannot exceed EUR 8 million (or an equivalent amount) are exempt from the requirement to publish an approved prospectus.[1194]

19.2.8 Without an approved prospectus, it is unlawful for an issuer to:

(a) offer those transferable securities to the public; or

(b) request that those transferable securities be admitted to trading on a "regulated market" situated or operating in the UK.[1195]

[1190] Sections 76(1)(a) and 76(1)(b).
[1191] Sections 76(3) to 76(6), and 387(2).
[1192] Section 76(7).
[1193] Sections 85(1) and (2). See section 102A(3) for the definition of "transferable securities" and section 102B for the meaning of "offer of transferable securities to the public". Certain types of transferable securities are excluded by virtue of section 85(5) and Article 1(2) of the UK Prospectus Regulation (defined below).
[1194] Section 86, and Article 1 of the UK Prospectus Regulation.
[1195] Sections 85(1) and (2).

19.2.9 An approved prospectus is one which has been approved by the FCA. The FCA may only approve a prospectus if it is satisfied that the prospectus:

(a) contains the information required by Articles 6(1) or 14(2) of the UK Prospectus Regulation; and

(b) complies with all of the requirements of the UK Prospectus Regulation and any requirements imposed by or in accordance with Part 6 of the Act (including, for example, the Prospectus Regulation Rules sourcebook in the FCA Handbook).[1196]

19.2.10 In the limited circumstances where the requirement to publish an approved prospectus does not apply, the Act provides that the Listing Rules may require that listing particulars be published instead.[1197] The prospectus regime (set out in sections 84 to 87O) in the Act may not be applicable, for example, because of the nature of the securities being listed (for example, units in an open-ended collective investment scheme)[1198], or because the securities are not being admitted to trading on a regulated market (for example, the Professional Securities Market, which is not a regulated market notwithstanding that securities traded on it are admitted to the Official List).

19.3 Discontinuance and suspension of listing

19.3.1 The FCA may discontinue the listing of securities if it is satisfied that there are special circumstances that preclude normal regular dealings in them. The FCA may also suspend the listing of any securities. If the FCA wishes to exercise these powers then it must do so in accordance with the Listing Rules.[1199]

19.3.2 The FCA may exercise either of these powers on its own initiative or on the application of the issuer of those securities. Where securities are suspended they are still to be treated as being listed.[1200]

Discontinuance or suspension on the FCA's own initiative

19.3.3 If the FCA decides, on its own initiative, to discontinue or suspend the listing of an issuer's securities, that discontinuance or suspension will

[1196] Sections 85(7), and 87A(1)(b) and 87A(1)(c).
[1197] Sections 79 to 82.
[1198] Section 85(5) and Article 1(2) of the UK Prospectus Regulation.
[1199] Sections 77(1) and 77(2).
[1200] Sections 77(2A) and 77(3).

take effect either immediately or on a future date. In either case, the FCA must give the issuer of the securities concerned written notice.[1201]

19.3.4 The Act sets out certain other requirements as to the form and content of such written notices, including:

(a) giving details of the discontinuance or suspension;

(b) informing the issuer of the date on which the discontinuance or suspension will take effect or when it took effect (if in the past);

(c) providing the FCA's reasons for discontinuing or suspending the listing of the issuer's securities and also for choosing the date on which it took effect or is to take effect; and

(d) informing the issuer that it has certain procedural rights (namely that the issuer may make representations to the FCA and may refer the matter to the Tribunal).[1202]

19.3.5 If the issuer makes representations to the FCA, then the FCA, having considered those representations, must decide whether to:

(a) proceed to discontinue or suspend the listing of the issuer's securities;

(b) maintain any discontinuance or suspension that has already taken effect; or

(c) reverse that discontinuance or cancel that suspension if it has already taken effect.

19.3.6 The FCA must give the issuer written notice of its decision. This notice must inform the issuer of its right to refer the matter to the Tribunal (and give an indication of the procedure on such a reference) if it decides to proceed with or maintain any discontinuance or suspension. If the FCA decides to cancel a discontinuance of the listing of an issuer's securities then those securities will be readmitted to the Official List without any further action.[1203]

[1201] Sections 78(1) and 78(2).
[1202] Sections 78(3)(a) to 78(3)(e).
[1203] Sections 78(5) to 78(9).

19.3.7 Where the FCA has suspended the listing of securities on its own initiative or securities have been suspended by the Bank under the relevant provisions of the Banking Act 2009, then the issuer may apply for that suspension to be cancelled. If the FCA proposes to refuse the issuer's application to cancel the suspension then it must give the issuer a warning notice. In response to that notice, the issuer has the right to make representations to the FCA. If the FCA decides, having considered any representations made by the issuer, to refuse the issuer's application (so that the discontinuance or suspension remains in place) then it must give the issuer a decision notice. The issuer may then refer the matter to the Tribunal.[1204]

Discontinuance or suspension on the application of the issuer

19.3.8 Where an issuer requests the FCA to discontinue or suspend the listing of its securities and the FCA agrees to the issuer's request then it must give the issuer notice. That notice can be given in writing or, in more urgent situations, orally. The notification (whether in writing or otherwise) must:

(a) inform the issuer of the date on which the discontinuance or suspension took effect or is to take effect; and

(b) inform the issuer of any other matters (if any) as specified in the Listing Rules.[1205]

19.3.9 The FCA is not obliged to agree to an issuer's application to discontinue or suspend the listing of securities and it can refuse such an application. If the FCA proposes to refuse an application to discontinue or suspend the listing of an issuer's securities then it must first give the issuer a warning notice. The issuer has the right to make representations to the FCA in response to that warning notice. If, having considered any representations, the FCA decides to refuse the issuer's application then it must give the issuer a decision notice. An issuer that has had its application refused by the FCA may refer the matter to the Tribunal.[1206]

[1204] Sections 78(10) to 78(12).
[1205] Sections 78A(2) and 78A(3).
[1206] Sections 78A(4) to 78A(6).

19.4 Penalties for breach of Part 6 rules and compensation

Penalties

19.4.1 Section 91 of the Act gives the FCA the power to impose financial penalties for breaches of the Part 6 rules[1207].

19.4.2 Generally speaking, the FCA can impose financial penalties on issuers and applicants for listing for breaches of the Part 6 rules.[1208] However, the FCA can take action against other persons depending on which rule has been breached. For example, where the rule concerned is a prospectus rule then the FCA can take action against a wide category of persons, including an offeror, a person who has applied for a prospectus to be approved and "any other person to whom any provision of, or made in accordance with, the UK Prospectus Regulation applies".[1209]

19.4.3 The FCA can also impose financial penalties on directors of issuers and listing applicants (and other persons depending on the particular rule in issue) if the FCA considers that the director was "knowingly concerned" in breaching a Part 6 rule, any provision of the UK Prospectus Regulation or any requirement imposed under sections 87K, 87L or 89L of the Act.[1210]

19.4.4 If the FCA is entitled to impose a financial penalty on any person in respect of any relevant breach, it has the option instead to publish a statement censuring that person.[1211]

19.4.5 If the FCA proposes to take action against a person under section 91, it must give that person a warning notice. A warning notice about a proposed penalty must state the amount of the proposed penalty, and a warning notice about a proposed statement of censure must set out the terms of the proposed statement. If, after issuing that warning notice and taking into account any representations made by the person affected, the FCA proceeds to take action under section 91, then it must give the person affected a decision notice. The decision notice must state similar information as in the case of the warning notice, depending on whether it relates to a penalty or a statement of censure.

1207 Sections 91(1A) and 91(1B).
1208 See, for example, sections 91(1)(a) and 91(1)(b), which apply to breaches of the Listing Rules.
1209 Sections 91(1A)(a) to 91(1A)(e).
1210 Sections 91(2), 91(1A)(d) and (e) and 91(1B)(b).
1211 Section 91(3).

Upon receiving the decision notice, the person affected may refer the matter to the Tribunal.[1212]

19.4.6 The FCA is obliged to issue a formal policy statement in respect of proceedings for and amounts of penalties imposed under section 91 of the Act. This can be found in DEPP 6 of the Decision Procedure and Penalties Manual contained in the FCA Handbook (**DEPP**). The statement addresses the FCA's policy with respect to the imposition and amount of such penalties. When determining the amount of a financial penalty, the Act requires the FCA's policy to have regard to the seriousness of the contravention in question, the extent to which it was deliberate or reckless and whether the person on whom the penalty is imposed is an individual.[1213]

19.4.7 The FCA has three years to take action against a person for breach of a Part 6 rule with that period running from the first day on which the FCA knew of the contravention. The FCA is treated as knowing of a contravention if it is in possession of information from which the contravention can reasonably be inferred. Proceedings are to be treated under the Act as having begun when the FCA issues a warning notice.[1214]

19.4.8 Part 8 of the Act sets out the UK civil regime for market abuse. It gives the FCA powers to take enforcement action against any person whose behaviour constitutes market abuse, regardless of whether they are authorised. Part 8 was extensively amended to reflect UK implementation of MAR. For more information on penalties for market abuse, please refer to paragraphs 15.3.1 to 15.3.9.

Compensation

19.4.9 The Act provides that any person responsible for listing particulars (or a prospectus) is liable to pay compensation to persons who have acquired securities (or transferable securities in the case of a prospectus) and have suffered loss as a result of any untrue or misleading statements in, or certain omissions from, listing particulars (or a prospectus).[1215] There

[1212] Sections 92(1) to 92(7) and 387(2).
[1213] Sections 93(1) and 93(2).
[1214] Sections 91(6), 91(7)(a) and 91(7)(b).
[1215] Sections 90(1), 90(11) and 90(11A). Note that this also includes supplementary particulars and prospectuses (see sections 90(10), 90(11) and 90(11A)).

are exemptions to this position, which are set out in Schedule 10 to the Act.[1216]

19.4.10 In addition, the Act provides that issuers of securities are liable to pay compensation to persons who have suffered loss as a result of a misleading statement or dishonest omission in certain published information (including, for example, information published by the issuer through a recognised information service)[1217] relating to the securities, or a dishonest delay in publishing such information.[1218]

19.5 Investigations

19.5.1 The FCA has the statutory power to appoint one or more competent persons to conduct an investigation where there are circumstances suggesting that there may have been a breach of the Part 6 rules.[1219]

19.6 Restitution

19.6.1 The court may, on the application of the FCA (as the appropriate regulator) or the Secretary of State, order restitution if it is satisfied that profits have accrued to a person, or that other persons have suffered loss, or both, arising from a contravention of a requirement imposed by or under the Act. This empowers the FCA to apply for restitution orders against listed companies and other persons who are "knowingly concerned" in contraventions of a requirement (for example, a Part 6 rule) imposed by or under the Act where, for example, shareholders suffer loss as a result.[1220]

19.7 Sponsors

Rule-making powers

19.7.1 A sponsor advises an issuer on the listing and disclosure requirements imposed by or under Part 6 of the Act. The Act itself defines a sponsor as a person "*approved by the FCA for the purposes of the rules*", and as a result, any person wanting to undertake the business of a sponsor must be approved by the FCA. Section 88(1) of the Act enables the FCA

[1216] Note that section 90(11)(b) amends Schedule 10 when dealing with prospectuses.
[1217] Paragraph 2 of Schedule 10A.
[1218] Section 90A and Schedule 10A.
[1219] Section 97.
[1220] Sections 382(9)(a), 382(9)(b) and 382(1).

to make Listing Rules requiring issuers to make arrangements with sponsors for certain purposes.[1221]

19.7.2 Listing Rules made under section 88(1) of the Act may also:

(a) provide for the FCA to maintain a list of sponsors;

(b) specify services that must be performed by sponsors;

(c) impose requirements on sponsors in connection with their provision of services;

(d) specify the requirements that a person must satisfy if that person is to be approved as a sponsor;

(e) impose limitations or restrictions on a sponsor's actual or future approval; and

(f) provide for the approval of a sponsor to be suspended on the application of the sponsor.[1222]

FCA approval

19.7.3 In addition to applying to the FCA for approval as a sponsor, persons may make other applications under the relevant parts of Part 6 of the Act relating to sponsors, including applications by a sponsor for the:

(a) suspension of its approval as a sponsor;

(b) withdrawal of the suspension of an approval as a sponsor; and

(c) withdrawal or variation of a limitation or other restriction on the services to which a sponsor's approval relates.[1223]

FCA's exercise of its powers in relation to sponsors

19.7.4 Where the FCA proposes to:

(a) refuse a person's application (for example, for approval as a sponsor or for the suspension of an approval as a sponsor);

[1221] Sections 88(2) and 88(1).
[1222] Sections 88(3)(a) to 88(3)(f).
[1223] Section 88(8).

(b) impose a limitation/restriction on a person's approval as a sponsor; or

(c) cancel a person's approval as a sponsor (otherwise than at his request),

it must give the person concerned a warning notice.[1224]

19.7.5 The sponsor can make representations to the FCA in response to this warning notice. If, after considering any such representations, the FCA decides to proceed with its proposed action, it must issue the person concerned with a decision notice. A person who is the subject of a decision notice may then refer the matter to the Tribunal.[1225]

FCA disciplinary powers against sponsors

19.7.6 The FCA may take action against a sponsor under section 88A if it considers that a sponsor has contravened:

(a) a requirement imposed on the sponsor in relation to the provision of services under its approval (section 88(3)(c)); or

(b) a limitation or other restriction on the services to which the sponsor's approval relates (whether or not that approval had already been granted) (section 88(3)(e)).[1226]

19.7.7 Where there has been a relevant contravention, the FCA can impose on a sponsor one or more of the following disciplinary sanctions:

(a) a financial penalty in any amount it deems appropriate;

(b) suspension of its approval for any period it deems appropriate (but in any case for no longer than 12 months);

(c) imposition of limitations or restrictions on its approval for any period it deems appropriate (but in any case for no longer than 12 months); and/or

(d) publication of a statement of censure.[1227]

[1224] Section 88(4).
[1225] Sections 88(6) and 88(7).
[1226] Section 88A(1).
[1227] Sections 88A(2) and 88A(3).

19.7.8 Where the FCA decides to suspend a sponsor's approval then that suspension may relate only to the performance in specified circumstances of a service to which the sponsor's approval relates. If the FCA imposes a restriction on the services that a sponsor can perform then that restriction may operate to require the sponsor to take, or refrain from taking, a specified action.[1228]

19.7.9 Having imposed a suspension or restriction, the FCA may withdraw or vary it so as to reduce the period for which it has effect or otherwise to limit its effect.[1229]

19.7.10 Part 6 of the Act provides that the FCA has three years to bring disciplinary action against a sponsor, beginning with the first day on which the FCA knew that the sponsor had contravened the requirement or restriction. The FCA is treated as knowing that a sponsor has contravened a requirement or restriction if it has information from which that contravention can reasonably be inferred.[1230]

19.7.11 If the FCA proposes to impose any of the specific sanctions following contravention of sections 88(3)(c) or 88(3)(e), it must first give the sponsor a warning notice. The warning notice must contain certain prescribed information, depending on the nature of the proposed sanction. For example, if the FCA decides to impose a financial penalty then the warning notice must state the amount of the penalty. The sponsor can make representations to the FCA in response to that warning notice.[1231]

19.7.12 If, having considered any representations made by the sponsor, the FCA decides to proceed and impose the sanction set out in the warning notice then it must give the sponsor a decision notice. Like the requirements relating to warning notices, a decision notice must contain certain information. For example, where the sanction is a financial penalty the decision notice must state the amount of the penalty. The sponsor may then refer the matter to the Tribunal.[1232]

FCA statement of policy

19.7.13 The FCA is obliged to prepare and issue a statement of policy in relation to the imposition of penalties, suspensions or restrictions on sponsors,

[1228] Sections 88A(4) and 88A(5).
[1229] Section 88A(6).
[1230] Sections 88A(7) to 88A(9).
[1231] Sections 88B(1), 88B(2) and 387(2).
[1232] Sections 88B(5), 88B(6) and 88B(9).

the amount of penalties, and the period for which suspensions or restrictions are to have effect.[1233] This can be found in DEPP 6A.

19.7.14 The FCA's policy in determining the amount of any penalty and the length of any restriction or suspension must have regard to:

(a) the seriousness of the contravention in relation to the requirement concerned;

(b) the extent to which the contravention concerned was deliberate or reckless; and

(c) whether the person concerned is an individual[1234].

19.7.15 The FCA must have regard to any statement published under section 88C when exercising (or considering whether to exercise) its disciplinary powers under section 88A. Copies of statements published under section 88C must also be given to the Treasury. Before statements of policy are issued under section 88C, the FCA must publish a draft and undertake a public consultation on the draft text before finalising it.[1235]

Powers available to advance the FCA's operational objectives

19.7.16 Under Part 6 of the Act, the FCA can take action against a sponsor if it considers that it is desirable to do so to advance one or more of its operational objectives. If the FCA is entitled to take action then it may:

(a) suspend the sponsor's approval; or

(b) impose such limitations or other restrictions (as it considers appropriate) on the sponsor's approval,

for such period as it feels appropriate.[1236]

19.7.17 The FCA may subsequently withdraw a suspension or vary a suspension or restriction so as to reduce the period for which it has effect or otherwise limit its effect.[1237]

19.7.18 The FCA can exercise these powers so that they take effect immediately or it can stipulate that they will become effective on a

[1233] Section 88C(1).
[1234] Section 88C(2).
[1235] Sections 88C(5), 88C(8) and 88D.
[1236] Sections 88E(1) and 88E(2).
[1237] Section 88E(5).

later date. If the FCA exercises these powers (that is, so that they take effect immediately) or proposes to exercise them, it must give the sponsor written notice to this effect. That notice must:

(a) give details of the action;

(b) inform the sponsor of when the action took, or is to take, effect;

(c) state the FCA's reasons for taking the action and its rationale for deciding when the action took, or is to take, effect;

(d) inform the sponsor that it may make representations to the FCA (whether or not the matter has been referred to the Tribunal); and

(e) inform the sponsor of its right to refer the matter to the Tribunal (and give an indication of the procedure for making such a reference).[1238]

19.7.19 If, having considered any representations, the FCA decides not to rescind a suspension or any limitation or restriction that has already taken effect or it decides to take the action as proposed in the first written notice then it must issue another written notice to the sponsor. Any such written notice must inform the sponsor of its right to refer the matter to the Tribunal and also give an indication of the procedure on such a reference.[1239]

19.8 Primary information providers

19.8.1 Part 6 of the Act[1240] provides for the FCA to exercise rule-making and disciplinary powers in relation to primary information providers (PIPs). The relevant sections of the Act are similar to the provisions of the Act that confer on the FCA supervisory and disciplinary powers in relation to sponsors.

19.8.2 A PIP receives the full text of regulatory announcements (which issuers are required by the Listing Rules, Prospectus Regulation Rules, Disclosure Guidance and Transparency Rules and MAR to make to the

[1238] Sections 88F(1) to 88F(3).
[1239] Sections 88F(5) and 88F(7).
[1240] Sections 89P to 89V.

market) and then disseminates these to secondary information providers (for example, news agencies).

19.8.3 Persons wishing to act as a PIP for the purposes of the Act must be approved to do so by the FCA. In accordance with Part 6 of the Act, the FCA has made rules that:

(a) require the FCA to maintain a list of all PIPs;

(b) specify the requirements that a person must satisfy if he is to be approved as a PIP;

(c) state the requirements that PIPs must comply with in connection with the activities covered by their FCA approval;

(d) impose limitations or restrictions on a PIP's actual or future approval; and

(e) provide for the approval of a PIP to be suspended on the application of that PIP.[1241]

19.8.4 The FCA can impose sanctions on a PIP where, for example, it has breached a relevant rule or where it has contravened any limitation or restriction imposed by the FCA in relation to any actual or future FCA approval. The sanctions available to the FCA are the same for PIPs as they are for sponsors.[1242]

19.8.5 Where the FCA exercises its disciplinary powers it must first issue a warning notice. Where the FCA intends to proceed with its proposed action then it must give the PIP a decision notice and explain that the person concerned has the right to refer the matter to the Tribunal.[1243]

19.8.6 The Act obliges the FCA to publish a statement of policy in relation to, among other things, the imposition of penalties, suspensions and restrictions on PIPs. The statement of policy must be subject to consultation before it becomes effective and a copy must be supplied to the Treasury.[1244] It can be found in DEPP 6.

19.8.7 As with sponsors, the FCA can also suspend a PIP's approval or impose restrictions or limitations on its approval to advance one or more of its

[1241] Sections 89P(2) and 89P(4) and the Disclosure Guidance and Transparency Rules, chapter 8.
[1242] Sections 89Q(1) and 89Q(2).
[1243] Sections 89R(1), 89R(5) and 89R(9).
[1244] Sections 89S(1), 89T and 89S(8).

operational objectives[1245]. The procedure that the FCA must follow when exercising these powers is the same as the equivalent procedure applicable to sponsors.

19.9 Transparency obligations

19.9.1 Part 6 of the Act sets out the FCA's rule-making and disciplinary powers relating to the disclosure of transparency information by certain issuers of transferable securities. It provides that the FCA may make rules (**Transparency Rules**):

(a) imposing requirements in relation to the disclosure of periodic or ongoing information about issuers whose shares are admitted to trading on a regulated market, including in particular as to the disclosure of information relating to voting rights;

(b) dealing with matters arising out of or relating to such requirements; and

(c) for the purpose of ensuring that information relating to the proportion of voting rights held by a person in respect of voting shares traded on a UK market other than a regulated market is made public or notified to the FCA.[1246]

19.9.2 The Transparency Rules made by the FCA are set out in the DTRs.[1247]

19.9.3 Part 6 of the Act also imposes requirements relating to annual and half-yearly financial reports published by the issuers of shares and debt securities, and allows the FCA to make rules requiring the publication or disclosure of the information contained in such reports.[1248]

Power to call for information

19.9.4 Section 89H of the Act gives the FCA the power to require issuers subject to the Transparency Rules, holders of voting rights in relation to such an issuers (a **voteholder**), an auditor or director or similar officer of an issuer or voteholder, or person who controls or is controlled by a voteholder, to provide specified documents or information to the FCA in connection with the exercise by the FCA of the functions conferred to it

[1245] Section 89U.
[1246] Sections 89A(1) and (3).
[1247] See, in particular, DTR 1A, 4, 5 and 6
[1248] Section 89C.

by Part 6 in relation to the Transparency Rules.[1249] The FCA may also require an issuer to make that information public and, if an issuer does not do so, make that information public itself.[1250]

19.9.5 The FCA must exercise its power to call for information by notice in writing.[1251] The person receiving that written notice must then provide the documents or information before the end of such reasonable period, and at such place as may be specified, in the notice.[1252] If a person required to produce a document fails to do so, the FCA may require that person to state, to the best of his knowledge and belief, where the document is.[1253]

19.9.6 The FCA may require information produced under section 85H to be verified, and documents to be authenticated or explained. The FCA can also take copies of or extracts from documents produced under that section.[1254]

Disciplinary powers

19.9.7 The FCA may publish a statement of censure against an issuer if it finds that the issuer has failed to comply with an applicable transparency obligation, including any requirements set out in the Transparency Rules. If the FCA proposes to publish a statement of public censure, it must first give the issuer a warning notice setting out the terms of the proposed statement. If, having considered any representations made in response to the warning notice, the FCA decides to make the proposed statement, it must give the issuer a decision notice setting out the terms of that statement. In both cases, the notice must inform the issuer of its right to refer to the Tribunal under section 89N.[1255]

19.9.8 Under section 89L of the Act, where the FCA has reasonable grounds for suspecting that a transparency obligation, including any Transparency Rule, has been infringed by an issuer whose securities are admitted to trading on a regulated market, or any voteholder of such an issuer, the FCA may:

(a) prohibit trading in the securities;

[1249] Section 89H.
[1250] Sections 89J(1) and (2).
[1251] Section 89H(1).
[1252] Section 89H(4).
[1253] Section 89I(5).
[1254] Sections 89I(2) and (3).
[1255] Section 89K.

(b) make a request to the operator of the market on which the issuer's securities are traded to prohibit trading in the securities; or

(c) (in the case of a suspected infringement by an issuer only), suspend trading in the securities for a period of up to 10 days or make a request to the operator of the market on which the issuer's securities are traded to effect such a suspension.[1256]

19.9.9 If the FCA imposes a requirement under section 89L, it must do so by notice in writing. The notice may provide for the relevant action to take effect immediately, or on a future date specified in the notice. The notice must provide details of the FCA's action or proposed action, stating its reasons for the action and the date on which it takes effect, as well as informing the recipient of their ability to make representations to the FCA and their right to refer the matter to the Tribunal. If the FCA decides to proceed, vary or revoke its decision, it must again give written notice to the recipient of the action.[1257]

19.9.10 The court may, on the application of the FCA, make an order suspending a person's exercise of voting rights attached to shares in a company admitted to trading on a regulated market, and in relation to which the person is a voteholder. In making an order, the court must be satisfied that:

(a) the voteholder has contravened one or more relevant transparency provisions (including certain Transparency Rules) in respect of any of the shares identified in the FCA's application or any other shares in the same company which are admitted to trading on a regulated market, and

(b) the contravention is serious enough — having regard to factors specified in section 89NA(4) of the Act — to make it appropriate for the court to make the order.[1258]

[1256] Section 89L.
[1257] Section 89M.
[1258] Section 89NA.

19.10 Corporate governance rules

19.10.1 The FCA may make rules (Corporate Governance Rules) relating to the corporate governance of issuers who have requested or approved admission of their securities to trading on a regulated market.[1259]

19.10.2 Corporate governance rules can relate to matters including:

(a) the nature, constitution or functions of the organs of the issuer;

(b) the manner in which organs of the issuer conduct themselves;

(c) the requirements imposed on organs of the issuer;

(d) the relationship between the different organs of the issuer; and

(e) the relationship between the organs of the issuer and the members of the issuer or holders of the issuer's securities.[1260]

19.10.3 The Corporate Governance Rules made by the FCA are set out in the DTRs.[1261]

[1259] Section 89O(1).
[1260] Section 89O(2).
[1261] See, in particular, DTR 1B and 7.

20. RECOGNISED INVESTMENT EXCHANGES AND RECOGNISED CLEARING HOUSES

20.1 Overview

Introduction

20.1.1 Part 18 of the Act establishes the regulatory regime in respect of certain investment exchanges and clearing houses (whether operating a securities settlement system or providing central counterparty (CCP) clearing services) providing services in the UK.

20.1.2 Neither "investment exchange" nor "clearing house" is defined for the purposes of the Act — these terms carry their ordinary meaning. Further, the Act does not provide for a specific regulated activity of operating an investment exchange or a clearing house. As with any other financial services business, therefore, a person wishing to establish and operate an exchange or a clearing house in the UK needs to assess whether its proposed activities fall within the scope of regulation under the Act.

20.1.3 Where the proposed activities fall within the scope of regulation under the Act, the Act offers a choice of regulatory framework for investment exchanges and clearing houses operating in the UK: (a) recognition under Part 18 of the Act as a recognised investment exchange (RIE) or a recognised clearing house (RCH) (together, "recognised bodies"); or (b) authorisation under Part 4A of the Act.

UK investment exchanges and clearing houses

20.1.4 The framework of a UK legal regime for clearing houses (which currently consist of operators of securities settlement systems and CCPs) sits within retained EU legislation, deriving from EU legislation and accompanying technical standards, which in turn follow global standards drawn up by central banks and securities market regulators working together through the Committee on Payments and Market Infrastructures (**CPMI**) and IOSCO[1262]. In addition to being regulated as RCHs under Part 18 of the Act:

[1262] The Bank has issued an approach document 'The Bank of England's approach to the supervision of financial market infrastructures' (April 2013). The document sets out the Bank's approach, prior to Brexit, to the supervision of securities settlement system, CCPs and recognised payment systems and describes, in summary, the regulatory regime applicable to UK financial market infrastructures and the Bank's objectives and its approach to the use of supervisory powers.

(a) all body corporates or unincorporated associations established in the UK intending to provide clearing services as a CCP are subject to UK EMIR, including the requirement to apply for authorisation to the Bank[1263];

(b) UK-incorporated securities settlement system operators are subject to the Uncertificated Securities Regulations 2001 (currently this only applies to Euroclear UK & Ireland, which operates CREST). Operators of securities settlement systems will be subject to the retained EU law version of the CSD Regulation (**UK CSD Regulation**). The UK CSD Regulation provides a common authorisation, supervision and regulatory framework for CSDs and introduces a set of common rules designed to increase safety across settlement systems. Third country CSDs may provide services in the UK, including through setting up a branch. A third country CSD that intends to provide notary services or central maintenance services, or set up a branch must apply for recognition.[1264] Under Article 25(9) of the UK CSD, the Treasury can specify a third country as equivalent. Within six months of regulations being made under Article 25(9) specifying a third country, a third country CSD established in the third country must apply for recognition where it intends to provide services on the basis of Article 25[1265]; and

(c) Operators of securities settlement systems may also apply to the Bank for designation under the Financial Markets and Insolvency (Settlement Finality) Regulations 1999 (as amended), which originally implemented the EU Settlement Finality Directive in the UK. Designation confers certain protections against the operation of normal insolvency law in respect of securities transfer orders submitted by participants in the system.

20.1.5 For the purposes of Part 18 of the Act, CCPs in relation to which a recognition order is in force are defined as "recognised central counterparties" and will be subject to the requirements applicable to RCHs, as modified by UK EMIR.[1266] A third country CCP is now defined as a person established in a country other than the UK who has been

[1263] Article 14 and Article 17 of UK EMIR.
[1264] Article 25 UK CSD.
[1265] Article 69 UK CSD
[1266] Section 285.

recognised by the Bank as a CCP pursuant to Article 25 of UK EMIR.[1267] In addition, certain requirements of the Act apply only to recognised CCPs[1268]. If a UK EMIR-authorised CCP wishes to extend its business to additional services or activities, a request for extension to the Bank is required.[1269]

20.1.6 In contrast to the treatment of recognised CCPs (which are treated as a sub-category of RCH under Part 18[1270]), the Central Securities Depositories Regulations 2017 created a new sort of recognised body governed by Part 18 known as recognised central securities depositories (RCSDs).[1271]

20.1.7 RIEs may also be subject to certain provisions of UK MiFID that apply to 'market operators'.

Overseas investment exchanges and clearing houses

20.1.8 Both UK-based and overseas investment exchanges and clearing houses may qualify for recognition under Part 18 of the Act.[1272] All investment exchanges and clearing houses must meet certain requirements (described further below) to obtain recognition and maintain their recognised status. However, the statutory framework differentiates between UK and overseas bodies: the recognition requirements, application process and continuing obligations of (as well as the supervisory powers that the relevant regulator may exercise in relation to) recognised overseas investment exchanges and clearing houses differ from those applying in respect of UK bodies.

Relevant regulatory authorities

20.1.9 Under Part 18 of the Act, the FCA is responsible for the recognition of investment exchanges and the Bank is responsible for the recognition of clearing houses.

20.1.10 The Bank has been given additional powers in relation to its role as the regulator of RCHs[1273]:

[1267] Section 285.
[1268] Section 296A.
[1269] Article 15 of UK EMIR.
[1270] Section 285.
[1271] Section 285 https://www.legislation.gov.uk/uksi/2017/1064/pdfs/uksiem_20171064_en.pdf.
[1272] Note, however, that overseas CCPs are now subject to EMIR. CCPs incorporated in the EEA will require authorisation under EMIR, whereas 'third country CCPs' may apply to ESMA for recognition if their third country regulatory regime has been deemed by ESMA to be equivalent to the standards in EMIR.
[1273] Parts 2 and 3 of Schedule 17A.

(a) certain provisions of the Act apply to the Bank in its capacity as the regulator of RCHs, including (among others) certain information-gathering and investigatory powers, the power to give directions to the parent company of an RCH and the power to charge fees; and

(b) the Act also provides the Bank with certain rights to participate in insolvency proceedings of an RCH, as well as to receive prior notice of, and to object to, any winding up, administration or insolvency proceedings and a power to give directions to insolvency practitioners.

20.1.11 The FCA and the Bank are required to prepare and maintain a MoU describing how they will work together in exercising their functions (however conferred) in relation to recognised bodies. This would include co-operation in the case of groups that include both an RCH and an RIE and in the case of entities that may fall within the regulatory remit of both regulatory authorities[1274].

20.1.12 Similarly, the FCA, the Bank and the PRA are required to prepare and maintain a MoU describing how they will work together in exercising their functions in relation to recognised bodies who are PRA-authorised firms or are members of a group of which a member is a PRA-authorised firm[1275].

20.1.13 The FCA, the PRA and the Bank have an MoU relating to their co-operation in respect of the supervision of markets and market infrastructure[1276]. The MoU, dated March 2015[1277], stated that at the time there were no recognised bodies that are PRA-authorised firms (or are members of the same group as a PRA-authorised firm) and that, if this were to change, the MoU would be updated to provide further details of the way in which the PRA would work with the other regulatory authorities. In 2021, the FCA released an update stating that the Bank and FCA held a consultation with financial market infrastructures (FMIs) and reviewed their co-operation regarding market infrastructure. The authorities concluded that the MoU's arrangements for co-operation

[1274] Schedule 17A, paragraph 1.
[1275] Schedule 17A, paragraph 2.
[1276] Paragraph 2 Part 1 of Schedule 17A.
[1277] The MOU can be found here: https://www.bankofengland.co.uk/-/media/boe/files/memoranda-of-understanding/bank-pra-and-fca-supervision-of-markets-and-markets-infrastructure.pdf?la=en&hash=75C22337593014AABEAA7797A3F3C16AF58EFA87.

remain effective, with appropriate co-ordination and no material duplication.[1278]

20.1.14 As part of Government's proposals for reform in Phase II of the Future Regulatory Framework Review, it is considering granting the Bank general rulemaking powers over CCPs and CSDs where they currently have only limited rulemaking powers. This will be accompanied by appropriate enhancements to the Bank's current framework of objectives and accountability in relation to the regulation and supervision of these entities. At the time of writing, the precise details of the proposals are unclear.

Exemption from the general prohibition

20.1.15 As noted above, a firm that is granted the status of a recognised body is exempt from the general prohibition in section 19 of the Act in relation to the carrying on of regulated activities. However, this is not a blanket exemption in respect of all regulated activities that an RIE or an RCH may carry on. The scope of the recognised bodies' exemption is defined as follows[1279]:

(a) in respect of an RIE, the Act exempts from the general prohibition any regulated activity that is carried on:

(i) by an RIE as part of the exchange's business as an investment exchange; or

(ii) for the purposes of, or in connection with, the provision by the exchange of services designed to facilitate the provision of clearing services by another person; and

(b) in respect of an RCH that is not a recognised CCP, the Act exempts from the general prohibition any regulated activity that is carried on for the purposes of, or in connection with:

(i) the provision of clearing services by the clearing house; or

[1278] This update can be found here: https://www.fca.org.uk/news/statements/update-bank-fca-mou-supervision-market-infrastructure-payment-systems.
[1279] Section 285.

(ii) the provision by the clearing house of services designed to facilitate the provision of clearing services by another person; and

(c) a recognised CCP is exempt from the general prohibition as regards any regulated activity that it carries on for the purposes of, or in connection with, the services or activities specified in its recognition order.

20.1.16 In respect of RIEs, the exemption before the amendments made by the FS Act 2012 was wider as it included the clearing services provided by the RIE itself — under the current regime it is only those activities that are designed to facilitate the provision of the clearing services by another person that fall within the scope of the exemption. This means that, in contrast to the position before April 2013, RIEs are no longer able to provide clearing services (as opposed to facilitation services) without seeking additional authorisation or exemption in respect of such services.

20.1.17 The Treasury introduced transitional provisions for RIEs that, before the amendments to section 285 of the Act becoming effective on 1 April 2013, provided clearing services under the old section 285(2)(b). These provisions[1280] allowed any self-clearing RIE to continue to provide these services without needing to seek recognition as an RCH during the period leading up to the point where such recognition was necessary under EMIR. During this period, a self-clearing RIE was treated as if it had been granted recognition as an RCH by the Bank, and was regulated as both an RIE and an RCH. This transitional period ended on either 15 February 2013 or, if an RIE submitted an application for authorisation in accordance with Article 17 EMIR on or before 15 February 2013, the day after the day on which the application was determined in accordance with EMIR. Such a firm applying today must seek recognition as both an RIE and an RCH.

20.1.18 In respect of RCHs, the Act expanded the scope of the activities that were exempt before April 2013 to include those activities that are designed to facilitate the provision of clearing services by another person whereas previously the only activities that were (expressly)

[1280] Article 32 of the Financial Services Act 2012 (Transitional Provisions) (Miscellaneous Provisions) Order 2013 (SI 2013/442).

exempt were those that were carried on by an RCH for the purposes of or in connection with its own clearing services.

20.1.19 An example of facilitation services could be where clearing services are provided by a related company (which might be regulated outside the UK) and the UK RIE or RCH routes trades not arranged using its facilities to a separate clearing house.

20.1.20 The Treasury is given a power to amend the scope of the exemption as regards the second limb (that is, the activities described in paragraphs 20.1.15(a)(ii) and 20.1.15(b)(ii)) by order (and subject to approval by a resolution of each House of Parliament).

Top-up permissions

20.1.21 A recognised body may apply for a top-up permission under Part 4A of the Act in respect of any regulated activity other than that for which it is exempt under the Act. This means that a recognised body may be both an exempt firm for its activities as an investment exchange or a clearing house and an authorised firm in respect of regulated activities for which it is not exempt as a recognised body.

20.1.22 This is in contrast to certain other exempt firms under the Act, for example appointed representatives, which are generally not permitted to have top-up permissions concurrently with retaining their exempt status under the Act for those activities that they carry out on behalf of their principal.[1281]

20.1.23 It is possible that a recognised body holding a top-up permission may be regulated by more than one regulatory body. The Act requires the FCA and the PRA to enter into a MoU setting out how they will work together in exercising their functions in relation to firms that are recognised bodies and that are also PRA-authorised firms or members of a group in which a member is a PRA-authorised firm[1282].

Liability in relation to recognised body's regulatory functions

20.1.24 As a consequence of acting in a regulatory capacity, recognised bodies need to have enforcement powers against those who seek to breach market rules. Therefore, reflecting the role of recognised bodies as regulators of their markets, the Act exempts recognised bodies from

[1281] Section 39(1).
[1282] Paragraph 2 Part 1 of Schedule 17A.

liability in respect of their functions as regulator. A recognised body, its officers and staff are not liable in damages for anything done or omitted in the discharge of the recognised body's functions relating to (or arising out of) the obligations to which the recognised body is subject by virtue of the Act (referred to in Part 18 of the Act as "regulatory functions")[1283].

20.1.25 The statutory immunity afforded to recognised bodies by the Act does not extend to any act or omission that: (a) is shown to be in bad faith; or (b) was unlawful as a result of section 6(1) of the Human Rights Act 1998.

20.2 Recognition requirements

Introduction

20.2.1 As mentioned above, all investment exchanges and clearing houses must meet certain requirements to obtain recognition and maintain their recognised status. The Treasury has a power to make regulations setting out the requirements that an investment exchange or clearing house must satisfy in order to qualify for recognition ("recognition requirements"). These regulations may confer on the Bank or the FCA (as the case may be) the power to make rules for the purposes of the regulations or any specified provision made by the regulations[1284]. For UK bodies, these are contained in the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001[1285] (the **Recognition Requirements Regulations**).

20.2.2 For overseas investment exchanges and clearing houses seeking a recognition order under the Act, the requirements are set out in the Act itself[1286].

20.2.3 Before the FCA or the Bank may grant an order for recognition, it must be satisfied that the applicant is able to satisfy all the relevant recognition requirements.

20.2.4 In addition, in relation to UK applicants, the appropriate regulator must be satisfied that the applicant does not have or propose to make any excessive regulatory provisions (replacing the competition scrutiny

[1283] Section 291.
[1284] Section 286.
[1285] SI 2001/995.
[1286] Section 292(3).

requirement that applied before April 2013).[1287] In brief, a recognised body, in its capacity as a market regulator, issues rules and guidance (for example, membership admission criteria and default rules). For the purposes of Part 18 of the Act, these and other provisions made or requirements imposed by a recognised body are referred to as "regulatory provisions".

20.2.5 Once a recognition order is issued, a recognised body must continue to satisfy the applicable recognition requirements to retain its recognised status. Failure to do so may result in the FCA or the Bank exercising its power to make an order revoking the recognition order without the consent of the relevant recognised body.[1288]

20.2.6 The relevant recognition requirements must be met by the recognised body. However, there is scope for the requirements to be satisfied on a delegated (or outsourced) basis: a recognised body may satisfy the recognition requirements by making arrangements for relevant functions to be performed on its behalf (without affecting its responsibility) by another person[1289].

20.2.7 Any such delegation is without prejudice to the responsibility of the recognised body to satisfy the relevant recognition requirements. In addition, where a recognised body delegates any of its functions, it is subject to an additional recognition requirement to satisfy the relevant regulator that any such delegate is a fit and proper person who is willing and able to perform the delegated function.[1290]

UK recognised investment exchanges

20.2.8 Any body corporate or unincorporated association may apply to the FCA for an order declaring it to be an RIE. The application must be made in such manner as the FCA may direct and must be accompanied by the supporting documents and the required particulars[1291]. Guidance on the application process, including details of the information and supporting documents to be provided, is set out in section 5 of the REC Rules.

1287 Section 290(A).
1288 Section 297.
1289 Regulation 6(2) of the Recognition Requirements Regulations.
1290 Regulation 6(3) of the Recognition Requirements Regulations.
1291 Section 287.

20.2.9 The recognition requirements applicable to investment exchanges are set out in Parts I and II of the Schedule to the Recognition Requirements Regulations.

20.2.10 The FCA Handbook also contains a 'Recognised Investment Exchanges sourcebook' (REC) (the **REC Rules**), which sets out rules and guidance for RIEs (and recognised auction platforms). In particular, the REC Rules provide guidance as to how an investment exchange may satisfy the recognition requirements and on the FCA's approach to supervision of RIEs.[1292] In addition, the REC Rules contain rules (made pursuant to section 293 of the Act) setting out notification requirements for RIEs.[1293] The FCA published a consultation paper[1294] in November 2013 on changes to the REC Rules, setting out the approach it would take in considering competition issues when performing its role as the supervisor of RIEs and recognised overseas investment exchanges. Changes made to the REC Rules arising out of this consultation came into effect on 2 May 2014.

UK recognised clearing houses

20.2.11 Any body corporate or unincorporated association may apply to the Bank for an order declaring it to be an RCH. If the person intends to provide clearing services as a CCP, the application must be made in accordance with Article 17 of UK EMIR and will constitute an application for recognition as a recognised CCP. If the person does not intend to act as a CCP, the application must be made in such manner as the Bank may direct and must be accompanied by a copy of the applicant's rules (along with any guidance), certain other "required particulars" and any other information the Bank may reasonably require[1295].

20.2.12 The recognition requirements applicable to clearing houses are set out in Parts III to VI of the Recognition Requirements Regulations and depend on whether an RCH is also an UK EMIR-authorised CCP (in which case the recognition requirements are modified to reflect the applicable UK EMIR requirements).

1292 REC 2 and REC 4.
1293 REC 3.
1294 CP13/16 — Competition in the market for services provided by a RIE: proposed amendments to REC.
1295 Section 288.

Overseas investment exchanges and clearing houses

20.2.13 An overseas investment exchange or clearing house (other than a CCP) will be a recognised body for the purposes of the Act if there is a recognition order in force in relation to it. The recognition requirements for overseas investment exchanges and clearing houses (other than a CCP) are set out in the Act itself[1296]. In summary, the requirements are that:

(a) investors are afforded protection equivalent to that which they would be afforded if the body concerned were required to comply with: (i) recognition requirements, other than requirements that are stated not to apply to overseas bodies; and (ii) requirements in any EU regulation, originally made under MiFID or MiFIR, which is retained direct EU legislation, or any subordinate legislation made under MiFIR on or after 31 December 2020;

(b) there are adequate procedures for dealing with a person who is unable, or likely to become unable, to meet their obligations in respect of one or more market contracts connected with the investment exchange or clearing house;

(c) the applicant is able and willing to co-operate with the appropriate regulator (that is, in the case of investment exchanges, the FCA and, in the case of clearing houses, the Bank) by the sharing of information and in other ways; and

(d) adequate arrangements exist for co-operation between the FCA or the Bank (as appropriate) and those responsible for the supervision of the applicant in the country or territory in which the applicant's head office is situated.

20.2.14 In considering the requirements set out in paragraphs 20.2.13(a) and 20.2.13(b), the FCA or the Bank (as the case may be) must have regard to the relevant law and practice of the country in which the applicant's head office is situated, as well as the rules and practices of the applicant.

[1296] Section 292.

20.2.15 An application by an overseas applicant must contain the address of a place in the UK for the service on the applicant of notices or other documents required or authorised to be served on it under the Act.

20.2.16 As mentioned above, overseas CCPs wishing to carry on business in the UK are now subject to UK EMIR.[1297] Where such an entity was recognised previously as an overseas clearing house under Part 18 of the Act and subsequently obtains authorisation as a third country CCP under UK EMIR, its previous recognition order will cease to be valid.[1298]

20.2.17 UK EMIR has also retained the concept of a Tier 2 CCP — a third-country CCP which has been determined by the Bank to be systemically important or likely to become systemically important to the UK's financial stability (Tier 2 CCPs) and then only recognised to provide certain clearing services or activities if it complies with additional obligations to ensure alignment with the UK regime.[1299]

20.2.18 EEA market operators who currently make use of passporting can apply to be recognised as a recognised overseas investment exchange (ROIE).[1300] The FCA has issued a direction explaining how an overseas applicant should make an application under Section 287(1) for a recognition order.[1301] The direction provides that applicants should make an application in accordance with REC 6 and the application should include a regulatory business plan and letter from the applicant. EEA market operators should also include certain explanatory material.

20.2.19 In December 2020, the Treasury published a call for evidence[1302] designed to gather information on how the current overseas framework, including the regime relating to ROIEs, supports the position of the UK as a global financial centre. The summary of responses published in July 2021[1303] outlined that respondents:

(a) supported retaining the ROIE regime in its current form;

(b) noted that the regime is a valuable mechanism for market access;

1297 Article 25 UK EMIR.
1298 Section 292(6).
1299 Article 25(2a) of UK EMIR.
1300 https://www.legislation.gov.uk/uksi/2019/662/pdfs/uksiem_20190662_en.pdf.
1301 https://www.fca.org.uk/publication/handbook/roie-direction.pdf.
1302 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/944250/Overseas_Framework_CfE_FINAL.pdf.
1303 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1000622/Overseas_Framework_Summary_of_Responses.pdf.

(c) noted that, in places, the current guidance makes it difficult to identify a clear set of criteria which a ROIE application will be tested against;

(d) supported a clearer, more streamlined approach to the application process as well as a more transparent process in legislation or FCA guidance;

(e) stated that the current guidance created ambiguity over whether Multilateral Trading Facilities (MTFs) are able to apply to get ROIE status;

(f) called for the Government to consider changes to the ROIE regime to ensure that MTFs and Organised Trading Facilities (OTFs) can be eligible for, and subject to, the ROIE regime alongside other trading venues

20.2.20 The Treasury will initiate a consultation on potential changes to the UK's regime for overseas firms and activities in the fourth quarter of 2021. The Government will consult on a range of issues, including whether further regulatory powers are needed for the ROIE regime to address any deficiencies in regulatory oversight.

Third Country CCPs in the EU

20.2.21 In 2017, the European Commission proposed a more robust supervision of CCPs considered to have a significant impact on the regulation and supervision of clearing in Europe. The proposal introduced a two-tier system for classifying third-country CCPs under which systemically important CCPs would be subject to additional requirements.[1304] Amendments to EMIR provided that ESMA[1305]:

(a) shall establish cooperation arrangements with competent authorities of third countries deemed equivalent, covering a series of minimum requirements[1306];

(b) can determine that a third-country CCP is, or is likely to become, systemically important to the EU's financial stability and then only recognise that CCP to provide certain clearing

[1304] https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1568 and Article 25(2a) EMIR.
[1305] https://publications.parliament.uk/pa/cm5801/cmselect/cmeuleg/229-xviii/22906.htm#footnote-063.
[1306] Article 25(2) and (7) of EU EMIR.

services or activities if it complies with additional obligations to ensure alignment with the EU regime;[1307] and

(c) can conclude that a CCP or some of its clearing services are of such substantial systemic importance that it should not be recognised to provide certain clearing services or activities. The European Commission can then, on request from ESMA, specify that some or all of the clearing services of that third-country CCP can only be provided to clearing members and trading venues established in the EU by that CCP after it has been authorised in accordance with EMIR.[1308]

20.2.22 On 21 September 2020, a temporary equivalence decision was adopted which allowed market participants 18 months to reduce their exposure to UK CCPs. The industry was encouraged to reduce their reliance on UK CCPs deemed systemically important for the EU.[1309] Delegated acts on tiering, comparable compliance and fees under EMIR, which set out the new regulatory and supervisory regime for third country CCPs including the details for conducting a tiering assessment, were also published in the Official Journal.

20.2.23 On 28 September 2020, ESMA recognised three UK CCPs, ICE Clear Europe Limited, LCH Limited and LME Clear Limited, as third country CCPs eligible to provide their services in the EU from 1 January 2021. In addition, ESMA has agreed an MoU with the Bank establishing the necessary cooperation arrangements for the recognition and supervision of UK CCPs under EMIR. The recognition decisions will continue to apply while the equivalence decision remains in force, which is until 30 June 2022.[1310] The European Commission will propose an extension of equivalence for UK-based CCPs in due course, of a duration that will allow a revision of the EU supervisory system for CCPs.

20.3 Directions and revocation of recognition

Power to give directions: general

20.3.1 The Act gives the FCA and the Bank the power to require a recognised body that has failed, or is likely to fail, to satisfy the recognition requirements, or has failed to comply with any other obligation

[1307] Article 25(2b) of EU EMIR.
[1308] Article 25(2c) of EU EMIR.
[1309] https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1713.
[1310] https://www.esma.europa.eu/sites/default/files/library/esma71-99-1403_communication_ukccps_recognition_2020.pdf.

imposed by or under the Act (including any obligation imposed by any qualifying provision specified (or of a description specified) in an order made by the Treasury), to take steps to remedy that failure. It also gives the Bank the power to direct a Tier 2 third country CCP that has failed to comply with an obligation imposed on it by or under the Act or by EMIR, to take steps to comply with these obligations.[1311]

20.3.2 In the case of UK recognised bodies and Tier 2 third country CCPs, those steps may include: (a) the relevant regulator accessing the premises of the recognised body to inspect the premises or any documents that appear to the regulator to be relevant for the purposes of exercising its power to give directions; and (b) the suspension of carrying on by the recognised body of any regulated activity for the period specified in the direction, or of the carrying on by the Tier 2 third country CCP in the UK of any activity in respect of which the third country CCP is exempt from the general prohibition.[1312]

20.3.3 The exercise of powers to give directions is subject to certain procedural requirements, although, in certain circumstances, the regulator may give a direction without following the required procedure[1313].

Additional power to direct recognised CCPs

20.3.4 The Act confers an additional power of direction on the Bank over recognised CCPs (that is, those UK RCHs that provide CCP services and are therefore also authorised under EMIR as CCPs)[1314]. This additional power of direction may only be used where the regulator is satisfied that it is necessary by reference to the public interest criteria set out in the Act.

20.3.5 There are limitations on the purposes for which this additional power may be used. For example, the Bank would not be able to use its additional powers of direction to compel a UK CCP to accept any transfer to it of the property, rights or liabilities of another clearing house.

20.3.6 This additional power of direction is subject to certain prescribed procedural requirements in line with other powers of direction under

[1311] Section 296.
[1312] Section 296.
[1313] Section 298.
[1314] Section 296A.

the Act (and subject to the regulator's discretion to forgo the relevant procedure in certain circumstances). Where the procedural requirements are not followed, the Bank is required to give reasons why the direction was given and why no prior notice of the intention to give directions was provided to the clearing house.

Power to revoke recognition

20.3.7 The FCA and the Bank have the power to revoke recognition:

(a) at the request (or with the consent of) the recognised body; or

(b) on their own initiative where it appears to the relevant regulator that a recognised body (other than a recognised CCP) is failing (or has failed) to satisfy the recognition requirements or any other obligations imposed on it under the Act[1315].

A CCP recognition order may be revoked by the Bank in accordance with Article 20 of EMIR.

20.3.8 In relation to recognised bodies (other than recognised CCPs) only, the own-initiative revocation power may also be used in the circumstances where the recognised body:

(a) has not carried on the business of an investment exchange or of a clearing house (as the case may be):

(i) within a period of 12 months from the date on which a recognition order in respect of that body was granted; or

(ii) at any time during the period of six months ending with the day on which the power to make the revocation order is exercised; or

(b) has failed (or is likely to fail) to comply with any obligation imposed on it by any qualifying provision specified (or of a description specified) in an order made by the Treasury.

20.3.9 The Bank may also revoke the recognition order of a recognised CCP if it has failed, or is likely to fail, to comply with certain obligations

[1315] Section 297.

imposed on it under the Securities Financing Transactions Regulations.[1316]

Power to disallow excessive regulatory provision

20.3.10 Under the Act, the FCA and the Bank have the power to disallow excessive regulatory provisions that a UK recognised body proposes to make[1317].

20.3.11 In summary, if a recognised body is proposing to make a regulatory provision (for example, introduce a new rule or guidance that would apply to its members or market participants), the recognised body must give written notice to the appropriate regulator without delay and cannot make the proposed provision before the relevant regulator decides whether to act. Any provision made in contravention of this restriction is deemed to be of no effect.

20.3.12 If the relevant regulator is of the view that the proposed requirement is excessive, it may direct that the proposed provision must not be made. For these purposes, a requirement is excessive if it is not required under any enactment or rule of law in the UK and either is not justified as pursuing a reasonable regulatory objective or is disproportionate to the end to be achieved.

Power to give directions in relation to parent undertakings of recognised bodies

20.3.13 Qualifying parent undertakings of UK RIEs and UK RCHs will be subject to the regulators' powers (conferred by Part 12A of the Act) to give directions to certain parent undertakings[1318]. These powers do not apply to overseas recognised bodies.

20.3.14 Please see Chapter 18 'Powers exercisable in relation to parent undertakings' for further detail on the powers that a relevant regulator may exercise under the Act in relation to qualifying parent undertakings.

1316 EU Regulation 2365/2015 and section 297(2D).
1317 Sections 300A to 300E.
1318 Part 12A (which, in the case of UK RCHs, is subject to certain modifications set out in Schedule 17A, paragraph 17).

20.4 Disciplinary powers

Financial penalties and public censure

20.4.1 Under the Act, the FCA and the Bank have powers to impose financial penalties on recognised bodies and to issue statements of public censure. The Act also sets out the procedure to be followed by the relevant regulator when publishing a statement of censure or imposing a financial penalty, including the publication of both a warning and a decision notice[1319].

20.4.2 Both the Bank and the FCA are required to produce a statement of policy with respect to the imposition and amount of financial penalties under the Act. In August 2018, the Bank updated a policy statement[1320] published in June 2014 setting out two statutory statements of procedure that cover its decision-making framework for giving warning and decision notices to RCHs and qualifying parent undertakings of RCHs and the procedure on publishing information about statutory notices given to such entities.

20.4.3 The FCA's statement of policy in respect of the imposition and amount of penalties is set out as general guidance in its Decision Procedure and Penalties Manual (**DEPP**).

Complaints about recognised bodies

20.4.4 The FCA and the Bank are required to make arrangements for the investigation of any relevant complaint about a recognised body. For these purposes, any complaint that the regulator in question considers relevant to the question of whether the body concerned should remain a recognised body is a relevant complaint[1321].

20.4.5 As regards RIEs, the FCA's current procedure for handling complaints is set out in REC 4.4 of the REC Rules. In brief, the regulator will only consider complaints that have first been made to the recognised body and where the complainant has exhausted the recognised body's own complaints procedures.

[1319] Sections 312E to 312K of Part 18.
[1320] https://www.bankofengland.co.uk/-/media/boe/files/statement/2018/statutory-statements-of-procedure-in-respect-of-the-boe-supervision-of-fmi-policy-statement-update.pdf.
[1321] Section 299.

20.5 Notification requirements

20.5.1 Recognised bodies (both UK and overseas) are subject to certain notification and regular reporting requirements under the Act[1322]. In addition to notices and information specified under the Act, the FCA and the Bank have the power to make rules requiring recognised bodies to provide certain additional information (including periodic reports as well as notice of specific events); the appropriate regulator is able to waive or modify any notification requirements arising under the rules made by it under the Act[1323].

20.6 Change in control

Recognised investment exchanges

20.6.1 The Act sets out provisions relating to the change in control regime applicable to RIEs[1324]. In summary, an acquisition (or increase) of control over an RIE is subject to prior approval by the FCA. The obligation to notify the FCA arises where a person (whether alone or taken together with its concert parties) decides to acquire or increase control over an RIE. The relevant thresholds are:

(a) acquiring 20 per cent. or more of shares or voting rights in an RIE or its parent undertaking or (where the relevant holding is below the 20 per cent. threshold) being able to exercise significant influence over the management of the RIE; and

(b) increasing control from less than 50 per cent. to 50 per cent. or more or otherwise becoming a parent undertaking of the RIE.

20.6.2 Certain holdings are disregarded for the purposes of calculating whether the relevant threshold has been reached.

20.6.3 The assessment period is three months from the date the FCA receives a completed application. The FCA may impose restrictions on shares or voting rights acquired in breach of the relevant change in control requirements, including suspending the rights attaching to the holder's interests (for example, prohibiting transfers, further issues and use of

[1322] Sections 293(5) to 293(7) (notification requirements applicable to UK recognised bodies), 293A (compliance with specified requirements) and 295 (notification requirements applicable to overseas recognised bodies).
[1323] Sections 293 and 294.
[1324] Sections 301A to 301M of Part 18.

voting rights). The FCA may also apply for a court order requiring the sale of shares or the disposition of voting power.

20.6.4 It should be noted that the RIE change in control regime set out in the Act does not differentiate between UK RIEs and overseas RIEs and, on the face of it, both types of recognised bodies would be subject to the prior approval requirement. While the requirement is clear as regards the UK RIEs, in respect of overseas RIEs, the FCA should be contacted to clarify the requirement for prior approval.

Recognised clearing houses

20.6.5 The Act does not provide for a change in control regime for RCHs. However, all RCHs that are recognised CCPs are now subject to the change in control regime in UK EMIR[1325].

20.6.6 In summary, acquisition (or increase) of control in a UK CCP will be subject to prior approval by the Bank. The obligation to notify the Bank would arise where a person (whether alone or taken together with its concert parties) decides to acquire or increase control over a UK CCP. The relevant thresholds are: acquiring 10 per cent., 20 per cent., 30 per cent. or 50 per cent. of voting rights or capital in a UK CCP or otherwise becoming a parent undertaking of the CCP.

20.6.7 The assessment period is 60 working days (plus up to a maximum of an additional 30 working days, depending on the identity of the proposed acquirer) from the date the Bank acknowledges receipt of a completed application.

20.6.8 The Bank, the PRA and the FCA (as appropriate) shall co-operate closely with each other when carrying out the assessment where the proposed acquirer is one of the following (or a parent undertaking or controller of one of the following): another CCP, a credit institution, assurance undertaking, insurance undertaking, reinsurance undertaking, investment firm, market operator, an operator of a securities settlement system, a UCITS management company or an AIFM.

[1325] Articles 31 and 32 of UK EMIR.

21. COMPLAINTS AGAINST AUTHORISED FIRMS

21.1 Overview

21.1.1 To ensure high levels of consumer protection in financial services, consumers must have access to swift and impartial resolution of the complaints they make against providers of financial services. The two key mechanisms for realising this objective are:

(a) ensuring that financial services businesses treat complainants fairly, with effective, fair and transparent complaint handling procedures; and

(b) where firms' complaint handling procedures cannot resolve the complaint, enabling the prompt and impartial consideration of the complaint under the Financial Ombudsman Service (**FOS**).

21.1.2 The first of these mechanisms is effected through requirements set out in the FCA Handbook in the 'Dispute Resolution: Complaints' sourcebook (the **DISP Manual**) at DISP 1, while the framework for the FOS is set out in Part 16. of and Schedule 17 to, the Act.

21.1.3 The FOS was established in 2001 under the Act and is operated by the Financial Ombudsman Service Limited (**FOS Ltd**). It has the statutory function of resolving — quickly and with minimum formality — certain disputes between consumers and financial services businesses.

21.1.4 The FOS is responsible for considering individual disputes, while responsibility for resolving and remedying complaints relating either to regular failings by a firm or to industry-wide issues lies with the FCA.

21.1.5 Furthermore, the implementation of the Alternative Dispute Resolution Directive (**ADR Directive**)[1326] into UK legislation has seen the FOS apply, and be granted by the FCA, status as a certified ADR entity under the regulations implementing the ADR Directive (the **ADR Regulations**[1327]). The FCA is the designated competent authority under those regulations to vet, approve and monitor the FOS as a certified ADR entity.

[1326] Directive 2013/11/EU.

[1327] Alternative Dispute Resolution (Competent Authorities and Information) Regulations 2015 (SI 2015/542), Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015 (SI 2015/1392), Alternative Dispute Resolution for Consumer Disputes (Amendment) (No.2) Regulations 2015 (SI 2015/1972) and Alternative Dispute Resolution for Consumer Disputes (Extension of Time Limits for Legal Proceedings) (Amendment etc.) (EU Exit) Regulations 2020/1139.

21.1.6 A key characteristic of the FOS, since its inception, has been that it should become available only once the complainant has exhausted the complaint handling procedures at the firm that is the subject of the complaint. While the implementation of the ADR Directive has made a small change to this principle, which is discussed further below[1328], this is still the fundamental way by which the FOS and firms operate. This chapter provides a summary of the requirements regarding complaint handling procedures, followed by an overview of the operation of the FOS and the FCA's powers to require certain financial services businesses to operate a consumer redress scheme.[1329]

21.2 Complaint handling procedures

21.2.1 DISP 1 sets out detailed requirements regarding the complaint handling procedures that must be established by the financial services businesses that are covered by the FOS. These include all authorised firms, payment service providers, electronic money issuers, designated credit reference agencies, designated finance platforms, consumer buy-to-let (**CBTL**) firms[1330], and certain other businesses that have voluntarily agreed to be subject to the jurisdiction of the FOS (collectively referred to as "respondents").

21.2.2 The central requirement placed on respondents is to establish and maintain effective and transparent procedures for the reasonable and prompt handling of complaints. Respondents are required to publish information regarding these complaint handling procedures, and to refer complainants to the availability of this information.[1331]

21.2.3 Respondents that are authorised firms are required to appoint an individual carrying on an FCA governing function (for example, a director or non-executive director) or an individual of appropriate seniority to have responsibility for oversight of complaint handling procedures.[1332]

21.2.4 Except in relation to complaints that are resolved within three business days, respondents are required, upon receiving a complaint, to send the

[1328] Paragraphs 21.2.8 and 21.2.9.
[1329] In addition, DISP 1.1A of the DISP Manual addresses complaints handling requirements for MiFID complaints which is outside the scope of this Guide.
[1330] These firms are exempt from authorisation under Article 72(I) of the Regulated Activities Order but are required to be FCA-registered pursuant to the Mortgage Credit Directive Order (SI 2015/910) (the "**Mortgage Credit Directive Order**"), Article 8.
[1331] DISP 1.3.1R and DISP 1.2 of the DISP Manual.
[1332] DISP 1.3.7R 'Complaints handling rules' of the DISP Manual.

complainant a prompt, written acknowledgement providing written assurance that it is dealing with the complaint.[1333]

21.2.5 Moreover, upon receipt of every complaint, the respondent must:

(a) investigate the complaint competently, diligently and impartially, obtaining such additional information as necessary;

(b) assess the subject matter of the complaint and decide fairly, consistently and promptly whether the complaint should be upheld and whether remedial action or redress may be appropriate;

(c) offer redress or to take remedial action where considered appropriate (and comply promptly with any such offer); and

(d) explain to the complainant promptly and in a manner that is fair, clear and not misleading its assessment of the complaint, its decision and any offer of redress or remedial action.[1334]

21.2.6 Within eight weeks of receiving a complaint, the respondent must send to the complainant either:

(a) a "final" response, being a written response that:

(i) accepts the complaint and offers redress or remedial action;

(ii) offers redress or remedial action without accepting the complaint; or

(iii) rejects the complaint, giving reasons why this is the case; or

(b) a written response explaining why the respondent is not in a position to provide a final response and indicating when it expects to be able to provide one.[1335]

[1333] DISP 1.6.1R 'Complaints time limit rules' of the DISP Manual.
[1334] DISP 1.4 'Complaints resolution rules' of the DISP Manual.
[1335] DISP 1.6 'Complaints time limit rules' of the DISP Manual. Where a complaint relates to electronic money or payments services, the respondent must send a "final" response within 15 business days of receiving a complaint. In addition, if a final response cannot be sent within 15 business days for reasons beyond the control of the respondent, the respondent must send a holding response within that time to the complainant explaining the delay, and indicating when it will respond in full. In these circumstances, a final response must be sent within 35 business days of receipt of the complaint.

21.2.7 In either case, the respondent must inform the complainant that, if the complainant remains dissatisfied, the complaint may be referred to the FOS. Following the implementation of the ADR Directive in 2015, the respondent must also inform the complainant whether it consents to waive the relevant time limits for the referral of a complaint to the FOS.[1336] If the respondent does not provide its consent, any such referral made following the written response must be made within six months.

21.2.8 Also as a result of the ADR Directive, the FOS can consider a complaint it receives from a complainant *who has not* first referred it to the respondent if both the respondent and the complainant consent. The FOS must inform the complainant that the respondent is obliged to deal with the complaint within eight weeks and may resolve it more quickly than the FOS, and also receive confirmation from the complainant that they, nevertheless, still wish the FOS to deal with their complaint.[1337]

21.2.9 This is a departure from the fundamental principle that firm complaint handling procedures should be exhausted before complainants revert to the FOS. However, in practice, firms are unlikely to provide their consent, as, by doing so, they would give up their opportunity to consider the complaint first.

21.2.10 The FCA expects respondents to aim to resolve complaints at the earliest possible opportunity, thereby minimising the number of unresolved complaints that need to be referred to the FOS for consideration. Moreover, once a complaint has been referred to the FOS, the respondent is required to co-operate fully with the resolution process and to comply promptly with any settlements or awards agreed through settlement or determined by an ombudsman.

21.2.11 Authorised firms are required to provide the FCA with either annual or biannual returns containing details of the number and nature of complaints received during that period and the percentage of complaints resolved within certain specified time periods. Respondents with fewer than 500 complaints within a reporting period are required to provide a shortened form of the return. Records of complaints must be retained for five years (in respect of collective portfolio

[1336] DISP 1.6 'Complaints time limit rules' of the DISP Manual.
[1337] DISP 2.8 'Was the complaint referred to the Financial Ombudsman Service in time?' of the DISP Manual. Brought in by the Alternative Dispute Resolution Directive Instrument 2015 (SI FCA 2015/25, FOS 2015/1). Where a complaint relates to electronic money or payments services, the relevant time limits within which the respondent must deal with the complaint are 15 business days or, in exceptional circumstances, 35 business days.

management services for a UCITS scheme/EEA UCITS scheme) or three years (otherwise).[1338]

21.2.12 Other respondents are subject to separate requirements. For example, designated credit reference agencies and designated finance platforms are required to retain records under separate legislation[1339], which can be used to assist the FOS if necessary. Similarly, CBTL firms must retain relevant information to demonstrate compliance with the requirements set out in the Mortgage Credit Directive Order.[1340]

21.2.13 Respondents who have submitted voluntarily to the FOS under its voluntary jurisdiction (see paragraph 21.3.17) are also not subject to the reporting requirements under the DISP Manual, but this provides guidance that it is in their interests to retain complaint records to assist the FOS if necessary.[1341]

21.3 FOS arrangements

General arrangements

21.3.1 The FCA and the FOS have broad scope under the Act to determine many of the detailed operational and procedural aspects of the FOS and, accordingly, the majority of this detail is set out in the DISP Manual. A discussion of the procedural detail set out in the DISP Manual is outside the scope of this Guide, although the effect of certain fundamental provisions is explained below.

21.3.2 The FOS is required under the Act to maintain a panel of persons, appearing to the FOS to have appropriate qualifications and experience, to act as ombudsmen for the purposes of the FOS.[1342]

21.3.3 To ensure that the FOS operates in a manner that is consistent with its statutory function of resolving complaints quickly and with minimum formality, the FOS operates a three-stage process to ensure that complaints are referred for consideration by an ombudsman only where other reasonable forms of guidance and mediation are unsuccessful. This three-stage process is broadly as set out below.

1338 DISP 1.9 'Complaints record rule' and DISP 1.10 'Complaints reporting rules' of the DISP Manual.
1339 Small and Medium-sized Business (Credit Information) Regulations (SI 2015/1945), Regulation 24 and Small and Medium Sized Business (Finance Platforms) Regulations, Regulation 21.
1340 Article 18 and Schedule 2 of the Mortgage Credit Directive Order.
1341 DISP 1.1.15R and 1.1.16G of the DISP Manual.
1342 Paragraph 4 of Schedule 17.

Stage 1: advice and guidance

21.3.4 At the initial stage, the nature of the complaint being made is considered and, where possible, the matter is resolved by giving general advice or guidance.

21.3.5 The FOS is available only to a person who is an eligible complainant and who has, as explained above[1343], either exhausted the respondent's complaint handling processes or consented, together with the respondent, to the FOS dealing with their complaint without it first being referred to the respondent.

21.3.6 In addition to a role in giving general advice and guidance to consumers, this first stage acts to filter out complaints that fail to meet the eligibility criteria to be considered under the FOS.

Stage 2: adjudicator assessment and mediation

21.3.7 Where the matter is not resolved or otherwise dealt with at the initial stage, the dispute is referred to an adjudicator for an individual assessment of the case.

21.3.8 The role of the adjudicator is to resolve complaints as informally as possible, by seeking to get both sides to agree to views or informal settlement arrangements proposed by the adjudicator.

Stage 3: ombudsman determination

21.3.9 Neither party to a complaint is bound by any view or settlement arrangement proposed by an adjudicator. Accordingly, if either party refuses to settle the matter based on any such proposal, the matter is referred to an ombudsman.

21.3.10 The consideration and determination of a complaint by an ombudsman is the final and most formal stage in the operation of the FOS, and the role of the ombudsman in this respect is described in more detail later in this chapter.

Eligibility of complainants

21.3.11 Only complaints made by certain specified "eligible complainants" can be considered under the FOS. Broadly, but subject to certain specific

[1343] See particularly paragraphs 21.2.6 to 21.2.9.

exceptions, this includes any person that falls within the following categories:

(a) a natural person acting for purposes outside their trade, business or profession ("a consumer"[1344]);

(b) a micro-enterprise (regardless of its legal form) that, at the time of making the complaint, employs fewer than 10 persons and has a turnover or annual balance sheet not exceeding €2 million (or equivalent value);[1345]

(c) a charity that has an annual income of less than £6.5 million at the time it makes the complaint;

(d) the trustee of a trust that has a net asset value of less than £5 million at the time the trustee makes the complaint;

(e) in relation to a CBTL business, a consumer or a borrower under a CBTL credit agreement.

(f) a small business (regardless of its legal form) that, at the time of making the complaint, has an annual turnover of less than £6.5 million and either employs fewer than 50 persons or has a balance sheet total of less than £5 million; and

(g) a guarantor.[1346]

21.3.12 Moreover, to be an eligible complainant, the relationship between the complainant and the firm to which the complaint relates must fall within an exhaustive list set out in the DISP Manual. Broadly speaking, this requires the complainant to be the consumer or other beneficiary of financial services being provided by the firm to which the complaint relates, or to be a person from whom the firm has sought to recover payment under a consumer credit agreement.

[1344] DISP 2.7.3R(1) of the DISP Manual.
[1345] For complaints relating wholly or partly to payment services, the business must satisfy the conditions either at the time of conclusion of the payment service contract or at the time the complaint is made.
[1346] DISP 2.7.3R to DISP 2.7.6R of the DISP Manual. See also DISP 2.7.9R of the DISP Manual for a list of persons excluded from being eligible complainants.

Jurisdictions of the FOS

21.3.13 The FOS is permitted only to consider complaints that fall within one of its jurisdictions. These jurisdictions are set out below.[1347]

Compulsory jurisdiction

21.3.14 Under the compulsory jurisdiction, the FOS can consider complaints that relate to an act or omission by a firm carrying on any regulated activities (including regulated consumer credit activities), payment services, CBTL business, money lending activities (including mortgage lending, unsecured lending, and credit cards), offering and/or issuing investments by insurance special purpose vehicles, giving non-personal recommendation advice or providing ancillary activities (for example, advisory activities or ancillary banking services).

21.3.15 Moreover, other key areas covered by the compulsory jurisdiction include acts or omissions by: (a) payment service providers, in carrying on payment services activities, credit-related regulated activities or any ancillary activities; (b) electronic money issuers, in carrying on electronic money issuance, credit-related regulated activities or any ancillary activities; (c) CBTL firms in carrying on CBTL business or any ancillary activities; (d) designated credit reference agencies in providing credit information or any ancillary activities; and (e) designated finance platforms in providing specified information or any ancillary activities.[1348]

21.3.16 Except for regulated claims management activities and activities ancillary to regulated claims management activities,[1349] the compulsory jurisdiction covers complaints falling within the above categories that are carried on from an establishment in the UK. It also includes complaints about activities carried on from an establishment in an EEA state by firms with temporary permissions post-Brexit with respect to services provided into the UK.[1350]

1347 Sections 226 and 227 of the Act; and DISP 2.3 and DISP 2.5 of the DISP Manual.
1348 DISP 2.3 'To which activities does the Compulsory Jurisdiction apply?' of the DISP Manual.
1349 The application of the compulsory jurisdiction to firms which carry on regulated claims management activities (and activities ancillary to regulated claims management activities) depends on whether the activity is carried on in Great Britain rather than whether it is carried on from an establishment maintained in the United Kingdom.
1350 DISP 2.6 'What is the territorial scope of the relevant jurisdiction?' of the DISP Manual.

Voluntary jurisdiction

21.3.17 The voluntary jurisdiction extends the FOS's application to certain acts or omissions carried on by voluntary FOS participants (**VJ participants**) from an establishment in the UK, largely being financial businesses that by their nature do not fall within the compulsory jurisdiction. In addition, EEA firms (and firms in Gibraltar) may agree to become VJ participants if the relevant activity is directed wholly or party at the UK, the contracts governing the activity are made under the law of England and Wales, Scotland or Northern Ireland and the VJ participant has notified the appropriate regulators in the jurisdiction in which it is established that it intends to participate in the voluntary jurisdiction of the FOS.[1351]

21.3.18 Under the voluntary jurisdiction, the FOS can consider a complaint regarding an act or omission by a VJ participant in connection with certain specified activities not falling within the compulsory jurisdiction, including:

(a) activities which at 30 April 2021 would be covered by the compulsory jurisdiction, if they were carried on from an establishment in the UK (or in Great Britain in respect of regulated claims management activities);

(b) certain lending activities (including mortgage lending, unsecured lending, and credit cards);

(c) offering and/or issuing investments by insurance special purpose vehicles;

(d) certain mortgage mediation and insurance mediation activities; and

(e) activities ancillary to any of the above carried on by the VJ participant in connection with those activities.[1352]

Role of the ombudsman

21.3.19 Ombudsmen are responsible for the formal assessment and determination of complaints that are not resolved or otherwise dealt with in the first two stages of the FOS's process. The appointed

[1351] DISP 2.6 'What is the territorial scope of the relevant jurisdiction?' of the DISP Manual.
[1352] DISP 2.5 'To which activities does the voluntary jurisdiction apply?' of the DISP Manual.

ombudsman is required to determine a complaint by reference to what that ombudsman considers to be fair and reasonable in all the circumstances of the case, having regard to:

(a) relevant law and regulation, regulatory rules and guidance, and codes of practice; and

(b) where appropriate, what the ombudsman considers to have been good industry practice at the relevant time.[1353]

21.3.20 Notwithstanding that the ombudsman must have regard to these matters of law and practice, there remain concerns that, by determining cases based on what is fair and reasonable in all the circumstances, ombudsman determinations may, from time to time, result in complaints being upheld against firms despite such firms having observed all relevant rules and guidance.

21.3.21 After reaching a determination, the ombudsman is required to give both parties a signed written statement explaining the determination and the reasoning by which the ombudsman reached that result.

21.3.22 The ombudsman's determination, if accepted by the complainant, is final and binding on both parties and can — if necessary — be enforced in the courts. If, however, the complainant rejects the determination or fails to respond within a given time limit, the determination is not binding on either party.

21.3.23 Under the FOS, ombudsman determinations can require firms to make "money awards" of up to £355,000 in respect of what, in the opinion of the ombudsman, is fair compensation for the loss or damage suffered. Moreover, the ombudsman can make a costs award against a firm in respect of any costs reasonably incurred by a complainant.[1354]

Publication of determinations

21.3.24 The FOS is required to publish a report of any determination made by an ombudsman, unless the relevant ombudsman decides that such publication (whether in whole or in part) is inappropriate. The report of a determination may not, unless the complainant agrees, contain any

[1353] DISP 3.6 'Determination by the Ombudsman' of the DISP Manual.
[1354] DISP 3.7 'Awards by the Ombudsman' of the DISP Manual.

information that, in the opinion of the FOS, would be likely to identify the complainant.[1355]

21.3.25 The FOS generally satisfies the requirement to publish a report by publishing the full version of each ombudsman determination, subject to the redaction of: (a) information that could identify the complainant (including names, addresses and contact details); and (b) certain other potentially sensitive information (including bank account details).

21.3.26 In a small number of cases, the redaction process can result in the determination becoming substantially redacted, such that the remaining report does not provide a clear and understandable account of the dispute. The FOS has indicated that in these rare cases it would be appropriate for the ombudsman to decide the determination should not be published either in whole or in part.

21.4 Complaint referrals and information sharing

21.4.1 The FOS and the FCA are required under the Act to take such steps as each considers appropriate to co-operate with each other in the exercise of their respective functions, and in that connection have entered into a MoU that sets out how they intend to achieve this.

21.4.2 Under the MoU, the FCA and the FOS have agreed, among other things, various principles governing how they will co-operate in the performance of their respective roles and the circumstances in which they will share information with each other.

Information sharing between the FCA and the FOS

21.4.3 The FOS is required under the Act to provide to the FCA any information that, in the opinion of the FOS, would or might be of assistance to the FCA in advancing one or more of the FCA's operational objectives.[1356]

21.4.4 Moreover, under their MoU, the FOS and the FCA have agreed that, subject to legal restrictions on the disclosure of information (confidential or otherwise):

(a) the FOS may disclose information to the FCA to assist the FOS in discharging its own functions; and

[1355] Section 230A and see DISP 3.6 'Determination by the Ombudsman' of the DISP Manual.
[1356] Section 232A.

(b) the FCA may disclose information to the FOS to facilitate the carrying out of a public function by the FCA or a function of the FOS.

21.4.5 In this connection, the FOS has agreed that, if concerns arise, it will give the FCA information about: (a) any serious shortcomings in a firm's complaint handling procedures; (b) concerns about the fitness or propriety of a firm or approved person; or (c) other issues that may require action by the FCA under its statutory objectives.

Referrals of complaints

21.4.6 As explained above, the FOS is responsible for determining individual disputes on a case-by-case basis and is not intended to act as the determining body in relation to mass complaints relating to industry-wide failings.

21.4.7 Accordingly, the FOS has the power in certain circumstances to refer matters relating to such large-scale failings to the FCA. The FOS may make such a reference to the FCA where it appears that either of the below sets of conditions is satisfied[1357].

(a) The first set of conditions (regular failures causing loss or damage to consumers) is that:

(i) there may have been a regular failure by one or more authorised firms, electronic money issuers or payment services providers (together, "regulated persons") to comply with any applicable requirements relating to the carrying on by that person of any activity; and

(ii) as a result, consumers have suffered, or may suffer, loss or damage in respect of which, if they brought legal proceedings, a remedy or relief would be available.

(b) For these purposes, the failure by the regulated person to comply with an applicable requirement includes anything done or omitted to be done by that regulated person in carrying on the activity: (i) that is a breach of a duty or other obligation, prohibition or restriction; or (ii) that otherwise gives rise to the availability of remedy or relief in legal proceedings.

[1357] Section 234D.

(c) This is regardless of whether the relevant duty, obligation, prohibition or restriction, or the remedy or relief, arises under the Act, any other Act, a rule of law, or otherwise.

(d) The second set of conditions (regular behaviours warranting an award under the FOS) is that:

(i) one or more regulated persons have, on a regular basis, acted or failed to act in such a way that, if a complaint were made under the FOS in relation to that conduct, the FOS would be likely to determine the complaint in favour of the complainant; and

(ii) in upholding the complaint in favour of the complainant, the FOS would be likely to make a money award in favour of the complainant or to give a direction to the relevant regulated person(s) to take such steps in relation to the complainant as the FOS considers are just and appropriate.

21.4.8 The FCA has published guidance on the presentation of a reasoned case for a reference to the FCA.[1358] The final guidance clarifies that, before submitting a formal reference, the referee should discuss the reference with the FCA. Any reference that is subsequently submitted should:

(a) clearly state that the reference is being made under section 234D;

(b) indicate whether the reference relates to the first or second set of conditions;

(c) set out the reasons why, in the referee's view, the conditions are satisfied and the outcome they are seeking; and

(d) provide, where possible, documented facts and evidence supporting the assertion that the conditions are satisfied.

21.4.9 Within 90 days of receiving such a reference, the FCA must publish a response stating how it proposes to deal with the complaint or reference and, in particular, (a) whether or not it has decided to take any action; and (b) if it has decided to take action, what action it

[1358] FCA 'Guidance for regulated persons and the Financial Ombudsman Service on making a reference under s. 234D' (FCA FG 13/2 (June 2013)).

proposes to take[1359]. This mechanism effectively enables the FOS to indicate to the FCA that the nature of the failings is sufficiently regular or widespread that the FCA should consider requiring the firm to carry out a formal scheme for making redress to consumers. The powers of the FCA to require firms to operate such a redress scheme are explained in paragraphs 21.6.1 to 21.6.7.

21.4.10 This ability to make a reference to the FCA in respect of both types of regular failing is extended under the Act to apply equally to regulated persons in respect of their own failings. Accordingly, if a regulated person considers that its failures or behaviours would fall within either of the sets of conditions set out above, then it can self-report that fact in a reference to the FCA. This principle is consistent with the requirement that regulated firms deal with the regulators in an open and co-operative way.[1360] The FCA guidance provides that, due to the formal and public nature of the reference procedure, the regulated person's reference should confirm that it is being made with the support and approval of the person(s) responsible for directing the affairs of that regulated person.

21.5 Super-complaints

21.5.1 The Act provides a framework for certain designated consumer bodies to complain to the FCA about features of any market for financial services in the UK that may be significantly damaging the interests of consumers.[1361]

21.5.2 The purpose of this "super-complaints" regime is primarily to provide consumer bodies with a mechanism to raise issues with the FCA where large numbers of consumers are suffering detriment, so that the FCA may consider whether it would be appropriate for it to take action.

21.5.3 Super-complaints may only be made by consumer bodies that are designated for that purpose by the Treasury. The Treasury can make any organisation a designated consumer body for these purposes provided that, in the Treasury's view, that body represents the interests of consumers of any description. The Treasury has published guidance for bodies seeking designation as super-complainants to the FCA, which sets out the Treasury's interpretation of the designation criteria under

[1359] Section 234E.
[1360] Principle 11 (set out at PRIN 2.1.1R) of the FCA's Principles for Businesses.
[1361] Section 234C.

the Act and how it will expect bodies applying for designation to demonstrate their satisfaction of those criteria.[1362]

21.5.4 The FCA has published guidance covering the presentation of a reasoned case for a super-complaint.[1363] The guidance clarifies that designated consumer bodies that intend to make a "super-complaint" should first discuss the matter with the FCA and that any super-complaint that is subsequently submitted should include the following:

(a) a clear explanation of the features of the relevant market for financial services that may be damaging the interests of consumers;

(b) to the extent possible, documented facts and evidence supporting the assertion that consumers' interests are being damaged; and

(c) a clear statement that the complaint is made pursuant to the super-complaints regime under the Act.

21.5.5 The FCA is required to respond to super-complaints within 90 days of receiving the complaint, stating how it proposes to deal with the complaint and in particular:

(a) whether or not it has decided to take any action; and

(b) if it has decided to take action, what action it proposes to take.[1364]

21.5.6 The Act does not prevent a designated consumer body from publicising that it has made a super-complaint, although the FCA has stated that it expects to be consulted before any such matter is made public to avoid jeopardising or otherwise hampering related investigations.

21.6 Consumer redress schemes

21.6.1 The FCA is empowered to require authorised firms to establish and operate a consumer redress scheme if it appears to the FCA that:

[1362] The Treasury 'Guidance for bodies seeking designation as super-complainants to the Financial Conduct Authority' (March 2013).
[1363] FCA 'Guidance for designated Consumer Bodies on making a super-complaint under s234C' (FCA FG 13/1 (June 2013)).
[1364] Section 234E.

(a) there may have been a widespread or regular failure by authorised firms, payment service providers or electronic money issuers to comply with requirements applicable to the carrying on by them of any activity; and

(b) as a result, consumers have, or may have, suffered loss or damage in respect of which a remedy or relief would otherwise be available through legal proceedings.[1365]

21.6.2 A consumer redress scheme for these purposes is a scheme pursuant to which the relevant firm is required:

(a) to investigate, by means of a past business review, whether it failed to comply with certain specified applicable requirements during a period specified by the FCA;

(b) to determine whether the failure caused or may cause loss or damage to consumers; and

(c) to determine what redress is appropriate in respect of such failures and make such redress to the consumers.

21.6.3 The FCA may require firms to establish and operate a consumer redress scheme through two alternative mechanisms, namely:

(a) by making rules, specifying among other things:

(i) the activities and requirements in relation to which a category of firms are to carry out investigations under consumer redress schemes;

(ii) examples of the failures that the schemes are designed to remedy; and

(iii) matters to be taken into account or steps to be taken by firms operating such scheme; or

(b) by varying an authorised firm's permission under Part 4A of the Act, so as to impose requirements on that firm to establish and operate a scheme that corresponds, or is similar, to a consumer redress scheme.

[1365] Section 404.

21.6.4 The former of these alternative mechanisms is likely to be more effective in implementing consumer redress schemes in relation to industry-wide issues, involving failures by multiple authorised firms. This mechanism was, for example, chosen to implement consumer redress schemes at the multiple firms that were found to have offered unsuitable advice to consumers to invest in Arch Cru funds.[1366]

21.6.5 The latter mechanism is likely to present the more efficient route for establishing a redress scheme at a single firm that has been identified as having committed regular or systemic failings.

21.6.6 Where a consumer redress scheme is being operated by a firm, the FOS is not permitted to consider customer complaints that relate to the subject matter of the scheme unless:

(a) the firm has already sent the complainant its redress determination under the scheme in relation to which the complainant is not satisfied; or

(b) the firm failed to make a redress determination in accordance with the scheme.[1367]

21.6.7 This process means that consumers who have not received, or are not satisfied with, their redress determination under a consumer redress scheme can have that determination considered under the compulsory jurisdiction of the FOS. In this case, the consumer must make their complaint to the FOS within the relevant time limits. The provision, referred to in paragraph 21.2.7, which permits the firm to consent to a waiver of those time limits, does not apply[1368].

[1366] The FCA's rules relating to the Arch Cru consumer redress schemes are set out in CONRED 2 of the FCA 'Consumer Redress Schemes sourcebook' (**CONRED**).
[1367] DISP 2.3 'To which activities does the Compulsory Jurisdiction apply?' of the DISP Manual.
[1368] DISP 2.8 'Was the complaint referred to the Financial Ombudsman Service in time?' and DISP 1.6 'Complaints time limit rules' of the DISP Manual.

22. INSOLVENCY AND COMPENSATION

22.1 Overview

22.1.1 Part 24 of the Act enables the PRA and the FCA to be closely involved in any insolvency proceedings relating to an authorised firm, while Part 15 affords deposit holders, investors and policyholders a financial safety net in the form of the Financial Services Compensation Scheme (the **FSCS**).

22.2 Insolvency

22.2.1 The Act gives the PRA and the FCA the right to be heard, and to participate in, insolvency proceedings relating to authorised firms, although the PRA can only do so in relation to PRA-authorised firms (or persons unlawfully carrying on a PRA-regulated activity). Part 24 applies to voluntary arrangements, administration, receivership, winding up and individual bankruptcy.[1369] In addition, the PRA and the FCA may apply to the court on specified grounds for the making of an administration order, or a winding-up order, in respect of any person that is or has been an authorised firm, an appointed representative or is carrying on, or has carried on, a regulated activity in contravention of the general prohibition.[1370]

22.2.2 The Act places a duty on administrators, receivers, liquidators and insolvency practitioners to report to the appropriate regulator if the office holder thinks that a person is carrying on or has carried on a regulated activity in contravention of the general prohibition,[1371] which would enable the PRA or the FCA to participate in the insolvency proceedings. The PRA and the FCA may additionally be heard on any application for a voluntary arrangement, an administration order, receivership, winding up or bankruptcy in respect of any person that is or has been an authorised firm, an appointed representative or is carrying on, or has carried on, a regulated activity in contravention of the general prohibition.[1372] The Act prevents an administrator being appointed outside of court (for example, by the company or its directors) in relation to a company carrying on regulated activities, or an appointed representative, unless the PRA consents to the

[1369] Sections 356 to 358, 362, 363, 365, 371 and 374.
[1370] Sections 359 and 367.
[1371] Sections 361, 364, 370 and 373.
[1372] Sections 356(3), 357(1), 362(2), 363(2), 365(3), 371(2) and 374(2).

appointment (in the case of PRA-regulated firms) or the FCA so consents (in all other cases).[1373]

22.2.3 The Act also imposes specific requirements in relation to restructuring plans relating to authorised persons, recognised investment exchanges, persons authorised or registered under the Payment Services Regulations 2017 or Electronic Money Regulations 2011, appointed representatives and persons carrying on a regulated activity in contravention of the general prohibition. Any such person (or, where applicable, their liquidator or administrator) must notify the appropriate regulator before applying to the court for any order convening a meeting of their creditors in relation to a restructuring plan. The consent of the PRA is also required in connection with any restructuring plan relating to a PRA-authorised person. If the applicant under a restructuring plan fails to notify or obtain the consent of the appropriate regulator (as required), the appropriate regulator may impose a financial penalty on that person, or publish a statement of public censure. The PRA and the FCA also have the right to be heard, and to participate in, any court hearings and creditor meetings convened in relation to a restructuring plan.[1374] The restructuring plan is a new process under Part 26A of the Companies Act 2006 for companies in financial difficulty. It was introduced by the Corporate Insolvency and Governance Act 2020, and has applied since 26 June 2020.

22.2.4 The Act makes special provision for insolvent life assurance companies. The purpose is to permit the continuation of the long-term business of such companies with a view to the business being transferred, as a going concern, to another insurance company. Unless the court orders otherwise, a liquidator must carry on the insurer's long-term business until such transfer. If the liquidator is satisfied that the interests of the policyholders require it, a special manager may be appointed to carry on the business.[1375] The Treasury may, by regulations, provide for the treatment of the assets of an insurance company in its winding up.[1376] No such regulations are currently in place. Winding-up rules may be made for determining the amount of the liabilities of an insurer to policyholders of any class or description for the purposes of proof in a

[1373] Section 362A.
[1374] Sections 355A and 355B.
[1375] Section 376.
[1376] Section 378.

winding up and, more generally, on the winding up of insurance companies.[1377]

22.2.5 The EU Directive on the taking-up and pursuit of the business of Insurance and Reinsurance[1378] (**Solvency II**) introduced a new framework for the solvency and supervision of EU insurers and their groups, and UK insurers and reinsurers have had to comply with UK domestic measures implementing the provisions of Solvency II since 1 January 2016. Solvency II replaced the EU Directive on the reorganisation and winding up of insurance undertakings[1379] (the **Winding-Up Directive**), among other pieces of EU legislation. The Insurers (Reorganisation and Winding Up) Regulations 2004, which originally implemented the Winding-Up Directive and set out the law applicable to the reorganisation and winding up of insurance undertakings, were amended to reflect Solvency II.[1380] Part IV of the Regulations provides for the priority of payment of insurance claims in a winding up, as well as making other modifications to the general law of insolvency.

22.2.6 As an alternative to winding up, the court may reduce the value of an insurance company's contracts if an insurer is unable to pay its debts. This sweeping power is intended to enable the insurer to avoid a winding up if the reduction of its liabilities would enable it to carry on business as a going concern. The court may also reduce the value of insurance contracts entered into by a life assurance company that is being wound up.[1381]

22.2.7 An insurer carrying on long-term business may only be wound up voluntarily with the consent of the PRA, which must, before refusing or giving consent, consult the FCA. The directors must notify the PRA of any proposed resolution for voluntary winding up. Failure to notify is an offence and any winding-up resolution passed without PRA consent is void. The Act also makes provision for the administration of insurers. Where an insurer is in administration, regulations provide for the

1377 Section 379. See the Insurers (Winding Up) Rules 2001 (SI 2001/3635) and the Insurers (Winding Up) (Scotland) Rules 2001 (SI 2001/4040).
1378 Directive 2009/138/EC.
1379 Directive 2001/17/EC.
1380 SI 2004/353.
1381 Sections 377, 376(8) and 376(9). In May 2021, HM Treasury published a consultation on proposed amendments to section 377 that are intended to clarify the scope of the write-down powers. The proposals also provide for: (i) the appointment of a "write-down manager" to oversee and implement a write-down under section 377 of the Act; (ii) a moratorium, and (in the case of life policies only) stay on policyholder surrender rights, on the termination or suspension of financial contracts and service contracts in administration, winding-up or a write-down under section 377; and (iii) new rule-making powers for the PRA that would enable the PRA to extend the scope of FSCS protection to cover write-downs under section 377 of FSMA.

administrator to provide assistance to the FSCS to enable the scheme manager to administer the compensation scheme in relation to insurance contracts and/or enable the scheme manager to secure continuity of insurance in relation to any long-term business.[1382]

22.3 Special Resolution Regime

22.3.1 While Part 24 of the Act addresses certain aspects of insolvency processes relating to authorised firms, the Banking Act 2009 (the **Banking Act**) provides for a special resolution regime (the **SRR**) that applies to banks, certain investment firms, banking group companies and central counterparties (**CCPs**).

22.3.2 The SRR comprises five pre-insolvency stabilisation options for firms in financial difficulties:

(a) the transfer of all or part of a bank to a private sector purchaser;

(b) the transfer of all or part of a bank to a bridge bank owned by the Bank;

(c) the transfer of all or part of a bank or bridge bank to an asset management vehicle;

(d) bail-in; and

(e) the transfer of a bank, or a bank holding company, into temporary public ownership.

22.3.3 The SRR was originally introduced during the 2008 financial crisis, and was subsequently amended to reflect the resolution regime established under the EU Bank Recovery and Resolution Directive (**BRRD**).[1383] The SRR, and the Banking Act as a whole, were also amended to reflect certain aspects of the EU BRRD II Directive in December 2020, although the Treasury ultimately decided not to implement certain features of that Directive.[1384]

22.3.4 In addition, the Banking Act 2009 created two new insolvency procedures for failing banks (the bank insolvency procedure and the

[1382] Sections 366 and 360. See the Financial Services and Markets Act 2000 (Administration Orders Relating to Insurers) Order 2010 (SI 2010/3023).
[1383] Directive 2014/59/EU.
[1384] Directive (EU) 2019/879.

bank administration procedure), and a special administration regime that applies to certain investment firms.

22.3.5 Further discussion of the Banking Act 2009 is beyond the scope of this Guide.

22.4 Compensation

22.4.1 The Act originally required the FSA to establish the FSCS. The Act, as amended by the FS Act 2012, requires the PRA and the FCA to take such steps as are necessary to ensure that the scheme manager of the FSCS is, at all times, capable of exercising the functions conferred on it under the Act. What would happen should the scheme manager fail is unclear. The chairman and other board members of the scheme manager are appointed by the PRA and the FCA, with the chairman subject to approval by the Treasury.[1385]

22.4.2 The FSCS is designed to provide compensation to depositors, investors and policyholders where a regulated firm is unable to meet its obligations. No protection is provided in respect of unauthorised firms unlawfully engaging in regulated activities (for example, 'boiler rooms'). The FSCS implements certain obligations which originally applied to the UK under various EU Directives. Although there is a single compensation scheme, the level of coverage varies depending on the type of business engaged in. Detailed consideration of the rules of the FSCS, and the procedure for claiming compensation, is outside the scope of this Guide.

22.4.3 The Act gives the PRA and the FCA wide-ranging powers to establish the rules of the FSCS, although the scheme manager is responsible for assessing and paying compensation, as well as imposing levies on authorised firms to meet its expenses (including expenses incurred in paying compensation). The Treasury is required to specify by order the cases in which the PRA is responsible for making rules on the payment of compensation as well as the cases where the FCA is responsible. Each regulator, and the scheme manager, must co-operate with each other. MoUs between the FSCS and FCA, and the FSCS and PRA, setting how such co-operation is to be effected, were published in April 2013.[1386] The MoU between the PRA and the FSCS was updated in September 2019 to

[1385] Sections 212(2) and 212(4).
[1386] MoU between the PRA and the FSCS; MoU between the FCA and the FSCS.

reflect minor changes to certain legislative functions and other organisational changes.

22.4.4 Coverage by the FSCS is extended to "successors" that have assumed responsibility for the liabilities arising from acts or omissions of relevant firms where they are unable, or are likely to become unable, to satisfy claims against them.[1387]

22.4.5 The FSCS is funded by the financial services industry. Broad powers exist to determine how the FSCS is funded, including the level of levies paid by firms carrying on different classes of regulated activities.[1388] The Treasury may permit the scheme manager to impose levies to maintain contingency funds from which possible expenses may be paid.[1389] The Treasury may also require the FSCS to contribute to the costs of resolution of a failing institution.[1390]

22.4.6 Compensation is, broadly speaking, available to private individuals and small businesses.[1391] Authorised firms, overseas financial services institutions, pension and retirement funds and governments are generally not protected.[1392] Detailed consideration of the conditions is outside the scope of this Guide. Different maximum amounts of compensation are payable to deposit holders and investors. The current levels of cover are:

Protected claim	Level of cover	Maximum payment
Deposits	100%	£85,000[1393]
Investment business	100%	£85,000[1394]
Home finance mediation	100%	£85,000[1395]

1387 Section 213(1)(b).
1388 Section 214.
1389 Section 214A. Note that, at the time of writing, the commencement date for this provision, inserted by section 170(1) of the Banking Act 2009, is yet to be announced.
1390 Sections 214B, 214C and 214D.
1391 Note that deposit protection under the FSCS is now available to all persons except certain categories of excluded persons (largely different types of regulated firm) and so will generally be available to corporates. See Rule 2.2 of the 'Depositor Protection' part of the PRA Rulebook.
1392 COMP 4.2.1R and COMP 4.2.2R of the 'Compensation sourcebook' (COMP) and Rule 2.2 of the 'Depositor Protection' part of the PRA Rulebook for CRR firms.
1393 Rule 4.2 of the 'Depositor Protection' part of the PRA Rulebook for CRR firms.
1394 COMP 10.2.3 of the FCA 'Compensation sourcebook' (COMP).
1395 *Ibid.*

Protected claim	Level of cover	Maximum payment
General insurance	100% if compulsory insurance	Unlimited
	90% in all other cases	Unlimited[1396]
Long-term insurance	100%	Unlimited[1397]
Non-investment insurance distribution	100% if compulsory insurance	Unlimited
	90% in all other cases	Unlimited[1398]
Debt management business	100%	£85,000[1399]

22.4.7 The FS Act 2010 introduced a new procedure under which the Treasury can require the scheme manager to act as the agent of other compensation schemes (including overseas schemes) where compensation is payable under those schemes.[1400] This is primarily intended to allow the FSCS to deliver compensation to UK customers of overseas financial firms as the agent of relevant overseas compensation schemes. In this case, the FSCS will not use its own resources, or raise levies on authorised firms, to pay such compensation.

22.5 Reforms to the Financial Services Compensation Scheme

22.5.1 The Banking Reform Act made a number of reforms to the FSCS and the compensation scheme itself, including:

(a) amendments to the Insolvency Act 1986 to provide that deposits that are eligible for protection under the FSCS are to be

[1396] Rule 17.2(1) of the 'Policyholder Protection' part of the PRA Rulebook for SII Firms and Non-SII Firms.
[1397] Rule 17.2(2) of the 'Policyholder Protection' part of the PRA Rulebook for SII Firms and Non-SII Firms.
[1398] COMP 10.2.3R of the FCA 'Compensation sourcebook' (COMP).
[1399] *Ibid.*
[1400] Sections 224B to 224F.

preferential debts.[1401] This ensures that, in the event of a bank's insolvency, these deposits will rank ahead of the claims of other unsecured creditors; and

(b) amendments to Part 15 of the Act to impose statutory duties on the manager of the FSCS, requiring it to: (i) operate the scheme swiftly and efficiently for the benefit of claimants; (ii) mitigate taxpayer costs; (iii) provide the Treasury with accountability and management information; and (iv) have a chief executive, who should also be the FSCS's accounting officer.[1402]

22.5.2 The Deposit Guarantee Schemes Directive,[1403] on which the FSCS was originally based, was replaced and recast by a new Directive in 2014.[1404] The recast Directive was transposed into UK law by the Deposit Guarantee Scheme Regulations 2015 and the 'Depositor Protection' and 'Policyholder Protection' Parts of the PRA Rulebook, which came into force on 3 July 2015.[1405]

22.5.3 Further implementation of the Directive was made through PRA policy statements. Changes to the PRA's rules in relation to FSCS funding, depositor eligibility, temporary "high balance" deposit protection, firms' depositor disclosure requirements, and the speed of FSCS pay outs were published in a PRA policy statement in April 2015.[1406] The PRA has subsequently published further policy statements making amendments to the rules, most recently in March 2021.[1407]

22.5.4 The FSCS originally provided protection in respect of business conducted with EEA firms operating in the UK on a cross-border basis (whether through an establishment or on a freedom of services basis) in a broad range of circumstances. That is no longer the case, and protection now only applies to deposits made with, or products sold by, a UK or Gibraltar establishment of an authorised person. Deposits and other products (including contracts of insurance) made with or sold by EEA firms prior to IP Completion Day which benefitted from FSCS protection prior to that date will, however, continue to do so.

[1401] Section 13 of the Banking Reform Act and sections 175 and 386 of, and Schedule 6 to, the Insolvency Act 1986.
[1402] Sections 14 to 16 of the Banking Reform Act.
[1403] Directive 94/19/EC.
[1404] Directive 2014/49/EU.
[1405] SI 2015/486.
[1406] PRA Policy Statement PS6/15 'Depositor and dormant account protection' dated April 2015.
[1407] PRA Policy Statement PS4/21 'Depositor protection: Identity verification' dated March 2021.

23. AUDITORS AND ACTUARIES

23.1 Overview

23.1.1 The Act confers on the PRA and the FCA powers in relation to the appointment and disqualification of, and information-gathering from, auditors and actuaries.

23.1.2 Part 22 of the Act provides for the appointment of auditors and actuaries of authorised firms, their right of access to certain information and obligations to provide certain information and notifications to the regulators, and powers to the regulators to disqualify, and reinstate, auditors and actuaries in certain circumstances. It also makes it a criminal offence for authorised firms to provide an auditor or actuary with false or misleading information. The main regulatory rules made under Part 22 are set out in the PRA Rulebook, Auditors Part and the FCA Handbook, SUP Manual, Chapters 3 and 4.

23.2 General duties

23.2.1 The PRA is obliged to maintain arrangements for the sharing of information that it is not prevented from disclosing, and the exchange of opinions, with auditors of PRA-authorised persons[1408]. The PRA must issue and maintain a code of practice describing how it will comply with these obligations. In order to comply with this obligation, the PRA published Legacy Supervisory Statement LSS7/13 which covers the nature of the relationship between the supervisor and auditor, the form and frequency that communication between the two parties should take, and the responsibilities and scope for sharing information between the two parties. While the FCA is not subject to the same requirement under Part 22 of the Act, it published a code of practice under its general power in Section 139A to provide guidance, which covers, broadly, the same areas.[1409]

23.2.2 Both the FCA and the PRA must make arrangements for meetings to take place at least annually between themselves and the auditors of certain PRA-authorised persons (broadly, UK banks and PRA-designated investment firms) and each must include in its annual report the

[1408] Section 339A(1).
[1409] Sections 339A(1)-(6). PRA Legacy Supervisory Statement LSS7/13 "The relationship between the external auditor and supervisor: a code of practice' (April 2013). FCA Finalised Guidance 13/3 "Code of practice for the relationship between the external auditor and the supervisor" (March 2016, updating July 2013).

number of such meetings held during the period to which the report relates.[1410]

23.3 Appointment

23.3.1 Where not already obliged to do so under another enactment (for example, the Companies Acts), rules made by the appropriate regulator may require an authorised firm to appoint an auditor or actuary, and require an authorised firm to produce periodic financial reports and to have such reports reviewed by an auditor or an actuary. The appropriate regulator is the PRA for a PRA-authorised firm or, in any other case, the FCA. These rules may also make provision for requirements concerning an auditor's or actuary's appointment, such as notification to the appropriate regulator, pre-appointment, conditions of remuneration, term of office, removal and resignation. The regulators may also specify requirements in relation to their qualifications, experience and any other relevant matters.[1411]

23.4 Information

23.4.1 An auditor or actuary of an authorised firm has a right of access at all times to the authorised firm's books and accounts and is entitled to require such information and explanations as he thinks necessary for the performance of his duties from the officers of the authorised firm. The provision of information or the expression of opinions to a regulator by the auditor or actuary of an authorised firm, or the auditor of an recognised investment exchange (**RIE**), will not result in his breaching any duty to which he is subject, as long as he acts in good faith and reasonably believes that the information or opinion is relevant to any functions of that regulator. This applies whether or not the auditor or actuary is responding to a request from the regulator.[1412]

23.4.2 Similar provisions apply in relation to the passing on by auditors and actuaries of information of which they have become aware in their capacity as auditor or actuary of persons who have "close links" with an authorised firm or, in respect of an auditor, an RIE[1413]. A person with close links is defined in Section 343(8) as a parent or subsidiary

[1410] Sections 339B and 339C.
[1411] Sections 340(1), 340(2), 340(4), 340(5A) and 340(6). FCA Handbook, SUP Manual, Chapter 3, Sections 3.3, 3.4, 4.3 and 4.4. PRA Rulebook, Auditors Part, Rules 2 and 3.
[1412] Sections 341 and 342. The FCA also stated in its Dear CEO Letter to auditors (August 2020) that its Finalised Guidance "Our framework: assessing adequate financial resources" (June 2020) and its Primary Market Bulletin 27 for public listed companies (November 2020 updating March 2020) will assist auditors in fulfilling their duties to report to the regulator.
[1413] Section 343. *Ibid.*

undertaking of the authorised firm or RIE, a parent undertaking of a subsidiary undertaking of the firm or RIE, or a subsidiary undertaking of a parent undertaking of the firm or RIE.

23.4.3 There is power in the Act for the Treasury to specify circumstances in which an auditor or actuary must pass on information to a regulator concerning an authorised firm or persons who have close links with an authorised firm or, in respect of an auditor, an RIE[1414]. Regulations have been made requiring auditors to inform the relevant regulator if the auditor reasonably believes that the authorised firm or RIE has, or may have, contravened requirements under the regulatory system that may be of material significance to the regulator[1415]. The notification requirement also applies if the auditor reasonably believes that the matters may be of material significance to the appropriate regulator in determining whether an authorised firm satisfies the threshold conditions or an RIE satisfies the qualifications for recognition, or that the authorised firm or RIE is not, may not be or may cease to be, a going concern. The auditor must also notify the appropriate regulator of material qualifications to the accounts or other relevant reports (for example, if the accounts do not give a true and fair view).

23.4.4 Regulations have also been made requiring an actuary to notify the appropriate regulator if he reasonably believes that: (a) an insurer is or may be in breach of the rules and such contravention may be of material significance to the regulator; (b) the information he has may be of material significance to the regulator in determining whether the insurer continues to satisfy the threshold conditions; (c) there is a significant risk that the assets in the long-term fund are, may be or may become inadequate to meet the insurer's liabilities; or (d) there is a significant risk that the insurer did not, does not, will not or may not take into account in a reasonable and proportionate manner the interests of its policyholders[1416].

23.4.5 If a matter concerning an authorised firm that is a credit institution[1417] or an investment firm[1418] is communicated to the FCA or the PRA by an actuary or auditor in accordance with the Regulations referred to in

[1414] Sections 342(5) and 343(5).
[1415] The Financial Services and Markets Act 2000 (Communications by Auditors) Regulations 2001 (SI 2001/2587), as amended by the Central Securities Depositories Regulations (SI 2017/1064).
[1416] The Financial Services and Markets Act 2000 (Communications by Actuaries) Regulations 2003 (SI 2003/1294).
[1417] "credit institution" is defined under Section 417(1) as "an undertaking the business of which is to take deposits or other repayable funds from the public and to grant credits for its own accounts".
[1418] As defined under UK CRR. See Section 342(8) and Section 417(1), definition of "capital requirements regulation".

paragraphs 23.4.3 and 23.4.4, the matter must be disclosed simultaneously to the management body of the firm, unless there are compelling reasons not to do so[1419].

23.4.6 The appropriate regulator is required to be notified without delay where an auditor or actuary is removed from office or is not re-appointed or where an auditor or actuary resigns before the expiry of his term of office[1420].

23.4.7 The PRA expects that auditors of major UK banks and building societies will provide written reports to the PRA in relation to the audited annual report and accounts (in respect of financial years with accounting reference dates on or after 1 November 2016) of such firms. Such reports must be provided within four months of the end of the relevant financial year, prepared with due skill, care and diligence, and provide information regarding key judgment areas, including: (a) matters of valuation; (b) quality of earnings; (c) key accounting judgments; and (d) the quality of the systems and controls relevant to the preparation of a firm's annual report and accounts.[1421]

23.4.8 Following the introduction of the UK ring-fencing regime, the PRA extended this rule to the audited annual reports and accounts (with accounting reference dates on or after 31 December 2018) of: (a) such a firm's parent undertaking (where such an entity exists and the auditor of the firm is also the auditor of the ultimate parent undertaking) and; (b) where the firm is a ring-fenced body, the ring-fenced holding company (where this entity exists).[1422]

23.5 FCA and PRA investigations

23.5.1 Part 11 of the Act (discussed in Chapter 16 'Investigations and discipline') deals with investigations of authorised firms and gives both regulators power to require an authorised firm to provide them with a

[1419] Sections 342(6A) and 343(6A).
[1420] Section 344.
[1421] PRA Rulebook, Auditors Part, Rule 8.1, 8.2, 8.3(1) and 8.4. See also Policy Statement 1/16 "Engagement between external auditors and supervisors and commencing the PRA's disciplinary powers over external auditors and actuaries" (January 2016) and PRA Supervisory Statement 1/16 on "Written reports by external auditors to the PRA" (March 2019, updating January 2016).
[1422] PRA Rulebook, Auditors Part, Rules 8.1, 8.3(2), 8.3(3) and 8.3A. See also PRA Policy Statement 6/19 on "Responses to CP24/18 Occasional Consultation Paper — Chapters 3-7" (March 2019) and PRA Supervisory Statement 1/16 "Written reports by external auditors to the PRA (March 2019 updating January 2016).

report by an accountant or other expert, including an actuary, or auditor of an authorised firm[1423].

23.6 Disciplinary measures

23.6.1 The FCA has the power to disqualify an auditor or actuary from acting for any authorised firm or class of authorised firm, or any RIE or class of RIE, if an auditor or actuary has failed to comply with a duty imposed by FCA rules or to communicate information to the FCA as required under the Act. The FCA may also publish a public censure and impose a financial penalty. If it publishes a public censure, it must provide a copy to the auditor or actuary and any third party who has received a copy of the decision notice provided to the auditor or actuary by the FCA.[1424]

23.6.2 The PRA has equivalent powers to disqualify the auditor or actuary of a PRA-authorised firm from acting for any PRA-authorised firm or class of PRA-authorised firm if the auditor or actuary has failed to comply with a duty imposed by PRA rules or to communicate information to the PRA as required under the Act. The PRA may also publish a public censure and impose a financial penalty.[1425] These powers were brought into effect from February 2015[1426]. If it publishes a public censure, it must provide a copy to the auditor or actuary and any third party who has received a copy of the decision notice provided by the auditor or actuary by the PRA[1427]. The FCA has the power to extend any disqualification made by the PRA to any FCA-authorised firm or class of FCA-authorised firm, or any RIE or class of RIE[1428].

23.6.3 If either of the FCA or the PRA intends to exercise these powers, the auditor or actuary must be given a warning notice and a decision notice, and has a right of appeal to the Tribunal[1429]. The relevant regulator must also notify the other regulator and notify the auditor or actuary that it has done so[1430]. The FCA and the PRA are required to

[1423] Sections 166 and 166A. FCA Handbook, SUP Manual, Chapter 5, 5.4.6G, 5.4.7G and 5.4.9G. PRA Rulebook, Use of Skilled Persons Part, Rule 3.1 and PRA Supervisory Statement 1/16 "Written reports by external auditors to the PRA" (March 2019, updating January 2016).
[1424] Sections 345(1), 345(2) and 345C. FCA Handbook, Enforcement Guide, Chapter 15, Rule 15.1.2.
[1425] Section 345A(1)-(4).
[1426] By the Financial Services and Markets Act 2000 (Regulation of Auditors and Actuaries) (PRA Specified Powers) Order 2015 (SI 2015/61).
[1427] Section 345C.
[1428] Section 345(3).
[1429] Section 345B.
[1430] Sections 345(5)(a), 345(5)(b), 345A(5)(a) and 345(5)(b).

publish statements of policy on the imposition of penalties and have done so[1431].

23.6.4 The FCA or PRA may remove an auditor or actuary disqualification if they are satisfied the disqualified person will, in future, comply with the duties set out in paragraphs 23.6.1 and 23.6.2 respectively. The FCA may remove an extension of a PRA disqualification as set out in paragraph 23.6.2 at any time.[1432]

23.7 Provision of information to auditors and actuaries

23.7.1 It is a criminal offence for an authorised firm knowingly or recklessly to give an auditor or actuary appointed under the Act information that is false or misleading in a material particular[1433].

[1431] Sections 345D and 345E. The FCA's statement of policy is contained in the FCA Handbook, Decision Procedure and Penalties Manual (DEPP), Chapter 6. The PRA's statement of policy is contained in its policy document "The Prudential Regulation Authority's approach to enforcement: statutory statements of policy and procedure" (October 2019, updating March 2019).
[1432] Sections 345(6), 345A(7) and 345(7).
[1433] Section 346.

24. LLOYD'S OF LONDON

24.1 Overview

24.1.1 Lloyd's operates a market for the provision of insurance in which expert underwriting agents give professional advice to Lloyd's members on underwriting insurance risks.

24.1.2 Part 19 of the Act sets out the framework for the regulatory treatment of the Lloyd's market. The Lloyd's market is supervised and regulated on an external basis by the PRA and the FCA, and on an internal basis by the Council of Lloyd's. Lloyd's and Lloyd's managing agents must be authorised by the PRA. Members' agents and Lloyd's brokers must be authorised by the FCA. Lloyd's members are not currently required to be authorised.

24.2 Lloyd's

24.2.1 As a PRA-authorised firm, Lloyd's is subject to prudential rules made by the PRA. The conduct of Lloyd's is regulated by the FCA. The memorandum of understanding (**MoU**) between the FCA and the PRA provides that there will be a supervisory college for Lloyd's to ensure appropriate co-ordination between the PRA and the FCA in the supervision of Lloyd's. The MoU also provides that the PRA and the FCA will co-ordinate with each other and Lloyd's over the use by Lloyd's of its rule-making and enforcement powers.

24.2.2 So far as is relevant to their respective functions, the FCA and the PRA must each exercise general oversight over the way in which the Council of Lloyd's supervises and regulates the Lloyd's market and the way in which the regulated activities that are the responsibility of that regulator are being carried on in the Lloyd's market. The Act allows the FCA or the PRA, upon consultation with the other, to give specific directions to Lloyd's or the Council of Lloyd's in relation to the exercise of its regulatory powers over the Lloyd's market. The Council of Lloyd's continues to make and enforce Lloyd's byelaws.[1434]

24.2.3 The PRA's objectives are modified in relation to Part 19 of the Act, so that a reference to PRA-authorised firms includes a reference to Lloyd's and its members, taken together[1435]. Consequently, although Lloyd's

[1434] Sections 314 and 318.
[1435] Section 314A.

members are not authorised firms, the PRA must consider them alongside Lloyd's when carrying out its objectives in relation to Lloyd's.

24.3 Underwriting agents

24.3.1 Underwriting agents (managing agents and members' agents) are subject to the Lloyd's byelaws.

24.3.2 However, managing the underwriting capacity of a Lloyd's syndicate as a managing agent is a PRA-regulated activity under the PRA-Regulated Activities Order and so firms that engage in this activity are subject to prudential supervision by the PRA and regulation of conduct by the FCA. Advising Lloyd's members on syndicate participation is also a regulated activity under the Regulated Activities Order and so firms that engage in this activity are regulated, on a prudential and conduct basis, by the FCA.

24.3.3 Underwriting agents must meet the threshold conditions, and comply with the senior managers and certification regime as well as the COBS Rules and other relevant provisions of the PRA Rulebook and the FCA Handbook.

24.4 Members and former members

24.4.1 Lloyd's members are not required to be authorised firms to carry on their underwriting activities, unless the FCA or the PRA so directs[1436].

24.4.2 The Act permits the FCA or the PRA, with the consent of the other, to extend the basic authorisation requirement to cover Lloyd's members' underwriting activities. It also permits the FCA or the PRA, with the consent of the other, to direct that certain core provisions of the Act will apply to members without requiring them to be authorised. The FCA or the PRA may only extend this requirement in pursuit of certain of their respective statutory objectives.

24.4.3 Former members, who ceased being underwriting members on or after 24 December 1996, are permitted to carry out contracts of insurance underwritten at Lloyd's as exempt firms[1437]. The PRA may make rules imposing requirements on former underwriting members.

[1436] Sections 316 to 317.
[1437] Sections 324(1) and 320.

24.5 Transfers of business

24.5.1 The Act permits the Treasury to apply the provisions of the Act dealing with the transfer of insurance business to a transfer of business carried on by members (or former members) of Lloyd's. This has been done[1438].

24.6 Compensation

24.6.1 Policyholders under insurance contracts underwritten at Lloyd's have a claim for compensation from the Lloyd's Central Fund. The PRA Rulebook[1439] states that when making payments or providing other forms of financial assistance from the Central Fund, Lloyd's must ensure that, in determining the amount of any payment or other financial assistance, it takes no account of the amounts of compensation that policyholders may receive under the provisions of the FSCS in respect of protected claims against members.

[1438] The Financial Services and Markets Act 2000 (Control of Transfers of Business Done at Lloyd's) Order 2001 (SI 2001/3626).
[1439] PRA Rulebook — Lloyds, 7.1 to 7.3.

25. MUTUALS

25.1 Overview

25.1.1 This chapter describes very briefly the regulatory arrangements for mutuals. A fuller discussion is beyond the scope of this Guide.

25.1.2 The Financial Services Act 2012 (Mutual Societies) Order 2013[1440] (the **Mutuals Order**) provides for the exercise by the FCA and the PRA of functions relating to mutual societies under specified provisions of the Act. The provisions relating to the FCA are set out in paragraph 2 of Schedule 1 to the Mutuals Order; the provisions relating to the PRA are set out in paragraph 3 of Schedule 1.

Register

25.1.3 A public record of registered mutual societies can be accessed at https://www.fca.org.uk/firms/mutuals-public-register. Mutual societies that are also authorised firms appear on the Financial Services Register maintained by the FCA.

25.2 Regulation of mutuals

25.2.1 Although many of the FSA's responsibilities and functions in relation to mutuals were transferred to the FCA and the PRA under the Mutuals Order, much of the pre-existing mutuals legislation remains in place.

Division of responsibilities between the FCA and the PRA

25.2.2 The remit for the supervision of mutuals is split broadly as follows:

(a) the PRA is responsible for prudential safety and soundness and enforcement in respect of PRA-related offences; and

(b) the FCA is responsible for other provisions, including those related to registration, the register and the public file, enforcement in respect of non-PRA related offences and the

[1440] SI 2013/496. The Mutuals Order amended the Industrial and Provident Societies Act 1965, the Industrial and Provident Societies Act 1967, the Friendly and Industrial and Provident Societies Act 1968, the Friendly Societies Act 1974, the Credit Unions Act 1979, the Credit Unions (Northern Ireland) Order 1985, the Building Societies Act 1986 and the Friendly Societies Act 1992, largely to reflect the transfer of functions from the FSA. Schedules 2, 3 and 4 to the Mutuals Order were repealed by the Co-operative and Community Benefit Societies Act 2014.

majority of the administrative functions relating to the regulation of mutuals.

25.2.3 See Chapter 5 'The Prudential Regulation Authority', Chapter 6 'The Financial Conduct Authority' and Chapter 7 'Co-ordination between the PRA and the FCA' for more information on the division of responsibilities between the FCA and the PRA under the Act.

The objectives of the PRA and the FCA

25.2.4 In discharging the functions transferred to it under the Mutuals Order, the PRA must act in a way that advances its general objective and, where applicable, its insurance objective[1441].

25.2.5 The FCA's objectives do not apply to the functions transferred to it under the Mutuals Order[1442]. The FCA's mutuals functions are largely administrative, so the FCA has little or no discretion over how it exercises those functions. The FCA's objectives do, of course, still apply to its regulation of authorised mutuals.

Mutual ownership model

25.2.6 To ensure that a "level playing field" operates across the financial system, both the PRA and the FCA must, when consulting on changes to their rules, consider the extent to which costs associated with the changes would affect mutually owned institutions differently to other ownership models[1443].

25.2.7 The Treasury has stated that this process "*will serve to build up an impartial evidence base so as to assist the regulators, the public and Government in understanding whether the legislative framework continues to treat diverse financial business models appropriately*"[1444].

25.3 Building societies

25.3.1 The regime established by the Building Societies Act 1986 relating to the constitution, corporate governance and principal purpose of building societies remains in place. However, the FCA and the PRA are now the regulators of building societies.

1441 Paragraph 3(2)(b) of Schedule 1 to the Mutuals Order; and sections 2B and 2C of the Act.
1442 Paragraph 2(2) of Schedule 1 to the Mutuals Order.
1443 Section 138K.
1444 The Treasury consultation document 'A new approach to financial regulation: building a stronger system' (February 2011), Cm 8012, page 89.

25.3.2 The PRA has the following functions in relation to building societies:

(a) to secure that the principal purpose of building societies remains that of making loans that are secured on residential property and are funded substantially by their members;

(b) to administer the system of regulation of building societies (in so far as sections 5(1), 9A and 9B of the Building Societies Act 1986 relate to that system); and

(c) to advise and make recommendations to the Treasury and other Government departments on any matter relating to building societies[1445].

25.3.3 The regulatory position of building societies derives from EU primary legislation, the PRA Rulebook and, to a limited extent, the FCA Handbook. The prudential rules are contained in the UK **CRR** and the 'CRR firms' part of the PRA Rulebook.

25.4 Friendly societies

25.4.1 The regime established by the Friendly Societies Act 1974 and the Friendly Societies Act 1992 relating to the "corporate code" for friendly societies remains largely in place. The FCA is now responsible for the registration of friendly societies and the PRA for their prudential supervision.

25.4.2 Most (non-financial) industrial and provident societies and other societies registered under the Friendly Societies Act 1974 continue to be unregulated.

25.5 Credit unions

25.5.1 The intention behind regulating credit unions is to give credit union members protection similar to that afforded to bank and building society depositors, including membership of a share protection scheme. In recent years there has been increasing political interest in credit unions as vehicles for improving financial and social inclusion.

25.5.2 The FCA shares responsibility with the PRA for the regulation of credit unions. Credit unions are included within the FSCS and are included

[1445] Paragraph 3(3) of Schedule 8 to the Mutuals Order, amending section 1 of the Building Societies Act 1986.

together with banks and building societies in the deposit-takers' contribution group.

25.5.3 The regulatory regime relating to credit unions is set out in the 'Credit Unions' part of the PRA Rulebook, PRA Supervisory Statement SS2/16 (updated in March 2020) (concerning prudential regulation) and, as part of the FCA Handbook, the Credit Unions Sourcebook (**CREDS**). In February 2016, the regulators published a policy statement PS4/16 and PS 16/1 containing feedback and final rules relating to a number of reforms, including changes to CREDS.

26. MISCELLANEOUS

26.1 Public record

26.1.1 Section 347 of the Act requires the FCA to maintain a public register of authorised firms, approved individuals, prohibited individuals and authorised collective investment schemes among others. It is currently known as the Financial Services Register and is maintained online. Section 347A gives the PRA a duty to disclose to the FCA information relevant to the register. The regulatory jurisdiction for the Register also comes under the Payment Services Regulations 2009, Electronic Money Regulations 2011 and Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017.

26.2 Disclosure of information by the FCA and the PRA

26.2.1 The Act makes provision for the FCA and the PRA to keep confidential certain information that they receive[1446]. However, the Treasury can, by regulations, specify "gateways" allowing the regulators to disclose such information, for example, to other regulatory authorities, or for specified purposes. The relevant regulations set out the circumstances in which confidential information may be disclosed by or to the regulators, the Secretary of State or the Treasury. Information may also be disclosed by or to other persons for specified purposes (usually for the purposes of their public functions)[1447].

26.3 Notice procedures

26.3.1 Part 26 of the Act contains detailed provisions concerning notices the regulators must give when taking certain decisions under the Act. Generally speaking, there are three categories of decision:

(a) disciplinary, or more significant supervisory decisions (for example, concerning market abuse, imposing penalties, withdrawing approvals or cancelling permissions);

(b) lesser supervisory decisions (for example, varying requirements or permissions); and

[1446] Section 348.
[1447] Various statutory instruments have been made, including the Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001 (SI 2001/2188), which have been amended on numerous occasions.

(c) application-related decisions (for example, granting or refusing applications for permission, approval or recognition).

26.3.2 The notice procedures differ depending on the type of decision, with, for example, greater protection being offered to persons in the case of disciplinary decisions (where the regulator is required to issue warning, decision and final notices in order to take action). In addition, section 415B requires the regulators to consult before issuing certain warning notices.

26.3.3 The Act also deals with when and what information concerning the various notices can be published by the regulator or the person to whom a notice is addressed or copied[1448]. Over the years, the position in this regard has changed and moved towards greater transparency. The position now tends to depend on the nature of the notice and the section under which it is given. In brief, the position is that:

(a) in relation to decision or final notices, the regulator giving the notice must publish such information about the matter to which the notice relates as it considers appropriate. However, the person to whom a decision notice is given or copied must not publish the decision notice (or any details concerning it) unless the regulator giving the notice has published the notice (or those details);

(b) in respect of warning notices, publicity depends on the section of the Act under which it is given. Neither the regulator nor the person to whom a warning notice is given may publish a warning notice (or any details about it) unless the warning notice is given under a section listed in section 391(1ZB), which provisions broadly relate to disciplinary outcomes (that is, where the regulator is proposing to censure, fine or suspend a firm or individual). In this case, the regulator may, after consulting the persons to whom a notice is given or copied, publish such information about the matter to which the warning notice relates as it considers appropriate[1449]. The person to whom a warning notice is given or copied may not publish the

[1448] Section 391.
[1449] EG 6.2 (Publicity during, or upon the conclusions of regulatory action) of the 'Enforcement Guide' (EG) relating to the FCA Handbook. The PRA's policy on the publication of disciplinary and other enforcement actions can be found in its statement of policy 'The Prudential Regulation Authority's approach to enforcement: statutory statements of policy and procedure' (last updated in October 2019).

notice and may only publish details concerning the notice if the regulator has published those details; and

(c) in respect of supervisory notices, the publicity position depends on the section of the Act under which it is given. When a supervisory notice takes effect, the regulator giving the notice must publish such information about the matter to which the notice relates as it considers appropriate, with some important exceptions.

26.4 Injunctions and restitution

Injunctions

26.4.1 The Act makes provision in Part 25 for the "appropriate regulator" (the PRA or the FCA depending on the section of the Act) or the Secretary of State to seek injunctions in three broad circumstances: first, to restrain the contravention of certain requirements (including a provision of the Act or a regulator's rules); second, to direct remedial action in the case of a contravention; and third, to freeze a person's assets[1450].

26.4.2 Injunctions can also be sought against persons who are "knowingly concerned" with a contravention.

26.4.3 Special provision is made for the FCA (only) to seek injunctions in cases of market abuse[1451].

26.4.4 In addition, section 415B requires the regulators to consult before making certain applications for injunctions.

Restitution

26.4.5 The Act provides for restitution orders to disgorge profits or compensate for losses arising from a breach of the Act or (from 1 April 2014) Part 7 of the FS Act 2012, certain qualifying provisions or a regulator's rules[1452].

26.4.6 Restitution orders can be made by the court on the application of the Secretary of State or the "appropriate regulator" (either the FCA or the PRA depending on the requirement contravened), or by the appropriate regulator, against persons who have contravened, or have been

[1450] Section 380.
[1451] Section 381.
[1452] Sections 382 to 384.

knowingly concerned in a contravention of, a relevant requirement, although only the FCA can apply to the court or make restitution arrangements in cases of market abuse contraventions.

26.4.7 In addition, section 415B requires the regulators to consult before seeking restitution in certain cases.

26.4.8 Guidance on how the FCA uses its powers in this context is set out in section 11 of the FCA 'Enforcement Guide'.

26.5 The FCA's information-gathering and enforcement powers in relation to short selling

26.5.1 The FCA has at its disposal various information-gathering powers relating to short selling. Part 8A of the Act confers upon the FCA the power to require a person to provide information or documents and to enter premises under warrant[1453].

26.5.2 If the FCA is satisfied that a person has breached the retained EU law version of the Short Selling Regulation (236/2012) (UK SSR) or any requirement to provide information or documents about short selling to it, it may impose a financial penalty of such amount as it considers appropriate on the person who contravened the rule or requirement or any person knowingly concerned in the contravention. Alternatively, it can publish a statement of censure on the person.

26.5.3 Failure to comply with a requirement to provide information or documents without reasonable excuse is treated as contempt. In addition, knowingly or recklessly providing false or misleading information in purported compliance with such a requirement is a criminal offence, as is intentionally obstructing the exercise of any rights conferred on the FCA by a warrant[1454].

26.6 Misleading the FCA or the PRA

26.6.1 The Act makes it an offence for a person knowingly or recklessly to give the FCA or the PRA information that is false or misleading in a material particular[1455].

[1453] Sections 131E to 131FB.
[1454] Section 131L.
[1455] Section 398.

26.7 Offences by bodies corporate

26.7.1 Where a body corporate or a partnership commits a criminal offence under the Act or Part 7 of the FS Act 2012, if the offence was committed with the consent or connivance of, or is due to any neglect on the part of, an officer or partner then that officer or partner is also guilty. An "officer" for these purposes includes, in relation to a body corporate, a director, a member of a management committee, a chief executive, a manager, a company secretary or an individual who is a controller of the firm[1456].

26.7.2 Similar provision is made in respect of offences committed by unincorporated associations where the officers or members of its governing body may also incur criminal liability.

26.8 Transformer vehicles

26.8.1 Section 284A gives the Treasury power to make regulations relating to 'transformer vehicles', which are used in transactions related to insurance-linked securities.

26.8.2 The framework for transformer vehicles is set out in the Risk Transformation Regulations 2017 (SI 2017/1212), made under the same section.

26.9 Gaming laws

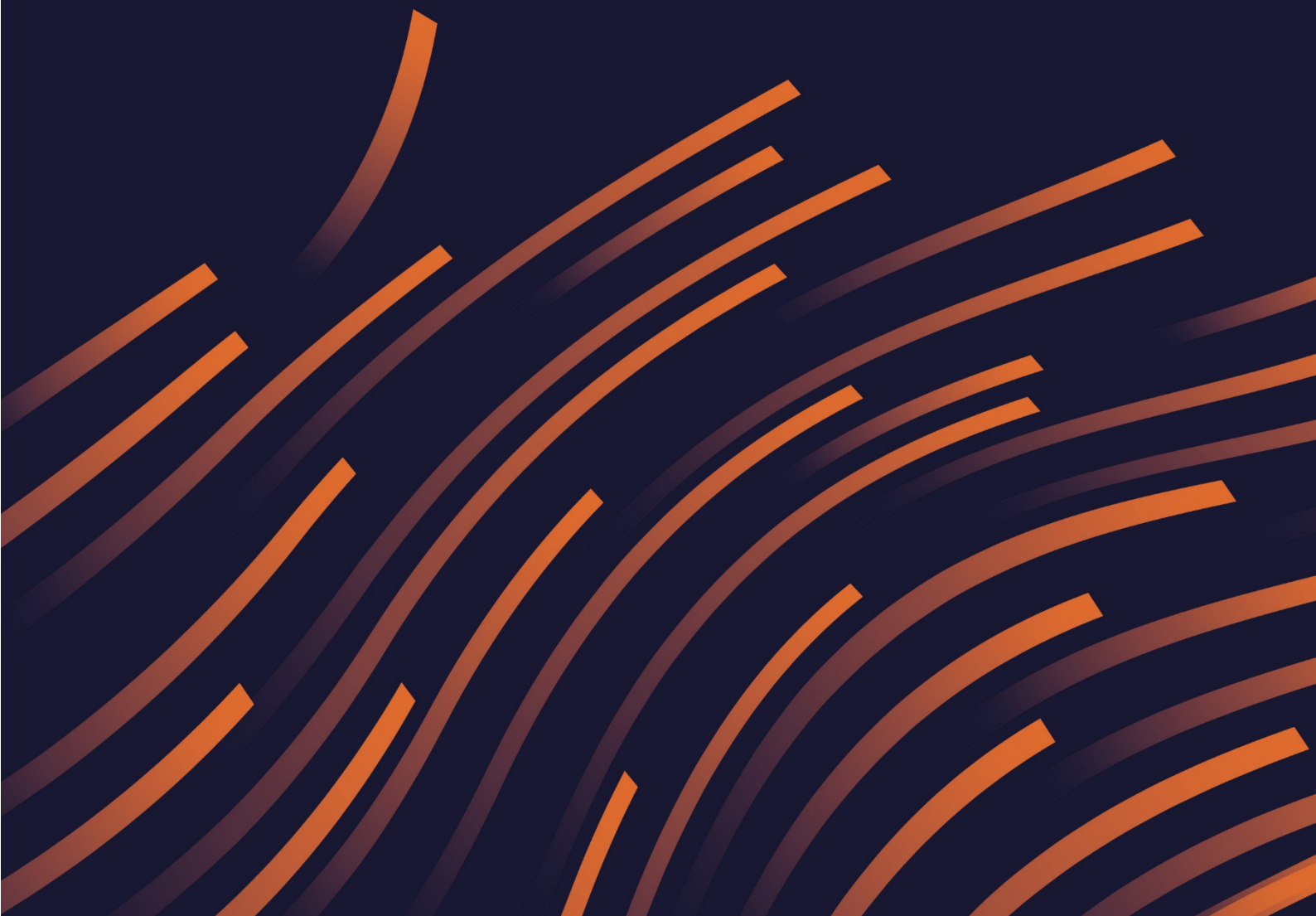
26.9.1 The Act as originally enacted made provision broadly similar to that under the FS Act 1986 whereby investment (principally derivatives) contracts were not unenforceable under gaming and wagering laws. The major provisions of these laws were repealed as from 1 September 2007, when the section was substantially amended. Since then, its practical importance has diminished[1457].

[1456] Section 400.
[1457] Section 412 and the Financial Services and Markets Act 2000 (Gaming Contracts) Order 2001 (SI 2001/2510).

SLAUGHTER AND MAY/

Glossary

Back to contents



Glossary

The following key defined terms are used in this Guide:

2016 Act	the Bank of England and Financial Services Act 2016;
Act	the Financial Services and Markets Act 2000;
ADR Directive	EU Directive 2013/11/EU on alternative dispute resolution;
ADR Regulations	the Alternative Dispute Resolution (Competent Authorities and Information) Regulations 2015 (SI 2015/542), the Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015 (SI 2015/1392), Alternative Dispute Resolution for Consumer Disputes (Amendment) (No.2) Regulations 2015 (SI 2015/1972);
AIF	alternative investment fund;
AIFM	an alternative investment fund manager;
AIFM Directive	EU Directive 2011/61/EU on Alternative Investment Fund Managers;
AIFM Exit Regulations	the Alternative Investment Fund Managers (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/328);
AIFM Regulations	Alternative Investment Fund Managers Regulations 2013 (SI 2013/1773);
Appointed Representative Regulations	the Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001 (SI 2001/1217);
Bank	the Bank of England;
Banking Reform Act	the Financial Services (Banking Reform) Act 2013;
BCBS	the Basel Committee on Banking Supervision;

BoE Act	the Bank of England Act 1998;
BRRD	EU Directive 2014/59/EU on bank recovery and resolution;
Business Order	the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001 (SI 2001/1177);
CCA	the Consumer Credit Act 1974;
CCB	the countercyclical capital buffer;
CCP	central counterparty;
CESR	the former Committee of European Securities Regulators (succeeded by the ESMA);
CIS EU Exit Regulations	the Collective Investment Schemes (Amendment etc.) (EU Exit) Regulations 2019;
CMA	the Competition and Markets Authority;
COBS Rules	the 'Conduct of Business Sourcebook' (COBS), which is contained in the FCA Handbook;
Code	the former 'Code of Market Conduct' that, until 3 July 2016, was contained in the market conduct requirements within the FCA Handbook;
COLL Rules	the requirements for 'Collective Investment Schemes' (COLL) contained in the FCA Handbook;
Complaints Commissioner	the Office of the Complaints Commissioner, the independent investigator of complaints about the PRA, the FCA and the Bank, appointed under section 84 of the FS Act 2012;
CONC Rules	the 'Consumer Credit sourcebook' (CONC) contained in the FCA Handbook;
CONRED	the 'Consumer Redress Schemes sourcebook' contained in the FCA Handbook;

Core Activities Order	the Financial Services and Markets Act 2000 (Ring-fenced Bodies and Core Activities) Order 2014 (SI 2014/1960);
Court of Directors	the Court of Directors of the Bank;
CRD IV	the EU legislation updating the EU capital requirements framework, which consists of the EU Directive (2013/36/EU) on the access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms and the EU Regulation (575/2013/EU) on prudential requirements for credit institutions and investment firms;
CRD V	the EU legislation updating the EU capital requirements framework, which consists of the EU CRD V Directive ((EU) 2019/878) and the CRR II Regulation ((EU) 2019/876);
CRR	the Capital Requirements Regulation ((EU) 575/2013));
CSD Regulation	EU Regulation 909/2014 on central securities depositories;
CSMAD	EU Directive 2014/57/EU on criminal sanctions for insider dealing and market manipulation (market abuse);
DAR	the Designated Activities Regime proposed in the Phase II consultation of the Government's Future Regulatory Framework Review;
DEPP	the 'Decision Procedure and Penalties Manual' (DEPP) that is contained in the FCA Handbook;
dual-regulated firm	an authorised firm that is regulated under the Act by both the PRA and the FCA (that is, a PRA-authorised firm);
EBA	the European Banking Authority;
ECA	The European Communities Act 1972;

EDMC	the Enforcement Decision Making Committee;
EEA	the European Economic Area comprising the EU member states together with Iceland, Liechtenstein and Norway;
EEA Passport Rights Regulations	the EEA Passport Rights (Amendment, etc., and Transitional Provisions) (EU Exit) Regulations 2018 (SI 2018/1149);
EG	the FCA 'Enforcement Guide' contained in the FCA Handbook;
EIOPA	the European Insurance and Occupational Pensions Authority;
Electronic Commerce Directive	EU Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (also known as the E-Commerce Directive);
EMIR	EU Regulation 648/2012 on European market infrastructures including OTC derivatives, CCPs and trade repositories;
ESA Regulations	the EU Regulations establishing the ESAs: Regulation 1093/2010 (the EBA), Regulation 1094/2010 (EIOPA) and Regulation 1095/2010 (ESMA);
ESAs	the European Supervisory Authorities (that is, the EBA, EIOPA and ESMA);
ESMA	the European Securities and Markets Authority;
EU MAR	EU Regulation 596/2014 on insider dealing and market manipulation (market abuse);
EUWA	the European Union (Withdrawal) Act 2018;
Excluded Activities Order	the Financial Services and Markets Act 2000 (Excluded Activities and Prohibitions) Order 2014 (SI 2014/2080);
FCA	the Financial Conduct Authority;

FCA Handbook	the FCA's Handbook of rules and guidance;
Financial Promotion Order	the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005 (SI 2005/1529);
Financial Regulators' Powers Regulations 2018	the Financial Regulators' Powers (Technical Standards etc.) (Amendment etc.) (EU Exit) Regulations 2018 (SI 2018/1115);
Financial Stability Reports	the biannual reports on financial stability published by the FPC;
FOS	the Financial Ombudsman Service;
FOS Ltd	Financial Ombudsman Service Limited;
FPC	the Financial Policy Committee of the Bank;
FRF Review	the Financial Services Future Regulatory Framework Review, launched by the UK government and announced in 2019;
FSA	the Financial Services Authority (the regulatory authority originally designated under the Act);
FS Act 1986	the Financial Services Act 1986;
FS Act 2010	the Financial Services Act 2010;
FS Act 2012	the Financial Services Act 2012;
FS Act 2021	the Financial Services Act 2021;
FSCS	the Financial Services Compensation Scheme;
FSMA Amendment Regulations	the Financial Services and Markets Act 2000 (Amendment) (EU Exit) Regulations (SI 2019/632);
FUND Rules	the 'Investment Funds sourcebook' (FUND) contained in the FCA Handbook;
Fundamental Rules	the 'Fundamental Rules' contained in the PRA Rulebook;
G-SII	globally systemically important firm;

ICB	the Independent Commission on Banking;
IFPR	the Investment Firms Prudential Regime;
Insurance Mediation Directive	EU Directive 2002/92/EC on insurance mediation;
IOSCO	the International Organization of Securities Commissions;
IP completion day	the end of the Brexit transition period;
legal cutover	1 April 2013 (the date on which the FS Act 2012 substantially came into force);
LIBOR	London Interbank Offered Rate;
Lloyd's	Lloyd's of London, a society incorporated by the Lloyd's Act 1871 (also known as the Society of Lloyd's);
LP	limited partnership;
MAD	EU Directive 2003/6/EC on insider dealing and market manipulation (market abuse);
MiFID	EU Directive 2004/39/EC on markets in financial instruments;
MiFID II	EU Directive 2014/65/EU on markets in financial instruments and MiFIR;
MiFID Investment Firm	a firm classified as an "investment firm" under MiFID;
MiFIR	EU Regulation 600/2014 on markets in financial instruments;
Mortgage Credit Directive	EU Directive 2014/17/EU on credit agreements for consumers relating to residential immoveable property;
MoU	memorandum of understanding;
MPM Order 2021	The Bank of England Act 1998 (Macro prudential Measures) (Amendment) Order 2021 (SI 2021/869);

Official List	the list of securities approved by the UK Listing Authority for trading on certain exchanges in the UK, which is maintained by the FCA under section 74(1) of the Act;
OFT	the Office of Fair Trading;
OTC	over-the-counter;
PCBS	the Parliamentary Commission on Banking Standards;
PERG Manual	the FCA 'Perimeter Guidance Manual' (PERG), which is contained in the FCA Handbook;
PIP	primary information provider;
PRA	the Prudential Regulation Authority;
PRA Handbook	the PRA's Handbook of rules and guidance, now deleted;
PRA-Regulated Activities Order	the Financial Services and Markets Act 2000 (PRA-Regulated Activities) Order 2013 (SI 2013/556);
PRA Rulebook	the PRA Rulebook of rules and directions;
Principles for Businesses	the 'Principles for Businesses' (PRIN), which are contained in the FCA Handbook;
Prospectus Directive	EU Directive 2003/31/EC on the prospectus to be published when securities are offered to the public or admitted to trading;
RCH	recognised clearing house;
REC Rules	the 'Recognised Investment Exchanges sourcebook' (REC) contained in the FCA Handbook;
Recognition Requirements Regulations	the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001 (SI 2001/995);
Regulated Activities Order	the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544);

RFB	ring-fenced body;
RIE	recognised investment exchange;
Securities Financing Transactions Regulation	EU Regulation (EU) 2015/2365 on transparency of securities financing transactions;
SCR	sectoral capital requirement;
Short Selling Regulation	EU Regulation 236/2012 on short selling and certain aspects of credit default swaps;
Single Market Directives	collectively, CRD IV, the Solvency II Directive, MiFID, the Insurance Mediation Directive, the Mortgage Credit Directive, the AIFM Directive and the UCITS Directive;
SME	small or medium sized enterprise;
Solvency II Directive	EU Directive 2009/138/EC on the taking up and pursuit of the business of Insurance and Reinsurance (Solvency II);
SRR	special resolution regime;
SUP Manual	the 'Supervision Manual' (SUP), which is contained in the FCA Handbook;
TCA	the UK-EU Trade and Co-operation Agreement, signed on 30 December 2020;
TFEU	the Treaty on the Functioning of the European Union;
TPR	the Temporary Permissions Regime, as provided in Part 3 of the EEA Passport Rights Regulations;
TR	trade repository;
Transparency Directive	EU Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated platform;
Treasury	HM Treasury;

Tribunal	the Upper Tribunal (Tax and Chancery Chamber), an independent judicial body administered by HM Courts and Tribunal Service;
TTP	the Temporary Transitional Power, as granted under Part 7 of the FSMA Amendment Regulations;
UCITS	undertakings for collective investment in transferable securities;
UCITS Directive	EU Directive 2009/65/EC on the co-ordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (also known as UCITS IV);
UCITS V	EU Directive 2014/91/EU on the co-ordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities;
UK CRR	the retained EU law version of the Capital Requirements Regulation (CRR) (575/2013);
UK CSD Regulation	the retained EU law version of the Central Securities Depositories Regulation (CSD Regulation) (909/2014);
UK EMIR	the retained EU law version of the Regulation on OTC derivative transactions, central counterparties and trade repositories (EMIR) (648/2012);
UK MAR	the retained EU law version of the Market Abuse Regulation (MAR) (596/2014); and
UK PRIIPS	the retained EU law version of the PRIIPs Regulation (1286/2014).

2021