



Finalised guidance 16/1

Guidance on the FCA's approach to the implementation of ring-fencing and ring-fencing transfer schemes

March 2016

1 Introduction and feedback summary

Introduction

- 1.1 This Finalised Guidance sets out our approach to ring-fencing transfer schemes (RFTSs) and, more generally, our key responsibilities in supporting the wider implementation of ring-fencing in the UK. It follows the September 2015 publication of our Guidance Consultation GC15/5 'Ring-fencing: Guidance on the FCA's approach to the implementation of ring-fencing and ring-fencing transfer schemes'. Our responses to the feedback we received on GC15/5 are set out below.
- 1.2 This guidance is relevant to firms and their groups that are subject to ring-fencing, as well as to skilled persons that are commissioned to author a scheme report for the purposes of RFTS court proceedings. It may also be of interest to other firms and consumers dealing with ring-fenced bodies.
- 1.3 We do not consider that the feedback received requires substantial changes to our guidance and proposed approach as set out in GC15/5. However, we have amended the draft guidance in some areas, mostly to clarify our approach. It should be noted that our ability to make changes to our approach is limited by the provisions related to RFTSs in Part VII of the Financial Services and Markets Act 2000 Act (FSMA).
- 1.4 This Finalised Guidance should be read in conjunction with the Prudential Regulation Authority's (PRA) Statement of Policy setting out the PRA's approach to RFTSs.

Background to ring-fencing and ring-fencing transfer schemes

- 1.5 The Banking Reform Act 2013 inserted provisions into FSMA that establish a ring-fencing regime for the UK's largest banks from 1 January 2019. In broad terms, the legislation aims to isolate retail banking activities from investment banking activities. The core objective is to reduce the likelihood of disruption of key retail services by insulating ring-fenced bodies from risks arising elsewhere in their own groups or in the wider financial system.
- 1.6 Only banks with average total core deposits (broadly, those from individuals and small to medium businesses) of more than £25 billion for a three-year period fall within the scope of ring-fencing. The ring-fencing regime will not apply to banks below the £25 billion threshold, building societies, foreign banks, or independent private banks.
- 1.7 The responsibility for supervising compliance with the ring-fencing regime will lie largely with the PRA. The PRA is also required to make rules covering a wide range of areas, including the governance of, and prudential requirements on, ring-fenced bodies. The

FCA is required by law to make rules specifying the information that a non-ring-fenced body (NRFB) must provide to certain individuals.¹

1.8 While the PRA is the lead regulator for the implementation of ring-fencing and is responsible for firms' compliance with the regime, the FCA has key responsibilities and interests in its effective implementation. In particular, the FCA will work closely with the PRA (and payments regulators) in the following areas:

- Policy: The FCA is responsible for making rules on disclosures by a NRFB to individual customers. The FCA also inputs into the PRA's ring-fencing policy-making in areas of common interest (e.g. intra-group transactions).
- Authorisations: Firms' implementation of the ring-fencing regime is expected to involve a number of regulatory transactions (e.g. applications for new banking licences, variation of permissions, change in control, waivers, and so on). Depending on the nature of the transaction, the PRA will be required to (a) consult with the FCA before approving the regulatory transaction, or (b) obtain the FCA's consent.
- RFTSs: Firms need to undertake one or more RFTSs to restructure the businesses of their groups to a compliant structure. The PRA and the FCA need to develop their approach to, and discharge their respective functions in, RFTSs in a coordinated way. The FCA's approach to RFTSs is the key focus of this guidance; more detail is provided below.
- Supervision: We need to analyse firms' ring-fencing implementation plans to identify, monitor and manage risks posed to our objectives, both during the transition and after.

Ring-fencing transfer schemes

1.9 RFTSs are an additional form of a transfer scheme introduced by the Banking Reform Act 2013. RFTSs will enable firms to use the legal procedures under Part VII of FSMA to give effect to any transfers of business needed by banking groups to achieve ring-fencing purposes (as defined in legislation). RFTSs have an important role in firms' plans to implement ring-fencing by 1 January 2019.

1.10 Firms may apply to the High Court (or, in Scotland, the Court of Session) to sanction the transfer of deposit-taking and other businesses from one entity (including a non-regulated entity) to another. The application to the court may only be made with the consent of the PRA. The PRA is obliged to consult the FCA at specific stages in the RFTS process. The PRA and the FCA will work jointly with one another throughout each individual RFTS process in pursuit of the objectives of the regulators, and to ensure our decision-making processes are conducted in an appropriately coordinated manner. This engagement will include the PRA consulting the FCA, as set out in section 3D of FSMA.

¹ In July 2015, we published CP15/23, where we have proposed rules in this area. CP15/23 also provides further background to ring-fencing and the FCA's role. See www.fca.org.uk/news/cp15-23-ring-fencing.

- 1.11 Firms are required to appoint persons with the skills necessary to produce a scheme report (skilled person). The scheme report must state whether persons (other than the transferor) are likely to be adversely affected by the RFTS and, if so, whether the adverse effect is likely to be greater than is reasonably necessary to implement whichever of the ring-fencing purposes is relevant (the 'statutory question'). The scheme report assists the court in assessing the RFTS and considering whether, in all the circumstances of the case, it is appropriate to sanction the scheme. The FCA must be consulted by the PRA before it approves or nominates the proposed skilled persons and approves the form of the scheme report.

Responses

- 1.12 The main points from feedback we received for GC15/5, along with our responses to the feedback, are summarised below.²

The extent to which adverse impacts are assessed for persons other than direct customers of the transferee/transferor

- 1.13 Some respondents questioned the extent to which the skilled person should consider adverse effects on persons other than direct customers of the transferee/transferor. They also argued that impacts on competitors and competition more broadly should be outside the scope of the skilled person's report. Our consultation guidance suggests that the skilled person should specifically consider customers of the transferee, transferor or the whole banking group, as well as consumers more generally (including distinguishing between different effects on different groups of consumers).
- 1.14 We note that the legislation requires the scheme report to consider the likely adverse effects on all potentially affected classes of person. The skilled person's assessment should therefore not be limited to customers of the transferee or transferor.
- 1.15 In the interest of advancing one or more of our operational objectives, we have further clarified in the guidance which consumers, who may not be direct customers of the entities in the banking group, should be considered by the skilled person in addressing the statutory question (e.g. counterparties). The final guidance also excludes, by way of examples, those categories of 'persons' whom we consider do not fall within the scope of our statutory objectives in relation to the statutory question. The final guidance excludes banks' employees, shareholders, and pension scheme members.
- 1.16 We have also clarified in the guidance that the skilled person will be able to conduct the assessment of likely adverse effects in respect of classes of persons (rather than on individual persons) and may consider groups of persons' ability to mitigate adverse

² In addition to the changes explained in this section, we have made a few other minor technical amendments to the guidance to further clarify its content. For example, we have amended the guidance to make it clearer that references to the 'court' mean the High Court or, in Scotland, the Court of Session, and references to 'effects' generally mean 'likely adverse effects'.

effects, as a consideration of whether the likely adverse effects are reasonably necessary.

- 1.17 We indicated in the consultation guidance that the skilled person should not exclude competitors when analysing the likely adverse effects of the RFTS on persons. We have now clarified in the finalised guidance that we do not expect the scheme report to cover the effects that the RFTS is likely to have on the dynamics or strength of competition generally. We have also clarified in the guidance that we expect the skilled person's assessment to consider likely adverse effects on competitors only where they are provided a service from the transferor or transferee that may be affected by the proposed scheme (e.g. access to payment systems).

Items to be included in the scheme report

- 1.18 In our guidance, we have set out a number of expectations on what should be included in the scheme report, including (but not limited to):
- the skilled person's opinion on the likely adverse effects on consumers and, in forming this view, a comparison of the likely effects if the scheme were or were not implemented
 - whether persons likely to be adversely affected are properly identified in a firm's communications plan, and
 - the skilled person's opinion of the likely effects of the scheme on consumers and, in doing so, a consideration of 'customer outcomes'
- 1.19 Some respondents argued that these specific expectations go beyond the scope of the legislation. For example, they have argued against the skilled person considering the likely effects if the scheme were not implemented, as implementation is not optional for firms. In addition, they have argued that the reference to 'customer outcomes' is open to a very broad interpretation.
- 1.20 The skilled person is expected to conduct a comparison of the likely effects if the scheme were or were not implemented in the specific form proposed. We do not expect the skilled person to opine on the likely effects of the firm not implementing ring-fencing, which we agree is not optional for firms. Our guidance does not ask the skilled person to opine on a comparison of whether or not a firm implements ring-fencing – rather, whether, if they do not implement the specific scheme they have decided upon, there are likely to be lesser adverse effects if there were changes to that scheme or by an alternative scheme. In this respect, see also the section below on alternative arrangements.
- 1.21 In relation to the communications plan, we do not propose any changes to the guidance. Our view is that from a public law perspective, our expectation regarding communication plans is reasonably within, or related to, the statutory function and purpose of the scheme report, particularly in light of the complexity of the restructuring and business being transferred. Consumers will rely on the scheme report to understand how they are likely to be affected and to consider whether they should use the safeguard allowed to

them to participate in the court proceedings by making representations, or to object, against the RFTS. We expect that the court will want to be satisfied that the firm has proposed an adequate communications plan.

- 1.22 In terms of the potential broad interpretation of 'customer outcomes', we have revised the guidance to provide more clarity on this point.

Consideration of alternative group arrangements

- 1.23 In our consultation guidance, we indicated that the scheme report should include a view on whether the skilled person considered alternative arrangements and, if so, what and whether any such alternative arrangements would lead to adverse effects on consumers that are less than the scheme proposed. Some respondents questioned the extent to which the skilled person would need to consider alternative group arrangements in order to determine whether the adverse effects of the scheme are reasonably necessary to achieve the purposes of ring-fencing. They have argued that consideration of alternative structures goes to the fundamental design decisions that are addressed during the authorisation process, and it would not be possible to conduct a meaningful assessment without assessing the holistic impact of alternative designs across all stakeholders, which would be complex and theoretical.
- 1.24 We agree with the PRA's view, as set out in their Statement of Policy, that the skilled person should not only consider the proposal put forward by the firm, but also whether there are viable alternative arrangements that would achieve ring-fencing purposes. While this does not require the skilled person to consider every conceivable alternative approach, it does require the skilled person to properly consider viable alternatives to the proposal if they would materially reduce adverse effects on persons other than the transferor.

Communications plan

- 1.25 Some respondents have asked for flexibility in the way that they communicate to customers, so that the firms can elect the most appropriate form, method and scope of communications with their customers. They have also questioned the need to communicate with all adversely affected 'consumers', rather than the customers of the transferee/transferor. Some have specifically questioned the current expectation in our guidance that the skilled person assess that the summary of the scheme report that is available to customers is clear, fair, and not misleading. Others queried whether it would be necessary for different summaries of the scheme report to be prepared, acknowledging that there may be different audiences, including customers.
- 1.26 Currently, our guidance reflects an expectation that firms communicate with persons likely to be adversely affected by the scheme in one or more ways, including publications in gazettes or national newspapers, or individually to adversely affected 'consumers'. Such communications are intended to inform those consumers how they are likely to be adversely affected so that they may consider exercising their statutory right to make representations, or object, against the scheme in the court.

- 1.27 We do not consider it necessary to revise the wording of the guidance on this point, as it already provides a degree of flexibility to firms. We support a flexible approach to communication, as long as firms are able to explain their communications plan and demonstrate why their proposal is appropriate. For example, this should include appropriate methods of communication with vulnerable customers or groups of consumers with protected characteristics under equality legislation. We expect that the court will want to be satisfied that the firm has proposed an adequate communication plan.
- 1.28 As discussed above, there may be circumstances where the individuals likely to be adversely affected are wider than direct customers of the transferee/transferor (e.g. counterparties). Firms should sensibly consider all groups of persons that are likely to be adversely affected, and whether and how they should communicate with them.
- 1.29 We consider it to be reasonable for the skilled person to assess that the summary (as drafted by the firm) of the scheme report is clear, fair, and not misleading, particularly in light of consumers' rights to be heard by the court and that the summary represents the skilled person's opinion on highly complex business restructurings.
- 1.30 We generally expect firms to produce a summary of the scheme report that can be understood by persons likely to be adversely affected, including customers. In our view, it should be for firms to assess whether it is necessary to prepare more than one version of the summary, depending on the circumstances of their scheme and the different persons adversely affected.

Reliance on regulators' assessments and decisions

- 1.31 A number of firms have queried the extent to which the skilled person can rely on the regulators' regulatory assessments and decisions (e.g. on authorisation applications). Others also noted that there may be occasions where information about a firm that is held by the regulator(s), but which is not publicly available, may be relevant to the skilled person's assessment, and he or she should therefore have access to such information.
- 1.32 We agree that it will be helpful for the skilled person to have an understanding of the FCA's regulatory assessments and its outcomes, as well as understand our feedback to firms on their plans. We expect to discuss our assessment of regulatory transactions, the scheme, and our views on firms' implementation plans with the skilled person at appropriate points in time once information is finalised.
- 1.33 However, the skilled person should not draw any undue inference from the FCA's regulatory assessments, decisions or views on firms' plans. This is on the basis that our assessments may not focus specifically on adverse impacts from the transfer of business across entities. For example, authorisation assessments are carried out with consideration to specific statutory conditions. Unequivocal regulatory approvals of relevant transactions may be useful reference, but only to the extent of the specific matters approved. Similarly, while we will review and develop a view on firms' overall

plans, any inference drawn from this should be limited and taken in the context of the feedback.

- 1.34 It should be noted that some stages of our regulatory assessments and reviews of firms' implementation plans may run concurrently with the writing of the skilled person's report, which may constrain the ability to usefully exchange information. In addition, our view on the scheme itself, which differs from firms' overall plans and our assessment of regulatory transactions, will be partly informed by the skilled person's report.

Exposure to regulatory consequences following the court's sanction

- 1.35 Some respondents have asked for clarification on the extent to which firms can rely on the court's sanction of the scheme and not be exposed subsequently to a regulator exercising powers under FSMA in relation to consequential customer detriment that was assessed to be reasonable to achieve the purposes of ring-fencing. A similar point has been raised in the consultation on the disclosure rules for non-ring-fenced bodies.
- 1.36 We will monitor implementation of the scheme as sanctioned by the court. However, we will continue to use our discretion to exercise powers under FSMA where the mishandling of a sanctioned RFTS, or any other action by the firms following the RFTS, or in the course of its implementation, potentially undermines the advancement of our operational objectives.

Timing and nature of adverse effects

- 1.37 Some respondents have asked for clarification on whether the skilled person's assessment should focus on a specific point in time post-implementation, cover multiple points in time (during transition and post-implementation), or take a more dynamic perspective over the implementation period.
- 1.38 We agree with the PRA's view that the assessment of adverse effects required by the statutory question is not restricted to a particular point in time. Therefore, adverse effects across the implementation period and post-implementation of the scheme are relevant to answering the statutory question. We expect, to a large degree, that the nature and focus of the skilled person's assessment will depend on the nature of the scheme.
- 1.39 In relation to forward-looking assessments of adverse impacts on consumers, another respondent asked for clarity on our expectations of the skilled person where adverse impacts are as a result of, or compounded by, legacy issues within the firm, rather than as a result of the scheme.
- 1.40 Our guidance currently includes a broad expectation that the skilled person assess the impact of changes to, for example, IT systems, insofar as they may affect customers adversely. We accept that this may be interpreted as quite broad. We have made some changes to clarify this. In particular, we acknowledge that the skilled person's assessment should be a 'relative' rather than an 'absolute' one – i.e. limited to the

specific impacts of the scheme, without taking into account ongoing legacy issues or change programmes that may affect customers adversely, but are not a direct consequence of the scheme. For example, if there are existing IT resilience issues in the transferor that will continue in the transferee until a programme to resolve them is completed, the skilled person will not be required to consider their potential impacts on customers and the effectiveness of the change programme in place. However, if the proposed scheme is likely to exacerbate an ongoing legacy issue, we would expect the skilled person's assessment to consider such likely adverse effect.

Independence of the skilled person

- 1.41 Some respondents have asked for more clarity on the FCA's position on whether a firm's external auditor is eligible to be nominated as the skilled person.
- 1.42 In our consultation guidance, we noted that the suitability of the skilled person will be assessed by the FCA with reference to the criteria and principles in the PRA's Statement of Policy. The PRA's position is that firms' external auditors are eligible to be nominated provided they can demonstrate the necessary skills and independence. In light of their role in the RFTS process, it seems appropriate for the PRA to take the lead in whether a person is sufficiently independent to be nominated. We will consider their independence through consultation, and in close coordination, with the PRA. We have amended the text in our guidance to make our position on this clearer.

Reliance on firm data and analysis by the skilled person

- 1.43 Some respondents have asked for clarity on whether the skilled person should be able to rely on firm data/analysis, as is the practice for insurance business transfers.
- 1.44 Like the PRA, we consider it is reasonable for the skilled person to rely on firms' data and analysis in their assessment. We have amended the text in the final guidance to provide more clarity on this.

Clarifying the process and FCA/PRA interactions

- 1.45 Some respondents have asked for general clarifications on the RFTS process, including on the timing and process of consultation between the PRA and the FCA, and the involvement of the court in the process.
- 1.46 The PRA, in close dialogue and coordination with the FCA, is considering how best to engage with firms to provide further clarifications on how the RFTS process will work in practice, including the consultation and engagement between the PRA and the FCA.

Protecting confidential information

- 1.47 Some respondents have asked for confirmation that the skilled person will not be required to disclose confidential information in the report, which will be publicly available.

1.48 We agree with this and have amended the text in the final guidance to clarify this.

Annex

General guidance on the FCA's approach to the implementation of ring-fencing and ring-fencing transfer schemes

The implementation of ring-fencing and ring-fencing transfer schemes: general guidance

A. Application and interpretation

1. This is general *guidance* given under section 139A(1) of the Financial Services and Markets Act 2000.
2. This *guidance* primarily advances our consumer protection objective, as a key area of our supervisory focus will be consumer outcomes during and after implementation of the regime. Doing so will also advance our integrity objective in protecting the orderly operation of the financial markets, and is compatible with our strategic objective by ensuring that the relevant markets function well. Where relevant, this guidance also takes into account and advances our competition objective.
3. This *guidance* applies to the following:
 - (1) a *firm* which, as a UK authorised person (as defined in section 106B(6) of the *Act*) and in relation to the *group* of which it is a member, is subject to the ring-fencing requirements in Part 9B of the *Act*, and
 - (2) a *firm* in (1) and the *group* of which it is a member in relation to a ring-fencing transfer scheme (as defined in section 106B(1) of the *Act*)
4. Interpretive provisions (including definitions in the *Glossary*) of the *FCA Handbook* apply to this *guidance* in the same way they apply to the *FCA Handbook*, but where a definition is defined in the *Act*, that applies for the purpose of this guidance.

B. High-level approach to supervision of ring-fencing implementation

5. We will assess the potential risks that the implementation of ring-fencing poses to us advancing our statutory objectives and duties.
6. The *FCA* expects that *firms'* implementation plans are drawn up and implemented with due regard to the interests of *consumers* (see, for example, Principle 6 on customers' interests in *PRIN 2.1.1R (6)* where the *FCA* will focus on the need to mitigate material disruptions of service to *customers* when creating new corporate entities, migrating *customers* between entities, or changing terms, account numbers and sort codes).
7. Another important focus for the *FCA* will be communications with *clients* (see Principle 7 on communications with clients in *PRIN 2.1.1R (7)*) where a *firm* should have thorough and comprehensive plans for communications, and engagement, with *clients* who are affected by its ring-fencing implementation plans to explain the changes it is proposing to make.
8. In pursuing our statutory objectives, we will continue to work closely with the *PRA*. The *FCA* and the *PRA* will aim to be appropriately coordinated, avoiding duplication of effort between the two regulators and duplication of demands (for example, for information) upon *firms*.

C. Regulatory transactions

9. We recognise that implementing ring-fencing will involve *firms* submitting a considerable number of regulatory transactions (e.g. Authorisations applications).
10. All regulatory transactions related to ring-fencing will be processed following the usual single administrative process, led by the *PRA*, in line with its and the *FCA*'s respective business-as-usual procedures. The regulators will continue to work closely together to process *firms*' applications.

Authorising a new dual-regulated entity

11. Pre-application meetings are a key part of the administrative process for these types of transactions. We aim to use these meetings to establish a relationship with key individuals within the applicant *firm*, gain greater understanding of the applicant's proposals, and raise any issues or concerns as soon as possible. The pre-application process will also make it clearer what we expect to receive from applicants.
12. Both regulators are obliged under section 55V of the *Act* to determine a new authorisation application for a new dual-regulated entity within a statutory timeframe of 12 months, or six months when the application is deemed complete (whichever is shorter).
13. As such, each regulator will assess an application against their respective Threshold Conditions, which are set out in Schedule 6 of the *Act*. Further information can be obtained from the *FCA Handbook*³, which sets out the *FCA*'s *threshold conditions* for *firms* carrying on, or seeking to carry on, *regulated activities* that include a *PRA-regulated activity*.
14. There are different options for authorising a new banking entity. The *FCA* and the *PRA* will discuss the options with applicants during the authorisation process. We determine authorisations within six months of receiving a complete application. The *PRA* and the *FCA* offer an alternative process that contains clear stages, so there is a distinction between meeting the key regulatory requirements and the wider operational needs of setting up a dual-regulated entity. This option, called mobilisation, offers the same pre-application support, but *firms* can submit a shorter application that focuses on key essential elements with the remaining information following later. For further details, please see the *FCA* website.⁴

Authorising a new solo-regulated entity

15. We will process the authorisation of a new solo-regulated entity in line with our business-as-usual procedures. The *FCA Handbook* sets out *threshold conditions* for *firms* carrying on, or seeking to carry on, *regulated activities* that do not include a *PRA-regulated activity*.⁵
16. Some *FCA* solo-regulated entities can become *PRA*-designated firms. For further details, please see the *PRA*'s website.⁶

Other applications (waivers, permissions under the prudential regime, change in control, and variation of Part 4A permissions)

17. In implementing ring-fencing, we will also process applications for *waivers*, permissions (including any variation of existing permissions) under the Capital Requirements Regulation (EU) No, 575/2013), change in control, and variation of *Part 4A permissions* in line with its business-as-usual procedures.

³ <https://www.handbook.fca.org.uk/handbook/COND/2/>.

⁴ www.fca.org.uk/firms/about-authorisation/dual-regulated-firms/banking-applications.

⁵ www.bankofengland.co.uk/pr/Pages/authorisations/newfirm/default.asp

and <https://www.handbook.fca.org.uk/handbook/COND/2/>.

⁶ www.bankofengland.co.uk/pr/Pages/authorisations/designatedfirmslist.aspx.

D. Ring-fencing transfer schemes: overall FCA approach

18. Transfers of business within a *group* may have both positive and negative effects on *consumers*. We will be concerned to assess the potential risks that a ring-fencing transfer scheme poses to us advancing our statutory objectives and duties.
19. In broad terms, the *FCA* will:
- (1) be consulted by the *PRA* in relation to some of the statutory decisions it takes on a ring-fencing transfer scheme (see paragraphs 22 and 30) and will work jointly with the *PRA* throughout each scheme, including being consulted by the *PRA* under section 3D of the *Act* (Duty of *FCA* and *PRA* to ensure coordinated exercise of functions)
 - (2) as part of its normal supervision of one or both of the transferor or transferee, consider the potential implications of the proposed transfer on its objectives, and
 - (3) consider the arrangements made to communicate the proposed scheme to *consumers*⁷, including communications with *clients* in line with Principle 7 (Communications with clients) (see *PRIN* 2.1.1R).
20. A key concern for the *FCA* will be to satisfy itself that the *firms'* notification plan, which relates to the communications to *consumers* likely to be adversely affected by the scheme, has adequate information and allows reasonable time within which *consumers* are able to understand:
- (1) whether or not they are likely to be adversely affected to an extent greater than is reasonably necessary in order to achieve the purpose of the ring-fencing
 - (2) if so, whether to make representations to the court⁸, and
 - (3) how, and by when, to:
 - (a) file (or lodge) with the court a written statement of the representations that the *consumer* wishes the court to consider, and
 - (b) serve copies of the statement on the *PRA* and the transferor concerned
21. A *firm* should consider whether any aspect of its proposals should be discussed with the *FCA* (as well as the *PRA*) at an early stage.

E. Skilled persons: suitability

22. Under section 109A of the *Act*, the *PRA* must consult the *FCA* before nominating or approving a person with the necessary skills to make the scheme report.
23. As the purpose of the scheme report is to inform the court, the rules applying to experts and their evidence in civil court proceedings are relevant to the *FCA's* (and the *PRA's*) consideration of the skilled person. In broad terms:
- expert evidence should be the independent product of the expert uninfluenced by the pressures of litigation

⁷ See paragraph 33 for a clarification on *consumers* who are the focus of this guidance.

⁸ In section 107(4) of the *Act*, 'court' means the High Court or, in Scotland, the Court of Session.

- an expert must assist the court by providing objective, unbiased opinion on matters within his or her expertise, and
 - the expert should maintain professional objectivity and impartiality at all times
24. The *PRA's* Statement of Policy on ring-fencing transfer schemes (The Implementation of ring-fencing: the *PRA's* approach to ring-fencing transfer schemes) sets out its expectations on the criteria of independence of skilled persons. Consistently with, and when consulted by, the *PRA*, the *FCA* will take account of the criteria under the rules of court as expressed in the *PRA's* Statement of Policy. It will also assess the suitability of the skilled person through consultation and close coordination with the *PRA*.
25. In broad terms, a skilled person would normally be expected to have relevant business, technical and technological skills and expertise, for example an accountant, lawyer or compliance consultant.
26. On being consulted by the *PRA*, the *FCA* will have regard to the following general criteria in assessing the suitability of the proposed skilled person:
- (1) the skills and relevant specialised knowledge, both practical and theoretical, and experience necessary to assess the transfer and complete the scheme report, for example knowledge and experience of the *firm* proposing the transfer and the types and complexity of the business transferred.
 - (2) the ability to complete the scheme report within the time expected by the regulators, and
 - (3) the detachment the skilled person appears to have, bearing in mind any existing professional or commercial relationship, to be able to collect or update information for the purpose of writing the conduct sections of the scheme report, or to give an objective opinion on conduct matters included in the scheme report.
27. A *firm* should cooperate fully with the skilled person and provide him or her with access to all relevant information and appropriate staff. The skilled person should be able to rely on data and analyses received from the *firm* in their assessment, unless he or she has reasons to doubt their quality or accuracy.
28. The suitability of a skilled person to make the scheme report will depend on the nature of the scheme (including the type and complexity of business being transferred), the *firms* concerned, and the overall circumstances of the transfer. The *FCA* will use the preliminary information supplied by *firms* proposing the scheme (and any other knowledge it has of the circumstances and the *firms*) to consider what specific skills are needed to make a proper report on the scheme and what specific criteria should therefore be applied to the choice of skilled person, in addition to the general criteria set out above. *Firms* proposing the scheme should expect to be informed of any such specific criteria that the *FCA* is minded to apply.

F. Form of scheme report

29. Section 109A(4) of the *Act* requires the scheme report to state:
- (1) whether persons other than the transferor concerned are likely to be adversely affected by the scheme, and
 - (2) if so, whether the adverse effect is likely to be greater than is reasonably necessary in order to achieve whichever of the purposes mentioned in section 106B(3) of the *Act* is relevant (the statutory question).

30. The *PRA* must therefore be satisfied that the skilled person has addressed the statutory question sufficiently for it to reach a view whether, in consultation with the *FCA*, to approve the form of the scheme report, and whether to consent or not to the application being made to court.
31. To address these matters, the scheme report should first identify what the likely adverse effects could be for persons other than the transferor.
32. Adverse effects could cover a range of negative outcomes. To assess whether outcomes might be negative, the skilled person:

- (1) would need to have regard to the position of the person in question before the transfer and their position subsequently
- (2) may wish to consider the adverse effects of the scheme at the level of groups of persons with homogenous characteristics where it would be impracticable otherwise to assess the adverse effects on individuals, and
- (3) where he or she has a reasonable basis for believing that the groups of adversely affected persons could mitigate a given adverse effect of a scheme, may consider the net adverse effects (taking account the expected cost of mitigation)

33. From the perspective of the *FCA*'s objectives, the key 'persons' who could be expected to be adversely affected and are the focus of this guidance are *consumers* who are the *customers* of the *group*, and some specific categories of other *consumers*. *Consumers* are defined quite broadly in section 1G of the *Act* to include persons who may use services provided by unregulated group service companies in the course of *regulated activities* provided by the transferor or transferee, persons who have invested or may invest in financial instruments and persons who deal with the transferor or transferee in the course of their provision of *regulated activities*. The specific categories of *consumers* who are not *customers* of the *group* but whom the skilled person should, where relevant, consider when addressing the statutory question include:

- (1) counterparties
- (2) *firms* that are provided indirect access to payments systems or other services by the transferor or transferee, and
- (3) groups of other *consumers* with homogenous characteristics who are likely to be adversely affected by the scheme

Such persons could have connections to the whole banking *group* and not just to the transferor or transferee. Persons who we consider in this context fall outside the scope of the *FCA*'s objectives include employees of the transferor or transferee, shareholders and members of the transferor, or transferee's pension scheme.

34. Under section 109A(5) of the *Act* which obliges the *PRA* to consult the *FCA* before approving the form of the scheme report, the *FCA* will provide feedback on matters it expects the scheme report to contain. In this regard:
- (1) The scope of matters to be covered, and the amount of detail, that the *FCA* expects in a scheme report will depend on the nature and complexity of the scheme (including the type and complexity of business being transferred), the materiality of the details themselves, the *firms* concerned, and the overall circumstances of each ring-fencing transfer scheme.

- (2) As explained in paragraph 33, the skilled person should consider whether there are likely adverse effects on *firms* that are provided access to payment systems or other services by the transferor or transferee. There is no expectation for the scheme report to cover the adverse effects the scheme is likely to have on the dynamics and strength of competition generally.
35. With regard to paragraph 34, the matters the *FCA* would normally expect the scheme report to contain include:
- (1) the skilled person's opinion of likely adverse effects of the scheme on *customers* of the group, and, where appropriate, other *consumers* (see paragraph 33 above), distinguishing between different effects on different groups
 - (2) the skilled person's opinion of whether persons likely to be adversely affected are properly identified for purposes of the planned communications to *consumers*
 - (3) matters (if any) that the skilled person has not taken into account or evaluated in the report that might, in his opinion, be relevant to *consumers'* assessment of whether they, or a group of them, are likely to be adversely affected by the scheme, and
 - (4) an outline of the reasons behind each opinion that the skilled person expresses in the report
36. On the likely adverse effects of the scheme on *consumers* in paragraph 35(1), the scheme report should include:
- (1) a comparison of the likely adverse effects if the scheme is or is not implemented in the specific form proposed, with an opinion on whether any such effects of the scheme being implemented on *consumers* affected are not likely to be greater than is reasonably necessary in order to achieve the ring-fencing purposes
 - (2) a view on whether the skilled person considered viable alternative arrangements to the specific form proposed and, if so, what and whether any such alternative arrangements would materially reduce the likely adverse effects on *consumers* compared to the scheme proposed, and
 - (3) where different groups of *consumers* are likely to be adversely affected differently by the scheme, a comment on those differences where material to *consumers*
37. In providing an opinion on the likely adverse effects of the scheme on *customers* in paragraph 35(1), the skilled person would normally be expected to have regard to factors that include the following, where applicable:
- (1) changes to *customers'* position, and how a negative impact is addressed, in the following areas: ability to transfer deposits, investments or products; ability to switch to other providers; penalties or other impediments, if any, connected to the proposed transfer; exercisable rights to set-off loans against deposits; and contractual rights
 - (2) the continuity, and levels, of service, including payment services, provided to *customers*
 - (3) the continuity of, or changes to, levels of protection under the Financial Services Compensation Scheme
 - (4) whether rights in relation to complaints, legal or other proceedings against the transferor (in relation to those already commenced or threatened, or proceedings in the future, including those not yet anticipated) are preserved or otherwise

- (5) whether rights to financial redress for legacy liabilities of the transferor for mis-selling of financial products are affected
- (6) whether product terms and conditions, including product benefits and outcomes for *customers*, will be affected by the transfer
- (7) whether product administration, including fees and other costs, may be affected on transfer
- (8) the amount of client money transferred and the terms of the transfer (see CASS 7.11.41G – 7.11.47R)
- (9) in relation to *customers* being transferred to another entity, any material adverse change to the level of consumer protection afforded by the availability of adequate resources of the transferee, and
- (10) the likely effects of the scheme on IT systems, operating models and matters such as governance, management, business strategy, and financial positions, in so far as they may be likely to affect *customers* adversely and are a direct consequence of the scheme rather than other factors (for example, legacy issues or ongoing change programmes)

38. In terms of our consideration of the planned communications to *consumers*, where the scheme report concludes that there are *consumers* who are likely to be adversely affected, the scheme report should include the skilled person's views on the extent to which the statement setting out the terms of the scheme and the summary of the scheme report (see section G) are clear, fair, and not misleading to each group of *consumers* who are likely to be adversely affected, taking into account:

- (1) whether a group of *consumers*, are differently affected, and
- (2) whether *consumers* have received adequate information to consider the likely adverse effects of the transfer as affecting each *consumer* or group of *consumers*

39. The skilled person is not expected to disclose confidential information in the scheme report, which will be publicly available, unless necessary consents have been obtained in respect of the confidential information.

G. Court proceedings: notifications

40. Under section 110 of the *Act*, any person who alleges that he would be adversely affected by the carrying out of the scheme is entitled to be heard in the final hearing of the court that is conducting the sanction proceedings. However, this right is limited. A person is not entitled to be heard in the proceedings unless before the hearing:

- (1) they have filed with the court a written statement of the representations that they wish the court to consider, and
- (2) served copies on the *PRA* and the transferor concerned

41. The transferor concerned or transferee, or both, should give notice to those persons likely to be adversely affected by the scheme. In particular, the transferor or transferee should consider giving notice of the application in one or more of the following ways:

- (1) publication in:
 - (a) the London, Edinburgh and Belfast Gazettes and

(b) national newspapers in the *United Kingdom* (normally two newspapers, but wider publication may be appropriate in some circumstances); and

(2) individually sent to all *consumers* who are likely to be adversely affected by the scheme

42. It would normally be appropriate for the following documents to be made available, free of charge, to anyone requesting them:

(1) a statement setting out the terms of the scheme and containing a summary of the scheme report, and

(2) a copy of the scheme report

The internet can be used for this purpose if it is suitable for the person making the request.

43. Recipients should understand from the summary of the scheme report, in broad terms, how the scheme is likely to affect them. The summary should be clear and concise while containing sufficient detail for the purpose.

44. The *FCA* should be given the opportunity to comment on the notices in paragraph 41, the statement and the summary of the scheme report before they are published or sent, unless the *firms* proposing the scheme have been informed in writing that this is not necessary.

45. The *FCA* would normally expect a period of more than six weeks between sending notices to persons likely to be adversely affected and the date of the court hearing. Therefore, it would be sensible, before the directions hearing when the court can be expected to consider the planned notifications, to consult the *FCA* on its views about what planned communication might be appropriate. The *FCA* will take into account the practicality and costs of sending notices to those persons, the likely benefits of receiving notices, and the efficacy of other arrangements proposed for such communications (including additional advertising or, where appropriate, electronic communication).

H. Court proceedings: certificate of financial resources for FCA solo-regulated transferee

46. Where the transferee is a solo-regulated *firm*, the certificate of financial resources required under section 111(2) (ab) and paragraph 9C of Schedule 12 of the *Act* is issued by the *FCA*.

47. The certificate of financial resources certifies that – taking the proposed transfer into account – the transferee possesses, or will possess before the scheme takes effect, adequate financial resources.

48. In order to issue a certificate of financial resources, the *FCA* will take into consideration a number of factors, including the *firm's* regulatory capital position, management accounts, projections and scheme documents. The *FCA* expects to cooperate closely with the *firm's* accountants and internal finance staff.

49. If financial resources are not considered adequate, additional regulatory capital may need to be raised by the transferee before the ring-fencing transfer scheme is sanctioned by the court.

I. Court proceedings: FCA participation

50. The *FCA* is entitled to be heard by the court on any application to sanction a ring-fencing transfer scheme where the transferee is an *authorised person*.

51. In practice, the *FCA* will expect to have discussions with the transferor or transferee, or both, well before an application is made to the court. The *FCA's* assessment of the ring-fencing transfer scheme

is a continuing process, and the *FCA* expects any concerns it may have to be dealt with by the *firms* before the court hearing.

52. In assessing the potential risks posed by a transfer scheme to its statutory objectives, the *FCA*'s consideration includes whether:

- (1) the terms of the scheme are unfair to *consumers*
- (2) adequate steps have been taken to tell *consumers* that are likely to be affected about the transfer and whether they had adequate information and time to consider it
- (3) there is a group of affected *consumers* who did not, or will not, receive any communications on the transfer scheme and why
- (4) there is adequate information or support to help *consumers* in resolving concerns and potential objections
- (5) there is adequate information or support to help *consumers* on how, and by when, to file (or lodge) with the court (including service on the *PRA* and transferor concerned) a written statement of the representations that they wish the court to consider
- (6) there are *consumer* concerns or alleged representations which remain unresolved or have not been adequately resolved, and
- (7) taking the proposed transfer into account, the transferee possesses, or will possess before the scheme takes effect, adequate financial resources

53. While considerable reliance will be placed on the scheme report, the *FCA* will form its own view taking into account other relevant information and having regard to its statutory objectives.

54. The *FCA* may exercise its other powers under the *Act* if it considers this a more effective method of advancing its statutory objectives.

55. In order to enable the *FCA* to assess the scheme and to facilitate the process, the parties to the proposed transfer should ensure timely provision of all relevant information to the *FCA* for consideration. These include:

- (1) the scheme documents
- (2) the scheme report
- (3) representations or objections raised by *consumers*
- (4) written statements of representations filed (or lodged) with the court by *consumers*
- (5) any witness statements or other evidence that the parties to the scheme intend to submit to the court, and
- (6) the draft order