FINANCIAL CONDUCT AUTHORITY

Finalised guidance

FG18/4: The FCA's approach to the review of Part VII insurance business transfers

May 2018

Abbreviations used in this document

FCA	Financial Conduct Authority
PRA	Prudential Regulation Authority
FSMA	Financial Services and Markets Act 2000
IE	Independent Expert
FSCS	Financial Services Compensation Scheme
TAS	Technical Actuarial Standards

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1. Introduction

1.1 This guidance sets out the Financial Conduct Authority's (FCA) approach to reviewing insurance business transfers Schemes under Part VII of the Financial Services and Markets Act 2000 (FSMA) (Part VII Transfers or Schemes). The Prudential Regulation Authority (PRA) leads the Part VII process, and is responsible for specific regulatory functions such as providing certificates. However, we also have an active role in the process.

1.2 In particular, under Section 110 of FSMA, we are entitled to be heard on an application to sanction a Part VII Transfer. The views we give to the High Court (the Court) are based on our assessment of the Part VII Transfer against our own statutory objectives, which are distinct from the PRA's statutory objectives.

1.3 This guidance is designed to help with both the process and considerations of a Part VII Transfer. The information in this document is split into the following sections:

- Chapter 2 – Sets out some factors firms should consider before contacting us and what they will need to produce in advance of any pre-application meeting.
- Chapter 3 – Details the documents we expect firms to provide in order for us to make a decision to approve an Independent Expert (IE).
- Chapter 4 – Sets out our overall approach, our expectations and the key aspects we will consider when reviewing the proposed transfer.
- Chapters 5 through 7 - Includes detailed information and examples for the key documentation – the Scheme documents, the IE report and Communications.
- Chapter 8 – Sets out examples and factors for Applicants to consider if firms proposing a Part VII Transfer (Applicants) intend to make any applications for dispensations from the requirements in the Financial Services and Markets Act 2000 (Control of Business Transfers) (Requirements on Applicants) Regulations 2001 (the Transfer Regulations).

1.4 This document is not intended to explain all aspects of our role in the process or all issues that firms may need to consider. This is because each transfer has many variations. We will not always insist firms take the approach set out in this guidance on any particular transfer. However, we expect Applicants to explain why they have diverged from the guidance where it is relevant to a particular Part VII Transfer. We will consider each Part VII Transfer on its own merits and circumstances and we will take a proportionate approach in our assessment. The purpose of this guidance is to help firms identify those areas of difference (from expectations and examples set out in this guidance) early enough in the process so that they do not create problems closer to court dates and interfere with timelines.

1.5 This guidance will be of interest to:

- Applicants and their professional advisors
- Independent Experts usually appointed by the Applicants to report to the Court on the terms of the Scheme.

1.6 The guidance is made under our power to make guidance in Section 139A of FSMA.

1.7 One specific aim of this guidance is to provide some examples of the types of comments that we have made or are likely to make to Applicants and IEs about their submissions on proposed Part VII Transfers. We hope that this will help Applicants draft their proposals in ways that minimise challenge from us and lead to a more efficient review process.

1.8 This guidance will also supplement our Principles for Businesses and so have the effect described in our Enforcement Guide at paragraphs 2.9.1 to 2.9.6.[1] In particular, this guidance will supplement Principle 2 (Skill, care and diligence), Principle 3 (Management and control), Principle 6 (Customers' interests), Principle 7 (Communications with clients), Principle 8 (Conflicts of interest), and Principle 11 (Relations with regulators). We may also ask Applicants to confirm that their proposed transfer satisfies the expectations in our guidance or else explain any divergence from it.

1.9 We expect firms to read this guidance together with our guidance in Chapter 18 of the Supervision manual in the FCA Handbook.[2] We also recommend that Applicants read the PRA Policy Statement on insurance business transfers at Appendix 2 to its Rulebook (PS7/15).[3]

1.10 Each section of this guidance includes one or more examples. These examples illustrate issues that we have previously identified on Part VII Transfers. These examples are not meant to be prescriptive but to help the reader understand our concerns and reasoning when we challenge Applicants. The examples will also give Applicants an expectation of the possible questions and challenges we may raise on a particular case. It will save time and resources in the long term if Applicants know to expect these questions and actively address the issues involved. It will also mean that the Applicants' proposed timetable is less likely to be jeopardised by issues we raise that need to be resolved before the relevant Court hearing.

1.11 In line with the FCA statement on the EU referendum result[4], we emphasise that firms must continue to abide by their obligations under UK law, including those from EU law. So they must continue with implementation plans for legislation that is still to come into effect. The longer term impact of the UK's decision to leave the EU on the UK's overall

[1] Enforcement Guide, FCA Handbook: www.handbook.fca.org.uk/handbook/EG/
[2] SUP 18 Transfers of business, FCA Handbook: www.handbook.fca.org.uk/handbook/SUP/18/
[3] Policy Statement PS7/15, The PRA Rulebook: Part 2, April 2015: www.bankofengland.co.uk/pra/Documents/publications/ps/2015/ps715.pdf
[4] Statement on European Union referendum result, FCA, 24 June 2016: www.fca.org.uk/news/statements/statement-european-union-referendum-result

regulatory framework will depend, in part, on the relationship that the UK seeks with the EU in the future.

1.12 For further information, please contact our Part VII Transfers of Business Team at PartVII&Schemes@fca.org.uk.

2. Initial Considerations

2.1 We would urge any firm contemplating a Part VII Transfer, and their advisors, to first contact both ourselves and the PRA as early as possible. While both regulators try to keep each other informed of developments, firms should not assume that, because they have spoken to us, the PRA will automatically be aware of the conversation or vice versa. Simply copying the initial email to the PRA to ourselves, or vice versa, will ensure that both regulators are aware of the proposed transfer and can allocate resources as early as possible.

2.2 We welcome the opportunity for early meetings with potential Applicants. If there are unusual or complex elements of the proposed transaction, it is usually ideal to hold an initial meeting with both regulators present. If the firm has a dedicated supervisor, it is likely that the supervisory team will coordinate these meetings. In other cases, the Part VII team will lead. However, firms should expect the Part VII Team to have overall responsibility for the FCA's engagement with the firm(s) during the Part VII process.

2.3 We expect to see a reasonably detailed proposed timetable for the Transfer at as early a stage as possible. We will then review the timetable and give comments. It is important that the timetable allows adequate time for each step. If we have any concerns about this we will suggest changes.

2.4 Once the timetable has been reviewed by the FCA and the PRA, Applicants should highlight any subsequent changes to the regulators as soon as possible so that we can plan resource requirements. We will normally confirm our agreement with the revised timetable or explain why we disagree with it.

2.5 As part of this early engagement with the regulators, it would be helpful if firms could include a broad description of the business to be transferred. This should include classes of business, numbers of Policyholders[5], numbers of open claims, etc. It is also helpful if firms highlight any early indications of unusual or complex elements of the proposed transaction and any identified risks at this stage.

2.6 Firms should not deviate from the agreed timetable without notifying the regulators beforehand. They must submit documents on time and in as near-final form as possible. Firms should note that we may require a minimum of six to eight weeks to review documents. So late submission could result in a request to delay planned hearings.

2.7 Regulatory fees should be paid to the FCA (we collect these on behalf of both regulators) at the start of the formal process. This will normally be at the same time as the firm submits their proposals for the nomination of the IE.

[5] As defined in the Financial Services and Markets Act 2000 (Meaning of "Policy" and "Policyholder") Order 2001. See paragraph 7.5 below.

3. Review of the appointment of the Independent Expert

3.1 The PRA is responsible for approving or nominating the person proposed as the IE, but it must consult us before doing so. Our review will include considerations of whether the IE is able to demonstrate:

- independence
- sufficient skill, experience and resources

Independence

3.2 We will consider the following when we assess the IE's independence:

- How many insurance business transfers the IE or their employer have reviewed for the Applicants and how recently. This is also relevant for the nominated peer reviewer and key members of the proposed team. For example, where the Applicants have previously engaged the IE, we may have concerns about the IE's independence. While, in some circumstances, we may not approve IEs who have previously worked for the Applicants, this is not a firm rule and we will consider each case on its merits.
- Any work, such as consultancy, which the IE or their employer has already, or will, undertake for the Applicants. We will also consider the materiality of the work and the capacity in which the IE did or will do it. In particular, we would not expect the IE to be reviewing their own previous work.
- Whether the IE or their employer is connected (as, for example, an employee, partner, principal or consultant) to a firm which has either Applicant, any party to the transfer, or member of the group, as a client (eg to provide audit services). Again, such issues will not necessarily mean we rule out the nominated candidate from appointment; the regulators will consider each case on its merits.
- Whether the IE or their employer has any other connection with the Applicants, eg an insurance policy, and if this has a material impact on their independence.
- Any potential or actual conflicts of interest from other matters the IE or their employer has been involved in, or as a result of personal relationships.
- Any non-standard fee arrangements. For example, abnormally low fee caps may also raise concerns that the quality of the work could be compromised. In the case of insolvent firms, we may also have concerns if the fees could affect potential claims

settlements. Similarly, for mutuals where the fees are being paid by Policyholders, we may have concerns if fee levels seem too high.

Sufficient skill, experience and resources

3.3 We will consider:

- Specific evidence of relevant experience, especially potential conduct risk issues from a particular transaction. Where the wider IE team's experience is less strong, we would expect to see evidence of sufficient oversight to compensate.
- Key information about the proposed transaction and its features as context for assessing the IE's relevant experience.
- Where the transfer involves a non-UK jurisdiction, we will expect the nominated expert to explain how they will get the necessary expertise to compare regimes.
- Statements that the IE will be able to allocate sufficient resource, including as part of a wider team, to consider all relevant conduct issues adequately, assess their materiality, collect relevant information, complete the IE report and provide necessary updates in the agreed timeframe. This may also include considering the IE's other commitments.
- Performance on previous Part VII Transfers.

3.4 We expect firms to supply us with the following information/documents to support the IE's nomination:

- a full CV
- a Statement of Independence and of capacity to do the work
- a draft letter of engagement including full details of the IE's fees, including any discounts offered
- details of the proposed peer reviewer (CV, Statement of Independence)
- a full CV for each of the proposed principal team members expected to work on the project

3.5 We do not want firms to propose multiple alternative IE nominations. But firms should be aware that occasionally the PRA and ourselves will not agree with a firm's first nomination. In these circumstances it would be helpful if the firm already had an alternative candidate in mind.

3.6 It is also helpful if, when firms nominate an IE, they give some indication of the rationale that led to that nomination. Firms may wish to include details of any candidates shortlisted.

4. Overview of our approach

4.1 We expect to file reports at Court, setting out our views or comments on the transfer, to help the Court in its consideration of the Scheme. Occasionally, it may also be necessary for us to file supplementary reports or letters on top of the two Court reports we would usually file. This section sets out further detail of the matters we will consider and comment on, both to firms and in the body of our report to the Court. These include:

- link to our objectives
- business rationale for the Scheme
- background regulatory issues
- competition considerations
- changes affecting Policyholders
- ongoing regulatory requirements
- objections
- unresolved issues

Link to our objectives

4.2 Our approach to assessing Part VII Transfers is based on the application of our statutory objectives, which are to:

- secure an appropriate degree of protection for consumers
- protect and enhance the integrity of the UK financial system
- promote effective competition in the interests of consumers

4.3 Annex 1 includes a high-level description of our approach to the review of Part VII Transfers. This description takes into account our statutory objectives.

Business rationale

4.4 We will first look at the reasons for the proposed Part VII and whether we consider them genuine and plausible reasons for the transfer.

4.5 Applicants should clearly explain the reasons why they are proposing a transfer. We want to ensure that the transfer is not motivated by a desire to benefit either Applicant to the material detriment of Policyholders, or to unfairly bring benefit to one class of Policyholder to the detriment of another class.

4.6 We also want to see the transfer in context. For example, how it relates to any other transfers being proposed in the group or any other significant transactions which are part of a larger re-organisation proposal.

4.7 An example of this is where there are other transfers being proposed into or out of the same entity at a similar time, or another significant proposal that might affect the relevant transfer. Both the IE and we need to be informed of such transfers so we can properly assess the impact on the immediate transfer being considered. We may, for example, have concerns about a proposed subsequent transfer of the business. So it is important that we are informed of any planned transfers when we consider the first proposed transfer in the chain.

Background regulatory issues

4.8 We will consider whether there are background regulatory issues involving the Applicants that may be of interest to the Court. An example of this would be unresolved enforcement proceedings against the Transferee.

Competition considerations

4.9 We assess whether the Applicants and the IE have considered whether there may be an adverse impact on effective competition in the interests of consumers or other competition issues. We do not expect the IE to be a competition expert, but we expect the IE to highlight any matters which could affect policyholders.

4.10 Examples of issues that may have an adverse impact on effective competition, and on which we expect the IE to highlight, include:

- Changes which affect a Policyholder's ability to switch providers. For example, when the transfer is in a niche area and might restrict Policyholders' future choice of providers.
- The exchange of information between the Applicants - in particular sensitive information - that is not information which is necessary for the transfer.
- Clauses in the Scheme document that have the effect of reducing competition between firms in the future. This might occur if, for example, the Scheme contains a clause that restricts the Transferor from targeting promotions to the transferred policyholders.

Changes affecting Policyholders

4.11 We want the Applicants and the IE to demonstrate that they have adequately considered what may be changing and have sufficiently analysed how, and to what extent, there may be an adverse impact on Policyholders. We will consider in detail whether:

- The Applicants have considered whether there are sufficient protections in the transfer documentation or proposals to mitigate against possible adverse impacts on Policyholders, including, where relevant, compensation.
- The IE has considered the relevant information and the analysis identified above. We will also consider whether they have considered appropriate protections and proposed mitigation and considered what mitigations should have been proposed to allow the IE to be satisfied with sufficient confidence.
- How the Policyholder communications describe all areas of potential change which may have an adverse impact, and any mitigating or compensation proposals.
- The Applicants have adequately explained and justified where they wish to depend on arguments of non-materiality or proportionality. Also, whether the IE is satisfied with these arguments and has demonstrated an appropriate degree of independent challenge.
- The description of the Scheme is sufficiently clear and fair, contains enough detail and is sufficiently prominent.

On-going regulatory requirements

4.12 We also consider the transfer in light of Applicants' ongoing regulatory obligations (including the Principles for Business referred to in paragraph 1.8). Examples include:

- Matters such as the resources available for the transfer, whether business-as-usual services and service standards may be affected or any adverse impact on governance arrangements.
- That regulatory requirements will continue to apply during and after the transfer and are not implicitly overridden by the Court. For example, we will challenge provisions for with-profits funds which are inconsistent with COBS 20.[6] We will do so even if these provisions were permitted under a prior Scheme sanctioned before COBS 20 came into force.[7]

[6] Chapter 20 - With-Profits, Conduct of Business Sourcebook, December 2016: www.handbook.fca.org.uk/handbook/COBS/20.pdf

[7] There are transitional provisions in COBS 20 which allow arrangements sanctioned before relevant rules came into force to continue without needing to comply with those rules where certain conditions were met. However the FCA's view is that these are not available where the arrangements form part of the new scheme after the rules came into effect. We are aware that some firms have received advice contesting this view and may wish to have the matter considered in court. In some cases, the FCA has considered applications for a waiver/modification from the relevant rules where firms can demonstrate that the relevant statutory tests are met.

- When Applicants argue that there is no material adverse impact, they should not overly rely on the fact that the Transferee is subject to the same regulatory regime. We expect firms to demonstrate that there is/will be no material adverse impact. It is open to the IE to describe how they have sought to interpret the term 'material' and to assess whether Policyholders or groups of Policyholders are affected. We will review the IE's description and challenge where we consider it to be inappropriate. This is particularly the case where it might allow quantifiable reductions in benefits to be considered non-material. We will also assess whether the IE's evaluation of whether there has been a material impact is sufficient.

Objections

4.13 We will consider in detail:

- objections raised by Policyholders, along with the Applicants' and IE's substantive response to, and consideration of, those objections
- how the Applicants have categorised Policyholders who continue to 'object'
- how the Applicants have addressed the initial concerns of those Policyholders who no longer wish to raise concerns or object
- how the Applicants propose to set out for the Court the representations of Policyholders who believe that they may be adversely affected

4.14 Please note that we may take a different view to the Applicants or IE, depending on whether the objectors' concerns have been adequately addressed. We may also ask the IE to give their opinion on a specific objection.

Unresolved issues

4.15 We may refer to any issues which we do not consider fully resolved in our report to the Court.

4.16 The issues may be significant enough to justify our objection to the proposals but, even if we do not object, we may still set out our concerns.

4.17 Where Applicants fully resolve any issues before the relevant hearing we may decide that these do not need to be brought to the Court's attention. Discussions between the Applicants and us about resolving outstanding issues may have a bearing on the Applicants' timetable.

4.18 The following sections give more specific detail on the documentation the firm provides and how we review it:

- the Scheme document: see Chapter 5.
- the form of the IE report: see Chapter 6.
- communications strategy: see Chapter 7.
- applications for dispensations from the Transfer Regulations: see Chapter 8

5. The Scheme document

5.1 We have a particular interest in some parts of the Scheme document. In this section, we give some examples of provisions where we have raised concerns and how these have been resolved. As explained in Chapter 1, these examples are not meant to prescribe specific forms of words but to help Applicants understand our concerns and reasoning.

5.2 In this chapter we specifically cover:

- clarity on business and liabilities being transferred
- continuity of proceedings
- changes to the Scheme
- changes to the 'effective date' of the Scheme

Clarity on business and liabilities being transferred

5.3 The PRA, the Financial Ombudsman Service and the FCA have an interest in ensuring there is no doubt as to which liabilities, if any, remain with the Transferor after the Scheme is effected. Similarly, where the Transferor is proposing to become de-authorised and possibly wind up there should be no doubt that all of the possible liabilities are being transferred.

5.4 The language used in the Scheme document should leave no uncertainty about the possible liabilities being transferred. Any uncertainty may impede the Transferor in applying to us to cancel regulatory permissions. Additionally, when the Financial Ombudsman Service considers customer complaints, it may ask Applicants to revisit the issue of liabilities and ask for further clarification and agreement between the parties on the intended scope. In turn, Applicants may need to consider whether further regulatory notifications are required.

5.5 Applicants should also ensure that the IE is fully aware of the nature and extent of the transferring liabilities. Where the Applicant intends to transfer mis-selling liabilities under the Scheme, the IE should specifically consider the transfer of these liabilities and take account of this in their assessment of the Scheme. We expect the IE to consider the implications of the Scheme on:

- any current and/or pending Financial Ombudsman Service complaints
- if the ability of affected Policyholders to bring complaints to the Financial Ombudsman Service in the future (in relation to pre-transfer acts or omissions) will be impacted by the proposed Scheme.

- if the Financial Services Compensation Scheme (FSCS) coverage will still apply

5.6 The business being transferred must be clearly defined and identifiable. For example:

- We have seen some Schemes refer to certain business in an ambiguous way, which creates difficulties of interpretation post-transfer. This includes difficulties for the Financial Ombudsman Service if complaints are made about a party to a Part VII Transfer and/or in connection with transferred business.

- The position on excluded policies should be clear. We will challenge a Scheme that does not fully explain which policies are excluded from the transfer.

5.7 There should also be no ambiguity about the liabilities that are being transferred with the business. Where all the insurance business is being transferred, and the Transferor will be applying to cancel its regulatory permissions following the transfer, we expect all liabilities to be transferred. We have seen for example, references to the transfer of 'all liabilities whatsoever' with liabilities being 'present or future, actual or contingent'. The following points should be read accordingly:

- Depending on the nature of the business transferring, there should be specific provision within the Scheme documentation in all of the circumstances below:

  - Where all the insurance and associated liabilities are transferring, this should be specifically stated. If liabilities for mis-selling are being transferred then this should be expressly stated in the Scheme document. Depending on the drafting of the Scheme document (for example, if there is a transfer of all insurance and 'associated' liabilities), this may simply require a statement 'for the avoidance of doubt' in order to specifically address mis-selling liabilities.

  - If liabilities in connection with lapsed, matured, surrendered and expired policies are being transferred, depending on the nature of the transferring business.

  - If liabilities in connection with quotations not proceeded with and those that did not become policies, such as those due to an administrative or processing error, are being transferred.

  - If liabilities in connection with reinstated policies are being transferred.

- It can be ambiguous if the Scheme refers to liabilities 'under' a contract of insurance. We want to understand what the commercial intention is and see that the wording matches that intention, where:

  - The intention is to limit liabilities to what is owed under the terms of the contract itself, and

  - Appears to exclude other liabilities connected with the contracts.

- The parties may have agreed that liabilities from the transferring business which are subsequently identified by the Financial Ombudsman Service should transfer. In these cases, the drafting of these liabilities should be broad and clear enough to achieve

that. Also, reference should be made to the DISP provisions setting out the scope of the Financial Ombudsman Service's jurisdiction[8].

- Liabilities drafted as being 'connected to/with a transferring policy' are likely to be too restrictive to include the following scenarios which commonly leads to complaints being made to the Financial Ombudsman Service:

  - Proposed policies which were applied for but not made, for example, if a firm agreed to set up a policy but it never came into force because of an administrative or processing error.

  - Liabilities connected with an application for insurance which was turned down in a way that creates liability, such as certain errors or discriminatory decisions by the firm.

  - Another firm may have underwritten policies which are now held by the Transferor following an earlier transfer of business. If these policies are intended to be part of the Scheme, then drafting describing the transfer of liabilities relating to business 'written by' a Transferor firm is likely to be too restrictive. In these cases, it may be more appropriate to refer to liabilities 'written and/or assumed by' the Transferor.

  - Where the intention is to transfer lapsed, matured, surrendered or expired policies, then drafting limited to business 'carried out by a firm at the Transfer Date' is likely to be too narrow.

  - Liabilities, such as periodic payment orders, made in favour of Policyholders by the Courts which are not automatically transferred. These liabilities may need specific treatment by the Court. This may be, for example, if the Transferor is expressly named by the Court as having liability without any mechanism to transfer that liability. The Applicants will be expected to explain how they are satisfied that liability for these orders will be transferred.

Continuity of Proceedings

5.8 In most cases, the Applicants intend that all proceedings which are in train, pending, threatened or in contemplation will continue against the Transferee. We would expect to see a standard clause included in the Scheme document to this effect.

5.9 We want to see that these clauses are not restricted and that they include any future proceedings brought, regardless of whether the Transferor or Transferee are aware of or anticipates them. This is partly to avoid any doubt that complaints arising after the transfer in relation to pre-transfer acts and omissions of the transferor can be made against the transferee and taken to the Financial Ombudsman Service. Applicants should be aware that it may be necessary to make consequential drafting changes to other parts of the Scheme. Examples may include:

[8]Financial Ombudsman Service - http://www.financial-ombudsman.org.uk/publications/index.htm

- References to ‘proceedings continued’ against the Transferee should include ‘or commenced’.

- Proceedings described as ‘current, threatened or pending’ at the transfer date should also include ‘or any other claims or complaints which may be brought in the future including those not yet in contemplation’ or similar.

- There should be no ambiguity about the specific types of claims that are covered. For example, not using limiting words such as claims ‘under the contract’ if the intention is for mis-selling claims to be brought against the Transferee. If the intention is that types of claim caught are not comprehensive, Applicants should make it clear which types of claim are not included and give their reasons.

- Proceedings should specifically include any complaint to an ombudsman.

Changes to the Scheme

5.10 Scheme documents sometimes state that minor or technical amendments can be made without returning to Court. Some examples include:

- correction of an obvious error

- changes required by law or regulation

- changes required by generally accepted actuarial practice.

5.11 However some documents contain examples where we consider the changes are likely to require Court approval because there is likely to be some discretion as to how these are effected, and so we will challenge those. An example is changes which may be proposed to the Scheme prompted by changes in management practice. Or changes prompted by actuarial practice where different approaches are permitted (for example where the changes are not limited to ‘generally accepted’ actuarial practice). Also:

- We expect the Scheme document to provide for us to be notified of minor or technical amendments in advance and given a reasonable opportunity to object (at least 28 days from the date that the Part VII team at the FCA acknowledges notice of the proposed change).

- When we receive a notification of a proposed change to be made to the Scheme without Court approval we will consider whether the change is minor or technical, or is actually ‘required’ by law or regulation and allows no discretion as to how it is effected. Where there is some scope for discretion or where the firm proposes to go beyond what is actually required we will consider whether it is likely to have had any impact on a Policyholder’s decision of whether or not to object to the Scheme, had they been informed at the time we were considering the Scheme. We will raise objections if we are not satisfied.

5.12 It is also common to see clauses which allow for future changes (not covered in 5.11 above) with Court approval. Some of the clauses anticipating Court approval contain provisions where we sometimes challenge firms. For example:

- A clause might not contain the proviso that such a change may only be made where it is necessary to give full effect to the Scheme. In such circumstances we question whether section 112(d) FSMA (incidental, consequential and supplementary matters) allows such a change. Where sections 112(a) to (c) of FSMA could be relied on to give effect to the change those sub-sections do not contain this restriction. That said, we consider that a change relying on these sub-sections will generally be less relevant to the FCA's objectives. In these cases, where a change is eventually proposed which would need to rely on s112(d) FSMA and is not necessary to give full effect to the Scheme, we will likely object at the time of the proposed change where there may be a potential for harm to occur.

- However, we accept that ultimately it is for the Court to decide. If the Court does permit changes, even though they are not needed to give full effect to the Scheme, then we would consider whether further Policyholder communications are required to explain this and allow objections to be made.

- We would also expect that any significant change is accompanied by an updated IE report or IE certificate, as appropriate, covering all the possible impacts of the change, not just benefit expectations, on all groups of potentially affected Policyholders (not just the transferring policyholders). Where possible we would expect the IE to be the same as the IE on the original Scheme, however we recognise that there may be circumstances where this is not practical or possible.

- Again we expect the Scheme to provide adequate time for us to object before the hearing. For example at least six weeks or a 'reasonable period' from date that FCA Part VII team acknowledged receipt of notice of the proposed change.

- We would like to see provisions which prompt firms to apply for a change to the Scheme where there have been unintended impact(s) on policyholders, assessed by reference to what was communicated to them in the policyholder notification. A provision of this type is likely to be particularly helpful, for example, in the context of EU withdrawal, to demonstrate Applicants' commitment to making only changes that are necessary to allow the Applicants to continue to service their business around the EU.

5.13 One example of an amendments clause that can be used where a return to Court is expected is where the so-called '3i's test' is to be satisfied. This permits a firm to make a change if it is 'impossible, impracticable or inequitable' to implement the terms of the Scheme without an amendment. In those circumstances, a return to Court would need to be accompanied by an IE report providing a view on the potential impact of the change on policyholders. The regulators should be notified in good time for them to consider making representations to, or being heard by, the Court.

5.14 In some cases the draft Scheme allows for changes to be made in very specific circumstances. An example would be in long term business transfers where the

Transferee expects to need to merge, close or split funds, usually with-profits. In those cases we expect to see:

- The Scheme to be as specific as possible about expected circumstances and/or limited to a particular known event so that the scope for the Transferee's judgement is appropriately limited.

- This scope for judgement might be appropriate to allow the Transferee to adjust to future circumstances and events to ensure Policyholders are fairly treated. However, it should be specified in a way that limits any possible adverse or difficult to assess impacts on Policyholders at the time of transfer.

- Confirmation that the merger, closure or splitting is permitted by the terms of the policies and does not make those terms more restrictive in a way that could be adverse to the interests of policyholders. If it is not clear and the applicant proposes to amend terms and conditions to permit these actions we would generally expect them to be amended in a way that is in the interests of policyholders (directly or indirectly). Any change would need to be clearly and prominently notified to policyholders.

5.15 Regarding sufficient protections for Policyholders in the event of such a change, Applicants should consider:

- Whether the change itself is in Policyholders' interests. One example is fund mergers where the fund size diminishes, once business has transferred out, to such a level that Policyholders may be adversely affected due to increased costs to maintain separate funds. However, it is not uncommon to see an optional fund size trigger as well as a compulsory minimum fund size trigger, to afford reasonable flexibility. Where funds become so small that merging with other funds with similar objectives has sound financial objectives but does not benefit policyholders because policyholder charges are fixed then we would question why some of the financial benefits of merger are not also passed on to policyholders, directly or indirectly.

- Whether the IE report has properly and fully commented on the possible impact to Policyholders and any possible adverse effect to them. In some circumstances it may also be appropriate to require an Independent Expert's review at the time of the merger, closure or split, to ensure the interests of policyholders are sufficiently protected. For example, where the terms of the policies are not clear on the scope of the firm's contractual power, the transferee is afforded significant discretion by the Scheme and the implications for policyholders are potentially significant.

- Whether the Scheme expressly requires that there is appropriate review of the merger, closure or split by any appropriate independent governance arrangements, for example, any with-profits committee.

- Pre-notification/non-objection of proposed changes to the regulators.

Changes to the 'effective date' of the Scheme

5.16 Scheme documents sometimes contain clauses which provide for Applicants to have some flexibility to change the effective date of the Scheme without returning to Court. We set out our comments on these below:

- Clauses such as this should not generally be relied upon as a substitute for the Applicants' own contingency planning to ensure they are in a position to transfer at the effective date. We would expect these clauses to be used only in exceptional circumstances and only after all other options have been explored.

- The effective date should be set so that the notifications to Policyholders do not become out of date and need to be refreshed. A delay of more than three months would be likely to fall into this category. However, depending on the Scheme, it could be shorter.

- Even where there is a delay of less than three months we would want to ensure that the Applicants have properly considered how best to inform Policyholders of the new effective date. In some cases this could include the need to consider individual re-notification, and we would take into account whether this would be proportionate in light of the particular transaction. It is particularly important to ensure that the mechanism employed is effective, to ensure that Policyholders are directed to the firm, or are clear on which firm, to approach with a question about their policy.

- The PRA will also have an interest in any proposals for postponement and, given their own objectives, may impose different conditions. When the effective date has not been fixed, there will also need to be a long-stop date for implementation.

5.17 Any changes to the effective date beyond, for example, three months may also require the Court's approval and may be likened to the changes in the previous list. While this is a general guide, the key consideration is to ensure that a Scheme's Policyholder notifications are not based on out-of-date information. It does not follow that we consider that any delay beyond three months would require re-notification (there may be other proportionate methods of making policyholders aware). But it may require re-notification if the information has changed in a way that could affect a Policyholder's decision significantly and we would like to see firms give appropriate consideration to the issue.

Requests to change the Scheme involving Court exercising its powers

5.18 For requests that involve the Court exercising its powers (for example, under s112 FSMA) to make ancillary orders, we could object to the use of these powers in the context of a Part VII Transfer. This is particularly the case where the ancillary orders powers are being used to change the contractual terms of Policies or the terms of reinsurance contracts. We:

- Will question whether any of the proposed changes are necessary as part of a Part VII Transfer. Here we do not, and are not able to, seek to override the Court; we are challenging the Applicants as a regulatory matter to advance our statutory objectives. Ultimately it is for the Court to decide whether or not to exercise its powers. If the

Applicants ask for such an order and we object then we reserve the right to make representations to the Court in our report for the Sanctions Hearing. Where changes are demonstrably for the benefit of policyholders but not obviously necessary for the Part VII transfer then we will leave the question for the Court as there may be no demonstrable harm to warrant our intervention.

- Will expect, where the changes are demonstrably necessary, that they are clearly and prominently notified to Policyholders, with sufficient accompanying detail. This will allow Policyholders to be able to assess whether the transfer may have an adverse impact on them and consider any proposals which are intended to mitigate this.

- Will be particularly concerned where the purpose of the transfer is primarily for the commercial reasons of the Applicants (and not primarily for the benefit of relevant policyholders). In these transfers we will be particularly concerned to see that appropriate mitigations are in place to ensure that Policyholders are not adversely affected by changes in terms. For example where changes in terms are due to operational differences between transferor and transferee.

- May object, in a particular case, where we consider the Applicants are using the Part VII Transfer artificially or opportunistically to inappropriately change provisions in the business.

6. Review of the form of the Independent Expert's report

6.1 The PRA is responsible for approving the form of the IE's report but it must consult us before doing so. Our review will not just be limited to a high-level check of whether the report covers the appropriate topics (see SUP 18 for details[9]). It also aims to ensure that there has been sufficiently detailed analysis and challenge of the Applicants' position, to allow us to be satisfied that it would be appropriate for the Court to rely on the conclusions.

6.2 We will try to review the report as far as possible from the perspective of a Policyholder, including claimants on commercial policies. As such, we expect the report to be easily readable and understandable by all its users and for the IE to pay attention to the following:

- Technical terms and acronyms should be defined on first use.
- There should be an executive summary that explains, at least in outline, the proposed transfer and the IE's conclusions.
- The business to be transferred should be described early in the report.
- The detail given should be proportionate to the issues being discussed and the materiality of the Transfer when seen as a whole. While all material issues must be discussed, IEs should try to avoid presenting reports that are disproportionately long.
- IEs should prepare their reports in a way that makes it possible for non-technically qualified readers to understand.

6.3 We often find that IE reports lack detailed analysis, critical review or reasoning to support a conclusion that there is likely to be no material adverse effect on Policyholder groups. In particular, we often find that IE reports lack sufficient consideration and comparison of:

- reasonable benefit expectations, including impact of charges
- type and level of service, including claims handling
- management, administration and governance arrangements

[9] SUP 18 Transfers of business, FCA Handbook: www.handbook.fca.org.uk/handbook/SUP/18/

6.4 We also sometimes see an imbalance between factual description and supporting analysis. IE reports often include a very detailed description of the transaction and background but much less analysis of the effect on each Policyholder group's reasonable expectations. Our concern here is that the IE often uses the detailed description of the background to compensate for the lack of analysis and challenge of the Applicants.

6.5 This Chapter sets out our expectations and gives some specific examples of the things we will consider when reviewing the IE's report. These include:

- the level of reliance on the Applicants assessments and assertions
- sufficient comparative regulatory framework analysis
- balanced judgements and sufficient reasoning
- sufficient regard to relevant considerations affecting Policyholders
- commercially sensitive or confidential information
- the level of reliance placed on the work of other experts
- examples of over-reliance on the work of other experts
- ambiguous language or a lack of clarity
- demonstrating challenge
- technical actuarial guidance

The level of reliance on the Applicants assessments and assertions

6.6 IEs will sometimes rely on Applicants' assessments to reach their own conclusions. In these cases, we expect the IE to demonstrate that they have questioned the adequacy of those assessments. We may also expect the IE to have asked the Applicants to undertake additional work or provide more evidence to support their assertions to ensure that the IE can be satisfied on a particular point.

6.7 We expect the IE to explain any challenges they made to the Applicants about such underlying information and the outcome in their report, rather than just stating the final position. We will question and challenge the IE where we feel they have relied on the Applicants' assertions without sufficient challenge or asking for supporting detail or evidence.

6.8 An example would be where conclusions are supported solely or largely by statements such as '*I have discussed with the firm's management and they tell me that…*' followed by '*I have no reason to doubt what they have told me…*'. In such cases we would challenge the IE on whether they have come to their own conclusions on the matters concerned. In these circumstances:

- Where a feature of the proposed transfer forms a significant part of the IE's own assessment of the Scheme's impact, we would ask the IE to review relevant underlying material. We would not expect them to just rely on the Applicants' analysis of the material and subsequent assertions.

- If there are concerns about matters that fall outside the IE's sphere of expertise, such as legal issues, we would expect the Applicants to give the IE any advice that they have received. If the issue is significant or remains uncertain, we would expect the IE to ensure the Applicants had obtained appropriate advice from a suitably qualified independent subject matter expert. We give further information below about the IE obtaining and relying on their own independent advice (6.33 onwards).

6.9 We would also expect the IE to challenge calculations carried out by the Applicants if there is cause for doubt on review of the Scheme and supporting documents. As a minimum, we will expect the IE to:

- review the methodology used and any assumptions made, to satisfy themselves that the information is likely to be accurate and to challenge it where appropriate

- challenge the factual accuracy of matters that, on the face of the documents or considering the IE's knowledge and experience, appear inconsistent, confusing or incomplete

6.10 We would also expect the IE to challenge Applicants where the documents provided contain an insufficient level of detail or analysis. Specific examples would include:

- Applicants' assertions that service levels will be maintained to at least the pre-transfer standard. In this case, we would expect the IE to include not only details of the Applicant's plans and any gap analyses produced, but also include their view of their adequacy.

- Where there are concerns that a change in governance arrangements in the Transferee may lead to poorer customer outcomes. Applicants' analysis is often carried out at a high level. So it does not always include reviewing and comparing any of the Transferor's governance arrangements that produce good customer outcomes with the Transferee's governance arrangements. An example of these governance arrangements would be any committees with conduct responsibilities.

- Consideration of the potential post-transfer strain on resources which could affect the service standards provided to the Transferee's existing customers and/or control over conduct of business risk. We would expect to see a review of relevant management information indicators and related contingency planning.

Sufficient comparative regulatory framework analysis

6.11 The regulatory framework may be different for the Transferor and Transferee. In these cases, we will want to see that the IE has carried out sufficient analysis of the differences including, where appropriate, taking independent advice.

6.12 In particular, with cross-border transfers we often see insufficiently detailed analysis of regulatory protections post-transfer. This can include:

- The extent to which existing regulatory requirements and protections continue. This includes whether there is continued access to the Financial Ombudsman Service and the Financial Services Compensation Scheme. Our expectation is that Applicants aim to preserve Financial Ombudsman Service, whether under the Compulsory or Voluntary jurisdictions, as far as it is possible to do to avoid any loss of protections. In the context of EU withdrawal we would expect this at least until the point of policy renewal. Some firms are able to continue to service contracts from UK branches to preserve continuity.

- The comparative regulatory requirements and conduct protections across any relevant jurisdictions, compared to the UK. This includes but is not limited to complaints or compensation bodies.

- Analysis of the likely impacts. For example, the number of Policyholders affected, the size of possible claims and any potential actions or provisions to mitigate this.

- Post EU Withdrawal, non-UK EEA customers may be subject to the local conduct of business rules regime, which may not include FOS or FSCS issues. In these cases, we are likely to accept firms taking proportionate approaches to compare regimes. For example a high level analysis may be appropriate, selecting key UK protections for consumers that are not harmonised in the EEA, and that could be relevant to servicing contracts. This could be accompanied by an explanation that a full gap analysis has not been carried out, but that policyholders can contact the Applicants if they are concerned. Some firms are able to continue to service contracts from UK branches to preserve continuity of regime at least until renewal.

6.13 In these instances, we would expect to see a statement describing the two regimes. We would also expect to see a considered comparison, highlighting points of significant difference that could adversely affect Policyholders. It is for the IE to use their judgement to decide on the level of detail to be included but it needs to be sufficient for the Court to be in a position to be satisfied.

6.14 The IE's analysis may be inconclusive or may highlight potential conduct risks due to differences in the regulatory framework. In such cases we expect to see sufficient explanation of how Policyholders may be affected and the Applicant's proposals to mitigate these risks.

Balanced judgements and sufficient reasoning

6.15 IEs will sometimes state that they are satisfied by referencing certain features of the Scheme, but will not adequately explain how those features have led to their satisfaction. In these circumstances we would expect to see both the evidence and the IE's reasoning that led to their conclusion.

6.16 We have also seen many examples of Schemes where the Applicants have stated that there will be no material adverse impact to Policyholders. However, from the report it is

unclear whether the IE is certain that there will most likely not be an adverse impact or whether it is their best judgement, but lacks certainty. In these instances, we expect IEs to consider the following:

- Where the IE takes the view that there is probably no material adverse impact, we expect the IE to challenge the Applicants about further work the Applicants could undertake to enable the IE to be satisfied to a greater degree.

- We accept that it is not the IE's role to suggest a different Scheme, or propose changes to a Scheme. However, we believe that they should be able to challenge the Applicants so that IE's can gain the necessary level of confidence that their report's conclusions are robust. Applicants and IEs should be aware that they will need to consider how any proposed changes/mitigations will impact all Policyholder groups.

6.17 When finalising their report, we expect the IE to have checked that the documents they are relying, and forming judgements, on are the most up-to-date available.

6.18 Market conditions may have changed significantly since the IE's analysis was carried out and they formed their judgement. In these cases, we would expect the Applicants to discuss any changes with the IE and for the IE to update their report as necessary. If the Scheme document has been finalised, the IE should give more detail in their Supplementary Report or by issuing supplementary letters to the Court to confirm whether their judgement is unchanged. See paragraphs 7.31-7.34 for further information on the Supplementary Report.

Sufficient regard to relevant considerations affecting Policyholders

6.19 We would expect to see IE consideration of all relevant issues for each individual group of Policyholders in both firms, as well as how an issue may affect each group. Our expectations of the IE when giving their opinion include the:

- current and proposed future position of each Policyholder group

- potential effects of the transfer on each of the different Policyholder groups

- potential material adverse impacts that may affect each group of Policyholders, how these impacts are inter-related and how they will be mitigated.

6.20 To support this, we would expect the IE to consider whether the groups of affected Policyholders have been identified appropriately. For example, this could include instances where certain Policyholder groups' services are provided by an outsourced function which is changing, but other Policyholder groups do not.

6.21 We would also expect the IE to review and give their opinion on administrative changes affecting Policyholders and claimants. Here we would expect the IE to include:

- Consideration of the impact of an outsourcing agreement entered into by the parties before the Part VII process began, where the administration duty 'moved' from the Transferor to the Transferee in preparation for the transfer. Here, we would expect to

see a comparison of the pre and post-outsourced administration arrangements so the IE can clearly review and compare any changes to Policyholder positions and service expectations.

- Also, we would not expect the IE to simply state that, because the transfer will not create any change to the administrative arrangements, there will be no material impact. The IE should consider what might happen if the Transfer does not proceed and the possibility that the outsourcing agreement could be cancelled, returning the administrative arrangements to the original state. In such circumstances, the IE should consider the impact on Policyholders and claimants of the outsourcing agreement as part of the Part VII process.

6.22 IEs should also review and give their opinion on all relevant issues for all Policyholder groups where reinsurance was entered into in anticipation of a transfer:

- Some firms pre-empt regulatory scrutiny by buying reinsurance against risks before they begin the transfer process. In these instances, the IE should consider if it is appropriate to compare the proposed Scheme with the position the Transferor would be in if they did not benefit from the reinsurance contract.

- If the transfer is not sanctioned and the reinsurance either terminates automatically or can be terminated by the Transferee, the IE should consider the Scheme as if the reinsurance was not in place.

6.23 The IE may identify particular sub-groups of Policyholders whose benefits, without other compensating factors, are likely to be adversely affected. Here we would want to see the IE take into account the Transferor's obligations under Principle 6 (Customers' interests) of our Principles for Businesses.[10]

6.24 When a loss is expected for a particular subgroup of Policyholders, we would expect to see IE consideration and analysis of alternatives, even if the IE does not consider this loss to be material. In these cases, we may request that the IE and/or Applicants consider other ways of mitigating the adverse impacts on the affected Policyholders, should they happen, including providing compensation.

6.25 We would expect to see this analysis even if the IE is able to conclude that the Policyholder group as a whole is not likely to suffer material adverse impact, even if a minority may. For example where:

- some Policyholders within a group/sub-group will suffer higher charges post-transfer because the Transferee has a different charging structure

- some Policyholders within a group/sub-group had free access to helplines that will no longer be available or have a significantly altered service after the transfer

6.26 When an IE is assessing the potential material adverse impacts on various groups of Policyholders, we may feel they have reached their conclusion based on the balance of

[10] Principles of good regulation, FCA: www.fca.org.uk/about/principles-good-regulation

probabilities and without adequately considering the possible impact on all affected Policyholder groups.

6.27 As a specific example, we might consider the right of Policyholders to make a claim on the FSCS following a cross-border general insurance transfer:

- The IE may say they are satisfied that there is no material adverse impact on Policyholders because of the Transferee's capital position (meeting relevant requirements), and the short term nature of the liabilities (for example, annually renewable). The IE may conclude from this that it is unlikely the Transferee will fail and Policyholders need recourse to the FSCS as a result. While we accept that this is a potentially relevant consideration, we would not be satisfied with this view without further evidence. For example, some evidence and analysis of why the size and complexity of a particular firm may make a default, before the time that policyholders have to claim on policies, extremely unlikely.

6.28 In summary, we expect to see the consideration, evidence of challenge, and reasoning to support the IE's opinion that a change due to the Part VII Transfer will not materially negatively affect a group of Policyholders.

Commercially sensitive or confidential information

6.29 Often the IE will need to consider commercially sensitive or confidential information as part of their decision-making process. In these circumstances, we remind IEs of their duty as an independent expert to consider Policyholder interests, particularly as this information will not be publicly available. Examples include:

- where 'whistle-blower' information relevant to the Scheme is received and forwarded to the IE

- where we are aware of enforcement action in progress with one of the Applicants

6.30 In these situations we expect to see the analysis and the information relied upon. It is also possible that the Court may wish to see that information without it being publicly disclosed. The IE may wish to consider sending a separate document with further details, solely for the Court's use and not for public disclosure.

The level of reliance on the work of other experts

6.31 For large scale and complex insurance business transfers we accept that the IE may rely on the analytical work of other qualified professionals, often to prevent their own work becoming disproportionately time consuming. However, we would still expect the IE to have carried out their own review of this analysis to ensure they have confidence in, and can place informed reliance on, the opinions they draw from another professional's work.

6.32 We expect the IE to have obtained a copy of relevant significant legal advice given to the Applicants, subject to appropriate arrangements to safeguard any legal professional privilege. This should be in writing or transcribed, and approved by the advisor. It should

also be in a sufficiently final form for the IE to be able to review and rely on it. The IE should reflect this review, and the opinions drawn from the advice, within their report.

6.33 The IE may refer to factors that are outside their sphere of expertise and relies on advice received by the Applicants. In these cases, the IE should consider whether or not to get their own independent advice on the relevant issue. This situation occurs most often with legal advice and we discuss our expectations in further detail below.

6.34 We accept that it is not necessary for IEs to get separate independent legal advice in all cases. However, we do expect that the IE will have given due consideration to whether or not they need to get their own advice. For example, where there is some uncertainty about the risks or there may be different outcomes but it is unclear which outcome may be better for Policyholders. In many cases, whether the IE decides to get independent legal advice will depend on the significance and materiality of the issue. See paragraph 6.36 below for a non-exhaustive list of factors which the IE should consider.

6.35 The IE's key consideration is whether it is reasonable for them to rely on the advice and whether their independence is compromised by doing so. Whether or not the legal advisor has acknowledged that it owes a duty of care to the IE will be relevant to this consideration. We may challenge IEs who rely on the Applicants' legal advice and merely state they have no reason to doubt the advice and/or that it is consistent with their understanding of the position or experience of similar business transfers. Our decision to challenge will depend on how complex the legal issue is.

6.36 In deciding whether to get independent legal advice, we would expect the IE to consider, amongst other things, the following:

- The significance of the issue and the degree of potential adverse impacts on Policyholders if the position turns out to be different from what the legal advice considers likely.
- How much the IE relies on the legal advice to reach their conclusions. Also, if they did not rely on the legal advice, would the report contain too little information to justify the view that there is no material adverse impact?
- The difficulty, novelty or peculiarity of the issue to the Applicants' own circumstances.
- Applicants' proposals to explain to Policyholders in communication documents the issues involved, any uncertainty, and any residual risks.
- Whether the Applicants have obtained an adequate level of advice, depending on the issue's significance or uncertainty. Where relevant, whether the Applicants have engaged external advisors with the appropriate expertise and qualifications for the specific subject or jurisdiction.
- Whether any advice already received is heavily caveated, qualified or there is a significant degree of uncertainty.

6.37 Alternatively, the IE may need to explain why they consider that they do not need to get independent advice to be adequately satisfied on a point. For example, the IE's

assessment should consider whether there are credible alternative arguments that could be made, whether identified in the Applicant's advice or otherwise. They should also consider where risks are identified but there are no suggestions about how they can be mitigated, or what the impact on Policyholders may be if the risks do occur. These considerations would allow the IE to consider the worst case scenario of these impacts.

6.38 Finally, the IE should consider the Applicant's contingency plans if the risks identified in the legal advice occur and whether this may create negative consequences for Policyholders. This could require further legal advice to explain how Policyholders may be affected or additional proposals to mitigate the risks.

Examples of over-reliance on the work of other experts

6.39 Further to these points, we give some specific examples below where we have challenged the IE around potential over-reliance.

6.40 Often an Applicant will get a legal opinion on whether a transfer involving overseas Policyholders will be recognised in non-EEA jurisdictions. The IE may take that advice into account but there may be some material doubt as to whether a court would adopt the approach set out in the advice. In that case, we expect the IE not to use such advice as the sole basis of their conclusion that there are no materially adverse effects. We would expect the IE to consider and be satisfied of the position if the advice turns out not to be the position taken by the relevant court. The legal advice itself should address this and suggest ways of mitigating this risk.

6.41 The IE may be uncertain, for example, because the legal advice is heavily qualified or uncertain and cannot form a conclusion on an issue. In this case, they may wish to get their own independent legal advice to ensure they can reach a more considered conclusion.

6.42 The position may be different depending on whether the Transferor remains authorised/in existence. So:

- If the Transferor's authorisations are to be cancelled and it could wind up or is planning to do so eventually, acceptable mitigations include the Transferee making a deed poll which is directly enforceable by Policyholders in either the UK or the relevant jurisdiction. It is unlikely that treating these policies as excluded policies is itself an adequate mitigation. Some IEs have received advice that even if the Scheme is not formally recognised in another jurisdiction, the Courts of that jurisdiction would still act to prevent the Transferee from denying that it is liable. This may well be correct but we still expect the IE to assess any material possibility, and any mitigations if it is not.

- Where the Transferor is expected to remain in existence for the foreseeable future, the position is less likely to have an adverse impact. This is because Policyholders will still be able to claim against the Transferor as an excluded policy. We would still expect an IE to examine what possible material adverse impact this could have on policyholders. For example, any delay in dealing with claims, and any risk that the

Transferor changes their approach to dealing with claims because of uncertainty around the Transferee indemnifying the Transferor in full. Mitigations could include some clear commitment by both Transferor and Transferee in the Scheme, enforceable by Policyholders, that Policyholders claims will not be affected or delayed because of the excluded policy and indemnity arrangements.

6.43 Our concern here is that the likelihood of an adverse impact should be low enough for consumers not to be adversely affected. We would expect the IE to take a view on that and seek the appropriate reassurances/ensure mitigations are in place.

6.44 In summary, in most cases we will seek to review copies of relevant significant legal advice obtained, with appropriate arrangements to maintain any legal professional privilege. We will expect that advice to also cover what happens if the relevant court does not take the position of the advice and what mitigations can be used if that happens. It is important that all significant material an IE relies on when evaluating a Scheme and reaching their conclusions should, wherever reasonably possible, be available for review by the Court and interested parties. Where material is commercially sensitive there are mechanisms that allow the Court and IE to review without detailed disclosure to all other interested parties.

Ambiguous language or a lack of clarity

6.45 At the start of the document, the IE should provide a description of where they propose to rely on information provided by the Applicants. We will look for any overly general reliance, as it indicates a lack of critical assessment or challenge.

6.46 Some examples we have seen and challenged IEs on include:

- Where a conclusion in the report is that the IE 'takes comfort' from certain matters, as opposed to 'being satisfied' having taken various matters into account.
- Where the conclusion is uncertain. For example, 'I am satisfied that there is no material adverse effect. However…' but it is unclear how the qualification affects or undermines the conclusion.
- Where the conclusions are caveated we will review whether these are reasonable in the circumstances. If the caveats involve areas that the IE has not considered, we will consider if it is reasonable for them not to do further work to satisfy themselves and remove the caveat.
- It is also important that the caveat does not undermine the report or the IE's ability to be satisfied on the relevant point. For example, the conclusion may be caveated by 'on the basis of information provided to me'. In these cases, we may ask if the IE should be carrying out their own analysis of the underlying documentation or if they require further information or documentation to be satisfied without making a qualification.

6.47 In summary, where the report does not seem to reach a clear conclusion, either generally or on a specific issue, the IE report should state clearly:

- That the IE has considered and is satisfied about the likely level of impact on a particular point. Where uncertainty remains, the IE report needs to include details of, and reasons for, this uncertainty. It should also include any further steps the IE has taken to get clarification, such as seeking further advice from a subject matter expert.

- How the IE satisfied themselves about the uncertainty they have identified and how they have formed an opinion on any potential impact.

Demonstrating challenge

6.48 To ensure the IE report is complete and considered we expect to see challenge from all involved parties. This includes evidence that Applicants have made appropriate challenges, particularly where they believe the IE has not fully addressed issues. Applicants have an interest in ensuring that the Court, regulators and Policyholders are able to rely on the IE report, taking into account the IE's disclaimers. On this basis, we consider that Applicants are able to make these challenges without compromising the IE's independence. We expect a confirmation that the near-final version of the IE's report had the relevant challenge at the time it was submitted.

6.49 To ensure effective two-way challenge we would expect the IE to engage with FCA or PRA- approved persons of sufficient seniority at the Applicant firm. This could be senior actuaries, including possibly the Chief Actuary, the CFO, Senior Underwriters and so on.

Technical actuarial guidance

6.50 We expect IEs who are both qualified and unqualified members of the Institute & Faculty of Actuaries to pay proper regard to the Technical Actuarial Standards (TAS) published by the Financial Reporting Council[11], particularly those for compiling actuarial reports.

6.51 IEs should be particularly aware that the revised versions of the TAS which came into force with effect from 1 July 2017 (TAS 100: Principles for Technical Actuarial Work and TAS 200: Insurance) specifically apply to technical actuarial work to support Part VII Transfers.

6.52 We draw specific attention to paragraph 5 of TAS 100 which states that actuarial communications should be 'clear, comprehensive and comprehensible so that users are able to make informed decisions understanding the matters relevant to the actuarial information'. We also draw specific attention to paragraph 5.2 of TAS 100 which states that 'the style, structure and content of communications shall be suited to the skills, understanding and levels of relevant technical knowledge of users'.

6.53 Actuarially qualified IEs and peer reviewers should also bear in mind the Actuaries' Code and Actuarial Profession Standards documents APS X2: Review of Actuarial Work and

[11] TAS 2017, Financial Report Council, December 2016: www.frc.org.uk/Our-Work/Codes-Standards/Actuarial-Policy/Technical-Actuarial-Standards.aspx

APS L1: Duties and Responsibilities of Life Assurance Actuaries.[12] IEs and peer reviewers should adhere to the required standards of their professional body, as applicable and current at the time when the work is performed.

[12] APS X2 & APS L1, Actuarial Profession Standards, July 2015 & January 2016 respectively: www.actuaries.org.uk/upholding-standards/standards-and-guidance/actuarial-profession-standards-apss

7. Review of the communications strategy

7.1 Applicants should recognise that the requirement to notify Policyholders and advertise the Scheme is a fundamental protection within the Part VII process. Adequately notifying Policyholders and other interested parties, as well as advertising the Scheme, complements the IE report, which cannot itself examine the position of each individual Policyholder.

7.2 One of the essential ways in which Policyholders' interests are protected within a Part VII Transfer is that each Policyholder is given the opportunity to fully consider the Scheme and its possible impact on them. The Policyholder then has the option to make appropriate representations to the Court. As individual Policyholders' contractual rights are being overridden, it is important that they have the chance to object to their policies being transferred.

7.3 We expect IEs to include consideration of the proposed communications strategy and any supporting requests for dispensations from the Transfer Regulations in their report. We also expect to see evidence that the IE has challenged proposed communications that are not clear and fair and do not adequately explain the transfer and the potential impacts on Policyholders and how these have been addressed.

7.4 This section details our expectations of the communications strategy as a whole. The communications form a large part of our overall conduct consideration and there are a number of components to explore in more depth. The following chapter is split as follows:

- the definition of Policyholder
- identifying and tracing Policyholders and other relevant persons
- content of communications
- individual notifications
- including sufficient information with sufficient prominence
- document translation
- the need for further communications before the Sanctions Hearing
- deficiencies in notifications

The definition of Policyholder

7.5 When Applicants are considering who is to be notified and which groups of Policyholders dispensations are being requested for, one common issue is the wide scope of the definition of 'Policyholder' under FSMA.[13] The FCA (like the FSA before it) takes the view that the definition is very broad and includes but is not limited to:

- Beneficiaries under a trust where a policy is taken out by the pension trustee. For example, pension 'buy-in' policies where the liabilities remain with the trustee who insures against the risk of making payments to its members under the pension Scheme.
- 'Buy-out' policies where the trustee's liabilities to pay are transferred to an insurer and there are dependants who may receive payment in certain circumstances eg dependent relatives.
- Employees under an employer's liability policy or group pension Scheme.
- Third-party claimants under a motor insurance policy where the insurer has notice of the claim and the address of the claimant.
- Any potential claimant under a policy, regardless of whether the possibility of claiming is remote.

7.6 Some Applicants take a different view of the scope of the definition of 'Policyholder'. We also acknowledge that there are compelling different views about some of the categories above. For example, employees who have not made a claim - and where there are currently no circumstances where they can - and where the employer is not at risk of default, and 'buy in' policies. However, in these cases, the Applicants have decided not to pursue their interpretation of the point, while also not conceding it, which we are content with, and instead use dispensations to achieve the same outcome.

7.7 We welcome Applicants approaching the difference in interpretation in this way. In general, we do not object to these types of applications for dispensation, usually on the grounds of proportionality or impracticality, where Applicants have provided relevant reasons and supporting evidence.

Identifying and tracing Policyholders and other relevant persons

7.8 We expect Applicants to set out, in sufficient detail, within the witness statement(s) the various classes of Policyholders and other persons caught by the definition of Policyholder before any dispensations are applied.

7.9 Applicants should ensure that they have included all potential classes of Policyholders including:

- transferring Policyholders

[13] The Financial Services and Markets Act 2000 (Meaning of "Policy" and "Policyholder") Order 2001

- Policyholders remaining with the Transferor
- the Transferee's existing Policyholders

Where there are sub-groups of Policyholders within these classes that require different treatment and notification the Applicant documents should clearly identify and describe them.

7.10 We also expect Applicants to be able to confirm and demonstrate to us, subject to dispensation applications, that they have made all reasonable efforts to identify, trace and contact Policyholders and other relevant persons in addition to any business-as-usual tracing.

7.11 Where Policyholder records are incomplete, our expectations are detailed below:

- Where records exist but are not held electronically, we expect Applicants to explain their approach to getting information from any non-electronic/manual sources.
- Applicants may propose to apply for a dispensation from notifying Policyholders whose details are held in non-electronic sources. In these cases, we expect to see evidence that they have fully considered the viability and cost/benefit of supplementing their electronic records with data from manual records.
- Where records are incomplete or not held we expect, in the first instance, Applicants should explain their approach to locating Policyholder details such as public database searches, using credit reference agencies and website searches. Where these efforts do not identify all relevant Policyholder details then it may be appropriate for the Applicants to apply for a dispensation (see below). If the Applicant applies for a dispensation, we will take into account the efforts the firm made when we consider whether or not to object to the application. Generally, we expect Applicants to use more than one method of tracing.
- Records may be kept by a third-party, such as a broker or third-party provider of connected services such as bank accounts. In these cases, we expect Applicants to demonstrate that they have taken all reasonable steps to get those records or to assist the third-party in making notifications on their behalf.
- Contractual arrangements with third-parties may mean that Applicants do not have a right to request this information or assistance. This could result in Applicants not having adequate systems and controls in place to ensure that they can comply with relevant regulatory requirements, which may require separate supervisory action from us to address. In this instance, we would expect to see alternative proposals for notification and action by the Applicants to change their contractual arrangements to enable them to comply with regulatory requirements.
- However, contractual relationships may mean that third-parties are required either to provide the information or to pass on insurer communications to Policyholders. In these cases, we expect Applicants to reasonably pursue these contractual obligations so that Policyholders are properly informed of the proposed transaction. As notifying

policyholders is a legal requirement, we generally do not accept arguments that third parties are concerned about data protection.

Content of communication

7.12 Our interest here is to ensure that the Applicants' communications (including the formal Legal Notice required by the Transfer Regulations, the individual Policyholder communications, website material and any advertising) are clear, fair and not misleading.

7.13 As such, all communications will need to:

- be understandable by a person with limited technical insurance knowledge
- not have a dissuasive effect in terms of their structure or the way they are drafted
- contain adequate information about the transfer itself, including ensuring that the firms involved can be identified sufficiently easily
- meet the formal requirements and language for Policyholders' rights used in Part VII and the Transfer Regulations
- give sufficient information and balanced explanation to allow Policyholders to take an informed view about the possible impact of the transfer on them, any potential adverse impacts they should consider further and whether to make representations to the Applicants and/or the Court
- where appropriate, direct Policyholders to further material including specific information about the potentially adverse impacts

7.14 Specifically with regard to the Legal Notice, we would expect it to:

- Identify the parties in a way that allows Policyholders to readily recognise them. For example, where appropriate, the commonly used names of the firms or brand names used for relevant business.
- Give clear telephone contact numbers, including for Policyholders who are abroad to call. These should be freephone numbers wherever possible and staffed by representatives of the Applicants at set times.
- Clearly state that if the Policyholder believes they may be adversely affected by the transfer, they can make representations which will be considered by the Court. Firms should take care not to dissuade Policyholders from making representations by, for example, suggesting that appearing at Court in person is the main or only way they can make representations.
- Where the Legal Notice asks that Policyholders respond by a certain date for practical reasons, it should be clear that this is a request and not a requirement. It should also be clear that Policyholders can still make representations up to, and at, the Sanctions Hearing.

- Clearly state that representations can be made in writing to the Applicants or by telephone to the contact number and/or in person or by legal representative at the hearing.

Individual notifications

7.15 Our review of the notifications will include the literature's tone, content, clarity and conciseness. We expect Policyholder notifications to be transparent, balanced and not misleading. They should include explanations of what the transfer may mean for Policyholders so that they can form their own view.

7.16 Specifically, notifications should also avoid discouraging effects such as:

- Stating that the Policyholder does not need to do anything. Instead Policyholders should, in the first instance, be encouraged to consider carefully the material in the letter and attachments. Reference to next steps may refer to not needing to take further action unless the Policyholder is unsure about the proposals, has questions, wants clarification or thinks they may be negatively affected.

- Applicants should avoid giving the impression that because the Court, the IE, and/or the FCA are considering the proposals, this implicitly means that Policyholders do not have to.

- Applicants should clearly set out the potential risks of adverse impacts for Policyholders. They should not downplay these risks or give the impression that Policyholders do not need to consider them further to assess how they may be affected. However, the IE's consideration of the issues and any mitigants being proposed should be referred to, in a balanced way, to allow Policyholders to take a view of the proposals.

- The call 'script' that Applicant's staff use for telephone queries must be consistent with the notifications. Where a Policyholder asks 'Is anything changing?' they should not, for instance, only be told that there are no changes to the terms and conditions, if there are other changes to consider. We expect the Applicants to give a full explanation of the proposals and any identified Policyholders considerations.

7.17 They should not use misleading descriptions of the Court or Part VII process. For example:

- When describing the protections under Part VII, reference to the FCA's review should not be given greater prominence than, or be listed ahead of, references to the IE's report, the Court's own consideration and Policyholders' rights to make representations or raise objections. It is fine to refer to the FCA having been consulted and/or having the opportunity to raise objections.

- When describing the protections under Part VII, we expect that Policyholder notifications and the opportunity for Policyholders to make representations are referred to as a key protection. This is because the IE will not be able to review the position of each Policyholder. So it is vital that Policyholders are alerted to the fact

that their own consideration of the Scheme is important and they should not just rely on the IE's general conclusions, the Court or FCA reviews.

- Applicants should use the same language and terms in the Legal Notice when describing what Policyholders should do if they have a question or want to make representations.

- References to what the Court may take into account should not suggest or give the impression that it has a particular consumer protection role. While this clearly forms part of the Court's consideration, we want to avoid giving the impression that Policyholders should be less likely to make representations because the Court will, in effect, look after their interests.

Including sufficient information with sufficient prominence

Covering letters

7.18 For covering letters, we understand Applicants' desire to avoid information overload, but we think that there is a balance to be struck. We consider covering letters to be useful in providing an overview of the transfer, the Court process, which documents Policyholders should read and how to ask questions or make representations. We expect that covering letters should also refer to key aspects of the transfer that will be relevant to Policyholders, stating where any attachments give further details.

7.19 For example, we consider it important that all the communications give prominence to any aspect of the Applicant's service which may be changing or where there are particular risks to Policyholders because of the transfer.

7.20 Where these risks may be particularly relevant to Policyholders' assessments of whether they may be adversely affected, it is appropriate to mention them upfront in the covering letter. Further detail should also be given in the attached Q&As, summary guides and/or the IE report summary.

7.21 There may also be important administrative changes that Policyholders must be informed of in a prominent and clear way, such as changes to direct debit payment instructions. The covering letter should clearly highlight these.

7.22 Our starting position will always be to challenge the need to make any changes to Policyholder rights, interests or expectations. However, if these changes are unavoidable, we will challenge firms to set out how they plan to mitigate or compensate for any possible adverse impact and clearly and prominently set out these proposals.

Attachments

7.23 Any attachments should include details of material changes or risks that may be relevant to a Policyholder's consideration of whether they may be adversely affected by the transfer.

7.24 Our aim when we review any attachments is to ensure that no Policyholder should need to read the full IE report to assess whether there are risks involved in the transfer or any changes that could adversely affect them.

7.25 We have previously challenged Applicants to include descriptions of particular risks or changes that the IE has highlighted in their attachments. This may be the case even though the IE has concluded that there is likely to be no material adverse impact, but this conclusion is not straightforward, based on an exercise of judgement or discretion or where uncertainty remains. In such circumstances, it is appropriate to bring this to the attention of Policyholders in the attachments and, where relevant, in the covering letter.

Other communication documents

7.26 Any communications sent to Policyholders should include:

- the IE's report summary
- a supporting document such as a Q&A or FAQ which gives further details and issues for note by Policyholders
- a summary of the terms of the Scheme itself
- a description of the effect of the main provisions

7.27 We also expect these attachments to be sent in full, where appropriate. We expect the Applicant(s) to explain why the contents of a policyholder pack and delivery method is appropriate for the specific circumstances of each transfer.

7.28 Other examples where we would want information given sufficient prominence and described in any attached Q&A or explanatory note, including a cross reference to the Scheme summary, the IE report summary and any other relevant reference documents, include:

- Long-term business where the Scheme expressly provides for changes to fund structures, such as closure, merger or splitting, where the Transferee's approach may differ from the Transferor's. The Applicant should highlight any protections that the Transferee has made to ensure the changes do not create a material adverse impact. For example, details of any independent reviews and consideration of compensation in appropriate circumstances.
- In a transfer of policies within a with-profits fund where there has been an issue about which fund certain assets were attributable to - that fund or another of the Transferor's funds. While the IE may have taken advice and formed a view, this may not have been straightforward and an element of judgement will clearly have been involved. Here, we would consider it appropriate to include a description of the issue in the Q&A document, as well as the IE report summary, setting out the key points.
- In a transfer where there is no comparable compensation scheme in the jurisdiction the business was being transferred to. This fact should be made clear to the Policyholders and should feature prominently in the communications. So should the option of moving, at no cost, to an insurer with FSCS or other compensation scheme

cover if a Policyholder considers this to be a significant issue. This applies where the firm has taken a commercial decision to switch to a jurisdiction without FSCS cover.

- If it is uncertain that a Scheme in a particular jurisdiction will be recognised then this will likely be of interest to Policyholders based there.

- Uncertainty about whether a parental guarantee will continue to be available to the Transferee, or a trust arrangement will continue to be available to Policyholders.

- If unit-linked policies were to be linked to different funds in the Transferee and some degree of judgement was used to decide whether the new funds were sufficiently similar in terms of content, risk and charging. This should be flagged so that Policyholders can consider and take their own view.

- Where, in exceptional circumstances, part of the cost of the transfer is to be charged to the Policyholders and it is suggested that the transfer is, at least partly, actively in the Policyholders' interests. Here, we will require Applicants to explain this fact in the attachments so that Policyholders can take a view on the rationale.

Document translation

7.29 Communications should be clear, fair and not misleading, so we expect, as a minimum, that individual notifications and attachments should be in the appropriate language for their audience. The language in which the original policy was written may provide a relevant starting point for considering the appropriate language to use. Where proportionate, we also expect that Policyholders can get other documents, on request, such as the full IE report and Scheme document, in the appropriate language. This option should also be made clear in the notification letters.

7.30 Our primary aim is that communications, including attachments, to local residents should be in the local language. However, we recognise that many policies, particularly commercial policies, will have been sold on the basis of English language documentation. We will take this into account when considering whether it is proportionate to translate documentation into other languages.

The need for further communications before the Sanctions Hearing

7.31 There can be uncertainty about whether it is necessary to produce a Supplementary IE Report if there have been no changes to the proposed Transfer since the main IE report was published.

7.32 We would expect a Supplementary Report to be produced on all transfers, whether or not there are any changes to the Scheme or the IE's conclusions. This Supplementary Report should reiterate the main points of the original IE report as well as confirming or updating the IE's conclusions.

7.33 Applicants will need to ensure they make the Supplementary Report available to Policyholders before the Sanctions Hearing and give them enough time to review it. This

time must be sufficient to enable Policyholders to consider whether or not to make initial or further representations. In particular, we expect that:

- Policyholders are given a minimum of two weeks to review the Supplementary Report, as a matter of good practice. However, we expect Policyholders to be given longer if the Supplementary Report contains substantive new material or changes to anything previously communicated. These include where:
    - the IE had stated in their main report that there were matters of significance that would be covered in their Supplementary Report
    - the Applicant has received significant objections to a change in facts or position from the main report which have resulted in further consideration and substantive responses by the IE
- Information is given sufficient prominence and is easily accessible on the Applicants' websites.
- Copies of the Supplementary Report will be sent to all objectors, persons stating that they will attend Court and anyone requesting a hard copy of the main IE report.
- Proper consideration is given to whether any changes as a result of new material or issues have materially or significantly changed the proposition originally put to Policyholders. If so, all Policyholders should be notified of the issues and given an opportunity to reconsider their position. We will also consider the material in the Supplementary Report in this light.

7.34 As an example of this, we have previously asked an IE to consider the potential impact of FCA enforcement action which started between the Directions and Sanctions Hearings. On that occasion, we decided further notification was not necessary in light of the IE's conclusions.

Deficiencies in notifications

7.35 Applicants are required to report to the Court and the regulators on how they have complied with the Directions Order by notifying relevant Policyholders and other relevant persons. Applicants are also required to report where they have not been able to fully comply with the Order, and the steps they have taken to rectify such failures.

7.36 We expect Applicants to carry out an analysis of returns against their estimated figures. The percentage of 'returned' notifications may be significantly above the level that they predicted or we have seen in comparative mailings. In these cases, we would want the Applicants to provide a reasonable explanation and evidence of the steps they have taken to minimise this difference.

7.37 If we consider the number of returned notifications is significantly higher than anticipated, then this may reveal more systemic issues with the notification process. These issues may be grounds for us to request that the Sanctions Hearing is postponed and request that the Applicants undertake a re-notification exercise.

7.38 Where we find indications that Policyholders have not had the appropriate notice period for that particular transfer (usually at least six to eight weeks) we will want to see Applicants demonstrate that:

- There is still sufficient time for Policyholders to review the notification material, consider whether they may be adversely affected and make representations.
- Their proposals to address the deficiency are sufficient and appropriate in light of the circumstances. For example, where Applicants propose to contact Policyholders by telephone (see below), this needs to be appropriate given the transaction's nature and complexity, category of Policyholder and the possible impact on them.
- That individual replacement notifications are sent out without delay with an appropriate flag for Policyholders to consider them promptly.
- When contacting Policyholders by telephone, they have:
  - confirmed that the replacement notification pack has been received and that the Policyholder has been encouraged to read it
  - offered to talk the Policyholder through the transfer and the notification pack in detail, giving sufficient opportunity to ask questions and discuss any issues
  - established where possible, and without leading, whether the Policyholder may or may not have any issues with the transfer
- Follow-up or alternative arrangements have been put in place where any Policyholders cannot be contacted by telephone and whether these are adequate to avoid Policyholder detriment.
- They have carried out sufficient further checks to ensure that any deficiencies will only affect the Policyholder groups they have identified and not others.

8. Applications for dispensations from the Transfer Regulations

8.1 There will be occasions where Applicants are unable or unwilling to notify everyone who falls under the definition of Policyholder. This chapter sets out how we judge whether to object to an application for dispensation from the Transfer Regulations and covers the following specific points:

- general arguments to support limited notification
- The Aviva Judgement
- impossibility
- practicality
- proportionality
- utility
- availability of other information channels
- notification of non-Policyholders and reinsurers

General arguments to support limited notification

8.2 As a rule, we expect Applicants to support any application for a dispensation from the notification requirements in the Transfer Regulations with adequate reasoning and evidence. We are unlikely to accept general arguments put forward by Applicants in support of an application for a dispensation from the notification or advertising requirements. For example, where:

- the IE has concluded that there is likely to be no material adverse impact to a particular group of Policyholders and the Applicants apply for a dispensation on that basis
- the Applicant claims that notification would confuse Policyholders or that Policyholders will simply not understand some of the complexities of the transfer
- the Applicant asserts that individual Policyholders have stated that they only want to receive targeted communications

8.3 We are also likely to challenge Applicants if they ask for dispensations on the basis that the costs of notification or advertising would be disproportionate. Here we will expect to see reasonable estimates of the costs of notification and will challenge where we believe Applicants have not shown enough effort to estimate these costs. We will also challenge

where they give insufficient reasoning for why the notification costs would be disproportionate.

The Aviva Judgement

8.4 Many Applicants use the judgment of Norris J[14] as a starting point for dispensations. This judgement sets out a number of factors to consider when making an application for dispensations. We explain our view on some of these factors in the following sections:

- impossibility of contacting Policyholders – where Policyholder contact information is not available because, for example, it is lost
- practicality of contacting Policyholders – for example where the firm or someone else has Policyholder contact information but it is not practical to use those details to notify Policyholders
- utility of contacting Policyholders – how useful the information will be to Policyholders
- proportionality – where the cost to the firm to communicate something which could be of marginal interest to a group of Policyholders will be expensive
- availability of other information channels – where firms could e-mail Policyholders, publish notifications on their website or advertise more broadly than the Transfer Regulations require

8.5 We will challenge Applicants' proposals where, in our view, they have not taken into account these factors or where they offer insufficient evidence or argument to support requests for dispensations.

Impossibility

8.6 Where firms apply for a dispensation for Policyholders whose names and addresses are unavailable or unreliable, for example where the policies are old (1970s/1980s or before), we expect them to have considered how they can resolve the issue. This could, for example, be by using other tracing or identification methods. However, we recognise that this can be disproportionate.

8.7 We also often see applications involving 'gone-aways'. Here, the Applicants' records show that correspondence sent to the Policyholder at their last known address has been returned because the Policyholder no longer lives there. We will consider each case on its merits but if the percentage of 'gone-aways' recorded is higher than we reasonably expect, we may challenge Applicants' tracing arrangements as in the paragraphs above.

[14] In Re Aviva International Insurance Limited [2011] EWCH 1901 (Ch.).

Practicality

8.8 We commonly see situations where Applicants have policies written through brokers and where the broker, rather than the insurer, holds Policyholder records. In these circumstances, we expect Applicants to have notified the brokers and requested that they notify the relevant Policyholders.

8.9 Where the brokers are willing and able to help, we expect Applicants to offer to pay the brokers' notification costs and/or provide postage paid template letters. We will also expect the Applicants to provide details of their arrangements to oversee the notification process. Applicants should be aware that we may check these at a later date.

8.10 We have not objected to a dispensation application where brokers have refused to facilitate the notification process or have withheld Policyholder information from the Applicants. However, we expect Applicants to present a strong case and to demonstrate that they have considered all reasonable options to make the brokers notify the Policyholders, and any alternative methods for undertaking notification. Our expectation is that brokers and other authorised third parties should help to facilitate the notification process under the FCA's Principles for Business, in particular Principles 3 and 7.[15]

8.11 If Applicants have policies that were placed through affinity Schemes, marketing partners or group policies, such as banks, unions or employers, they may not have access to Policyholder details. Here, we will consider Applicants' proposals for ensuring that these placing organisations carry out appropriate notifications at the Applicant's expense, use notification packs produced/funded by the Applicants or increase their use of alternative notification methods, such as targeted advertising.

Proportionality

8.12 We will often challenge Applicants' arguments to demonstrate the disproportionate cost of notification against the benefits of notifying a particular Policyholder group. As a guide:

- We will challenge Applicants who simply assert or provide a brief explanation of why they think that the cost of notification is disproportionate. Demonstrating this will require a detailed analysis of the actual costs involved. This should include an estimated amount and not just a description of 'high' or 'expensive' costs. It will also require an analysis of why the benefits to that particular group of Policyholders are outweighed by the costs of notification.
- We will also consider whether the cost estimates are reasonable or inflated and so should be challenged. We are aware that an Applicant's financial position may also be relevant, for example, if the Transferor is in run-off or in financial difficulty.
- The Applicants should include the supporting analysis, including any additional detail provided as a result of our challenge, in the relevant Applicant's witness statement. This is so that it is also capable of being relied on by the Court as evidence supporting the application for a dispensation from the Transfer Regulations.

[15] Principles of good regulation, FCA: www.fca.org.uk/about/principles-good-regulation

8.13 The section below includes some examples of arguments that we have seen based on proportionality and our approach to these.

Manual records

8.14 In some instances an Applicant may have updated their manual files for current customers or 'live' policies, but has only manual records for expired/legacy policies. In this instance we expect Applicants to estimate the costs of searching manual databases and demonstrate a lack of proportionality as well as covering the relevance of notifying those Policyholders (see 8.26).

8.15 Where only manual records exist, Applicants may suggest alternative notification arrangements, in support of proportionality arguments. We will take into account, among other things, the number of Policyholders whose details are not held on electronic records, the likelihood of a claim being brought and how, with evidence, the Applicants have formulated a view of these prospects. If the Policyholder numbers and/or the chances of a claim being made are significant then we are more likely to object.

Low probability of a claim

8.16 In general insurance cases, Applicants have argued that while the relevant information is available and accessible, the probability of a claim is so low that the cost of notification is outweighed by the lack of utility. This is particularly common in run-off firms where policies are treated as 'closed' but there is still a residual possibility of a claim. For example, where cover is triggered by when the event happened and not when the claim is made.

8.17 In such cases we expect to see a thorough analysis and supporting evidence showing a claims history and/or arguments as to why it is unlikely that a certain group of Policyholders will claim or claim before a particular date. Where this is not the case, we may challenge Applicants to consider revising their proposals.

8.18 For example, an Applicant may argue, and can demonstrate, that no claims have been received for ten years for policies written before 2000. As a result, it proposes not to notify Policyholders who took out their policy before that date. In such a case, we will consider:

- Whether just because there have been no claims after a particular date, this is good evidence that they will not arise later. Generally, the fact that no claims have been made historically does not necessarily mean that none will be made in the future. In some cases, it will depend on the facts as to whether this kind of data can reliably indicate that it is unlikely claims will be made. This will also involve taking into account the type of business written, the terms of the policy and any risk indicators relevant to the particular business. We will challenge Applicants to provide this evidence.
- Whether the firm has completed a cost benefit analysis supporting their argument that the cost of notification is disproportionate to the likely Policyholder benefit. Our view is that this is not just a 'utility' test alone.

- For ‘longer tail’ liabilities, we may ask firms to consider additional notification requirements or mitigation steps. Examples include asbestos claims under public and product liability policies or deafness claims under an employers’ liability policy

Non-transferring Policyholders

8.19 Where the application is for a dispensation for notification of non-transferring Policyholders of the Transferor and/or the Transferee:

- Our view is that when assessing the likely benefit/utility to Policyholders, it is not enough for Applicants simply to assert that the IE has found no potential material adverse impact on these Policyholder groups. This is particularly true if the IE’s conclusions on whether these Policyholders are adversely affected by the transfer are finely balanced.

- We expect there to be some additional factors which may mean these Policyholder groups are less affected and so makes the cost of notification even more disproportionate. This may include where the IE concludes that there is likely to be no adverse effect at all for reasons given in the report. This may be either where the impact is very minor because of the relative insignificance of the business or where the IE has identified that the group of Policyholders will positively benefit from the transfer.

- We may also take into account the relative size of the transaction compared to the size of either Applicant’s business. For example, a transfer which is 5% of the Transferor’s/Transferee’s business may not be material to the non-transferring Policyholders. However, this can depend on the type of liabilities. For example, if there are particular risks attached to the type of business being transferred or if the business was particularly profitable for the Transferor.

- As well as considering the size of the transfer by value, the number of policies transferring may also be relevant to the impact of any dispensation, especially in retail business.

Policyholders in non-transferring funds

8.20 In some cases, the transfer involves a life insurance firm with a number of with-profits or non-profit funds. Here, Applicants may seek a dispensation from:

- notifying Policyholders in the funds that are not transferring, or

- from notifying Policyholders in the Transferee’s funds to which the business is not being transferred.

8.21 In those cases, we will consider carefully the IE’s impact assessment, whether the IE is making judgement calls about the potential impact, and any other risks which we would expect Policyholders to be notified about.

Beneficiaries of trusts/employees of an employer

8.22 Where there are beneficiaries of trusts/employees of an employer, we will need to see arguments and evidence to demonstrate that notification would not be proportionate. These may take into account the obligations of the trustee or employer to act in the beneficiaries'/employees' best interests. We also expect Applicants to ensure that:

- They include in any proposed notification to the trustees/employer a request that the notification is passed on to beneficiaries/employees where the trustees/employer considers this to be appropriate in light of their own obligations.
- Where Applicants only have one trustee/employer on record, the notifications should prominently request that this contact notifies any other trustee or employer.
- They provide reasonable assistance, including financial assistance and providing notification packs, to the trustees/employers. This is because we do not accept some Applicants' argument that it is the trustees' own fiduciary duty to notify beneficiaries which then excuses or reduces the Applicants' own statutory obligation to notify. This is not intended to deny that trustees do owe fiduciary obligations to their beneficiaries.
- Where appropriate, newspaper advertising includes the names of trustees/employers which beneficiaries may more readily identify.

Deceased Policyholders

8.23 For deceased Policyholders, Applicants may apply for a dispensation where they do not have details of all executors/administrators on record or to waive notification altogether if payment is imminent. This is regardless of whether they have details of the executors/administrators.

8.24 As well as any arguments and evidence for a dispensation, usually about proportionality, and utility where payment is imminent, we expect firms to include in the notification to the executors/administrators of the estate:

- a request that the notification be passed on to any other person who may have an interest
- relevant examples of the types of person having an interest, such as fellow executors, spouses, children, etc

Policies with more than one beneficiary

8.25 Applicants may apply for a dispensation for separate notification for all dependants if there are other Policyholders connected with a particular type of policy who could bring a potential claim but the Applicant does not have their details. These could include dependants such as children/spouses regarding a life policy, joint holders of an annuity policy or other named drivers on a motor insurance policy.

8.26 In these cases, if the Applicants apply for a dispensation, we expect them to demonstrate that the cost of notification is disproportionate to the likely benefits, as the main

Policyholder will be notified. We are less likely to object to these applications. We expect Applicant's letters to the Policyholders to include :

- a request that the notification is passed on to all other 'Policyholders', ie potential claimants.
- clear examples of the type of person this may be in the particular case, such as spouses/children, joint Policyholders, other named drivers, or others

Utility

8.27 We consider that the IE would need to identify particular factors that demonstrate the information would not be useful or of interest to a particular group. This should be over and above the IE's conclusion that it's unlikely there will be a material adverse impact on the relevant Policyholders. Here we:

- Believe that Policyholders are entitled to be notified and they alone are empowered to decide whether or not they are 'interested' in the proposals. It is not up to Applicants to decide how 'interested' Policyholders will be in a notification. If Applicants seek a dispensation, they will need to make a strong case.
- Are unlikely to agree with Applicants applying for dispensations who cite the conclusions of marketing field studies that say Policyholders report they only want to receive targeted communications. We are also unlikely to agree with Applicants who say they believe Policyholders would not be 'interested' in being notified. Similarly, we do not generally agree with applications that claim Policyholders will be confused by the communication documents, as the Applicants should be able to deal with this issue by improving the clarity of their communications package.

Availability of other information channels

8.28 Applicants sometimes request that notification be made via their website or that advertising additional to that required by the Transfer Regulations means there is no need for notification. We consider that these methods of notification are not sufficient by themselves because they do not address Policyholders individually.

8.29 However, such methods may be used to support applications on other grounds, for example, impracticability or proportionality. Where Applicants suggest this approach we will expect them to pay close attention to how effective the alternative information channels are, and show they have sufficiently considered the following:

- Using sufficiently targeted additional advertising. For example by type of business and/or geographical area.
- Sufficiently prominent advertising. For example, advertising is not only in the notices or business section if it is a sufficiently large retail transfer.
- Where Applicants request a dispensation for a large number of Policyholders, we will expect the size and prominence of the additional advertising to reflect this.

- We will also expect to review the proposed website material, advertising and positioning to ensure that it is sufficiently accessible, clear and prominent.

8.30 For website material, our view is that there should be a link from the Applicants' home pages to additional detail explaining the proposed Scheme. This link should:

- be very obvious on the home page - preferably in the middle towards the top, but if that is not possible then in another prominent position
- make it clear when there are important updates and also recommend that Policyholders read these
- lead to a main page of information which should be clear, unambiguous and provide background information, the process to follow and details of the stage the process has reached

8.31 The main website page should also:

- clearly explain how Policyholders can make objections and representations to the transfer and include all details of how to do so, such as a relevant email address, contact number of helpline, etc
- be updated promptly when new information is available
- go live as soon as possible after the Directions Hearing

8.32 The website material should also provide links to other relevant information, such as the IE's and other reports. We expect firms will send Policyholders or other interested parties who requested documents via the website updated documents that subsequently become available. We also expect that firms will send the IE's Supplementary Report to anyone who requested the IE's report.

8.33 Text message or alternative notification methods may be helpful but are likely to be limited to particular circumstances. For example, the transfer could involve mobile phone insurance where the value of each policy is very small but there are many Policyholders and the costs of sending a hard copy notification pack to each would be disproportionate. In these circumstances, text messages may be the best way of contacting the relevant Policyholders, given the nature of their cover.

Notification of non-Policyholders and reinsurers

8.34 We will carefully consider arguments from firms about not following the expectation to notify certain non-Policyholders. For example:

- Former Policyholders who need to know the identity of the insurer on an ongoing basis. For example, where there is a past business review in progress and former Policyholders may receive compensation payments.

- Notifications to banks and building societies where transferring policies are linked to mortgages. For example, where the policy is a condition of a mortgage. Clearly, this will only apply where the insurer has been notified of the lender's interest.

- Co-insurers where the risk is insured by one or more insurers, where the Transferor is one insurer. Anyone else with an interest in the policies may be expected to be notified only where that person has notified the Transferor of their interest.

8.35 We will also consider scenarios that are similar to these from firms applying for dispensations from the requirement to notify reinsurers.

8.36 In particular, it is possible that Applicants do not have reliable up-to-date contact details and it is unlikely that Policyholders could claim the reinsurance policy. For some insurers there may also be some uncertainty about whether reinsurance remains in place or there may be chains of reinsurance where the insurer does not have the relevant details.

8.37 In these instances, Applicants may apply for a precautionary dispensation in case they have not fully identified all reinsurers. We consider that these are relevant factors. However, we will again look for arguments and evidence to support an application for dispensation on the grounds of disproportionality. There is no need to apply for a dispensation for commuted reinsurances.

Annex 1: The FCA’s approach to Part VII Transfers as described in the FCA Court report annexes (Directions Hearing)

The FCA's approach to the evaluation of Schemes in general:

1. The FCA has a duty (Section 1B FSMA 2000) in discharging its general functions, to act, in so far as is reasonably possible, in a way which is compatible with its strategic objective and which advances one or more of its operational objectives (see Annex 1). The FCA’s general functions include determining the general policy and principles by reference to which it performs particular functions under FSMA 2000 including the policy and principles by which it will carry out its functions in relation to Part VII of FSMA 2000, and in particular the functions of considering what, if any, representations to make to the Court (given its right to be heard in Section 110), and also the FCA’s functions in responding to consultation requests from the PRA.

2. The FCA also has a separate duty to discharge its general functions in a way which promotes effective competition in the interests of consumers, in so far as that is compatible with acting in a way which advances the consumer protection objective or the integrity objective (Section 1B(4) FSMA 2000).

3. The FCA has determined that the principles by which it will carry out its particular functions in relation to Part VII are to assess whether a proposed transfer of business poses any threat to any of its operational objectives, to its duty to promote competition described in paragraph 2 above, or threatens to be inconsistent with its strategic objective.

4. The FCA’s approach is also set out in Chapter 18 of the Supervision Manual of the FCA’s handbook of rules and guidance (SUP 18). The most relevant parts of this policy are the same as those in the PRA’s Statement of Policy on its approach to insurance business transfers issued in April 2015 which is copied as an attachment to the PRA report.