

## **Guidance consultation**

# **GC17/5: Proposed guidance on the FCA's approach to the review of Part VII insurance business transfers**

**May 2017**

## Introduction and consultation

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- 1.1 The draft guidance at Appendix 1 of this document sets out the Financial Conduct Authority's (FCA) approach to reviewing insurance business transfers Schemes under Part VII of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).
- 1.2 While the Prudential Regulation Authority (PRA) leads the Part VII process (particularly for specific regulatory functions such as providing certificates), the FCA also has an active role. In particular, under section 110 of FSMA, we have a right to be heard on applications to sanction a Part VII Transfer. The views we give the Court are based on our assessment of the Part VII Transfer against our statutory objectives, which are distinct from the PRA's objectives.
- 1.3 This document does not aim to explain all aspects of our role in the process or all of the issues that firms may need to consider as there are many variations within each transfer. Additionally, we will not always insist that the approach set out in this guidance is the approach that must be used for a particular transfer. However, we expect firms proposing a Part VII Transfer (Applicants) to explain why they are diverging from this guidance, where this is relevant to a particular Part VII Transfer.
- 1.4 We will consider each Part VII application on its own merits and circumstances and will take a proportionate approach in our assessment.

## Who does this guidance affect?

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- 1.5 This guidance will be of interest to:
  - insurance firms considering Part VII Transfers and their professional advisors
  - independent experts usually appointed by the Applicants to report to the High Court on the terms of the Scheme

## How to respond to this consultation

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- 1.6 We are asking for comments on this draft guidance by close of business 15 August 2017.
- 1.7 You can send your response by email to [PartVIIGuidancedocumentfeedback@fca.org.uk](mailto:PartVIIGuidancedocumentfeedback@fca.org.uk) or by post to:

Sarah Parrett  
Transfers of Business Team  
Retail Authorisations Department  
Financial Conduct Authority  
25 The North Colonnade  
Canary Wharf  
London E14 5HS

- 1.8 We make all responses to formal consultations available for public inspection unless the respondent requests otherwise. We will not regard a standard confidentiality statement in an email message as a request for non-disclosure.
- 1.9 Despite this, we may be asked to disclose a confidential response under the Freedom of Information Act 2000. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by the Information Commissioner and the Information Rights Tribunal.

### Cost benefit analysis

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- 1.10 We set out below our cost benefit analysis for this guidance.
- 1.11 This guidance has been drafted partly in response to requests by industry practitioners to help them understand the FCA's approach and requirements. It is consistent with what we would currently communicate directly to an individual firm or practitioner.
- 1.12 As a high-level estimate, this guidance may assist and reduce the compliance costs to firms for around 20 transactions a year (the remainder being transactions where the practitioners already fully take into account our requirements).
- 1.13 We are aware that Independent Expert (usually actuaries) fees typically range between £35,000 and £200,000. We assume legal and other costs can be significantly higher than the actuarial fees, particularly when Counsel is instructed to appear at the Hearings.
- 1.14 Our comment, feedback and occasional rejection of documents that do not satisfy our approach and requirements currently generate additional work for the practitioners which could be significantly reduced or eliminated if practitioners fully apply the proposed guidance.
- 1.15 We therefore estimate that the savings could be up to £50,000 per affected transaction. Since this guidance can be expected to reduce costs for around 20 transactions a year, we estimate that the guidance could result in an annual savings in the region of £1m a year. This obviously needs to be balanced out by the initial costs of practitioners getting familiar with the contents of the guidance, but we expect that over time these costs will reduce.

### Compatibility statement

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- 1.16 Section 1B of FSMA requires the FCA, when discharging its general functions, as far as is reasonably possible, to act in a way that is compatible with its strategic objective and advances one or more of its operational objectives. The FCA also needs to, so as far as is compatible with acting in a way that advances the consumer protection objective or the integrity objective, carry out its general functions in a way that promotes effective competition in the interests of consumers. We consider that the guidance advances, in particular, our consumer protection objective by setting out our expectations for firms, many of which are aimed at getting an appropriate degree of protection for policyholders.

However, we also consider that the other two objectives are advanced by putting forward guidance which is also aimed at improving consistency.

- 1.17 We are satisfied that these proposals are compatible with our general duties under section 1B of FSMA, in particular having regard to the matters set out in 1C(2) FSMA and the regulatory principles in section 3B. We consider that it will contribute to enabling the FCA to use its resources in an efficient and economical way; the expectations contained within it are proportionate to the benefits; it recognises differences in the nature of and the objectives of businesses carried on by different persons, and it supports the principle that the regulators should exercise their functions as transparently as possible.

### **Equality and diversity considerations**

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- 1.18 We have considered the equality and diversity issues that may arise from this guidance. We do not consider that this guidance raises concerns with regards to equality and diversity issues.
- 1.19 We do not consider that this guidance will adversely impact any of the groups with protected characteristics, ie age, disability, sex, marriage or civil partnership, pregnancy and maternity, race, religion and belief, sexual orientation and gender reassignment.
- 1.20 We will continue to consider the equality and diversity implications of this guidance during the consultation period, and will revisit them when publishing the final guidance. In the interim we welcome any feedback to this consultation on such matters.

## Appendix 1

# Guidance on the FCA's approach to the review of Part VII insurance business transfers



## **Guidance consultation**

# **Proposed guidance on the FCA's approach to the review of Part VII insurance business transfers**

**May 2017**

## 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 considerations for firms before contacting us and what they will need to produce for any pre-application meeting.
  - Chapter 3 – Details the documents we expect to receive and consider about the nomination and approval of the Independent Expert (IE).
  - Chapter 4 – Sets out our overall approach, expectations and key considerations 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 does not aim to explain all aspects of our role in the process or all issues that firms may need to consider as there are many variations within each transfer. Additionally, we will not always insist that the approach set out in this guidance is taken on a particular transfer. However, we expect Applicants to explain their divergence with the guidance where it is relevant to a particular Part VII Transfer. We recognise that each Part VII Transfer has to be considered on its own merits and circumstances and we expect to take a proportionate approach in our assessment.

- 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 particular 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.<sup>1</sup> 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 the transfer they are proposing 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.<sup>2</sup> We also recommend that Applicants read the PRA Policy Statement on insurance business transfers at Appendix 2 to its Rulebook (PS7/15).<sup>3</sup>
- 1.10 Each section of this guidance includes one or more examples. These are included to 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 help give Applicants an expectation of the possible questions and challenges we may raise on a particular case. If Applicants know to expect these questions and actively address the issues raised then this will save time and resources in the long term. 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,<sup>4</sup> we emphasise that firms must continue to abide by their obligations under UK law, including those from EU law, and 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 regulatory

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<sup>1</sup> Enforcement Guide, FCA Handbook: [www.handbook.fca.org.uk/handbook/EG/](http://www.handbook.fca.org.uk/handbook/EG/)

<sup>2</sup> SUP 18 Transfers of business, FCA Handbook: [www.handbook.fca.org.uk/handbook/SUP/18/](http://www.handbook.fca.org.uk/handbook/SUP/18/)

<sup>3</sup> Policy Statement PS7/15, The PRA Rulebook: Part 2, April 2015: [www.bankofengland.co.uk/pradocuments/publications/ps/2015/ps715.pdf](http://www.bankofengland.co.uk/pradocuments/publications/ps/2015/ps715.pdf)

<sup>4</sup> Statement on European Union referendum result, FCA, 24 June 2016: [www.fca.org.uk/news/statements/statement-european-union-referendum-result](http://www.fca.org.uk/news/statements/statement-european-union-referendum-result)

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](mailto: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 often 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 agreed by the FCA and the PRA, it is important that Applicants highlight any subsequent changes with 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, including classes of business, numbers of Policyholders,<sup>5</sup> numbers of open claims, etc. Early indications of unusual or complex elements of the proposed transaction and any identified risks are also helpful at this stage.
- 2.6 Firms should not deviate from the agreed timetable without notifying the regulators beforehand and documents must be submitted 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. 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, normally at the same time as the firm submits their proposals for the nomination of the IE.

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<sup>5</sup> 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**

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

- How many insurance business transfers the IE or their employer have reviewed for the Applicants and how recently. This is particularly relevant for the nominated peer reviewer and key members of the proposed team. For example, where the IE has been engaged previously by the same Applicants, we may have concerns about the IE's independence. Although in some circumstances IEs who have previously worked for the Applicants may not be approved, this is not a firm rule and we will consider each case on its merits.
- Any work, such as consultancy, which previously has, or will be, carried out by the IE or their employer for the Applicants, its materiality and the capacity in which the IE did or will do the work. 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 preclude 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 consequence 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

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#### 3.3 We will consider:

- Specific evidence of relevant experience, especially potential conduct risk issues from a particular transaction. Where experience in the wider IE team is less strong, we would expect to see evidence of sufficient oversight to compensate.
- 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 and assess their materiality, collect relevant information, complete the IE report, and provide necessary updates in the agreed timeframe. This may also include consideration of IE's other commitments.
- Performance on previous Part VII Transfers.

#### 3.4 We expect the following information/documents to be supplied to us 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 While we do not want firms to propose multiple alternative IE nominations, 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
- on-going regulatory requirements
- objections
- unresolved issues

### **Link to our objectives**

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

- we secure an appropriate degree of protection for consumers
- we protect and enhance the integrity of the UK financial system
- we 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

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- 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 a transfer is necessary. 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

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- 4.8 We will consider whether there are background regulatory issues relating to the Applicants that may be of interest to the Court, an example is unresolved enforcement proceedings against the Transferee.

## Competition considerations

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- 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.
- 4.10 Examples of issues that may have an adverse impact on effective competition, and on which we expect the IE to conduct an assessment, include:
- changes which affect a Policyholder's ability to switch 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 transferring Policyholders in the future if, for example, different groups of Policyholders are merging with different terms

## Changes affecting Policyholders

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- 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; as well as appropriate protections and the proposed mitigation; whether the IE considered what mitigations should have been proposed.
  - 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. Furthermore, 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

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- 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:
- We will consider 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.
  - We expect 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 charges to with-profits funds which are inconsistent with COBS 20,<sup>6</sup> even if these charges were permitted under a prior Scheme sanctioned before COBS 20 came into force.
  - 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 for the IE to define what the term 'material' means and to assess whether Policyholders or groups of Policyholders are affected. We will review the IE's definition and assess whether the IE's evaluation of it is sufficient.

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

## Objections

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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

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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, with a view to resolving outstanding issues, may have a bearing on the Applicants' timetable. This is particularly likely if the timetable does not allow sufficient time between the Court getting the regulators' comments and the date by which Court documents need to be filed.

4.18 The following sections provide more specific detail on the documentation provided and how we review this:

- The Scheme document: See Chapter 5.
- 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**

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- 5.3 The PRA, the Financial Ombudsman Service and ourselves 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 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 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 regulatory permissions following the transfer, we expect all insurance liabilities to be transferred. 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, depending on the drafting of the Scheme, 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. If 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 then we want to understand what the commercial intention is and see that the wording matches that intention.
- 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.<sup>7</sup>

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<sup>7</sup>Financial Ombudsman Service - <http://www.financial-ombudsman.org.uk/publications/index.htm>

- 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

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- 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. Applicants should be aware that it may be necessary to make consequential drafting changes to other parts of the Scheme. Examples may include:
- 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

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- 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 in actuarial practice.
- 5.11 However some documents contain amendments where we do consider the changes to require Court approval, for example, changes in management practice. To clarify:
- We expect to be notified of such proposed amendments in advance and given a reasonable opportunity to object (ideally 28 days). The drafting of provisions should reflect this.
  - When notified we will consider whether the change is minor or technical, or is 'required' by law or regulation and allows no discretion as to how it is effected. In these instances 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 with Court approval. Some of the clauses anticipating Court approval contain provisions where we sometimes challenge firms. For example:
- Where the clause does not contain the proviso that such a change may only be made where it is necessary to give full effect to the Scheme, we question whether FSMA allows such change. In these cases, where a change is proposed which is not necessary to give full effect to the Scheme, we will likely object at the time of the proposed change.
  - 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 based on the correct information.

- We would also expect that any significant change is accompanied by an updated IE report, covering all the possible impacts of the change on all groups of Policyholders.

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 means 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, either with-profits or unit-linked. 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.

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.
- The IE report should comment on the impact to Policyholders and any material adverse effect to them.
- Review by any appropriate independent governance arrangements within the Scheme, for example, any with-profits committee.
- Pre-notification/non-objection of proposed changes to the regulators.

## Changes to the 'effective date' of the Scheme

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- 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:
- A need for this flexibility may suggest a lack of planning by the Applicants and cast doubt on whether or not they can meet the effective date. 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 two 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 two months we would want to ensure that the Applicants have properly considered how best to inform Policyholders of the new effective date, such as through individual re-notification. This is particularly important to ensure Policyholders 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, two 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.
- 5.18 For requests that involve the Court exercising its powers (eg under Section 112 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 in following 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.
  - 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.

- May consider, in a particular case, that 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 While the PRA is responsible for approving the form of the IE's report, it must consult us before doing so. Our review will not be limited to a high-level check of whether the report covers the appropriate topics (see SUP 18 for details).<sup>8</sup> 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 have been constructed in such a way that it is 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 viewed 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
- 6.4 We also sometimes see an imbalance between factual description and supporting analysis. In many cases IE reports include a great deal of detail describing the

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<sup>8</sup> SUP 18 Transfers of business, FCA Handbook: [www.handbook.fca.org.uk/handbook/SUP/18/](http://www.handbook.fca.org.uk/handbook/SUP/18/)

transaction itself and the background but much less analysis of the effect on each Policyholder group's reasonable expectations. Our concern in these cases is that the detailed description of the background is used 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 In some instances, IEs will rely on assessments carried out by Applicants to reach their own conclusions. In these circumstances we expect the IE to demonstrate that they have questioned the adequacy of those assessments. We may also expect the IE to have urged the Applicants to undertake additional work or produce further evidence to support their assertions to ensure that the IE can be satisfied on a particular point.
- 6.7 We would also expect the IE to explain the nature of any challenges made to the Applicants and the outcome of these within their report, rather than just stating the final position. We will question and challenge the IE where we feel that an IE has relied on assertions made by the Applicants without sufficient challenge or request for supporting detail or evidence.
- 6.8 For example, 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...*'; 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, rather than relying 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 provide the IE with any advice that they have received. If the issue is significant or remains uncertain, we would expect the IE to ensure that 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 instance, we would expect the IE to include not only details of the Applicant's plans and any gap analyses that have been 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. Because of this, it does not necessarily involve reviewing and comparing any governance arrangements in the Transferor which produce good customer outcomes (eg any committees with conduct responsibilities) with the Transferee's governance arrangements.
- The consideration of the strain on resources that may occur post-transfer which could impact on 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**

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6.11 Where the regulatory framework is different for the Transferor and Transferee, 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, including whether there is continued access to the Financial Ombudsman Service and the Financial Services Compensation Scheme.
  - The comparative regulatory requirements and conduct protections across any relevant jurisdictions, including but not limited to complaints or compensation bodies compared to the UK.
  - Analysis of the likely impacts. For example, the number of Policyholders affected, the size of possible claims and any potential mitigations.
  - Whether a Solvency II equivalence assessment is necessary.
- 6.13 In these instances, we would expect to see a statement describing the two regimes as well as a considered comparison, highlighting points of significant difference that could adversely impact 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 If the IE's analysis is inconclusive or there are potential conduct risks due to differences in the regulatory framework, 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**

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- 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 IEs 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 We expect the IE to have checked that the documents they are relying, and forming judgements, on are the most up-to-date available when finalising their report.
- 6.18 If market conditions have changed significantly since the IE's analysis was carried out and they formed their judgement, 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 comment in 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 regarding the Supplementary Report).

### **Sufficient regard to relevant considerations affecting Policyholders**

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- 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 impact 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.
  - In addition 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, we believe 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.<sup>9</sup>
- 6.24 We would expect to see IE consideration and analysis of alternatives when a loss is expected for a particular subgroup of Policyholders, even if the IE does not consider this loss to be material. In these circumstances 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 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 the Transferee's capital position, and the short term nature of the liabilities, means that it is unlikely the Scheme will fail and Policyholders need recourse to the FSCS as a result. We would not be satisfied with this view without further evidence.

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<sup>9</sup> Principles of good regulation, FCA: [www.fca.org.uk/about/principles-good-regulation](http://www.fca.org.uk/about/principles-good-regulation)

- Alternatively the IE may suggest that the Applicants implement some form of mitigation. For example, Policyholders being notified that they have the option to 'switch' providers at no cost if they want to continue to have insurance with FSCS cover.

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

### **Commercially sensitive or confidential information**

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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**

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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 any legal advice given to the Applicants. 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 Where the IE refers to factors that are outside their sphere of expertise and relies on advice received by the Applicants, the IE should consider whether or not to obtain 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 obtain 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 obtain 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, the IE's decision to obtain 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. Depending on how complex the legal issue is, we may challenge IEs who rely on the Applicants' legal advice and merely state that 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.
- 6.36 In deciding whether to obtain 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 to Policyholders if the position turns out to be different from that considered likely in the legal advice.
  - How much the IE relies on the legal advice to reach their conclusions and, 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, depending on the issue's significance or uncertainty, the Applicants have obtained an adequate level of advice. 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

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- 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 IE will obtain a legal opinion on whether a transfer involving overseas Policyholders will be recognised in non-EEA jurisdictions. Should the IE intend to rely on the work of overseas legal advisors, we expect them not to use such advice as the sole basis of their conclusion that there are no materially adverse effects and we expect the IE to consider the position if the advice turns out to be incorrect.
- 6.41 If the IE is still uncertain and cannot form a conclusion on an issue, they may wish to obtain further independent legal advice to ensure they can reach a more considered conclusion. Additionally:
- They may get a legal opinion that states that it is likely that an overseas jurisdiction will recognise the transfer, but that there is a degree of uncertainty. We expect the IE to have considered, and be satisfied with, what the impact on Policyholders may be if the transfer is not recognised overseas.
  - Where the Transferor is to have their authorisations cancelled and wind up, then the IE will need to consider and explain what may happen if the transfer is not recognised in the overseas jurisdiction.
  - 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.

In cases like these, with unresolved risk or uncertainty, we expect to see that the IE has properly considered, and has seen legal advice which explains, what the impact on Policyholders would be and any ways to mitigate this impact. Mitigants could include Transferee indemnities in the Scheme which are directly enforceable by Policyholders in either the UK or the relevant jurisdiction.

- 6.42 Where the Transferor remains in existence and the Scheme anticipates that the Policyholders will still be able to claim against the Transferor; an IE may want to seek an independent legal opinion on how likely it is that the Transferee will indemnify the Transferor in these circumstances.
- 6.43 Our concern here is that the likelihood of this 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.
- 6.44 In summary, in most cases we will seek to review copies of any legal advice obtained. It is important that all significant material an IE relies on when evaluating a Scheme and reaching their conclusions should, wherever possible, be available for review by the Court and interested parties.

## Ambiguous language or a lack of clarity

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- 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 whether further information or documentation is required for the IE 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 as well as 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 identified uncertainty and formed an opinion on any potential impact.

## Demonstrating challenge

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- 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 to the IE's disclaimers. On this basis, we consider that Applicants are able to make these challenges without compromising the IE's independence.

- 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, such as senior actuaries, including possibly the Chief Actuary, the CFO, Senior Underwriters and so on.

### Technical actuarial guidance

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- 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,<sup>10</sup> particularly those for compiling actuarial reports.
- 6.51 IEs should be particularly aware that the proposed new versions of the TAS due to come into force during 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' and 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 APS L1: Duties and Responsibilities of Life Assurance Actuaries.<sup>11</sup>

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<sup>10</sup> TAS 2017, Financial Report Council, December 2016: [www.frc.org.uk/Our-Work/Codes-Standards/Actuarial-Policy/Technical-Actuarial-Standards.aspx](http://www.frc.org.uk/Our-Work/Codes-Standards/Actuarial-Policy/Technical-Actuarial-Standards.aspx)

<sup>11</sup> 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](http://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 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 can then make representations to the Court as appropriate. It is an important quid pro quo for the statutory override of their contractual rights that individual Policyholders 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
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## The definition of Policyholder

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- 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.<sup>12</sup> 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.
  - Potential claimants where the possibility of claiming is remote.
- 7.6 Some Applicants take a different view of the scope of the definition of 'Policyholder'. However, in many of these cases, the Applicants have decided not to pursue their interpretation of the point (while also not conceding it) and instead use dispensations to achieve the same outcome.
- 7.7 We generally welcome Applicants approaching the difference in interpretation in this way. In many cases we have not objected to these dispensations where relevant reasons and supporting evidence has been provided.

## Identifying and tracing Policyholders and other relevant persons

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- 7.8 We expect Applicants to set out, in sufficient detail, within the Scheme document and witness statements the various classes of Policyholders and other persons caught by the definition of Policyholder before the application of any dispensations.
- 7.9 Applicants should ensure that they have included all potential classes of Policyholders including:
- transferring Policyholders
  - Policyholders remaining with the Transferor
  - the Transferee's existing Policyholders

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<sup>12</sup> The Financial Services and Markets Act 2000 (Meaning of "Policy" and "Policyholder") Order 2001

Where there are sub-groups of Policyholders within these classes that require different treatment and notification these should be clearly identified and described within the Applicant documents.

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.

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 obtaining information from any non-electronic/manual sources.
- Where Applicants propose to apply for a dispensation from notifying Policyholders whose details are held in non-electronic sources, we would 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 to explain their approach to locating Policyholder details such as public database searches, using credit reference agencies and website searches. Where these efforts fail to identify all relevant Policyholder details then it may be appropriate for the Applicants to apply for a dispensation (see Chapter 8). If a dispensation is applied for, we will take into account the efforts made by the firm when we consider whether or not to object to the application. Generally, we expect Applicants to use more than one method of tracing.
- Where records are kept by a third-party (eg broker or third-party provider of connected services such as bank accounts), we expect Applicants to demonstrate that they have taken all reasonable steps to obtain those records or to assist the third-party in making notifications on the their behalf.
- Where contractual arrangements with third-parties mean that Applicants do not have a right to request this information or assistance, this may mean that the Applicants do not have adequate systems and controls in place to ensure that they can comply with relevant regulatory requirements. In this instance, we would expect to see alternative proposals for notification.
- However, where the contractual relationship means that third-parties are required either to provide the information or to pass on insurer communications to Policyholders, we expect Applicants to enforce these contractual obligations so that Policyholders are properly informed of the proposed transaction.

### **Content of communication**

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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 are sufficiently identifiable
- meet the formal requirements and language used in Part VII and the Transfer Regulations as to Policyholders' rights
- 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 those for use by Policyholders who are abroad. Telephone numbers 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. Care should be taken 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

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- 7.15 Our review of the notifications will include the tone, content, clarity and conciseness of the literature. 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 dissuasive 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 adversely 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.
  - Potential risks of adverse impacts for Policyholders should be clearly set out and not downplayed 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.
  - With regard to the Legal Notice, Applicants should use the same language and terms 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

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#### Covering letters

- 7.18 For covering letters, we understand Applicants' desire to avoid information overload, however, 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 should be read and how to ask questions or make representations. We expect that key aspects of the transfer that will be relevant to Policyholders should also be referred to in covering letters, 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 Applicants service which may be changing or where there are particular risks to Policyholders as a result of the transfer.
- 7.20 Where these risks may be particularly relevant to Policyholders' assessing whether they may be adversely affected, we consider 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 In reviewing any attachments, our aim 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, in a number of cases, 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, is based on an exercise of judgement or discretion or where uncertainty remains. In such circumstances, we consider it appropriate to bring this to the attention of Policyholders in the attachments and, where appropriate, 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, rather than cross referred to as available online or on request, unless there are exceptional circumstances where a different approach is justified.

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 general insurance transfer where, on renewal of Policyholder contracts, there would be 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.

- 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**

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- 7.29 In line with our view that communications should be clear, fair and not misleading, we expect, as a minimum, that individual notifications and attachments should be in the appropriate language for their audience. 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 for documentation to be translated into other languages.

### **The need for further communications before the Sanctions Hearing**

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- 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 to 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 that the Supplementary Report is made available to Policyholders before the Sanctions Hearing and that they are given enough time to review it. This 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.
  - Significant objections to a change in facts or position from the main report have been received which have prompted 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 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**

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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. If the percentage of 'returned' notifications is significantly above the level that they predicted or we have seen in comparative mailings, 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 a re-notification exercise is undertaken.

7.38 Where we find deficiencies which could mean 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 seen as appropriate given the transaction's nature and complexity, the category of Policyholder and the possible impact on the Policyholders concerned.
- 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**

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8.2 As a rule, we expect any application for a dispensation from the notification requirements in the Transfer Regulations to be supported by 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 where 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**

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8.4 Many Applicants use the judgment of Norris J<sup>13</sup> 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 to effect.
- 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 support requests for dispensations with insufficient evidence or argument.

### **Impossibility**

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8.6 Where firms apply for a dispensation in respect of Policyholders whose names and addresses are unavailable or unreliable, for example where the policies are old (1970s/1980s or before), we expect firms to have considered to what extent they are able to 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 however, if the percentage of 'gone-aways' recorded is higher than we reasonably expect, we may challenge Applicants' tracing arrangements as in the paragraphs above.

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<sup>13</sup> In Re Aviva International Insurance Limited [2011] EWCH 1901 (Ch.).

## Practicality

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- 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 set out details of the arrangements they have put in place 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, perhaps for data protection or commercial reasons. However, we expect Applicants to present a strong case and to have considered asking the Court to make a ruling ordering the brokers to notify the Policyholders.
- 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

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- 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, including 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.

- 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 there are expired/legacy policies for which only manual records remain. In this instance we expect Applicants to estimate the costs of searching manual databases and demonstrate a lack of proportionality as well as referencing the utility of notifying those Policyholders (see 8.27).
- 8.15 Applicants may suggest alternative notification arrangements, in support of proportionality arguments, where only manual records exist. 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 bought 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, such as looking back to the date before which prospects of a claim were minimal.
- 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 speaking, 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, such as asbestos claims under public and product liability policies or, for example, deafness claims under an employers' liability policy, we may ask firms to consider additional notification requirements or mitigation steps.

### 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 the Policyholders concerned, it is insufficient 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 are finely balanced as to whether Policyholders are adversely affected by the transfer.
- 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.
- The relative size of the transaction compared to the size of either Applicant's business may also be part of our consideration of an application for a dispensation. 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 this consideration of the size of the transfer by value, the number of policies transferring may also be relevant to the impact any dispensation may have, 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. In these instance Applicants may seek a dispensation from notifying Policyholders in the funds that are not transferring or from notifying Policyholders in the Transferee to which the business is not being transferred.

8.21 In those cases, we will consider carefully the IE's impact assessment to assess whether the IE is making judgement calls about the potential impact, and any other risks which we would expect Policyholders to be made aware of by notification.

## Beneficiaries of trusts/employees of an employer

8.22 Where the beneficiaries of trusts/employees of an employer are involved, we will need to see arguments and evidence to demonstrate a lack of proportionality of notification. 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 any other trustee or employer is notified.
- 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 may be more readily identified by beneficiaries.

## 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, 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 where the Applicant does not have details on file. 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, then we would expect to see them 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 that Applicants include in letters to the Policyholders that they:
- request that the notification is passed on to all other 'Policyholders', i.e. potential claimants
  - give clear examples of the type of person this may be in the particular case. For example, spouses/children, joint Policyholders, other named drivers, or others as relevant

### Utility

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- 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 there is not likely to be a material adverse impact on the Policyholders in question. 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 the prerogative of Applicants to determine how 'interested' Policyholders will be in a notification and if a dispensation is sought, it is for the Applicants to make a strong case.
  - Are unlikely to find it helpful if Applicants, when putting forward applications for dispensations, cite conclusions of marketing field studies that Policyholders have told them that they only want to receive targeted communications or that the Applicant believe Policyholders would not be 'interested' in being notified. Similarly, we do not generally consider applications helpful 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

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- 8.28 Applicants sometimes request that notification be made via their website or that additional advertising to that required by the Transfer Regulations means the need for notification falls away. 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 this approach is suggested we will expect the Applicant to pay close attention to how effective the alternative information channels are, and that they have given sufficient consideration to 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 log objections and representations to the transfer and include all details of methods of doing 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 that Policyholders or other interested parties who requested documents via the website will be sent updated documents that subsequently become available and that anyone who requested the IE's report will also be sent the IE's Supplementary Report.

8.33 Text message or alternative notification methods may be helpful but are likely to be limited to particular circumstances. For example, if the transfer involves 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**

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- 8.34 We will carefully consider applications for dispensations from the requirement to notify non-Policyholders. For example:
- Former Policyholders who have a continued interest in the identity of the insurer. 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 and anyone else with an interest in the policies, especially where that person has notified the Transferor of their interest.
- 8.35 We will also consider similar scenarios to these for applications 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 the possibility of claiming under the reinsurance policy may be remote. 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.