Consultation Paper

CP11/18*

Financial Services Authority

Quarterly consultation

(No. 30)

Financial Services Authority

September 2011

Contents

The Financial Services Authority invites comments on this Consultation Paper. Comments on Chapter 9 of this CP should reach us by 6 October 2011 and comments on Chapter 2 of this CP should reach us by 20 October 2011. Comments on Question 3.8 of Chapter 3 of this CP should reach us by 6 October 2011; Comments on all other questions in Chapter 3 should reach us by 6 December 2011. Comments on all other chapters should reach us by 6 November 2011.

Comments may be sent by electronic submission using the form on the FSA's website at www.fsa.gov.uk/Pages/Library/Policy/CP/2011/cp11_18_response.shtml.

You can also respond by email: cp11_18@fsa.gov.uk

If you wish to respond by letter, please send your comments to the person named at the end of each chapter and set out below:

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It is the FSA's policy to make all responses to formal consultation available for public inspection unless the respondent requests otherwise. A standard confidentiality statement in an email message will not be regarded as a request for non-disclosure.

A confidential response may be requested from us under the Freedom of Information Act 2000. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by the Information Commissioner and the Information Tribunal.

Copies of this Consultation Paper are available to download from our website – www.fsa.gov.uk. Alternatively, paper copies can be obtained by calling the FSA order line: 0845 608 2372.

Abbreviations used in this paper

ACD	authorised corporate director
AFM	authorised fund manager
BIPRU	Prudential sourcebook for Banks, Building Societies and Investment Firms
CBA	cost benefit analysis
CFA	chartered financial analyst
CPD	continuing personal or professional development
COBS	Conduct of Business sourcebook
COLL	Collective Investment Schemes sourcebook
COMP	Compensation sourcebook
CP	consultation paper
DLG	Defined liquidity group
DEPP	Decision Procedure and Penalties manual
DTR	Disclosure and Transparency Rules
EEA	European Economic Area
EG	Enforcement Guide
FICOD	Financial Conglomerates Directive
FSCS	Financial Services Compensation Scheme
FSMA	Financial Services and Markets Act 2000

FAIFS	funds of alternative investment funds
GENPRU	General Prudential sourcebook
ILAS	individual liquidity adequacy standards
ILG	individual liquidity guidance
ICVCs	investment companies with variable capital
KII	key investor information
MiFID	Markets in Financial Instruments Directive
MMR	Mortgage Market Review
NURS	non-UCITS retail scheme
OEIC regulations	Open-Ended Investment Companies Regulations 2001
OFT	Office of Fair Trading
PERG	Perimeter Guidance manual
PS	policy statement
QCP	quarterly consultation paper
RDR	Retail Distribution Review
RIS	regulatory information service
RRPs	recovery and resolution plans
SMEs	small and medium enterprises
SPS	statement of professional standing
SRB	sale and rent back agreement
SUP	Supervision manual
SYSC	Senior Management Arrangements, Systems and Controls sourcebook
TC	Training and Competence sourcebook
TD	Transparency Directive
UCITS	Undertakings for Collective Investment in Transferable Securities Directive
UCITS IV	revised UCITS Directive

1

Overview

1.1 In this Consultation Paper (CP), we invite comments on miscellaneous amendments to the Handbook. It proposes amendments:

- to require financial conglomerates to include recovery and resolution arrangements and plans within their risk management process (Chapter 2);
- to review examination standards for 'undertaking pensions transfer activity' and 'managing investments', and amend the appropriate qualifications (Chapter 3);
- to the definition of a small and medium-sized enterprise deposit, change the treatment of collateral held with a central bank in excess of requirements and clarify reporting guidance (Chapter 4);
- to broaden the scope of who qualifies as a 'settlement decision maker' (Chapter 5);
- to clarify the rules on funds of alternative investment funds, winding-up rules for investment companies with variable capital, issue new guidance to aid authorised fund managers in determining the eligibility of interests in syndicated loans as investments for authorised funds, and incorporate consequential changes arising from the revised UCITS Directive (UCITS IV) (Chapter 6);
- to clarify the relationship between investor notifications to an issuer regarding voting rights and the issuer's duty to ensure that information provided to a regulatory information services is not misleading (Chapter 7);
- to establish that sale and rent back agreements will be a regulated activity, even where they are not the relevant firm's or individual's main source of business (Chapter 8); and
- to ensure that voiding rules are limited to firms of systemic importance and with higher risk business models (Chapter 9).

1.2 Comments on Chapter 9 of this CP should reach us by 6 October 2011 and comments on Chapter 2 of this CP should reach us by 20 October 2011. Comments on Question 3.8 of Chapter 3 of this CP should reach us by 6 October 2011; Comments on all other questions in

Chapter 3 should reach us by 6 December 2011. Comments on all other chapters should reach us by 6 November 2011.

CONSUMERS

The proposals in Chapters 5 and 8 may be of interest to consumers.

2

Implementing Omnibus 1 changes for financial conglomerates

Introduction

2.1 In this chapter we propose to amend rules in Chapter 12 of the Senior Management Arrangements, Systems and Controls sourcebook (SYSC), to require financial conglomerates[1] to include recovery and resolution arrangements and plans within their risk management processes.

2.2 The proposed changes are required by amendments to the Financial Conglomerates Directive (2002/87/EC) (FICOD) made by the Omnibus I Directive (2010/78/EU) in November 2010. We are required to transpose these provisions by 31 December 2011.

2.3 This material is only relevant for financial conglomerates and will not be of interest to consumers. The amendments are consistent with our proposed policy on recovery and resolution plans (RRPs), as consulted on in CP11/16[2] in August this year.

2.4 We would make these amendments under section 138 (General rule-making power), section 150(2) (Action for damages) and section 156 (General supplementary powers) of the Financial Services and Markets Act 2000 (FSMA). The text of the proposed amendment is set out in Appendix 2.

1 Financial conglomerates are defined in Article 2(14) of the Financial Conglomerates Directive. This is a consolidation group that contains both investment firm/credit institution and insurance activities, as identified as a financial conglomerate by the decision tree provided in GENPRU 3 Annex 4.

2 CP11/16: *Recovery and Resolution Plans* (August 2011).

Proposed amendment

2.5 The Omnibus I Directive amended FICOD in respect of the internal control mechanisms and risk management processes required for financial conglomerates. The corresponding rules are currently found in SYSC 12.1.11R and SYSC 12.1.12R. The Omnibus I Directive proposes an additional point to Article 9(2) of FICOD, which requires the risk management processes of a financial conglomerate to include: 'arrangements in place to contribute to and develop, if required, adequate recovery and resolution arrangements and plans. Such arrangements are required to be updated regularly.'

2.6 As a result, we propose to implement these changes by copying out this directive provision as an additional point under SYSC 12.1.11R. This is consistent with our current approach of applying a direct copy-out for the other internal control and risk management requirements for financial conglomerates.

2.7 The effect of this provision will mean that recovery plan requirements are imposed on financial conglomerates to include firms that are already subject to RRP requirements from other legislation. In practice, this amendment will only affect banking-led conglomerates. There will be no implications for insurance-led conglomerates as these firms are not subject to RRPs requirements.

2.8 Therefore, this amendment does not result in additional RRP requirements beyond those already in place and/or currently being consulted upon. Rather, it reinforces the supplementary nature of FICOD.

2.9 In CP11/16, we consulted on RRP requirements for credit institutions and investment firm groups. As set out in that paper, the RRPs aim to ensure that financial institutions:

- assess and document the recovery options which would be available to them in a range of severe stress situations;
- enable these recovery options to be mobilised quickly and effectively; and
- supply the regulatory authorities with information and analysis on their businesses, organisation and structures to enable them to carry out an orderly resolution, if it became necessary.

2.10 While the currently proposed RRP rules in CP11/16 apply to UK deposit-takers and certain investment firms, the RRP must be produced on a group basis. Therefore, we do not expect any practical material differences between what is being proposed in CP11/16 and the amendments proposed in this consultation paper. Since the current RRP work is expected to apply to credit institutions and investment firms, these proposals would only apply in respect of banking-led financial conglomerates. However, this is subject to future development of policy proposals on RRPs for insurance firms.

Q2.1: Do you agree with the proposed approach for a direct copy-out of the Directive provision?

Cost benefit analysis

2.11 Evidence from the recent financial crisis suggests that firms tend to have inadequate processes and plans in place to survive low-probability but high-impact financial stress events without public sector intervention. Further, authorities may need to resolve firms' procedures because of the external impact that disorderly failures can have on the financial sector and the wider economy.

2.12 RRPs deliver benefits by addressing this and aiming to reduce the likelihood and frequency of firm failures. They do so by obliging firms to produce, in periods of stability, an effective framework for action to be implemented when a crisis occurs. They are also intended to facilitate the effective use of the powers under the special resolution regime and potentially reduce market expectations of bail-out.

2.13 Recovery plan proposals are likely to help strengthen market confidence by improving the readiness of firms to deal with financial stress events, thereby reducing the probability of failure. The resolution planning information will enable the authorities to plan better for managing the adverse effects of firm failure and, therefore, help to reduce the risks of firm failure to financial stability.

2.14 The full cost benefit analysis on RRP requirements was provided within CP11/16, which indicates that the total annual ongoing cost to UK-incorporated deposit-takers will amount to a figure in the range of £150m to £400m. While the proposals in CP11/16 did not specifically mention requirements for financial conglomerates, we believe that the group-level requirements in CP11/16 could not be met without appropriate internal control mechanisms and risk management processes at the level of the financial conglomerate. As a result, we believe that no separate cost benefit analysis is necessary for the change proposed here.

Compatibility statement

2.15 The proposed amendments are compatible with our regulatory objectives and with the principles of good regulation. In particular, these measures contribute to greater market confidence and stability by improving the readiness of firms to deal with financial stress events, thereby reducing the probability of failure. The RRP plans will enable the authorities (the Treasury, the Bank of England and the FSA) to plan better for managing the adverse effects of firm failure and help to reduce the risk to financial stability. Therefore, we are satisfied that these proposals are compatible with our general duties under section 2 of FSMA.

Equality and diversity issues

2.16 We have assessed that our proposals do not give rise to discrimination and that the proposals are of low relevance to the equality agenda. Nevertheless, we would welcome any comments respondents may have on any equality issues that they believe arise.

Contact

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3

Proposed changes to the Training and Competence sourcebook

Introduction

3.1 In Chapter 3 of PS10/18[3] we confirmed our intention to review all examination standards every three years on an ongoing basis. We set out a suggested timetable and order of priority for reviewing examination standards and confirmed we would start the review by the end of 2011. This consultation includes our proposal to review examination standards for the training and competence activities of 'undertaking pension transfers activity' and 'managing investments'.

3.2 In PS10/18 we also confirmed publication of an appropriate qualifications list within our Training and Competence sourcebook (TC). Further, we clarified that we would continue to add qualifications to those lists. This consultation includes further additions and amendments.

3.3 This chapter proposes to:

- set out our approach to reviewing the examination standards for 'undertaking pension transfer activity' and 'managing investments'; and
- include a further two qualifications to the list of appropriate qualifications, plus amendments to three existing qualifications.

3.4 We are aware that the timing of applications to have qualifications added to the list of appropriate qualification or to be recognised as an accredited body does not always coincide with the timetable for publication of our quarterly consultation papers (QCPs) where we usually consult on these matters. In the future we may decide to consult in a standalone consultation paper outside the QCP timetable where we consider this to be appropriate.

3 PS10/18: *Competence and ethics: Feedback on CP10/12 and final rules* (December 2010).

3.5 These amendments would be made under section 138 (General rule-making power), section 149 (Evidential provisions), section 156 (General supplementary powers) and section 157(1) (Guidance) of the Financial Services and Markets Act 2000 (FSMA). This chapter will be of interest to firms and individuals who are subject to our TC requirements, including where our professionalism requirements under the Retail Distribution Review (RDR) apply.

Review of examination standards

3.6 In Chapter 3 of PS10/18 we confirmed that, in future, we will own and oversee the production of, and changes to, examination standards. While the governance and responsibility moves to us, the intention is that the production of examination standards is still carried out by the industry for the industry. We also said that any change to examination levels would be determined by the industry – although we would be the accountable owner. We outlined our plans to begin the process to revise examination standards during 2011 and promised that as part of that process we would explain how the governance and process will work.

3.7 We also confirmed that examination standards will be reviewed every three years on an ongoing basis. We will consult for three months each time an examination standard is reviewed. We set out a proposed timetable and order of priority with the first three being:

- undertaking pension transfer activity;
- regulated mortgage advice (including equity release); and
- managing investments.

3.8 Due to our ongoing Mortgage Market Review (MMR), we have taken the decision to postpone the review of examinations standards in this area so we can take into account any changes required by the MMR. Therefore, this consultation only proposes a review of the examination standards for 'undertaking pension transfer activity' and 'managing investments'.

How we will review examination standards

3.9 Each examination standard review will consist of two stages, if required, both using a QCP. An initial consultation will ask for views on:

- what, if any, changes should be made to a specific examination standard;
- if the current qualification level is still appropriate; and
- how gaps in knowledge should be addressed if changes are made to the examination standards.

3.10 We will consider the responses to each examination review and propose an approach based on those responses and any separate evidence that is available, such as findings in our thematic reviews.

3.11 It is important to state that ongoing reviews of examination standards will not automatically result in the approach we have taken to qualification reforms under the RDR.

'Undertaking pension transfer activity'

3.12 The examination standards for 'undertaking pension transfer activity' were last reviewed in 2007. The examination standards for this activity are a combination of those from 'advising on packaged products' and the specific examination standard covering 'undertaking pension transfer activity'. This review will focus on this specific standard, as the examination standards for advising on packaged products have recently been reviewed as part of the RDR.

Examination standard content

3.13 Our view is that the risks within 'undertaking pension transfer activity' have not changed. Our rules (COBS 19.1) are about the pros and cons of switching occupational pension schemes into personal pensions (including self-invested personal pensions) and stakeholder pensions. Our rules do not, for example, extend to switches between personal pensions schemes or transfers involving immediate benefits, such as for drawdown purposes. The examination standards extend beyond our rules into the wider general pensions landscape. Our view is that any updates should focus on these wider issues, such as changes to the tax regime in annual allowances and drawdown, and the Government's pensions reform involving automatic enrolment.

3.14 If changes are made, we believe that any gaps in knowledge to any revised examination standards could be met through ongoing regular continuing professional development (CPD), rather than a qualifications gap-fill exercise.

Q3.1: Do you think the examination standards for 'undertaking pension transfer activity' need updating, and if so what changes should be made?

Q3.2: If the examination standards are changed, how should any gaps in knowledge be addressed?

Qualification level

3.15 We use the Qualifications and Credit Framework as a benchmark for deciding what level a qualification should be. The level of a qualification indicates what skills and knowledge a candidate should be assessed against.

3.16 In paragraph 3.13 we said that anyone carrying out the activity of 'undertaking pension transfer activity' should have covered the examination standards of advising on packaged products. Individuals should be updating their qualifications for advising on packaged products in line with our RDR qualifications reform where the level of qualification has been changed to Level 4. So, our view is that, to ensure consistency, the specific examination standards covering 'undertaking pension transfer activity' should also be set at Level 4. The combination of examination standards covering 'undertaking pension transfer activity' can be shown as follows:

Examination standard	Current Level
Regulation and Ethics	4
Investment principles and risk	4
Personal taxation	4
Retirement planning	4
Financial protection	3
Pension transfers	3

Q3.3: Do you agree that the level for the examination requirement for 'undertaking pension transfer activity' should be set at Level 4?

'Managing investments'

3.17 The examination standards for managing investments were last reviewed in 2006. The examination standards are currently a combination of two standards covering 'the UK financial services industry' and 'managing investments'.

Examination standards content and combination of modules

3.18 Our view is that changes could be made to the 'managing investments' examination standards to include reference to the following:

- penny shares (under Equities);
- contracts for difference and spread betting (under Derivatives);
- land banking (under Real Estate); and
- enterprise investment schemes (under Pooled Investments).

3.19 Changes could also be made to include content on funds of alternative investment funds, with reference to the Alternative Investment Fund Managers Directive.

3.20 As stated in paragraph 3.18, there are two current examination standards that make up the complete standard for managing investments. There are no examination standards that cover 'investment principles and risk' or 'personal taxation'.

3.21 We believe that the future examination standards for managing investments should include these topics, aligning with our approach to standards under the RDR. Individuals who advise clients as well as manage investments will already have completed, or be working towards, qualifications reform requirements under the RDR. Further, we propose that the RDR regulations and ethics standards should replace the existing standard on 'UK financial services industry' which will bring further alignment between the various examination standards. So the proposed new standards would look like this:

Current standard	New standard
UK Financial services and industry	Replace with 'UK Regulation and ethics'
Managing investments	Managing investments
n/a	Investment principles and risk
n/a	Personal taxation

3.22 If we make these changes, it is likely that some of the content we have suggested adding in paragraph 3.18 may already be covered in 'investment principles and risk'.

Q3.4: Do you think the examination standards for 'managing investments' needs updating and, if so, what changes should be made?

Q3.5: Do you agree that we should include standards on investments principles and risk and personal taxation?

Qualification level

3.23 Our understanding is that some individuals who undertake the 'managing investments' activity will also offer advice to retail clients and, as a result, will already be at, or above, a Level 4 standard, or working towards this as a result of being captured under the RDR. However, we believe there are a large number of individuals managing investments who do this on a purely discretionary basis, and so would not have been captured under the RDR.

3.24 We would propose that a Level 4 qualification be set as the entry-level standard for this activity and that existing individuals undertaking the managing investments activity in a discretionary environment work should broaden their knowledge through structured gap-filling activity in order to cover these gaps.

Q3.6: Do you agree that the examination requirement for 'managing investments' should be set at Level 4?

3.25 Our initial view is that reviewing the exam standards for managing investments will not result in an RDR qualifications reform outcome. We review the exam standards to identify any changes that reflect how the sector has evolved since the last review. We expect any changes to exam standards to be introduced only for new joiners to the industry, with a requirement that all existing investment managers meet the changes of standards through regular CPD only.

Q3.7: Do you agree that any changes to exam requirement should only be introduced for new joiners to the industry, and that individuals already working in a 'managing investments' activity should be able to fill gaps in knowledge through CPD?

Appropriate qualifications

3.26 TC includes qualification requirements for individuals carrying out certain retail activities. This is one way of securing an appropriate degree of protection for retail consumers.

3.27 In PS10/18[4] and PS11/1[5] we confirmed the list of qualifications appropriate for each retail activity. This list is published in Appendix 4E of TC. We said that we would consult for one month each time a qualification was added, removed, or other changes were made to the list. We propose to make the following additions/amendments.

- Add the Calibrand/SQA diploma in Professional Financial Advice (NMBA – Alternative Assessment method) to the activity of advising on packaged products (which are not broker funds) and friendly society tax-exempt policies. We have assessed this qualification and consider it meets full qualification requirement up to and after 31 December 2012 under the RDR proposals.
- Add University Centre at Blackburn College's Foundation Degree Award in Financial Services to the activity of advising on packaged products (which are not broker funds) and friendly society tax-exempt policies. We have assessed this qualification and consider it meets full qualification requirements up to and after 1 January 2013 under the RDR proposals.
- Amend the existing qualification for the Faculty/Institute of Actuaries to reflect that the completion of a specific combination of modules under their associate programme fully covers the exam standards for RDR.

4 PS10/18: *Competence and ethics: Feedback to CP10/12 and final rules* (December 2010).
5 PS11/1: *Distribution of retail investments: Delivering the RDR – professionalism* (January 2011).

- Add the CFA Society of the UK to the activity of 'managing investments or acting as a broker fund adviser'. This qualification was on the previous list maintained by the Financial Services Skills Council.
- Amend the Chartered Insurance Institute qualification listed under 'advising on long term care insurance' to reflect a change of name.

Q3.8: Do you agree with these additions/amendments to our appropriate qualification lists?

Cost benefit analysis

3.28 Section 155 of FSMA requires us to perform a cost benefit analysis (CBA) of our proposed requirements and to publish the results, unless we consider that the proposals will not give rise to any costs or to an increase in costs of minimal significance.

Review of examination standards for 'undertaking pension transfer activity' and 'managing investments'

3.29 This proposal does not increase the costs set out in the CBA in PS10/18 as, at this stage, it simply seeks feedback on the examination standards for 'undertaking pension transfer activity' and 'managing investments'. The proposed changes will not increase costs: new joiners would be under an obligation to gain an appropriate qualification under current regulation and existing investment managers will be able to bring themselves in line with any new standards through CPD, which is already required.

Additional appropriate qualifications

3.30 This proposal does not increase the costs set out in the CBA in CP10/12[6] as it simply updates the list of appropriate qualifications. We believe the proposal will deliver potential benefits by increasing the choice of qualifications available.

Compatibility statement

3.31 These proposals are designed to meet our consumer protection objective and are relevant to the principles of good regulation – in particular, promoting innovation in conjunction with regulated activities. We are satisfied that these proposals are compatible with our general duties under section 2 of FSMA.

6 CP10/12: *Competence and ethics* (June 2010).

Equality and diversity issues

3.32 We have assessed that our proposals do not give rise to discrimination and that the proposals are of low relevance to the equality agenda. Nevertheless, we would welcome any comments respondents may have on any equality issues that they believe arise.

Contact

Comments on Question 3.8 should reach us by 6 October 2011; comments on all other questions should reach us by 6 December 2011. Please send them to:

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4

Proposed minor changes to our liquidity regime

Introduction

4.1 This chapter proposes minor amendments to our liquidity rules in the Prudential sourcebook for Banks, Building Societies and Investment Firms (BIPRU) and guidance on liquidity reporting in the Supervision manual (SUP).

4.2 We propose:

- an amendment to the definition of small and medium-sized enterprise (SME) deposit in BIPRU 12.6;
- a change to the treatment of collateral held with a central bank in excess of requirements; and
- an amendment to the SUP 16 Annex 25G reporting guidance for FSA048.

4.3 The proposed amendments will be made under section 138 (General rule-making power), section 150(2) (Actions for damages), section 156 (General supplementary powers) and section 157(1) (Guidance) of the Financial Services and Markets Act 2000 (FSMA). The text of the proposed amendments can be found in Appendix 4. These changes will be of interest to individual liquidity adequacy standards (ILAS) BIPRU firms and simplified ILAS BIPRU firms, but are unlikely to be of specific interest to consumers.

Proposed amendments

Amendment to the definition of a 'SME deposit'

4.4 BIPRU 12.6.7R provides firms with the definition of a deposit from a SME in relation to the simplified ILAS liquidity regime.

4.5 Previously, firms have been required to determine the appropriate line in FSA047/048 in which to report deposits from charities and, in turn, determine the appropriate treatment under the simplified buffer calculation. We propose that the behaviour of deposits from charities is similar to the behaviour of other SME deposits and, therefore, it is appropriate to include charities in this definition.

4.6 We propose to amend the definition of SME deposits to include charities. This will result in deposits from charities being included in the retail and SME deposit component of the simplified buffer calculation which attracts a 20% weighting.

Q4.1: Do you agree with our proposal to amend BIPRU 12.6.7R to include charities?

Amendment to BIPRU 12.7.9R and 12.7.10G, assets that the FSA regard as encumbered

4.7 BIPRU 12.7.10G states that assets provided as collateral are considered encumbered by the FSA. This means that those assets cannot be recognised in a firm's liquid asset buffer. However, where firms have placed assets with a central bank as collateral, and the value of the assets exceeds the value of collateral required, those excess assets cannot be included in the liquid asset buffer.

4.8 We propose to amend BIPRU 12.7.10G so that assets held at a central bank in excess of the minimum amount of collateral required, and which can be withdrawn by a firm without restriction, can be recognised as unencumbered. This recognition will begin from the time when the firm would be able to convert the asset into cash if it notified the central bank of a withdrawal of those assets. For example, a firm is preparing a liquid assets buffer calculation at the end of a business day (day 1) and knows that by making a withdrawal request at the central bank the following morning, it would have possession of the assets by the end of the next business day (day 2). That firm can then include the excess assets, held as collateral with the central bank, in its liquid assets buffer calculation with effect from the end of day 2.

4.9 This would allow firms to include these assets in their liquid asset buffer for the purpose of meeting the overall liquidity adequacy rule and individual liquidity guidance requirement. It should also remove any disincentive to the pre-positioning of collateral with central banks which might otherwise have existed because of the rule.

4.10 Once assets have been placed as collateral with a central bank, it takes legal title to those assets. Therefore, in order to enable firms to count excess collateral under BIPRU 12.7.10G, it is necessary to amend BIPRU 12.7.9R to make it clear that the legal title for excess held may lie with the central bank rather than the firm.

Q4.2: Do you agree with our proposal to amend BIPRU 12.7.9R and 12.7.10G?

Amendment to the guidance in SUP 16 Annex 25G in relation to securities issued by group entities

4.11 SUP 16 Annex 25G sets out the guidance for completing FSA data items including the liquidity data items.

4.12 The current guidance for line 12 (securities issued by group entities) of FSA048 states that where the obligor of the security forms part of the firm's group, and the issuing vehicle is included in the scope of the report, the securities should be reported as own-name securities in line 9 of FSA048. However, the guidance for line 9 states that firms should report unencumbered balances and contractual security flows of any own-name covered bonds and asset-backed securities.

4.13 We propose that the correct wording of the line 12 guidance is that the securities should be reported on line 9 if the securities are own-name covered bonds or asset-backed securities. Where this is not the case, the securities should not be reported in FSA048.

Q4.3: Do you agree with our proposal to amend SUP 16 Annex 25G to clarify reporting requirements under FSA048?

Cost benefit analysis

4.14 These proposals do not materially alter the balance of costs and benefits considered within the cost benefit analysis (CBA) in PS09/16.[7]

Amendment to the definition of a SME deposit

4.15 Firms currently make their own judgement on the appropriate treatment of charity deposits for the calculation of the simplified buffer and the appropriate reporting lines within FSA047 and FSA048. *Liquidity Reporting (Miscellaneous Amendments) Instrument 2011* FSA 2011/45 amends the definition of SME deposits in the SUP 16 Annex 25 guidance so that charity deposits are treated in the same way as SME deposits. The amendment will result in a simplified and consistent treatment of charity deposits in both the calculation of the simplified buffer and reporting lines within FSA047 and FSA048. The proposed changes will not result in significant costs to firms, or loss of information, because firms currently do an alternative calculation and provide a similar assessment of the volatility in charity deposits.

7 PS09/16 *Strengthening liquidity standards including feedback on CP08/22, CP09/13, CP09/14* (October 2009).

Amendment to BIPRU 12.7.9R and 12.7.10G, assets that the FSA regard as encumbered

4.16 There are two likely impacts from the change in BIPRU 12.7.10G. First, the change should remove the disincentives that exist in the current guidance for central bank collateral pre-positioning by firms. Secondly, if firms place liquid assets as collateral in excess of the requirements for the use of central banks facilities, these assets will still be available for liquid asset calculations. We believe these two impacts will deliver benefits to the central bank and firms in the form of operational efficiency.

4.17 We expect the proposed changes to BIPRU 12.7.10G to have a minimal impact on costs to firms.

Amendment to the guidance in SUP 16 Annex 25 in relation to securities issued by group entities

4.18 We do not believe the proposed changes will result in significant costs to firms. The proposed amendment makes the intention and meaning of the current guidance within SUP 16 Annex 25G clearer. The proposed amendment will not increase or reduce the amount of information required from firms.

Q4.4: Do you agree with the cost benefit analysis?

Compatibility statement

4.19 In Chapter 14 of PS09/16 we set out our view that the liquidity reporting regime is compatible with our statutory objectives and the principles of good regulation.

4.20 The proposed minor amendments in this consultation are driven by feedback from firms and other industry participants, as well as internal FSA analysis. The policy intention has not changed from that set out in PS09/16.

4.21 The minor amendments we are consulting on are intended to help us deliver PS09/16 and to meet our statutory objectives of market confidence and consumer protection. We have considered the principles of good regulation and, in particular, that a burden or restriction should be proportionate to the benefits. Further, we have looked at the need to use our resources in the most efficient and economic way, and taken into account the international character of financial services and markets and the desirability of maintaining the competitive position in the UK.

Equality and diversity

4.22 We have concluded that our proposals do not give rise to discrimination and are of low relevance to the equality agenda. Nevertheless, we would welcome any comments respondents may have on any equality issues they believe arise.

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5

Settlement decision makers

Introduction

5.1 This chapter proposes amendments to the identity of 'settlement decision makers' to broaden the scope of who qualifies and, in turn, improve the efficiency of the settlement process. These changes, if taken forward, will amend the Glossary, the Decision Procedure and Penalties manual (DEPP) and the Enforcement Guide (EG).

5.2 We would make these amendments under our powers in section 157 (Guidance) and section 395(5) (The Authority's procedures) of the Financial Services and Markets Act 2000 (FSMA). The proposed changes to the Handbook and to the Enforcement Guide are set out in Appendix 5 to this CP. These amendments are of interest primarily to firms but they may also affect consumers in the delivery of compensation payments.

Background

5.3 The FSA resolves many enforcement cases by settlement. Early settlement has many potential advantages as it can result, for example, in consumers obtaining compensation more quickly, the FSA and industry saving resources, messages getting out to the market sooner and a public perception of timely and effective action. Therefore, the FSA considers it is in the public interest for matters to settle, and settle early, if possible.

5.4 Settlements in the FSA context are not the same as 'out of court' settlements in the commercial context. An FSA settlement is a regulatory decision, taken by the FSA, the terms of which are accepted by the firm or individual concerned. When agreeing the terms of a settlement, the FSA will carefully consider its regulatory objectives and other relevant matters, for example, the importance of sending clear, consistent messages through enforcement action. The FSA will only settle in appropriate cases where the agreed terms of the decision result in acceptable regulatory outcomes.

5.5 Settlement discussions can take place at any time during the enforcement process between FSA staff and the firm or individual concerned, if both parties agree. If the discussions

result in a proposed settlement of the matter, FSA staff will put the terms of the proposed settlement in writing and agree them with the person concerned.

5.6 The proposed settlement is considered by the settlement decision makers under the procedures set out in Chapter 5 of DEPP. They may either accept the proposed settlement by deciding to give a statutory notice (i.e. a warning notice, decision notice or supervisory notice) based on the terms of the settlement, or decline the proposed settlement.

5.7 DEPP 5.1.1G(3) states that the settlement decision makers will be 'two members of the FSA's executive of at least director of division level (which may include an acting director)', and that the settlement decision makers will take decisions jointly. DEPP 5.1.1G(4) adds that one of the settlement decision makers will usually be, but need not be, the director of Enforcement (now called the Enforcement and Financial Crime Division). For example, in exceptional cases the director of the Enforcement and Financial Crime Division may have been directly involved in establishing the evidence on which the decision is based and so, in accordance with section 395 of FSMA, would not be able to participate in the decision-making process.

Proposed amendments

5.8 Although DEPP allows any FSA director to be a settlement decision maker, in practice the pool of directors who act as settlement decision makers is much smaller, as the FSA aims to select the most appropriate directors according to the circumstances of the case (subject to availability and any potential conflicts). As mentioned above, the director (or acting director) of the Enforcement and Financial Crime Division will usually act as one of the settlement decision makers. The other settlement decision maker will usually be selected after taking into account factors such as whether they are responsible for the division which supervises the firm or the firm connected with an individual under investigation (if so, it is likely they will be considered appropriate) and their knowledge of a particular industry sector (for example, the Markets Division director is likely to be the preferred choice in market abuse cases). In particularly significant cases, it may be considered appropriate for the FSA's Chief Executive Officer or a managing director to act as a settlement decision maker.

5.9 We consider that increasing the number of potential settlement decision makers will improve the efficiency of the settlement process. Therefore, we are proposing to amend the identity of the settlement decision makers, as set out in DEPP 5.1.1G(3), to allow one of the settlement decision makers to be of at least head of department level (for the avoidance of doubt, this will not include an acting head of department). The other settlement decision maker will continue to be of at least director of division level (which may include an acting director).

5.10 We are also proposing to amend DEPP 5.1.1G(4) so that, consistent with the current position, at least one of the settlement decision makers will not be from the Enforcement

and Financial Crime Division. In accordance with section 395 of FSMA, a person will also not be chosen to act as a settlement decision maker if they have been directly involved in establishing the evidence on which the decision is based.

5.11 We consider that these proposals will reduce the risk of delays in the settlement process, which should mean the benefits of early settlement should be achieved sooner.

Q5.1: Do you have any comments on our proposed changes to the identity of the settlement decision makers?

Cost benefit analysis

5.12 When proposing new rules, we are obliged under section 155 of FSMA to publish a cost benefit analysis (CBA) unless we consider that the proposed rules will give rise to no costs or an increase in costs of minimal significance.

5.13 The proposals set out in this chapter do not relate to rule changes or to guidance on rules. They are concerned instead with statements of procedure or policy that we are required to publish under the Act in relation to the FSA's approach to giving statutory notices. We have, however, considered whether to perform a CBA to ensure we have a proper appreciation of the possible impact of the proposed changes upon firms and consumers. We have concluded that there will be no significant costs on either firms or consumers as a result of these proposals to widen the pool of potential settlement decision makers to include heads of department and to provide that at least one of the settlement decision makers should be from a division other than the Enforcement and Financial Crime Division. The former should improve the efficiency of the settlement process, while the latter simply reflects existing practice.

Compatibility statement

5.14 We are satisfied these proposals meet our regulatory objectives. Reducing the risk of delays in the settlement process helps meet our consumer protection and market confidence objectives, as early settlement can result in consumers obtaining compensation earlier and messages getting out to the market more quickly.

5.15 We are also satisfied that these proposals are compatible with the principles of good regulation set out in section 2(3) of FSMA. In particular, they are consistent with the duty to have regard to the need to use our resources in the most efficient and economic way.

Equality and diversity

5.16 We have assessed the equality issues that arise in our proposals. We believe that our proposals do not give rise to discrimination and are of low relevance to the equality agenda. Nevertheless, we would welcome any comments respondents may have on any equality issues they believe arise.

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6

Proposed changes to the Collective Investment Schemes sourcebook

Introdution

6.1 This chapter proposes amendments to the Collective Investment Schemes sourcebook (COLL) which will:

- enable authorised fund managers (AFMs) to operate a non-UCITS retail scheme (NURS) umbrella under which some, but not all, sub-funds are NURSs, acting as funds of alternative investment funds (FAIFs);
- amend the winding-up rules for investment companies with variable capital (ICVCs), so that the scheme is automatically wound up following an arrangement to transfer all of the scheme property to another fund;
- issue new guidance to aid AFMs in determining the eligibility of interests in syndicated loans as investments for authorised funds; and
- incorporate consequential changes arising from implementing the revised UCITS Directive (UCITS IV).

6.2 The proposed amendments, if approved, will be made under section 138 (General rule-making power), section 139(4) (Miscellaneous ancillary matters), section 156 (General supplementary powers), section 157(1) (Guidance) and section 247 (Trust scheme rules) of the Financial Services and Markets Act 2000 (FSMA); and regulation 6 of the Open-Ended Investment Companies Regulations 2001 (OEIC Regulations). The text of the proposed amendments is set out in Appendix 6.

Definition of FAIFs

6.3 When we introduced FAIFs in 2010, we included a requirement that the scheme's instrument of incorporation must state that the scheme is a NURS, operating as a FAIF. One interpretation of that requirement is that an AFM may not operate a NURS umbrella that consists of a mixture of sub-funds operating as a (standard) NURS under the investment and borrowing powers rules in COLL 5.6, and sub-funds operating as FAIFs under the rules in COLL 5.7.

6.4 We are consulting on amending our rules to remove the need for the instrument constituting the scheme, where the scheme does not operate solely as a FAIF, to state that the scheme will operate as a FAIF. Instead, we propose the instrument must state that the scheme is operating as a NURS and the prospectus for the scheme should set out which sub-funds will operate in accordance with COLL 5.6 and those which fall under COLL 5.7.

6.5 This proposal will require consequential changes to other areas of COLL, namely:

- to amend COLL 1.2.1R(2) to clarify that an authorised fund type also includes a NURS which is an umbrella with a mixture of sub-funds operating either as FAIFs or standard NURSs;
- to amend COLL 3.2.6R(7C) to refer to schemes that operate solely as a 'standard' NURS;
- to insert a requirement into COLL 4.2.5R for an operator to state which sub-funds are NURSs and which are NURSs operating as FAIFs; and
- to introduce a new rule (COLL 5.7.12R) to apply COLL 5.7 at sub-fund, instead of scheme, level.

Q6.1: Do you agree with the proposed changes to allow a NURS umbrella to consist of a combination of standard NURS sub-funds and NURS sub-funds operating as a FAIF?

Winding-up rules for ICVCs

6.6 We have identified an inconsistency between the rules for winding up ICVCs compared with the equivalent rules for authorised unit trusts (AUTs). COLL 7.4.3R(1)(e), in conjunction with COLL 7.4.3R(2)(f), requires the manager of an AUT to apply for the authorisation of the scheme to be revoked following the effective date of a duly approved scheme of arrangement which results in the scheme being left with no property. However, there is no similar requirement in COLL 7.3 which applies to ICVCs.

6.7 This has the effect that an authorised corporate director (ACD) of an ICVC need not request revocation of the authorisation order and can instead keep the scheme open as a 'shell'. If the ACD decides to launch new funds in the future it can then re-use that shell, instead of

establishing a new scheme. In doing so, it would be able to apply for approval of an alteration to an existing scheme, rather than applying for authorisation of a new scheme.

6.8 Under FSMA and the OEIC Regulations, we must approve or refuse applications for alterations to existing schemes within one month, whereas the timescale allowed for us to determine an application for the authorisation of a new scheme is either two or six months. We need more time to carry out the checks necessary to meet our statutory objectives of maintaining market confidence and protecting consumers, while having regard to the need to use our resources in an efficient and economic way. It is not appropriate for us to be required to reach a decision on what is effectively a new authorisation within one month.

6.9 We are proposing to insert new requirements in COLL 7.3.4R, similar to that in COLL 7.4.3R, for ACDs of ICVCs to ask us to revoke the authorisation of the scheme following the transfer of all of the scheme property to another fund. For umbrella ICVCs, this requirement will arise when the scheme property attributable to each remaining sub-fund has either been transferred under a scheme of arrangement or realised and distributed to unit holders. If the ICVC holds movable or immovable property necessary for carrying out its business, or has other assets or liabilities not directly attributable to a specific sub-fund, these must be dealt with in accordance with the rules for the winding-up of a scheme.

Q6.2: Do you agree with the proposal to require ACDs of ICVCs to ask for a scheme's authorisation to be revoked in the circumstances described above?

Guidance on authorised funds investing in interests in syndicated loans

6.10 The FSA has received a number of queries regarding the eligibility of interests in loans for investment by authorised funds. Loans can be structured in a number of ways and can display a variety of characteristics. As such, it is not possible for us to state categorically that interests in all loans are permitted or prohibited. Instead, we expect AFMs and depositaries to undertake sufficient analysis of the proposed investment to identify in each case whether or not it meets the criteria for certain asset types in COLL, for example, a transferable security or a debenture.

6.11 The number of queries suggest that there may be a need for us to provide clarification on this matter in the Handbook. Therefore, we are proposing to insert some guidance in Chapter 5 of COLL which firms may find useful when determining the eligibility of interests in a syndicated loan, including leveraged loans.

Q6.3: Do you agree with the addition of proposed guidance on investing in syndicated loans? If not, please explain why.

UCITS IV consequential changes

6.12 Since we made rules on 1 July 2011 to implement the revised UCITS Directive (known as UCITS IV), we have become aware of two points that need to be clarified in COLL.

- We are proposing to clarify the guidance in COLL 4.5.6G on what information about charges should be disclosed in a short report. The guidance refers to the ongoing charges figure published in a key investor information (KII) document for a UCITS scheme. The intention is that this figure should be calculated at the end of the period to which the report relates, and then published in both the report and (as long as it would not be misleading as an indicator of future charges) the next update of the KII. It appears that the reference in the guidance to the figure 'as disclosed in the most up-to-date key investor information' is confusing and could lead firms to interpret the guidance in the wrong way, so we are proposing to delete this reference.
- COLL 9.4.2R(1) applies to all recognised schemes, including EEA UCITS schemes that can be marketed in the UK. It requires copies of documents such as the constituting instrument, prospectus and periodic reports for the scheme to be made available to investors in English. UCITS IV removed the obligation for those documents to be translated when a UCITS is marketed in another EEA State, so it is no longer appropriate for this rule to apply in full. We propose to amend it so that only the KII document must be in English, in accordance with directive translation requirements.

Q6.4: Do you agree with the proposed changes to the guidance on short reports and the rule on translation of documents for recognised schemes?

Cost benefit analysis

6.13 Section 155 of FSMA requires us to publish a cost benefit analysis of the implications of the proposed amendments. The requirement under section 155 of FSMA does not apply if there will be no increase in costs or if any increase in costs will be of minimal significance.

Definition of FAIFs

6.14 We do not expect the proposed amendments to lead to a cost increase. The proposals will allow managers the flexibility to operate schemes with a combination of sub-funds should they wish to do so. We do not propose to introduce any requirements on AFMs in respect of this change, other than changes to the information disclosed in the prospectus.

6.15 Affording more flexibility to AFMs by allowing the operation of schemes comprising both standard NURS and FAIF sub-funds could lower costs. The costs are usually borne by investors, so a reduction in costs could see returns to investors marginally increased.

Winding-up rules for ICVCs

6.16 There will be some impact on costs for managers as a result of the proposals in this area. These will arise from operational, legal and audit costs associated with winding up a scheme and launching a new scheme at a later date, where relevant. It is difficult for us to quantify these costs as they vary from case to case. For example, a fund investing in property may experience higher costs because of the additional requirements for valuation of property and the involvement of third parties, unlike a fund investing predominantly in equities which could experience a more straightforward winding up. In our opinion, these costs are justified by the reduction in risks to consumers where, but for the proposed change, we would not have sufficient time or resources to fully consider all aspects of the changes to the scheme within the statutory timeframe permitted.

Guidance on investing in syndicated loans in authorised funds

6.17 The guidance proposed provides clarification of existing rules rather than setting new requirements and is, therefore, unlikely to impose significant costs on firms.

UCITS IV consequential changes

6.18 The proposed change to COLL 4.5.6G is a clarification of existing guidance and does not impose any new burden on regulated firms. It is intended to reduce the risk that firms will incur costs by revising their KII documents more frequently than is necessary.

6.19 The proposed change to COLL 9.4.2R removes an undue burden from operators of EEA UCITS schemes being marketed in the UK, in cases where the documents for the scheme are in a language other than English. It ensures that these funds can be marketed without all of those documents having to be translated into English first. This measure was introduced under UCITS IV to reduce costs and make the European single market for funds more efficient and thus more competitive. It is not considered to weaken the quality of disclosures available to investors, who will be given the short and clearly-written KII document in their own language.

Compatibility statement

6.20 The proposals aim to meet our statutory objectives of market confidence and consumer protection.

6.21 Our proposed amendment to the rules on winding up an ICVC would provide a greater level of consumer protection as it will ensure that we have sufficient time to fully consider all aspects of changes to any scheme which constitutes the creation of a new scheme.

6.22 By providing guidance which clarifies what AFMs should consider before investing in loans, we reduce the risk of managers entering into investments which are not eligible. This, in turn, has the potential for reducing investor detriment.

6.23 The amendments to the UCITS IV rules and guidance aim to ensure that the directive is implemented correctly and consistently with other EEA jurisdictions. They help to protect consumers by ensuring firms give them appropriate and timely information, without imposing unnecessary costs on the firms that would impede the development of a competitive market for UCITS schemes.

6.24 We have had regard to the principles of good regulation and, in particular, to the principle that a burden or restriction should be proportionate to the expected benefits. Our analysis indicates that cost impact will be minimal for all of the changes proposed.

Equality and diversity issues

6.25 We have assessed the equality issues that arise in our proposals. We believe that they do not give rise to discrimination and are of low relevance to the equality agenda. Nevertheless, we would welcome any comments respondents may have on any equality issues they believe arise.

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7

Proposed changes to the Disclosure and Transparency Rules

Introduction

7.1 In this chapter we are consulting on changes to the Disclosure and Transparency Rules (DTR). We are proposing an amendment to clarify the relationship between investor notifications to an issuer regarding voting rights (DTR 5.8.12R) and the issuer's duty to ensure that information provided to a regulatory information service (RIS) is not misleading (DTR 1A.3.2R). The suggested text is set out in Appendix 7.

7.2 The proposed amendments, if approved, will be made under section 89A (Transparency Rules) of the Financial Services and Markets Act 2000 (FSMA) and various other powers under FSMA, as set out in the cover sheet of the draft instrument in Appendix 7 of this consultation paper.

Background

Publication of notifications of major holdings

7.3 The Transparency Directive (TD)[8], as implemented in Chapter 5 of DTR requires investors to notify an issuer when its holdings in the voting rights of the issuer (whether held directly or indirectly) reach, exceed or fall below specified thresholds.

7.4 DTR 5.8.12R, derived from Article 12(6) of TD, requires an issuer to publish any information contained in the notifications it receives from investors as soon as possible.

8 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, and amending Directive 2001/34/EC.

Issuers of shares admitted to trading on a regulated market and whose Home State is the UK must publish this information no later than the end of the trading day following receipt of the notification. Non-UK issuers[9] and UK issuers of shares admitted to trading on a 'prescribed market' other than a regulated market must publish this information no later than at the end of the third trading day following receipt of the notification.

Misleading, false or deceptive information

7.5 DTR 1A.3.2R requires an issuer to 'take **all reasonable care** to ensure that **any information** it notifies to a RIS is not misleading, false or deceptive and does not omit anything likely to affect the import of the information' (bold text is our emphasis).

7.6 'Any information' currently includes the publication of information required by DTR 5.8.12R. Therefore, this places an obligation on the issuer to take all reasonable care to ensure that the information set out in the notifications provided to it by investors is not misleading, false or deceptive before its publication.

7.7 Recently this has raised the question of how an issuer should comply with this obligation in relation to DTR 5.8.12R.

7.8 We examined a number of options when considering the relationship between DTR 1A.3.2R and DTR 5.8.12R.

Applying the 'all reasonable care' standard

7.9 The first option was to leave the rules unchanged, requiring issuers to apply the reasonable care standard required in DTR 1A.3.2R. Our view, based on feedback from the market, is that this provision, when read with DTR 5.8.12R, is open to wide and disparate levels of interpretation. We considered how appropriate it would be to develop guidance on the basic checks that issuers should conduct, such as whether the investor used the correct denominator or verified the investor's basic calculation.

7.10 We concluded that issuers would not always be able to complete these checks within the required publication deadline, particularly where an investor has entered into relatively complex transactions, such as those involving contracts for difference. Requiring issuers to carry out these checks could subject them to a disproportionate burden, as they may have no sight of the calculations or steps taken by investors to ensure the accuracy of information contained in their notifications.

7.11 We also considered the potential issues that might arise if an issuer discovers errors in any notifications. An issuer should take all reasonable care not to publish false information under DTR 1A.3.2R. They would have to correct the false information, either directly or by

9 A '*non-UK issuer*' is an issuer whose shares are admitted to trading on a regulated market and whose Home State is the United Kingdom other than:
(a) a public company within the meaning of section 4(2) of the Companies Act 2006; and
(b) a company which is otherwise incorporated in, and whose principal place of business is in, the UK.

requiring the investor to correct their notification, within the specified deadlines set out in DTR 5.8.12R. This would be particularly problematic if the investor is not easily contactable, for example because they are located in a different jurisdiction from the issuer.

7.12 We also question whether issuers would want to take on the additional liability of altering information on the notification without verification from the investor.

Delaying disclosure

7.13 We considered a further option, to enable issuers to delay the disclosure of investor notifications where appropriate (for example, to correct false information in investor notifications). This would involve aligning the deadlines set out in DTR 5.8.12R(1), which is a super-equivalent provision, with those set out in Article 12(6) of TD.

7.14 However, we concluded that a three-day publication deadline may not guarantee sufficient time for issuers to carry out the necessary checks. This approach also carries a risk that issuers who are required to publish this information no later than the end of the trading day following receipt of the notification, would start to automatically publish investor notifications at the end of the third trading day, resulting in an undesirable reduction in transparency on information which is highly valued by the market.

7.15 It is worth noting at this stage that there is no equivalent requirement in Article 12(6) of TD for issuers to verify the information contained in these notifications.

Proposed amendment

7.16 Having considered the options set out above, we propose to amend DTR 1A.3.2R so that it will no longer apply to information which issuers are required to publish under DTR 5.8.12R.

7.17 Our proposed approach addresses concerns about issuers' ability to verify the information contained in investor notifications for the purposes of DTR 1A.3.2R while at the same time ensuring there will be no diminution in transparency. Investors are required to ensure that their notifications made to issuers and, where applicable, filed with the FSA[10], are accurate. The FSA is empowered to take enforcement action against investors where necessary for failure to fulfil their DTR obligations.

Q7.1: Do you agree with the proposed amendment to separate the information issuers are required to publish under DTR 5.8.12R from the standard of care in DTR 1A.3.2R?

10 DTR 5.9.1R.

Cost benefit analysis

7.18 Section 155 of FSMA requires us to publish a cost benefit analysis of the implications of the proposed amendments. The requirement, under section 155 of FSMA, does not apply if there will be no increase in costs or if any increase in costs will be of minimal significance.

7.19 Given the nature of the proposed changes, we do not envisage that the cost increase, if any, will be of more than minimal significance.

Compatibility statement

7.20 In presenting these proposals, we are satisfied that they are compatible with the general duties conferred upon us under section 73 of FSMA.

7.21 The amendments proposed are compatible with our general duties because they improve the usability of the clarified provisions and, therefore, enhance the compatibility of those provisions with our statutory duties under section 2 of FSMA.

Equality and diversity issues

7.22 We have completed an impact assessment and conclude that the proposals are of low relevance to the equality agenda. Nevertheless, we would welcome any comments respondents may have on any equality issues they believe arise.

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8

Proposed amendments to the Perimeter Guidance manual

Introduction

8.1 This chapter proposes amendments to the Perimeter Guidance manual (PERG) that, in line with government proposals, clarify that arrangements in respect of sale and rent back agreements (SRB) will be a regulated activity, even when they are not the relevant firm or individual's main source of business.

8.2 We propose that this change should be reflected in PERG and we intend to issue the proposed guidance in exercise of our powers under section 157(1) (Guidance) of the Financial Services and Markets Act 2000 (FSMA). The proposed text of the amendments is set out in Appendix 8.

Background to changes

8.3 A market study by the Office of Fair Trading (OFT) in 2008 on SRBs identified the potential for significant consumer detriment. Under such agreements, homeowners sell their property and rent it back from the new owner. SRB can, as a last resort, help homeowners who are in financial difficulties to remain in their home. However, homeowners are often losing out financially as sales are typically at a discount against the open market value. They also have reduced security of tenure as they are renting rather than owning the property. In response, in 2009, the Treasury extended the FSA's regulatory scope to include the regulation of SRB transactions.

8.4 We introduced an interim SRB regime on 1 July 2009, followed by the full regime on 30 June 2010. Our regime provides a package of measures designed to meet our statutory

objectives, including that of consumer protection.[11] Under that regime, persons that entered into regulated SRB agreements by way of business (among other things) required FSA authorisation.

8.5 However, we are concerned that a considerable number of unregulated SRB transactions are happening, which means some homeowners are still exposed to the same potential detriment identified by the 2008 OFT report. We believe some small firms and individual investors who are active as SRB providers are avoiding our regulatory requirements because they claim they are not carrying on SRB activities 'by-way-of-business'.

8.6 The Treasury have sought to change the 'by-way-of-business' test for agreement providers entering into SRB transactions, so that even entering into one transaction will be treated as being carried out 'by-way-of-business'. Firms and individuals currently providing unregulated SRB agreements will be captured and will in the future require our authorisation. This will bring more consumers under our regulatory protection. However, this does not apply where the SRB is being provided by a person related to the agreement seller.[12]

8.7 This change ceases to have effect on 1 January 2015. Before the end of 2012, the Treasury are required to carry out a review of this change and publish a subsequent report. Following that review, the Treasury will decide whether the amendment should be allowed to expire, be revoked early or be maintained in force with or without amendments.

Proposed amendments

8.8 As a result of the legislative change, we need to make changes to PERG so it is clear that firms and individuals are engaged in a regulated activity, even if it is not their main source of business. For example, even if they only do one SRB or if they act as provider for a friend.

8.9 In order for an activity to be a regulated activity it must be carried on 'by-way-of-business'. PERG 2.3.2R provides a broad outline of what 'by-way-of-business' means in the FSA's view. We propose changes in this paper to inform the reader that there is a change to the business element for persons entering into SRB transactions.

Q8.1: Do you have any comments on the draft text of the proposed guidance on PERG 2.3.2R?

8.10 In PERG 14.4A, Q37C explains when a person may be carrying on the regulated activity of entering into a regulated SRB agreement. We propose a change here to make clear they may be doing this if they enter into just one SRB transaction.

11 Details of our full SRB regime can be found in CP10/04, published on 29 January 2010, www.fsa.gov.uk/pages/Library/Policy/CP/2010/10_04.shtml

12 A definition of 'related person' is given in Q37A of our Perimeter Guidance, http://fsahandbook.info/FSA/html/handbook/PERG/14/4A

Q8.2: Do you have any comments on the draft text of the proposed guidance on Q37C of PERG 14.4A?

8.11 In PERG 14.5, Q38 to Q38B describes the business test for home finance transactions, explains the difference between the types of business tests, gives examples of when the business test is unlikely to be satisfied and suggests that this may be where a one-off agreement is entered into by a friend of the agreement seller. We propose to make consequential changes to these Q&As to take into account the proposed Treasury changes.

Q8.3: Do you have any comments on the draft text of the proposed guidance on Q38 to Q38B of PERG 14.5?

8.12 In PERG 14.5, Q38C gives examples of when the business test is unlikely to be satisfied and suggests this may be where a one-off agreement is entered into by a friend of the agreement seller. We propose to delete the reference to 'friend' as under the Treasury changes this type of SRB transaction will require FSA authorisation.

Q8.4: Do you have any comments on the draft text of the proposed guidance on Q38C of PERG 14.5?

8.13 In PERG 14.5, Q38D asks if the business test would be met if only one home finance transaction is entered into. The answer is that this might be the case. However, once the Treasury change to the 'by-way-of-business' test comes into effect, entering into one SRB transaction will require authorisation unless the agreement seller is a relative.

Cost benefit analysis

8.14 No cost benefit analysis is required.

Compatibility statement

8.15 We propose making changes to PERG that improve the clarity of the guidance on existing legislation. We take the view that these proposals are compatible with our regulatory objectives, are the most appropriate way of meeting our objectives and take account of the principles of good regulation in section 2(3) of FSMA.

Equality and diversity

8.16 We have assessed that our proposals do not give rise to discrimination and that the proposal are of low relevance to the equality agenda. Nevertheless, we would welcome any comments respondents may have on any equality issues they believe arise.

Contact

Comments should reach us by 6 November 2011. Please send them to:

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9

Remuneration Code – proposals to amend the transitional provisions on voiding and recovery

Introduction

9.1 This chapter proposes amendments to rules in the Senior Management Systems and Controls sourcebook (SYSC) which provide that provisions of contracts that breach certain provisions of the Remuneration Code are void. The proposed changes will ensure that those voiding rules will continue to be limited to large firms that are of systemic importance and have higher risk business models.

9.2 We are proposing these amendments under our powers in section 138 (General rule-making power), section 139A(9) (General rules about remuneration), section 149 (evidential provisions), section 156 (General supplementary power) and section 157 (Guidance) of the Financial Services and Markets Act 2000 (FSMA). The proposed changes to the Handbook are set out in Appendix 9. These proposals are of particular interest to firms within the scope of the Remuneration Code.

Background

9.3 Section 139A(9) of FSMA confers a discretionary rule-making power on the FSA to provide that provisions of certain agreements are void (voiding rules). The relevant agreements are those which contravene rules specified in the voiding rules which prohibit persons from being remunerated in particular ways. Voiding rules may also provide for the recovery of any payment made, or other property transferred, in pursuance of such a provision.

9.4 The FSA has exercised the power to make voiding rules in SYSC 19A.3.54R and SYSC 19A Annex 1 (along with providing guidance in SYSC 19A.3.55G). The voiding rules apply to certain provisions of agreements relating to certain firms subject to the Remuneration Code and certain types of Remuneration Code staff.[13]

9.5 The voiding rules provide that provisions of agreements which contravene the following rules of the Remuneration Code are void:

- guaranteed variable remuneration (SYSC 19A.3.40R);
- non-deferred variable remuneration (SYSC 19A.3.49R); and
- replacing payments recovered or property transferred (SYSC 19A Annex 1.7R).

9.6 Where the voiding rules apply to the provision of an agreement, they operate automatically to make that provision void. They differ from other regulatory sanctions, as the FSA does not decide whether or not to apply voiding (as we would, for example, with a financial penalty).

9.7 Our supervisory approach is to review the policies and practices of the largest firms, and the proposed remuneration structures of the Code staff within them, prior to the announcement and distribution of awards, with the intention of ensuring compliance with the Code.

9.8 SYSC TP 3.6R currently limits the scope of the firms subject to the provisions on voiding and recovery to those that were subject to the original Remuneration Code (which applied before 1 January 2011). This transitional provision expires on 1 January 2012.

9.9 Without amendment, with effect from 1 January 2012, the voiding and recovery provisions would automatically apply to all firms within the scope of the revised Remuneration Code (as set out in SYSC 19A.1.1R, i.e. all BIPRU firms and third country BIPRU firms).

Proposed amendments

9.10 In PS10/20[14] we indicated our intention to put in place a new limiting provision on the voiding rules that would apply broadly to firms in proportionality tier one.[15] These proposed amendments are principally designed to implement this policy. In line with our proportionate approach to implementing the Remuneration Code, this would allow us to focus on systemic importance and the risk posed by different business model types.

9.11 The proposed amendments to the Handbook will introduce a provision on the voiding rules to limit their scope to certain firms which are part of major financial groups operating in the UK. Therefore, we are proposing an approach which has some similarities with how

13 For Remuneration Code staff subject to voiding, see SYSC 19A.3.54R(3) – (4).

14 PS10/20: *Revising the Remuneration Code – Feedback on CP10/19 and final rules* (December 2010).

15 To implement the Code proportionately and consistently across more than 2,700 firms, and help those firms understand the extent to which they can disapply some of the Code's rules, we developed a four-tiered proportionality framework. Proportionality tier one contains the largest banks and broker dealers.

firms subject to the original Remuneration Code were identified and the proportionality tier one definition.

9.12 The limit which identifies which firms are subject to voiding, needs to provide a high level of upfront certainty about whether the provisions apply. It needs to clearly identify which firms are subject to these provisions at any given time. The definitions adopted for proportionality tier one[16] expressly contemplate that tier classifications may be varied through the giving of individual guidance. To give an appropriate level of ongoing certainty as to the application of these provisions a different approach is needed in respect of voiding.

9.13 We propose to adopt a limit for the voiding provisions to apply them only to the following categories of firm:

- UK banks and building societies with capital resources on their last accounting reference date exceeding £1bn;
- BIPRU 730k firms that are full scope BIPRU investment firms with capital resources on their last accounting reference date exceeding £750m; and
- a full credit institution, BIPRU 730K firm or third country BIPRU 730K firm which is part of a group containing a firm falling into the above categories.

9.14 Practically, the third category would capture firms which fall into proportionality tiers one to three[17] which are part of the same group as the firms described in the first two categories outlined above, irrespective of whether they are UK incorporated or a third country branch. Limited licence and limited activity firms that are categorised as proportionality tier four firms under our proportionality framework and which form the vast majority of firms subject to the Code would be excluded.

9.15 Large third country branches that are currently caught by the proportionality tier one definition (by virtue of the total assets threshold for third country BIPRU firms) and do not have another firm within their group which would fall within the first two categories, outlined above, would not be caught by our proposed application of the voiding rules. This approach in practice will only capture groups that include a BIPRU firm (rather than a third country branch) that meets the proportionality tier one definition.

9.16 Voiding rules will continue to be limited in scope to breaches of rules set out in SYSC 19A.3.54R(1).

9.17 The voiding rules currently confer limited protection on pre-existing agreements. This is designed to avoid retrospective application and relates to provisions contained in agreements made before the voiding rules were made on 16 December 2010.[18] The

16 FSA *General guidance on proportionality: the Remuneration Code (SYSC 19a) and Pillar 3 disclosures on remuneration (BIPRU 11)* (December 2010).

17 FSA *General guidance on proportionality: the Remuneration Code (SYSC 19a) and Pillar 3 disclosures on remuneration (BIPRU 11)* (December 2010), Part C.

18 See SYSC 19A Annex 1.2R and Annex 1.3G.

amendments we propose include a transitional provision extending this limited protection to any firm which becomes subject to voiding for the first time as a result of the amendments described in paragraph 9.13, above.[19]

9.18 It is also necessary to consider the position in relation to provisions of agreements which were agreed *after* the voiding rules were made, but *before* the particular firm and Remuneration Code staff member satisfied the conditions for voiding to apply, based on the factual circumstances of the case at hand.

9.19 For example, a firm might agree a provision which contravenes a rule subject to voiding[20], but at a time when the firm or a Remuneration Code staff member, or both, were not subject to voiding.[21] Such provisions would not have been void when they were agreed, however the remuneration in question will still constitute a breach of the relevant rule of the Remuneration Code and provide the basis for potential supervisory and/or enforcement action.

9.20 In this example, if the conditions for voiding are later satisfied, then the contravening provision of the agreement will be rendered void by SYSC 19A Annex 1.1R from the point at which both the firm and the Remuneration Code staff member become subject to voiding.[22] Rendering such provisions void does not involve making retrospective provision. In the situation described in 9.18, the legal conditions for when voiding applies were clear at the time the agreement was made (even if those conditions were not, as a matter of fact, satisfied at that point in time). As a result, the sort of pre-existing provision described in 9.17 is very different to that described in 9.18.

9.21 An alternative approach would be to provide protection for the sorts of pre-existing provisions of agreements described in paragraph 9.18, such that they would not be rendered void, unless an amendment is subsequently made to, or in relation to, the provision which contravenes a rule subject to voiding.

9.22 Finally, the amendments make consequential and transitional provision, and correct a mistake in SYSC 19A Annex 1.7R.

Q9.1: Do you agree with the proposal to limit the voiding rules to the firms that meet the criteria described?

19 At present, the firms subject to voiding cannot change as the transitional provision (SYSC TP 3.6R) provides that voiding applies only to firms subject the Remuneration Code as it applied before 1 January 2011.

20 As set out in SYSC 19A.3.54R(1), see above.

21 For the proposed conditions related to when the voiding rules may apply to firms see SYSC 19A.3.54R(1B) – (1D) of the proposed Handbook text. For the provisions setting out when a Remuneration Code staff is subject to voiding see SYSC 19A.3.54R(3).

22 SYSC 19A Annex 1.1R is not limited to provisions of agreements agreed after the time at which the conditions for voiding are satisfied, and the protection in Annex 1.2R will not apply.

Q9.2: Do you think the pre-existing provisions of agreements described in paragraphs 9.19 and 9.20 should become void when the conditions for voiding are later satisfied, or do you think such provisions should be excluded from voiding unless they are subsequently amended?

Q9.3: Do you have any other suggestions to improve the way in which the proposed amendments to the voiding rules can provide certainty for firms about whether the voiding rules apply?

Cost benefit analysis

9.23 We considered the voiding rules as part of the cost benefit analysis in CP10/19. Our proposals will not significantly extend the scope of the voiding rules when the transitional period expires on 1 January 2012. Firms subject to the voiding rules should already be compliant with the revised Remuneration Code. For firms that were previously not subject to the voiding provisions, the cost benefits analysis of CP10/19 applies. Therefore, we consider that there are no material additional costs in complying with these voiding rules.

Compatibility statement

9.24 We believe our proposals are compatible with our general duties under section 2 of FSMA. Our Remuneration Code contributes to meeting our market confidence and financial stability objectives. In line with the principles of good regulation we are required to have regard, among other things, to the principle that the burden on firms imposed by our rules is proportionate to the benefits. Limiting the voiding rules, as described above, continues our existing policy and is consistent with our proportionate approach to the application of the revised code. We believe this approach is the most appropriate way to achieve our objectives.

Equality and diversity

9.25 We have assessed that our proposals do not give rise to discrimination and that the proposals are of low relevance to the equality agenda. Nevertheless, we would welcome any comments respondents may have on any equality issues they believe arise.

Contact

Comments should reach us by 6 October 2011. Please send them to:

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Appendix 1

List of questions

Chapter 2:

Q2.1: Do you agree with the proposed approach for a direct copy-out of the Directive provision?

Chapter 3:

Q3.1: Do you think the examination standards for 'undertaking pension transfer activity' need updating, and if so what changes should be made?

Q3.2: If the examination standards are changed, how should any gaps in knowledge be addressed?

Q3.3: Do you agree that the level for the examination requirement for 'undertaking pension transfer activity' should be set at Level 4?

Q3.4: Do you think the examination standards for 'managing investments' needs updating and, if so, what changes should be made?

Q3.5: Do you agree that we should include standards on investments principles and risk and personal taxation?

Q3.6: Do you agree that the examination requirement for 'managing investments' should be set at Level 4?

Q3.7: Do you agree that any changes to exam requirement should only be introduced for new joiners to the industry, and that individuals already working in a 'managing investments' activity should be able to fill gaps in knowledge through CPD?

Q3.8: Do you agree with these additions/amendments to our appropriate qualification lists?

Chapter 4:

Q4.1: Do you agree with our proposal to amend BIPRU 12.6.7R to include charities?

Q4.2: Do you agree with our proposal to amend BIPRU 12.7.9R and 12.7.10G?

Q4.3: Do you agree with our proposal to amend SUP 16 Annex 25G to clarify reporting requirements under FSA048?

Q4.4: Do you agree with the cost benefit analysis?

Chapter 5:

Q5.1: Do you have any comments on our proposed changes to the identity of the settlement decision makers?

Chapter 6:

Q6.1: Do you agree with the proposed changes to allow a NURS umbrella to consist of a combination of standard NURS sub-funds and NURS sub-funds operating as a FAIF?

Q6.2: Do you agree with the proposal to require ACDs of ICVCs to ask for a scheme's authorisation to be revoked in the circumstances described above?

Q6.3: Do you agree with the addition of proposed guidance on investing in syndicated loans? If not, please explain why.

Q6.4: Do you agree with the proposed changes to the guidance on short reports and the rule on translation of documents for recognised schemes?

Chapter 7:

Q7.1: Do you agree with the proposed amendment to separate the information issuers are required to publish under DTR 5.8.12R from the standard of care in DTR 1A.3.2R?

Chapter 8:

Q8.1: Do you have any comments on the draft text of the proposed guidance on PERG 2.3.2R?

Q8.2: Do you have any comments on the draft text of the proposed guidance on Q37C of PERG 14.4A?

Q8.3: Do you have any comments on the draft text of the proposed guidance on Q38 to Q38B of PERG 14.5?

Q8.4: Do you have any comments on the draft text of the proposed guidance on Q38C of PERG 14.5?

Chapter 9:

Q9.1: Do you agree with the proposal to limit the voiding rules to the firms that meet the criteria described?

Q9.2: Do you think the pre-existing provisions of agreements described in paragraphs 9.19 and 9.20 should become void when the conditions for voiding are later satisfied, or do you think such provisions should be excluded from voiding unless they are subsequently amended?

Q9.3: Do you have any other suggestions to improve the way in which the proposed amendments to the voiding rules can provide certainty for firms about whether the voiding rules apply?

Appendix 2

Implementing Omnibus 1 changes for financial conglomerates

SENIOR MANAGEMENT ARRANGEMENTS, SYSTEMS AND CONTROLS (FINANCIAL CONGLOMERATES) (AMENDMENT) INSTRUMENT 2011

Powers exercised

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

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

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

Commencement

C. This instrument comes into force on [*31 December 2011*].

Amendments to the Handbook

D. The Senior Management Arrangements, Systems and Controls sourcebook (SYSC) is amended in accordance with the Annex to this instrument.

Notes

E. In the Annex to this instrument, the "note" (indicated by "**Note:**") is included for the convenience of readers but does not form part of the legislative text.

Citation

F. This instrument may be cited as the Senior Management Arrangements, Systems and Controls (Financial Conglomerates) (Amendment) Instrument 2011.

By order of the Board
[*date*]

Annex

Amendments to the Senior Management Arrangements, Systems and Controls sourcebook (SYSC)

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

12 Group risk systems and controls requirements

12.1 Application

…

Financial conglomerates

12.1.11 R Where this section applies with respect to a *financial conglomerate*, the risk management processes referred to in *SYSC* 12.1.8R(2) must include:

…

(4) adequate procedures for the purpose of ensuring that the systems and controls of the members of the *financial conglomerate* are consistent and that the risks can be measured, monitored and controlled at the level of the *financial conglomerate*; and

(5) arrangements in place to contribute to and develop, if required, adequate recovery and resolution arrangements and plans. Such arrangements must be updated regularly.

[**Note**: article 9(2) of the *Financial Groups Directive*]

Appendix 3

Proposed changes to the Training and Competence sourcebook

Appendix 3

TRAINING AND COMPETENCE SOURCEBOOK (ACCREDITED BODIES AND QUALIFICATIONS AMENDMENTS NO 2) INSTRUMENT 2011

Powers exercised

A. The Financial Services Authority makes this instrument in the exercise of:

(1) the following powers and related provisions in the Financial Services and Markets Act 2000 ("the Act"):

(a) section 138 (General rule-making power);
(b) section 149 (Evidential provisions);
(c) section 156 (General supplementary powers);
(d) section 157(1) (Guidance); and

(2) the other powers and related provisions listed in Schedule 4 (Powers exercised) to the General Provisions of the Handbook.

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

Commencement

C. This instrument comes into force on [*date*].

Amendments to the Handbook

D. The Senior Management Arrangements, Systems and Controls sourcebook (SYSC) is amended in accordance with Annex A to this instrument.

E. The Training and Competence sourcebook (TC) is amended in accordance with Annex B to this instrument.

Citation

F. This instrument may be cited as the Training and Competence Sourcebook (Accredited Bodies and Qualifications Amendments No 2) Instrument 2011.

By order of the Board
[*date*]

Annex A

Amendments to the Senior Management Arrangements, Systems and Controls sourcebook (SYSC)

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

3.1 Systems and Controls

...

3.1.10 G If a *firm* requires *employees* who are not subject to ~~an~~ a ~~examination~~ qualification requirement in *TC* to pass a relevant examination from the list of recommended examinations maintained by the Financial Services Skills ~~Council~~ Partnership, the *FSA* will take that into account when assessing whether the *firm* has ensured that the *employee* satisfies the knowledge component of the *competent employees rule*.

...

5.1 Skills, knowledge and expertise

...

5.1.5A G If a *firm* requires *employees* who are not subject to ~~an~~ a ~~examination~~ qualification requirement in *TC* to pass a relevant examination from the list of recommended examinations maintained by the Financial Services Skills ~~Council~~ Partnership, the *FSA* will take that into account when assessing whether the *firm* has ensured that the *employee* satisfies the knowledge component of the *competent employees rule*.

Annex B

Amendments to the Training and Competence sourcebook (TC)

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

Appendix 4E Appropriate Qualification tables

…

Qualification table for : Advising on (but not dealing in) *securities* (which are not *stakeholder pension* schemes or *broker funds)* – Activity number 2 in TC Appendix 1.1.1R		
Qualification	**Qualification Provider**	**Key**
…		
SFA Securities Representative Examination	The Chartered Institute for Securities & Investment (Formerly the Securities and Investment Institute)	c
Fellow or Associate or where the individual has passed all of the following modules CT1, CT2, CT4, CT5, CT6, CT7 and CT8	Faculty or Institute of Actuaries	a
…		

Qualification table for : Advising on (but not dealing in) *Derivatives* – Activity number 3 in TC Appendix 1.1.1R		
Qualification	**Qualification Provider**	**Key**
…		
Fellow or Associate or where the individual has passed all of the following modules CT1, CT2, CT4, CT5, CT6, CT7 and CT8	Faculty or Institute of Actuaries	a
…		

Qualification table relating to : Advising on *Packaged Products* (which are not *broker funds)* and *Friendly Society* tax-exempt policies - Activity Numbers 4 and 6 in TC Appendix 1.1.1R		
Qualification	**Qualification Provider**	**Key**
Financial Services Foundation Degree	Blackburn College –University Centre	a
…		
Diploma in Professional Finance Advice	Calibrand/Scottish Qualifications Authority	a
Diploma in Professional Financial Advice (NMBA Alternative Assessment method)	Calibrand/Scottish Qualifications Authority	a

…		
Fellow or Associate or where the individual has passed all of the following modules CT1, CT2, CT4, CT5, CT6, CT7 and CT8	Faculty or Institute of Actuaries	a
…		

…

Qualification table for : Advising on *Long-term care insurance contracts* – Activity number 7 in TC Appendix 1.1.1R		
Qualification	**Qualification Provider**	**Key**
Certificate in Financial Planning plus the Award in ~~&~~ Long Term Care Insurance	Chartered Insurance Institute	1
…		

…

Qualification table for : Managing *investments* or Acting as a *Broker fund adviser* – Activity number 14 and 10 in TC Appendix 1.1.1R		
Qualification	**Qualification Provider**	**Key**
...		
Fellow or Associate by examination	CFA Society of UK (Formerly United Kingdom Society of Investment Professionals/Institute of Investment Management and Research)	1
…		

…

Qualification table for : ~~Carrying out~~ Overseeing on a day to day basis administrative functions in relation to effecting or carrying out *contracts of insurance* which are *life policies*:

- **(i) new business administration;**
- **(ii) policy alterations including surrenders and policy loans;**
- **(iii) preparing projections;**
- **(iv) processing claims, including pension payments;**
- **(v) fund switching**

Activity number 18 in TC Appendix 1.1.1R

Qualification	**Qualification Provider**	**Key**
…		

Appendix 4

Proposed minor changes to our liquidity regime

Appendix 4

LIQUIDITY STANDARDS (MISCELLANEOUS AMENDMENTS NO 3) INSTRUMENT 2011

Powers exercised

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

(1) section 138 (General rule-making power);
(2) section 150(2) (Actions for damages);
(3) section 156 (General supplementary powers); and
(4) section 157(1) (Guidance).

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

Commencement

C. This instrument comes into force on [*date*].

Amendments to the Handbook

D. The Prudential sourcebook for Banks, Building Societies and Investment Firms (BIPRU) is amended in accordance with Annex A to this instrument.

E. The Supervision manual (SUP) is amended in accordance with Annex B to this instrument.

Citation

F. This instrument may be cited as the Liquidity Standards (Miscellaneous Amendments No 3) Instrument 2011.

By order of the Board
[*date*]

Annex A

Amendments to the Prudential sourcebook for Banks, Building Societies and Investment Firms (BIPRU)

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

Simplified ILAS conditions

…

12.6.7 R In this section:

(1) a "retail *deposit*" is a *deposit* accepted from a *consumer*; and

(2) "SME *deposits*" are *deposits* accepted from, and account balances where the account holders are, *small and medium-sized enterprises* (or *partnerships* or *sole traders* which would be *small and medium-sized enterprises* if they were companies) or a charity.

…

12.7 Liquid assets buffer

…

12.7.9 R For the purposes of *BIPRU* 12.7.2R(1) and (2), a *firm* must only count securities:

(1) which are unencumbered;

(2) (a) to which it has legal title; ~~and~~ or

(b) in relation to any securities held as excess collateral with a *central bank* which meet the requirements of *BIPRU* 12.7.9AR, to which that *central bank* has legal title; and

(3) which that *firm* realises on a regular basis.

12.7.9A R A *firm* may include assets provided by it to a *central bank* as collateral which are held under that *central bank's* facilities which:

(1) are in excess of the amount of collateral required to be held; and

(2) the *firm* is entitled to withdraw without restriction;

in its liquid assets buffer with effect from the point in time at which the assets would be available to the *firm* to convert into cash if it notified the relevant *central bank* of a withdrawal of those assets.

12.7.10 G The *FSA* regards as encumbered any asset which the *firm* in question has provided as collateral. Therefore, where assets have been used as collateral in this way (for example, in a *repo*), they should not be included in the *firm's* liquid assets buffer. However, any assets provided by the *firm* to a *central bank* as collateral which meet the requirements in *BIPRU* 12.7.9AR are regarded as unencumbered by the *FSA* for the purposes of *BIPRU* 12.7.9R(1).

Annex B

Amendments to the Supervision manual (SUP)

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

16 Annex 25G Guidance notes for data items in SUP 16 Annex 24

…

FSA 048 Enhanced Mismatch Report

...

12 Securities issued by group entities

A *firm* should report in this row the unencumbered balances and security flows attributable to securities where the obligor of those securities forms part of the *firm's group* and where the issuing vehicle is excluded from the scope of the report. If the issuing vehicle is included in the scope of the report, the securities should be reported as own-name securities and reported on line 9, if:

(1) the securities are own-name covered bonds or asset-backed securities; or

(2) the credit rating of such *exposures* is associated with *credit quality step* 2 or above in the *credit quality assessment scale* published by the FSA for the purpose of *BIPRU* 3 (the Standardised Approach to Credit Risk: mapping of the ECAIs credit assessment to credit quality steps (Long term mapping)) or *credit quality step* 1 in the case of short-term mapping~~, or omitted from this report if they do not~~.

If (1) or (2) are not met the securities should be omitted from this report.

For avoidance of doubt, if a *firm* holds bonds issued by its *group*, …

Appendix 5

Settlement decision makers

Appendix 5

GLOSSARY AMENDMENT (DEFINITION OF SETTLEMENT DECISION MAKERS) INSTRUMENT 2011

Powers exercised

A. The Financial Services Authority makes this instrument in the exercise of the following powers in the Financial Services and Markets Act 2000:

(1) section 157(1) (Guidance); and
(2) section 395(5) (The Authority's procedures).

Commencement

B. This instrument comes into force on [*date*].

Amendments to the Handbook

C. The Glossary is amended in accordance with Annex A to this instrument.

D. The Decision Procedure and Penalties manual (DEPP) is amended in accordance with Annex B to this instrument.

Amendments to the Enforcement Guide

E. The Enforcement Guide (EG) is amended in accordance with Annex C to this instrument.

Citation

F. This instrument may be cited as the Glossary Amendment (Definition of Settlement Decision Makers) Instrument 2011.

By order of the Board
[*date*]

Annex A

Amendments to the Glossary of definitions

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

settlement decision makers	(in *DEPP* and *EG*) two members of the *FSA's* ~~executive~~ senior management, one of whom will be of at least director of division level (which may include an acting director) and the other of whom will be of at least head of department level, with responsibility for deciding whether to give *statutory notices* in the circumstances described in *DEPP* 5. At least one of the decision makers will not be from the Enforcement and Financial Crime Division.

Annex B

Amendments to the Decision Procedure and Penalties manual (DEPP)

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

5.1.1 G …

(3) The decision will be taken jointly by two members of the *FSA's* ~~executive~~ senior management, one of whom will be of at least director of division level (which may include an acting director) and the other of whom will be of at least head of department level (the "*settlement decision makers*").

(4) At least one of the *settlement decision makers* will not be from the Enforcement and Financial Crime Division. ~~One of the directors taking the decision~~ The other *settlement decision maker* will usually be, but need not be, ~~the director of~~ from the Enforcement and Financial Crime Division. Consistent with section 395(2) of the *Act*, a *settlement decision maker* will not have been directly involved in establishing the evidence on which the decision is based. ~~(In exceptional cases, the director of Enforcement may have been directly involved in establishing the evidence on which the decision is based and would not therefore be able to participate (see section 395(2) of the *Act*).)~~

…

Annex C

Amendments to the Enforcement Guide (EG)

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

5.5 Decisions on settlements and *statutory notices* arising from them are taken by two members of the FSA's senior management ~~of at least director level~~, rather than by the *RDC* (*DEPP* refers to these individuals as the '*settlement decision makers*'). Full details of the special decision making arrangements for settlements are set out in *DEPP* 5.

Appendix 6

Proposed changes to the Collective Investment Schemes sourcebook

Appendix 6

COLLECTIVE INVESTMENT SCHEMES SOURCEBOOK (AMENDMENT NO 6) INSTRUMENT 2011

Powers exercised

A. The Financial Services Authority makes this instrument in the exercise of the powers and related provisions in or under:

(1) the following sections of the Financial Services and Markets Act 2000 ("the Act"):

(a) section 138 (General rule-making power);
(b) section 139(4) (Miscellaneous ancillary matters);
(c) section 156 (General supplementary powers);
(d) section 157(1) (Guidance);
(e) section 247 (Trust scheme rules); and

(2) regulation 6(1) (FSA rules) of the Open-Ended Investment Companies Regulations 2001 (SI 2001/1228).

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

Commencement

C. This instrument comes into force on [*date*].

Amendments to the Handbook

D. The Glossary of definitions is amended in accordance with Annex A to this instrument.

E. The Collective Investment Schemes sourcebook (COLL) is amended in accordance with Annex B to this instrument.

Citation

F. This instrument may be cited as the Collective Investment Schemes Sourcebook (Amendment No 6) Instrument 2011.

By order of the Board
[*date*]

Annex A

Amendments to the Glossary of definitions

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

fund of alternative investment funds	(a)	an *authorised fund* whose *instrument constituting the scheme* contains the statement in *COLL* 3.2.6R(7C) (Table: contents of the instrument constituting the scheme) that it is a *fund of alternative investment funds*; or
	(b)	a *sub-fund* in a *non-UCITS retail scheme* which is an *umbrella*, where the *authorised fund manager* operates, or proposes to operate, the *sub-fund* in accordance with the investment and borrowing powers in *COLL* 5.7 (Investment powers and borrowing limits for NURS operating as FAIFs) as if the *sub-fund* were a separate *scheme*.

Annex B

Amendments to the Collective Investment Schemes sourcebook (COLL)

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

Types of authorised fund

1.2.1 R An application for an *authorisation order* must propose that the *scheme* be one of the following types:

…

(2) a *non-UCITS retail scheme* including:

(a) a *non-UCITS retail scheme* operating as a *fund of alternative investment funds* (*FAIF*); or

(b) a *non-UCITS retail scheme* which is an *umbrella* with a mixture of *sub-funds* operating either as a *FAIF* or a standard *non-UCITS retail scheme*; or

...

Types of authorised fund - explanation

1.2.2 G ...

(2) *Non-UCITS retail* schemes are schemes that do not comply with all the conditions set out in the *UCITS Directive*. Such *schemes* could become *UCITS schemes* provided they are changed, so as to comply with the conditions set out in the *UCITS Directive*. *Non-UCITS retail schemes* operating as *FAIFs* have wider powers to invest in *collective investment schemes* than other *non-UCITS retail schemes*. A *non-UCITS retail scheme* may also be structured as an *umbrella* with a mixture of *sub-funds* operating either as a *FAIF* or a standard *non-UCITS retail scheme*. In these cases, *rules* relating to investment powers and borrowing limits apply to each *sub-fund* as they would to a *scheme*.

…

Table: contents of the instrument constituting the scheme

3.2.6 R This table belongs to *COLL* 3.2.4R (Matters which must be included in the instrument constituting the scheme)

...	
	Funds of alternative investment funds

7C	For a *non-UCITS retail scheme* operating solely as a *FAIF*, a statement that it is a *fund of alternative investment funds*.
…	

…

Table: contents of the prospectus

4.2.5 R This table belongs to *COLL* 4.2.2R (Publishing the prospectus).

...	
Funds of alternative investment funds	
22B	...
22C	For a *non-UCITS retail scheme* which is an *umbrella* with a mixture of *sub-funds* operating either as a *FAIF* or a standard *non-UCITS retail scheme*, a statement to that effect and a statement identifying which *sub-funds* operate as a *FAIF* and which operate as a standard *non-UCITS retail scheme*.
…	

…

Significant information to be included in the short report

4.5.6 G For the purpose of *COLL* 4.5.5R(1)(d) and *COLL* 4.5.5R(1)(e) the *authorised fund manager* should consider including the following as sufficient and significant information:

…

(4) the total expense ratio at the end of the period or, in the case of a *UCITS scheme*, the ongoing charges figure together with (where appropriate) any performance-related fee payable to the *authorised fund manager* or any investment adviser~~, as disclosed in the most up-to-date *key investor information*~~;

…

…

Guidance on syndicated loans

5.2.35 G (1) A syndicated loan for the purposes of this *guidance* means a form of loan where a group or syndicate of parties lend *money* to a third party and in return receive interest payments during the life of the debt, and a return of principal at the end of the loan period. Such loans are usually arranged through agent banks which maintain a

record of the lenders' interest in the loan and arrange the interest payments. Whether an interest in a syndicated loan constitutes a *transferable security* or otherwise will depend on the terms of the relevant instrument. Where an *authorised fund manager* plans to invest *scheme property* in interests in such syndicated loans, it may wish to consider seeking professional advice as to their eligibility.

(2) To determine whether an interest in a syndicated loan would be an eligible investment for a *UCITS scheme* in accordance with *COLL* 5.2, an *authorised fund manager* should first consider whether it constitutes a *transferable security* within the meaning of *COLL* 5.2.7R (Transferable securities) and then consider the additional eligibility criteria arising out of the *UCITS eligible assets Directive* that relate to liquidity, valuations and negotiability (see *COLL* 5.2.7AR (Investment in transferable securities)).

(3) A *UCITS scheme* cannot lend money from its *scheme property* and therefore is unable to partake in the initial funding of a syndicated loan.

(4) An instrument will not be a *transferable security* if it falls within one or more of the exclusions set out in article 77(2) of the *Regulated Activities Order*. An instrument acknowledging or creating indebtedness for, or for money borrowed to defray, the consideration payable under a contract for the supply of goods or services would be an example of such an exclusion.

(5) In the *FSA's* opinion, for an instrument to be classed as a *debenture* for the purposes of constituting a *transferable security* (see *COLL* 5.2.7R(1)(b)), there must be an instrument creating or evidencing indebtedness. A facilities agreement and a drawdown request which does not create or evidence indebtedness will not be a *debenture* for these purposes.

(6) In the *FSA's* view, the simple fact that a debt obligation is transferable (whether by way of creation, assignment or otherwise) does not necessarily make it negotiable for the purposes of *COLL* 5.2.7AR(1)(e) (Investment in transferable securities), so as to make it a permissible investment for a *UCITS scheme*. When *securities* are capable of being traded on a capital market, whether *on-exchange* or *off-exchange*, as a class and are fungible within their class, this would tend to indicate (unless the *AFM* was aware of specific evidence to the contrary) that they are negotiable.

(7) The *FSA's* understanding is that leveraged loans are a non-investment grade sub-set of syndicated loans and, where this is the case, *AFMs* should use similar analysis to determine whether or not interests in such loans are eligible investments for *UCITS schemes*.

(8) Where a loan falls within the *Glossary* definition of a *transferable security*, investment in such a loan in the case of a *UCITS scheme* is

subject to the spread requirements in *COLL* 5.2.11R (Spread: general). *AFMs* also need to bear in mind that where such a *transferable security* does not meet the requirements of *COLL* 5.2.8R(3) (Transferable securities and money-market instruments generally to be admitted to or dealt in on an eligible market), the *scheme's* overall exposure to such loans is limited in aggregate to 10% of the value of its *scheme property*, as required by *COLL* 5.2.8R(4).

…

Guidance on syndicated loans

5.6.25 G (1) *COLL* 5.2.35G (Guidance on syndicated loans) is equally applicable to investment by a *non-UCITS retail scheme* in a syndicated loan, except that the additional eligibility criteria arising out of the *UCITS eligible assets Directive* relating to liquidity, valuations and negotiability (see *COLL* 5.2.7AR (Investment in transferable securities)) do not apply in relation to a *non-UCITS retail scheme*.

(2) Where a loan falls within the *Glossary* definition of a *transferable security*, investment in such a loan in the case of a *non-UCITS retail scheme* is subject to the spread requirements in *COLL* 5.6.7R (Spread: general). *AFMs* also need to bear in mind that where such a *transferable security* does not meet the requirements of *COLL* 5.6.5R(1) (Eligibility of transferable securities and money-market instruments for investment by a non-UCITS retail scheme), the *scheme's* overall exposure to such loans is limited in aggregate to 20% of the value of its *scheme property*, as required by *COLL* 5.6.5R(2).

…

Non-UCITS retail schemes that are umbrellas with FAIF sub-funds

5.7.12 R In relation to a *non-UCITS retail scheme* which is an *umbrella* with a mixture of *sub-funds* operating either as a *FAIF* or a standard *non-UCITS retail scheme*, the provisions in this section apply to each *sub-fund* operating as a *FAIF* as they would to a separate *scheme*.

…

When an ICVC is to be wound up or a sub-fund terminated

7.3.4 R …

(4) Subject to (3) and the subsequent provisions of this section, the appropriate steps to wind up an *ICVC* or terminate a *sub-fund* under this section must be taken:

…

(b) when the period (if any) fixed for the duration of the *ICVC* or the *sub-fund* by the *instrument of incorporation* expires or any event occurs, for which the *instrument of incorporation* provides that the *ICVC* or the *sub-fund* is to be wound up; or

(c) on the date stated in any agreement by the *FSA* in response to a request from the *directors* for the winding up of the *ICVC* or a request for the termination of the *sub-fund*; or

(d) on the effective date of a duly approved *scheme of arrangement* which is to result in the *ICVC* ceasing to hold any *scheme property*; or

(e) in the case of a *sub-fund*, on the effective date of a duly approved *scheme of arrangement* which is to result in the *sub-fund* ceasing to hold any *scheme property*; or

(f) in the case of an *ICVC* that is an *umbrella*, on the date on which all of its *sub-funds* fall within (e) or have otherwise ceased to hold any *scheme property*, notwithstanding that the *ICVC* may have assets and liabilities that are not attributable to any particular *sub-fund*.

…

Documents

9.4.2 R (1) …

(1A) For a section 264 *recognised scheme*, the requirement in (1) for documents to be in English applies only to the *EEA key investor information document* referred to in (1)(d).

…

Appendix 7

Proposed changes to the Disclosure and Transparency Rules

Appendix 7

DISCLOSURE RULES AND TRANSPARENCY RULES SOURCEBOOK (AMENDMENT NO 5) INSTRUMENT 2011

Powers exercised

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

(1) section 73A (Part 6 rules);
(2) section 89A (Transparency rules);
(3) section 89B (Provision of voteholder information);
(4) section 89C (Provision of information by issuers of transferable securities);
(5) section 89D (Notification of voting rights held by issuer);
(6) section 89F (Transparency rules: interpretation etc);
(7) section 89G (Transparency rules: other supplementary provisions);
(8) section 101 (Part 6 rules: general provisions); and
(9) Schedule 7 (The Authority as Competent Authority for Part VI).

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

Commencement

C. This instrument comes into force on [*date*].

Amendments to the Handbook

D. The Disclosure Rules and Transparency Rules sourcebook (DTR) is amended in accordance with the Annex to this instrument.

Citation

E. This instrument may be cited as the Disclosure Rules and Transparency Rules Sourcebook (Amendment No 5) Instrument 2011.

By order of the Board
[*date*] 2011

Annex

Amendments to the Disclosure Rules and Transparency Rules sourcebook (DTR)

In this Annex, underlining indicates new text.

Misleading information not to be published

1A.3.2	R	An *issuer* must take all reasonable care to ensure that any information it notifies to a *RIS* is not misleading, false or deceptive and does not omit anything likely to affect the import of the information.
1A.3.2A	R	The duty imposed by *DTR* 1A.3.2R does not apply to an *issuer's* obligation under *DTR* 5.8.12R to make public the information contained in a voteholder notification made to it under *DTR* 5.1.2R.

Appendix 8

Proposed amendments to the Perimeter Guidance manual

Appendix 8

PERIMETER GUIDANCE (AMENDMENT NO 3) INSTRUMENT 2011

Powers exercised

A. The Financial Services Authority makes this instrument in the exercise of its powers under section 157(1) (Guidance) of the Financial Services and Markets Act 2000.

Commencement

B. This instrument comes into force on [*date*] 2011.

Amendments to the Perimeter Guidance manual

C. The Perimeter Guidance manual (PERG) is amended in accordance with the Annex to this instrument. The general guidance in PERG does not form part of the Handbook.

Citation

D. This instrument may be cited as the Perimeter Guidance (Amendment No 3) Instrument 2011.

By order of the Board
[*date*] 2011

Annex

Amendments to the Perimeter Guidance manual (PERG)

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

2.3 The business element

…

2.3.2 G There is power in the *Act* for the Treasury to change the meaning of the business element by including or excluding certain things. They have exercised this power (see the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001 (SI 2001/1177), the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No.2) Order 2003 (SI 2003/1476), ~~and~~ the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) (Amendment) Order 2005 (SI 2005/922) and the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business)(Amendment) Order 2011 (SI 2011/XXX). The result is that the business element differs depending on the activity in question. This in part reflects certain differences in the nature of the activities:

…

(3) …

(3A) A *person* who enters into a *regulated sale and rent back agreement* as *agreement provider* is to be regarded as carrying on that activity by way of business except where he is a related person to the agreement seller. See *PERG* 14.4A, Q37A for the meaning of 'related person'.

…

…

14.4A Activities relating to regulated sale and rent back agreements

…

Q37C. When will I be carrying on the activity of entering into a regulated sale and rent back agreement?

This will occur when you enter into the agreement at the outset as the agreement provider even if you do so only once. It can also occur at a later stage if all or part of the rights or obligations of the agreement provider are transferred to you or if you acquire all or part of the interest in land bought by the agreement provider (where you become an 'agreement transferee')…

…

14.5 The 'by-way-of-business' test

Q38. How do I know if I am carrying on regulated activities by way of business?

A *person* will only need to be an *authorised* person or exempt if he is carrying on a *regulated activity* 'by way of business' (see section 22 of the *Act* (Regulated activities)). There are, in fact, ~~three~~ four different forms of business test applied to ~~the~~ *home finance transactions* (see Q38A).

Whether or not any particular *person* will meet the requirement that he carries on a *regulated activity* by way of business and so needs *authorisation* or exemption will invariably depend on that person's individual circumstances. Generally speaking, ~~A~~ a number of factors need to be taken into account in determining whether the test is met. These include:

- the degree of continuity (not applicable for *regulated sale and rent back agreements* (see Q38B));
- the existence of a commercial element;
- the scale of the activity;
- the proportion which the activity bears to other activities carried on by the same person but which are not regulated; and
- the nature of the particular regulated activity that is carried on.

…

Q38A. What are the ~~three~~ four different forms of business test referred to in Q38?

They are:

(1) the 'by way of business' test in section 22 of the *Act* applies unchanged in relation to the activity of *entering into a home finance transaction* other than a *regulated sale and rent back agreement*;

(1A) in the case of a *regulated sale and rent back agreement* the effect of article 5 of the *Business Order* is that a *person* is to be regarded as acting 'by way of business' unless the parties to the agreement are family members;

…

Q38B. How does the business test in the Business Order differ from the business test in section 22 of the Act?

The 'carrying on the business' test in articles 3B to 3D of the *Business Order* is a narrower test than that of carrying on *regulated activities* 'by way of business' in section 22 of the *Act* as it requires the *regulated activities* to represent the carrying on of a business in their own right.

On the other hand, the business test in article 5 of the *Business Order* is wider than the business test in section 22 of the *Act* as it does not require any degree of

continuity; entering into just one *regulated sale and rent back agreement* is enough.

Q38C. Can you give me some examples of where the business test is unlikely to be satisfied?

Examples are:

(1) When an individual enters into a one-off sale and rent back agreement as agreement provider for an agreement seller who is a ~~friend or~~ member of his family whether at market rates or not; and

(2) …

Q38D. Will I meet the business test if I only enter into one home purchase plan~~,~~ or home reversion plan ~~or regulated sale and rent back agreement~~ a year?

Yes, you might meet the business test. Whether or not you do will depend largely on the facts. The following issues may be helpful to bear in mind:

…

With this in mind, if you intend on entering into just one ~~sale and rent back agreement,~~ home reversion plan or home purchase plan each year this may be enough to meet the 'by way of business' test if the scale of this activity is likely to be significant in relation to your other activities.

Q38E. Will I meet the business test if I enter into one sale and rent back agreement?

Yes you will, provided the agreement seller is not a related person. See Q37A for the definition of 'related person'.

This is because of an amendment to the *Business Order* made under the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business)(Amendment) Order 2011 (SI 2011/XXX) which came into force on XXX. This Order also provides that the amendment will cease to have effect at the end of 2014. The Treasury is required to review the operation and effect of the amendment and to publish a report before the end of 2012. Following the review, the Treasury will decide whether the amendment should be allowed to expire, be revoked early, or be maintained in force with or without amendments. A further instrument would be needed to maintain the amendment in force or to revoke the amendment early.

Appendix 9

Remuneration Code – proposals to amend the transitional provisions on voiding and recovery

SENIOR MANAGEMENT ARRANGEMENTS, SYSTEMS AND CONTROLS (REMUNERATION CODE) (NO 4) INSTRUMENT 2011

Powers exercised

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

(1) section 138 (General rule-making power);
(2) section 139A (General rules about remuneration);
(3) section 149 (Evidential provisions);
(4) section 156 (General supplementary powers); and
(5) section 157(1) (Guidance).

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

Commencement

C. This instrument comes into force on 1 January 2012.

Amendments to the Handbook

D. The Glossary of definitions is amended in accordance with Annex A to this instrument.

E. The Senior Management Arrangements, Systems and Controls sourcebook (SYSC) is amended in accordance with Annex B to this instrument.

Citation

F. This instrument may be cited as the Senior Management Arrangements, Systems and Controls (Remuneration Code) (No 4) Instrument 2011.

By order of the Board
[ ]

Annex A

Amendments to the Glossary of definitions

Insert the following new definition in the appropriate alphabetical position. The text is not underlined.

third country BIPRU 730k firm	an *overseas firm* that: (a) is not an *EEA firm*; (b) has its head office outside the *EEA*; and (c) would be a *BIPRU 730k firm* if it had been a *UK domestic firm*, had carried on all its business in the *United Kingdom* and had obtained whatever authorisations for doing so as are required under the *Act*.

Annex B

Amendments to the Senior Management Arrangements, Systems and Controls sourcebook (SYSC)

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

Effect of breaches of the Remuneration Principles

19A.3.53 A R *SYSC* 19A Annex 1 makes provision about voiding and recovery.

19A.3.54 R (1) ~~The~~ Subject to (1A) to (3), the detailed provisions on voiding and recovery in *SYSC* 19A Annex ~~1~~ 1.1R to 1.4R apply in relation to the prohibitions on *Remuneration Code staff* being *remunerated* in the ways specified in:

(a) *SYSC* 19A.3.40R (guaranteed variable *remuneration*);

(b) *SYSC* 19A.3.49R (non-deferred variable *remuneration*); and

(c) *SYSC* 19A Annex 1.7R (replacing payments recovered or property transferred).

(1A) Paragraph (1) applies only to those prohibitions as they apply in relation to a *firm* that satisfies at least one of the conditions set out in (1B) to (1D).

(1B) Condition 1 is that the *firm* is a *UK bank* or *building society* that had *capital resources* exceeding £1,000 million on its last *accounting reference date*.

(1C) Condition 2 is that the *firm* is a relevant *BIPRU 730k firm* that had *capital resources* exceeding £750 million on its last *accounting reference date*.

(1D) Condition 3 is that the *firm*:

(a) is a *full credit institution*, a relevant *BIPRU 730k firm* or a relevant *third country BIPRU 730k firm*; and

(b) is part of a *group* containing a *firm* that is:

(i) a *UK bank* or *building society* that had *capital resources* exceeding £1,000 million on its last *accounting reference date*; or

(ii) a relevant *BIPRU 730k firm* that had *capital resources* exceeding £750 million on its last *accounting reference date*.

(1E) In condition 2 in (1C) and condition 3 in (1D)(a) and (b)(ii):

(b) a "relevant *BIPRU 730k firm*" is any *BIPRU 730k firm* that is not a *limited activity firm* or a *limited licence firm*;

(b) a "relevant *third country BIPRU 730k firm*" is any *third country BIPRU 730k firm* that is not a *limited activity firm* or a *limited licence firm.*

…

19A.3.55 G (1) Section 139A(9) of the *Act* enables the *FSA* to make *rules* that render void any provision of an agreement that contravenes specified prohibitions in the *Remuneration Code*, and that provide for the recovery of any payment made, or other property transferred, in pursuance of such a provision. *SYSC* 19A.3.35AR and *SYSC* 19A.3.54R (together with *SYSC* 19A Annex 1) ~~is such a *rule*~~ are such *rules* and ~~renders~~ render void provisions of an agreement that contravene the specified prohibitions on guaranteed variable *remuneration*, non-deferred variable *remuneration* and replacing payments recovered or property transferred. This is an exception to the general position set out in section 151(2) of the *Act* that a contravention of a *rule* does not make any transaction void or unenforceable.

(2) ~~*SYSC* TP3.6R provides that *SYSC* 19A.3.54R and *SYSC* 19A Annex 1 apply, until 1 January 2012, only in relation to a *firm* that was subject to the version of the *Remuneration Code* that applied before 1 January 2011.~~ [deleted]

19A Annex 1 Detailed provisions on voiding and recovery (SYSC 19A.3.53AR and SYSC 19A.3.54R)

	Rendering contravening provisions of agreements void		
1	R	Any provision of an agreement that contravenes a prohibition on *persons* being *remunerated* in a way specified in a *rule* to which this ~~annex~~ *rule* applies (a "contravening provision") is void.	
1A	R	A contravening provision does not cease to be void because:	
		(1)	the *firm* concerned ceases to satisfy any of the conditions set out in *SYSC* 19A.3.54(1B) to (1D); or
		(2)	the member of *Remuneration Code staff* concerned starts to satisfy both of the conditions set out in *SYSC* 19A.3.54R(3)(a) and (b).
2	R	A contravening provision that, at the time a *rule* to which this ~~annex~~ *rule* applies was made, is contained in an agreement made before that time is not	

		rendered void by 1R unless it is subsequently amended so as to contravene such a *rule*.		
3	G	The effect of 2R, in accordance with section 139A(11) of the *Act*, is to prevent contravening provisions being rendered void retrospectively. Contravening provisions may however be rendered void if they are contained in an agreement made after the *rule* containing the prohibition is made by the *FSA* but before the *rule* comes into effect. For further relevant transitional provisions, see *SYSC* TP3.6A.		
…				
5	R	In relation to any payment made or other property transferred in pursuance of a contravening provision, a *firm* must take reasonable steps to:		
		(1)	recover any such payment made or other property transferred by the *firm*; and	
		(2)	ensure than any other person ("P") recovers any such payment made or other property transferred by that person.	
5A	R	Paragraph 5R continues to apply in one or both of the following cases:		
		(1)	the *firm* concerned ceases to satisfy any of the conditions set out in *SYSC* 19A.3.54(1B) to (1D);	
		(2)	the member of *Remuneration Code staff* concerned starts to satisfy both of the conditions set out in *SYSC* 19A.3.54R(3)(a) and (b).	
	…			
	Replacing payments recovered or property transferred			
7	R	(1)	A *firm* must not award, pay or provide variable *remuneration* to a *person* ~~whose~~ who has received *remuneration* in pursuance of ~~has caused the *firm* to breach~~ a contravening provision (the "contravening *remuneration*") unless the *firm* has obtained a legal opinion stating that the award, payment or provision of the *remuneration* complies with the *Remuneration Code*.	
		(2)	This *rule* applies only to variable *remuneration* relating to a performance year to which the contravening *remuneration* related.	
		(3)	The legal opinion in (1) must be properly reasoned and be provided by an appropriately qualified independent individual.	
		(4)	Paragraph (1) continues to apply in one or both of the following cases:	
			(a)	the *firm* concerned ceases to satisfy any of the conditions set out in *SYSC* 19A.3.54(1B) to (1D);

			(b)	the member of *Remuneration Code staff* concerned starts to satisfy both of the conditions set out in *SYSC* 19A.3.54R(3)(a) and (b).
…				

…

TP 3 Remuneration code

…

6 R Until 1 January 2012, *SYSC* 19A.3.54R and *SYSC* 19A Annex 1 (on voiding and recovery) apply only in relation to a firm that was subject to the version of the *Remuneration Code* that applied before 1 January 2011.

6A R (1) Paragraph (2) applies in relation to a *firm* that was not subject to the version of the *Remuneration Code* that applied before 1 January 2011 but satisfies at least one of the conditions set out in *SYSC* 19A.3.54R(1B) to (1D).

(2) Where this paragraph applies, a contravening provision that is contained in an agreement made before [**date to be inserted, which will be the the date of the making of the draft rules*] is not rendered void by *SYSC* 19A Annex 1.1R unless it is subsequently amended so as to contravene a rule to which *SYSC* 19A Annex 1.1R applies.

6B G The effect of 6R is to limit the provisions on voiding and recovery to *firms* which were subject to the version of the *Remuneration Code* which applied before 1 January 2011. That transitional provision comes to an end on 1 January 2012. A new limit providing for voiding to apply only in relation to certain types of firm is provided in *SYSC* 19A.3.54R(1B) to (1D). Paragraph 6AR applies to *firms* which become subject to the provisions on voiding after the transitional provision in 6R comes to an end. It prevents certain contravening provisions which predate the making of the new rules limiting the application of voiding from becoming void.

…

PUB REF: 002740

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