GN37: The Financial Services and Markets Act 2000 (Communications by Actuaries) Regulations 2003

Classification
Recommended Practice

MEMBERS ARE REMINDED THAT THEY MUST ALWAYS COMPLY WITH THE PROFESSIONAL CONDUCT STANDARDS (PCS) AND THAT GUIDANCE NOTES IMPOSE ADDITIONAL REQUIREMENTS UNDER SPECIFIC CIRCUMSTANCES

Definitions
Defined terms appear in italics when used in the standard.

Reference	Definition
Appointed actuary	A Fellow of the Faculty of Actuaries or of the Institute of Actuaries appointed by (or by the FSA for) an insurance company or friendly society in accordance with SUP4.3.1R or 4.3.3R of the FSA Handbook
Appropriate actuary	A Fellow of the Faculty of Actuaries or of the Institute of Actuaries appointed by a friendly society in accordance with SUP4.4.1R of the FSA Handbook
Board	The board of the insurance company or the controlling body of the friendly society to which the actuary is appointed
Close link	As defined in section 343(8) of the Act
FSA	Financial Services Authority
Insurer	The insurance company or friendly society in respect of which the *appointed actuary* or *appropriate actuary* is appointed
Threshold Conditions	The Threshold Conditions contained in Schedule 6 to the Act

In addition, the following abbreviations are used for sections of the *FSA* Handbook:

APER	Statement of principles and code of practice for approved persons
COND	Threshold conditions
ENF	Enforcement
IPRU(INS)	Interim prudential sourcebook for insurers
IPRU(FSOC)	Interim prudential sourcebook for friendly societies
SUP	Supervision manual
SYSC	Senior Management Arrangements, Systems and Controls

Legislation or Authority

The Financial Services and Markets Act 2000 ("the Act").
The Financial Services and Markets Act 2000 (Communications by Actuaries) Regulations 2003 ("the Regulations").
The *FSA* Handbook of Rules and Guidance (the "*FSA* Handbook")

Application

Appointed Actuaries of UK-supervised insurance companies and Appropriate Actuaries of UK-supervised friendly societies

Author
Life and General Insurance Boards

Status
Approved under Due Process (Fast Track)

Version	***Effective from***
1.0	01.09.03

1 General

1.1 The Regulations require an *appointed actuary* or an *appropriate actuary* to communicate certain specified matters concerning the *insurer* to the *FSA*.

1.2 The specified matters are set out in Regulation 2(4)(a)-(d) of the Regulations and are, in brief:

(a) that contravention by the *insurer* of any requirement imposed under any provision of the Act (other than Part VI of the Act which deals with listing rules) or contravention of any other legislation constituting an offence which the *FSA* has the power to prosecute under the Act may have occurred, where that contravention may be of material significance to the *FSA*,

(b) that matters exist which may be of material significance to the *FSA* in relation to the continued ability of the *insurer* to satisfy the *threshold conditions*,

(c) where applicable, that there is a significant risk that assets of any of the *insurer's* long-term business funds are, or may be, or may become insufficient to meet the liabilities of the fund,

(d) where applicable, that there is a significant risk that the *insurer* did not, does not, or may not be able to, take into account in a reasonable and proportionate manner the interests of long-term business policyholders.

Sections 2 – 3 provide relevant guidance.

1.3 The specified matters must have come to the attention of the actuary in his or her capacity as the *appointed actuary* or *appropriate actuary* of the *insurer* or when acting as actuary for a *close link* of the *insurer.* Section 4 provides relevant guidance.

1.4 Sections 342(3) and 343(3) of the Act relieve the *appointed actuary* or *appropriate actuary* of any legal duty of confidentiality if he or she gives information or opinion about the *insurer* in good faith to the *FSA* on matters of which he or she becomes aware in his or her capacity as *appointed actuary* or *appropriate actuary* for the *insurer,* or as actuary acting for a *close link* of the *insurer,* which he or she reasonably believes to be relevant to any function of the *FSA*. This applies whether or not the information or opinion is required to be communicated under the Regulations.

1.5 When the *appointed actuary* or *appropriate actuary* first becomes aware of a matter which may be required to be communicated to the *FSA* under the Regulations, he or she should first take, without undue delay, appropriate steps to verify that the matter does indeed come within the scope of the Regulations. These steps are likely to include discussing the matter with the compliance officer of the *insurer* (where it relates to matters under his or her jurisdiction), other relevant senior management or the *board* of the *insurer* (or the controlling body of a *close link* in the parental hierarchy of the *insurer* if the *appointed actuary* or *appropriate actuary* became aware of the matter from involvement with the *close link*) and seeking agreement on the facts of the matter. However, it is the opinion of the *appointed actuary* or *appropriate actuary* which determines whether a matter is to be communicated.

1.6 The *insurer* may decide to take actions which would prevent or remedy a matter which is required to be communicated. This does not remove the requirement to communicate the matter, although the *appointed actuary* or *appropriate actuary* should refer to the *insurer's* intended actions or remedy in his or her communication to the *FSA*.

1.7 The *insurer* may have communicated the matter to the *FSA* or may indicate an intention to do so. This does not remove the requirement on the *appointed actuary* or *appropriate actuary* also to communicate the matter.

1.8 The criterion for communication to be necessary is only to establish that a contravention may have occurred, that a matter may be of material significance to the *FSA*, or that a significant risk may be present, not that any of these conditions are definitely confirmed. If the *insurer* is seeking a legal

opinion with the object of confirming or disproving a suspected contravention of an *FSA* rule, it is likely to be appropriate for the *appointed actuary* or *appropriate actuary* to inform the *FSA* of the *insurer's* suspicions and of the fact that a legal opinion is being sought. However, if legal clarification is being sought with the aim of confirming the *insurer's* belief that a current practice is compliant, it is not likely for the *appointed actuary* or *appropriate actuary* to inform the *FSA* unless he or she does not consider that the firm's practice is compliant.

1.9 There is no requirement for legally privileged information to be disclosed to the *FSA* by *appointed actuaries* or *appropriate actuaries*. If an *appointed actuary* or *appropriate actuary* is concerned as to whether a disclosure would constitute a waiver of privilege by the *insurer*, he or she should consider taking legal advice before communicating such a matter to the *FSA*.

1.10 Once the *appointed actuary* or *appropriate actuary* is satisfied that a requirement to communicate a matter to the *FSA* has arisen, the matter should be communicated without delay to the *FSA*. Use of one of the methods described in SUP 15.7.4 would be appropriate. If the matter is of sufficient urgency, the matter should in addition be communicated by telephone to the *insurer's* usual supervisory contact at the *FSA*.

1.11 Where the *appointed actuary* or *appropriate actuary* also acts in an executive capacity for the *insurer*, the communication under the Regulations may be combined with any necessary communication to the *FSA* from the *insurer*. The text of the communication should make this dual purpose clear.

1.12 *Appointed actuaries* are also approved persons under the Act. As such, APER 4.4.4 imposes a requirement to report any matters which it would be reasonable to assume would be of material significance to the *FSA*. This reporting may be to another approved person of the *insurer* or of any group to which the *insurer* belongs or it may be direct to the *FSA* if there is no such other nominated approved person (or if the *appointed actuary* is that nominated person). Even if this report is made direct to the *FSA*, it should not be assumed that satisfaction of this requirement satisfies the requirements of the Regulations, nor does satisfaction of the Regulations necessarily satisfy this requirement. However, in some circumstances a single communication making clear that both requirements are being satisfied simultaneously may be appropriate.

1.13 Termination of appointment as *appointed actuary* or *appropriate actuary* (or as actuary for a *close link*) does not remove the requirement to communicate relevant matters to the *FSA* which came to the actuary's attention prior to the date of termination of the appointment. This is the case even where the appointment was terminated prior to the coming into force of the Regulations (except where the appointment terminated prior to the coming into force of section 340 of the Act). The protection provided by sections 342(3) and 343(3) of the Act also continues to apply. The guidance provided in 5.2 below will also be relevant for actuaries whose appointment was terminated between

the coming into force of section 340 of the Act and the coming into force of the Regulations.

1.14 The Financial Services and Markets Act 2000 (Communications by Auditors) Regulations 2001 imposes certain communications requirements on the auditors of *insurers*..

1.15 *Appointed actuaries* and *appropriate actuaries* should be aware of the particular emphasis in ENF 17.4.4(2) and (3) placed on failure to make a required notification to *FSA* when the *FSA* decides whether to exercise its powers to disqualify an actuary under section 345(1) of the Act.

2 Regulation 2(4)(a) and (b)

2.1 Under Regulation 2(4)(a), to be required to be communicated to the *FSA*, a matter must potentially be of material significance to the *FSA* in determining whether to exercise, in relation to the *insurer*, any functions conferred on the *FSA* by the Act[1].

2.2 Under Regulation 2(4)(b), to be required to be communicated to the *FSA*, a matter must potentially be of material significance to the *FSA* in determining whether the *insurer* satisfies and will continue to satisfy the *threshold conditions*.

2.3 A matter which is of material significance to the *FSA* in these cases should be taken to mean a matter on which the *FSA* would be likely to take further action if the matter were drawn to its attention.

2.4 It is not necessary for the matter to be of material financial consequence for it to be of material significance to the *FSA*.

2.5 An occurrence may not of itself be of material significance. However, if there have been a number of repetitions of similar occurrences, the series of occurrences may be of material significance to the *FSA*, for example, in determining the adequacy or otherwise of the *insurer's* systems and controls.

2.6 It is not necessary for the *appointed actuary* or *appropriate actuary* to carry out any investigations in addition to those necessary in his or her role *as appointed actuary* or *appropriate actuary* to determine whether any communicable matters have arisen. However, *appointed actuaries* and *appropriate actuaries* should be aware of the major requirements of, and key regulations under, the Act, and of the major requirements of the *FSA*

[1] *Appointed actuaries* and *appropriate actuaries* should also be aware of the power of the *FSA* under section 402 of the Act to institute proceedings for offences under other enactments, such as Part V of the Criminal Justice Act 1993 (insider dealing) and the money laundering regulations. The FSA also has the power under section 401 of the Act to institute proceedings for offences committed prior to the commencement of the Act, under certain repealed legislation, including the Financial Services Act 1986, the Insurance Companies Act 1982 and section 31 of the Friendly Societies Act 1992. See also 5.4 below.

Handbook and of other legislation of the type referred to in the footnote to 2.1 above, to the extent that they apply to the *insurer*.

2.7 The *FSA* has advised that the following are examples of matters in respect of which a duty to communicate would be likely to arise under Regulation 2(4)(a):

- material inadequacies in the *insurer's* relationship with the actuary (e.g. the provision of information, explanations and resources as required under SUP 4 and Part XXII of the Act);
- breaches of the high-level rules and standards set by the *FSA* for insurers (e.g. the *FSA* Principles, SYSC and notification rules), criminal matters such as money laundering, and misleading statements by firms and key individuals to customers, regulators and other persons (e.g. to actuaries and auditors);
- breaches of prudential rules and reporting requirements imposed on the *insurer*;
- material breaches of conduct of business rules (e.g. mis-selling, communications to policyholders and potential policyholders and the handling of complaints).

2.8 *Appointed actuaries* and *appropriate actuaries* should be aware of the *threshold conditions*. Of particular relevance are *threshold conditions* 3, 4 and 5.

2.9 *Threshold condition* 3 refers to circumstances in which a close link[2] of the *insurer* may prevent the *FSA* effectively supervising the *insurer*. Inappropriate influence being exerted on the *board* from an organisation in the parental hierarchy of a group, or material inadequacy of information available from a subsidiary for control purposes, would be matters needing communicating to the *FSA*.

2.10 *Threshold condition* 4 refers to the adequacy of the *insurer's* resources. *Appointed actuaries* and *appropriate actuaries* should be aware of the application of *threshold condition* 4 to non-financial resources; in particular, material inadequacy of human or other resources applied to establishing and maintaining systems and controls over risk would be a matter needing communicating to the *FSA*.

2.11 The guidance accompanying *threshold condition* 4 refers specifically to the circumstances of new firms or of firms making major change to their

[2] "Close links" for the purpose of the *threshold conditions* has a different meaning from that given in section 343(8) of the Act. In addition to the meaning set out in section 343(8) of the Act, a person will also be a close link of an *insurer* if 20% or more of its voting rights or capital are owned by the *insurer* or where such a person owns or controls 20% or more of the voting rights and capital of the *insurer*.

operations. Material inadequacy of the business plan in such circumstances would be a matter needing communicating to the *FSA*.

2.12 For *appropriate actuaries* of friendly societies which do not carry on long-term business, *threshold condition* 4 should be interpreted as requiring to be communicated to the *FSA* the fact that there is a significant risk that the *insurer* does not or may not in the future have sufficient assets to meet its minimum required solvency margin.

2.13 *Threshold condition* 5 refers to the fitness and propriety of the *insurer* to carry out its business. In particular, an *insurer* must have competent and prudent management and conduct its business with integrity, due care, skill and diligence and in compliance with proper standards. COND 2.5.6 and 2.5.7 provide substantial guidance. If the *appointed actuary* or *appropriate actuary* becomes aware that material failings in this context are being exhibited by the management or *board* of the *insurer* or by one or more individual members of the management or *board,* this would be a matter needing communicating to the *FSA*.

3 Regulations 2(4)(c) and (d) and 2(5)

3.1 For an *appointed actuary* of a long-term *insurer*, these Regulations pertain to circumstances of a similar but not necessarily identical nature to those envisaged in SUP 4.3.13R(2)(a) and (c). However, *appointed actuaries* should normally assume that matters which must be advised to the *insurer* under SUP 4.3.13R(2)(a) or (c) must also be communicated to the *FSA*.

3.2 There is almost always a risk of some magnitude, no matter how small, that an *insurer* will be unable to meet its liabilities or otherwise fail to take into account in a reasonable and proportionate manner the interests of its policyholders. A requirement to communicate to the *FSA* arises when the risk first becomes significant (and continues whilst the risk remains significant). In relation to whether there is a significant risk of the kind specified by Regulation 2(4)(d) only, the Regulations provide that *appointed actuaries* and *appropriate actuaries* should consider the factors set out in Regulation 2(5). Unless the *FSA* has provided specific or generic guidance on objective measures of absolute significance of risk, the *appointed actuary* or *appropriate actuary* should assume that the *FSA* requires that it be made aware of any material deterioration in the risk from its previous level, whether this arises from the action or inaction of the *insurer* or from external factors.

3.3 The measures of risk of an *insurer* being unable to meet its liabilities or of being unable to take into account in a reasonable and proportionate manner the interests of its policyholders should be those measures used by the *appointed actuary* in the report required to be produced by paragraph 6.1 of GN1. An *appropriate actuary* should use measures that would be contained in a report required by paragraph 6.1 of GN1, assuming that for this purpose that paragraph applied to *appropriate actuaries.*

3.4 Subject to the agreement of the *board*, an *appointed actuary* should each year provide the *FSA* with either a copy of or a relevant extract of the report required to be produced by paragraph 6.1 of GN1; and an *appropriate actuary* should provide a summary of any investigations that have been carried out to assess the risk of the friendly society being unable to meet its liabilities or to take into account reasonably and proportionately its policyholders' interests. This will enable the *FSA*, if it so wishes, to provide *the appointed actuary* or *appropriate actuary* with an indication as to whether it considers that the current risks to which the *insurer* is exposed are significant and, if not, of the extent of change necessary before they became so.

3.5 Where the *insurer* has not been provided with, or has not followed, advice provided by the *appointed actuary* or *appropriate actuary* in respect of a matter relevant to Regulation 2(4)(d), the matter would need to be communicated to the *FSA* if it would not have been in accordance with GN1 (in particular paragraphs 3.6, 4.9 and 4.10) for *the appointed actuary* or *appropriate actuary* to have advised the *insurer* to take the action which it has taken or intends to take. For this purpose, it should be assumed those paragraphs of GN1 apply also to *appropriate actuaries*.

4 Regulations 2(2) and 2(3)

4.1 Regulation 2(2) refers to matters of which an *appointed actuary* or *appropriate actuary* has become aware whilst acting in his or her capacity as that actuary. In practice, it is likely to be difficult to identify occasions when the actuary has become aware of a relevant matter when not acting in this capacity, unless the matter first came to his or her attention before taking up his or her present appointment (see Section 5 below) or from involvement with a *close link* (see paragraph 4.3 below). Normally, therefore, an *appointed actuary* or an *appropriate actuary* should assume that all matters of which he or she becomes aware (other than from involvement with a *close link*) is whilst acting in the capacity of *appointed actuary* or *appropriate actuary*.

4.2 Notwithstanding 4.1 above, if an *appointed actuary* or *appropriate actuary* considers that he or she may have become aware of a relevant matter in another capacity (other than from involvement with a *close link*) and is concerned that the Regulations and the protection of sections 342(3) of the Act may not be applicable, he or she should consider taking personal legal advice before communicating such a matter to the *FSA*.

4.3 Regulation 2(3) refers to matters relating to the *insurer* of which the *appointed actuary* or *appropriate actuary* has become aware whilst acting as actuary for a *close link.* In this context, the expression 'acting as actuary for' is not restricted to acting as an *appointed actuary* or *appropriate actuary* for the close link. In particular, the close link does not need to be an *insurer* for this requirement to apply. Normally, therefore, an *appointed actuary* or an *appropriate actuary* should assume that all matters of which he or she becomes aware from involvement with a *close link* is whilst acting in the capacity of actuary for that *close link*.

4.4 Notwithstanding 4.3 above, if an *appointed actuary* or *appropriate actuary* considers that he or she may have become aware of a relevant matter in another capacity and is concerned that the Regulations and the protection of sections 343(3) of the Act may not be applicable, he or she should consider taking personal legal advice before communicating such a matter to the *FSA*.

4.5 Matters about a *close link* of which an *appointed actuary* or *appropriate actuary* becomes aware in any way, other than if he or she is also the *appointed actuary* or *appropriate actuary* of that *close link*, are not subject to the Regulations nor to the protection of section 343(3) of the Act.

4.6 There will be occasions when more than one actuary is potentially under an obligation to communicate the same matter to the *FSA*. This could occur, for example, where a former *appointed actuary* of an *insurer* now acts as actuary for a parent. In such a situation, it may be appropriate for the former *appointed actuary* to contact the current incumbent to ensure that the former *appointed actuary* is in possession of all the facts (whilst bearing in mind paragraph 1.10 above). It is not necessary for both actuaries in such a situation to agree that an obligation to communicate the matter to the *FSA* has arisen; each actuary must come to his or her own decision. However, if both agree that a matter does require communicating, a joint communication may be made.

5 Retrospectivity

5.1 Regulations 2(4)(a) and (d) contain direct and indirect references to matters arising in the past. An *appointed actuary* or an *appropriate actuary* should assume that a matter which requires to be communicated to the *FSA* should be communicated when it first comes to his or her attention even if it has already been satisfactorily addressed by the *insurer*.

5.2 The extent of retrospectivity is of particular relevance to newly appointed *appointed actuaries* and *appropriate actuaries* and at the coming into force of the Regulations. It is not required that *appropriate actuaries* and *appointed actuaries* investigate the history of the insurer on either of these occasions. However, if any matter which came to the actuary's attention prior to the coming into force of the Regulations or prior to his or her taking up the appointment remains of material significance, the matter should be communicated to the *FSA* as if it had come to the actuary's attention on the date the Regulations or the appointment came into force. In relation to a new appointment, this applies even if the actuary's predecessor had decided that the matter did not fall within the scope of the Regulations. However, a matter which has been communicated by a predecessor need not be re-communicated on appointment unless it has materially deteriorated since last being communicated.

5.3 Any matter which comes to the *appointed actuary's* or the *appropriate actuary's* attention after the coming into force of the Regulations or after he or she took up his or her appointment but which took place before that date

should be considered for notification to the *FSA* in the same way as if it had taken place after that date.

5.4 Contraventions of the rules of recognised self-regulating organisations under the Financial Services Act 1986 (e.g. LAUTRO, PIA) do not constitute a 'contravention of a relevant requirement' so far as Regulation 2(4)(a) is concerned (but also see footnote to 2.1 above).

6 Status Disclosure

6.1 An actuary who intends to act as an actuary for a *close link* of an *insurer* and who has been at any time since the coming into force of section 340 of the Act, but no longer is, the *appointed actuary* or *appropriate actuary* of the *insurer*, must disclose this to the senior management of the *close link* and inform them of the obligations which the Regulations place upon him or her (i.e. to communicate certain matters about the *insurer* to the *FSA* of which he or she might become aware through acting as an actuary for the *close link*).

6.2 At the date of the coming into force of the Regulations, or as soon as possible thereafter, an actuary who is acting as an actuary for a *close link* of an *insurer* and who has been at any time since the coming into force of section 340 of the Act, but no longer is, the *appointed actuary* or *appropriate actuary* of the *insurer*, must disclose this to the senior management of the *close link* and inform them of the obligations which the Regulations place upon him or her (see 6.1 above).