

APS L2: THE FINANCIAL SERVICES AND MARKETS ACT 2000 (COMMUNICATIONS BY ACTUARIES) REGULATIONS 2003

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Purpose: To provide assistance to a **Relevant Actuary** who is thinking about communicating matters of which he/she becomes aware to the **FSA** in accordance with the **Regulations** and **APER**.

Authority: The Institute and Faculty of Actuaries

Target Audience: **Relevant Actuaries** and the **Members** who support them.

General Professional Obligations:

All **Members** are reminded of the Status and Purpose preamble to the Actuaries' Code which states that the Code will be taken into account if a **Member's** conduct is called into question for the purposes of the Institute and Faculty of Actuaries' Disciplinary Scheme. Rule 1.6 of the Disciplinary Scheme states that misconduct:

"means any conduct by a Member...in the course of carrying out professional duties or otherwise, constituting failure by that Member to comply with the standards of behaviour, integrity or professional judgement which other Members or the public might reasonably expect of a Member having regard to...any code, standards, advice, guidance, memorandum or statement on professional conduct, practice or duties which may be given and published by the Institute and Faculty of Actuaries and/or...the Board for Actuarial Standards".

Members are required to comply with all applicable provisions of **APSs**.

In the event of any inconsistency between this **APS** and the Actuaries' Code, the Code prevails.

Use of the words "must" and "should":

This **APS** uses the word "must" to mean a specific mandatory requirement.

In contrast, this **APS** uses the word "should" to indicate that, while the presumption is that **Members** comply with the provision in question, it is recognised that there will be some circumstances in which **Members** are able to justify non-compliance.

1. Introduction

- 1.1. In this **APS**, requirements of legislation or of **FSA** rules and guidance are specifically referred to as such. The inclusion of summarised references to, or quotations from, particular provisions of the **Regulations** is not a substitute for referring to the **Regulations**.
- 1.2. The **Regulations** require a **Relevant Actuary** to communicate information on, or his/her opinion on, certain **Specified Circumstances** to the **FSA**.
- 1.3. The **Specified Circumstances** are summarised as follows:
 - 1.3.1. there is or has been a contravention by the **Firm** of any requirement of the **Act** (apart from the Part VI listing rules) or other legislation which may be of material significance to the **FSA**;
 - 1.3.2. there are matters of material significance to the **FSA** in relation to the continued ability of the **Firm** to satisfy the **Threshold Conditions**;
 - 1.3.3. there is a significant risk that assets of any of the **Firm's** long-term business funds are or may become insufficient to meet the liabilities of the fund; or
 - 1.3.4. there is a significant risk that the **Firm** did not or may not take into account in a reasonable and proportionate manner the interests of long-term business policyholders.
- 1.4. The **Specified Circumstances** must have come to the attention of the **Relevant Actuary** in his/her capacity as the **Relevant Actuary** of the **Firm** or when acting as an actuary for a **Close Link** of the **Firm**.
- 1.5. **Relevant Actuaries** should be aware of:
 - 1.5.1. the **FSA's** enforcement provisions under the **Act**; and
 - 1.5.2. the **FSA's** disqualification powers under section 345(1) of the **Act**.

2. When Specified Circumstances should be communicated

- 2.1. The **Regulations** apply when the **Relevant Actuary** reasonably believes that a **Specified Circumstance** exists. The **Relevant Actuary** is not required to:
 - 2.1.1. confirm the existence of a **Specified Circumstance**;
 - 2.1.2. carry out investigations in addition to those necessary in his/her role as **Relevant Actuary** in order to determine whether a **Specified Circumstance** has arisen; or
 - 2.1.3. provide legally privileged information to the **FSA**.

- 2.2. **Relevant Actuaries** must be aware of the major requirements of, and key regulations under, the **Act**, of the major requirements of the **FSA Handbook** and of other relevant legislation to the extent that they apply to the **Firm**.
- 2.3. Termination of appointment as **Relevant Actuary** (or as actuary for a **Close Link**) does not remove the requirement to communicate **Specified Circumstances** to the **FSA** which came to the **Relevant Actuary's** attention prior to the date of termination of the appointment (except where the appointment terminated prior to 1 December 2001).
- 2.4. Sometimes more than one **Relevant Actuary** is potentially under an obligation to communicate the same **Specified Circumstance** to the **FSA**. It is not necessary for **Relevant Actuaries** in such a situation to agree that an obligation to communicate the matter to the **FSA** has arisen; each actuary should come to his/her own decision. However, if they agree that a **Specified Circumstance** must be communicated, a joint communication may be made.
- 2.5. **Actuarial Function Holders** should assume that matters which must be advised to the **Firm** under **SUP 4.3.13R (2) (a) or (c)** must also be communicated to the **FSA**.
- 2.6. **APER 4.4.4** and the **Regulations** impose requirements to report any matters which it would be reasonable to assume would be of material significance to the **FSA**. Where appropriate, a single communication may be used provided that it satisfies both the **APER** and **Regulations** requirements.
- 2.7. The Financial Services and Markets Act 2000 (Communications by Auditors) Regulations 2001 provide that relevant matters coming to the attention of auditors, including matters brought to the attention of the auditor by actuaries acting for the auditor, must be communicated to the **FSA** by the auditor under the regulations. There is no requirement for an actuary acting for the auditor to communicate these matters directly to the **FSA**.

3. How a matter should be communicated

- 3.1. When the **Relevant Actuary** first becomes aware of a matter which may be required to be communicated to the **FSA** under the **Regulations**, he/she must first take, without undue delay, appropriate steps to verify that the matter comes within the scope of the **Regulations**. These steps are likely to include discussing and agreeing the material facts of the matter with:
 - 3.1.1. the compliance officer of the **Firm**;
 - 3.1.2. other relevant senior management;
 - 3.1.3. the **Governing Body** of the **Firm**; or
 - 3.1.4. the controlling body of a **Close Link** in the parental hierarchy of the **Firm** (if the **Relevant Actuary** became aware of the matter from involvement with the **Close Link**).
- 3.2. The **Relevant Actuary**:
 - 3.2.1. must determine whether a matter is to be communicated;
 - 3.2.2. must communicate the **Specified Circumstance** to the **FSA** without delay;
 - 3.2.3. should use one of the methods identified in **SUP 15.7.4** to communicate the **Specified Circumstance** to the **FSA**; and
 - 3.2.4. if the **Specified Circumstance** is of sufficient urgency, should also communicate the **Specified Circumstance** by telephone to the **Firm's** usual supervisory contact at the **FSA**.

3.3. Where the **Relevant Actuary** also acts in an executive capacity for the **Firm**, the communication under the **Regulations** may be combined with any necessary communication to the **FSA** from the **Firm**. The text of the communication should make this dual purpose clear.

4. **Actions of Firms**

4.1. Where a **Firm** has taken actions which would prevent or remedy a **Specified Circumstance**, the **Relevant Actuary** must still communicate the **Specified Circumstance** to the **FSA** and should refer to the **Firm's** intended actions or remedy in his/her communication.

4.2. Where a **Firm** has communicated the matter to the **FSA** or has indicated an intention to do so, the **Relevant Actuary** must still communicate the **Specified Circumstance** to the **FSA**.

4.3. If the **Firm** suspects that a relevant requirement has been contravened and is seeking a legal opinion with the object of confirming or disproving this, the **Relevant Actuary** should inform the **FSA** of the **Firm's** suspicions and of the fact that a legal opinion is being sought.

4.4. However, if the **Firm** believes that a current practice is compliant and is seeking legal clarification of this, it is not likely to be appropriate for the **Relevant Actuary** to inform the **FSA** unless he/she does not consider that the **Firm's** practice is compliant.

5. **Guidance in relation to “material significance” (Regulations 2(4)(a) and (b))**

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

5.2. 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 **Firm's** systems and controls.

5.3. The following are examples of matters in respect of which a duty to communicate would be likely to arise under Regulation 2(4)(a):

5.3.1. material inadequacies in the **Firm'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**);

5.3.2. material breaches of the high-level rules and standards set by the **FSA** for firms (e.g. the **FSA Principles**, **SYSC** and notification rules);

5.3.3. 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);

5.3.4. material breaches of prudential rules and reporting requirements imposed on the **Firm**; and

5.3.5. material breaches of conduct of business rules (e.g. fair treatment of with-profits policyholders, mis-selling, communications to policyholders and potential policyholders and the handling of complaints).

6. Threshold Conditions (Regulation 2(4)(b))

- 6.1. **Relevant Actuaries** must be aware of the **Threshold Conditions**. The following are of particular relevance:
- 6.1.1. **Threshold Condition 3:** circumstances in which a close link¹ of the **Firm** may prevent the **FSA** effectively supervising the **Firm**. The following are examples of **Specified Circumstances**:
- 6.1.1.1. inappropriate influence being exerted on the **Governing Body** from an organisation in the parental hierarchy of a group; and
- 6.1.1.2. material inadequacy of information available from a subsidiary for control purposes.
- 6.1.2. **Threshold Condition 4** and accompanying guidance: the adequacy of the **Firm's** resources. The following are examples of **Specified Circumstances**:
- 6.1.2.1. material inadequacy of human or other resources applied to establishing and maintaining systems and controls over risk;
- 6.1.2.2. material inadequacy of the business plan of new **Firms** or of **Firms** making major change to their operations; and
- 6.1.2.3. significant risk that the **Firm** does not or may not in the future have sufficient assets to meet its capital resources requirement.
- 6.1.3. **Threshold Condition 5:** the fitness and propriety of the **Firm** to carry out its business. A **Firm** 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. **Specified Circumstances** include where material failings in this context are being exhibited by the management or **Governing Body** of the **Firm** or by one or more individual members of the management or **Governing Body**.

7. Guidance in relation to “significant risk” (Regulations 2(4)(c) and (d))

- 7.1. There is almost always a risk of some magnitude, no matter how small, that a **Firm** 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 significance of the risk first becomes known.
- 7.2. The **Regulations** set out at **Regulation 2(5)** the factors that a **Relevant Actuary** should take into account when considering whether there is a significant risk of the kind specified by **Regulation 2(4)(d)**.
- 7.3. Unless the **FSA** has provided specific or generic guidance on objective measures of absolute significance of risk, the **Relevant Actuary** should normally 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 **Firm** or from external factors.

¹ Close links for the purpose of the **Threshold Conditions** has a different meaning from that given in section 343(8) of the **Act** which is used elsewhere in this **APS**. In addition to the meaning set out in section 343(8) of the **Act**, a person will also be a close link of a **Firm** if 20% or more of its voting rights or capital are owned by the **Firm** or where such a person owns or controls 20% or more of the voting rights and capital of the **Firm**.

8. Guidance in relation to the Duty of Confidentiality

8.1. The **Relevant Actuary** is relieved (under sections 342(3) and 343(3) of the **Act**) of any legal duty of confidentiality if he/she gives information or opinion about the **Firm** in good faith to the **FSA** on matters of which he/she becomes aware:

8.1.1. in his/her capacity as **Relevant Actuary** for the **Firm**; or

8.1.2. as an actuary acting for a **Close Link** of the **Firm**,

which he/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**.

8.2. **Specified Circumstances** which the **Relevant Actuary** becomes aware of in any way, other than in 8.1.1 and 8.1.2 above, are neither subject to the **Regulations** nor to the protection of sections 342(3) and 343(3) of the **Act**.

8.3. If a **Relevant Actuary** considers that he/she may have become aware of a **Specified Circumstance** in a way, other than in 8.1.1 and 8.1.2 above, and is concerned that the **Regulations** and the protection of sections 342(3) and 343(3) of the **Act** may not be applicable, he/she should consider taking personal legal advice before communicating such a matter to the **FSA**. Guidance on whistleblowing can be found in the Institute and Faculty of Actuaries' publication "Whistleblowing: A guide for actuaries".

9. Guidance in relation to acting in capacity as an actuary (Regulation 2(2))

9.1. **Regulation 2(2)** refers to matters which a current or former **Relevant Actuary** has become aware of whilst acting in his/her capacity as that actuary. A **Relevant Actuary** should assume that all matters of which he/she becomes aware (other than from involvement with a **Close Link**) were whilst acting in the capacity of **Relevant Actuary**.

9.2. A **With-Profits Actuary** should assume that relevant matters coming to his/her attention, even if not related directly to the with-profits business, have been obtained in the capacity of **With-Profits Actuary** unless he/she is certain that it was obtained in another capacity.

10. Guidance in relation to acting as a close link (Regulation 2(3))

10.1. **Regulation 2(3)** refers to matters relating to the **Firm** which the **Relevant Actuary** has become aware of whilst acting as actuary for a **Close Link**. In this context, the expression "acting as actuary for" is not restricted to acting as a **Relevant Actuary** for the **Close Link**. In particular, the **Close Link** does not need to be a **Firm** for this requirement to apply.

10.2. A **Relevant Actuary** should assume that all matters of which he/she becomes aware about the **Firm** from involvement with a **Close Link** were whilst acting in the capacity of an actuary for that **Close Link**.

11. Newly Appointed Actuaries (Regulations 2(4)(a) and (d))

11.1. A newly appointed **Relevant Actuary**:

11.1.1. must communicate to the **FSA Specified Circumstances** which came to his/her attention prior to taking up the appointment and which remain of material significance to the **FSA**. This includes matters which the **Relevant Actuary's** predecessor had decided did not fall within the scope of the **Regulations**;

- 11.1.2. must communicate any **Specified Circumstance** which comes to the attention of the **Relevant Actuary** after he/she took up his/her appointment but which took place before that date;
- 11.1.3. is not required to re-communicate a **Specified Circumstance** to the **FSA** where that matter has already been communicated to the **FSA** by the **Relevant Actuary's** predecessor, unless it has materially deteriorated since last being communicated to the **FSA**; and
- 11.1.4. is not required to investigate the history of the insurer to ascertain whether a **Specified Circumstance** took place before they took up their appointment.

12. Status Disclosure

- 12.1. An actuary who intends to act as an actuary for a **Close Link** of a **Firm** and who has been at any time after 1 December 2001, but no longer is, the **Actuarial Function Holder**, **Appointed Actuary**, **With-Profits Actuary** or **Appropriate Actuary** of the **Firm**, must disclose this to the senior management of the **Close Link** and inform them of the obligations which the **Regulations** place upon him/her.

Term	Definition
Act	Financial Services and Markets Act 2000
Actuarial Function Holder	A Fellow of the Institute and Faculty of Actuaries appointed by (or by the FSA for) a Firm in accordance with SUP 4.3.1R or SUP 4.3.3R of the FSA Handbook to perform the role specified in SUP 4.3.1R (1) (a)
APER	The part of the FSA Handbook in High Level Standards which has the title Statements of Principle and Code of Practice for Approved Persons
Appointed Actuary	A Fellow of the Institute and Faculty 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 (prior to 31 December 2004)
Appropriate Actuary	A Fellow of the Institute and Faculty of Actuaries appointed by a Friendly Society in accordance with SUP4.4.1R of the FSA Handbook
Approved Person	A person in relation to whom the FSA has given its approval under section 59 of the Act (Approval for particular arrangements) for the performance of a controlled function
APS	Actuarial Profession Standard
Close Link	As defined in section 343(8) of the Act
COND	The part of the FSA Handbook in High Level Standards which has the title Threshold Conditions
Firm	An insurance company or Friendly Society in respect of which the actuary is appointed
Friendly Society	An incorporated friendly society or a registered friendly society
FSA	Financial Services Authority (or its successor)
FSA Handbook	The FSA Handbook issued by the FSA
FSA Principles	The part of the FSA Handbook in High Level Standards which has the title Principles for Businesses
Governing Body	The board of directors or committee of management of a Firm
Member	A Member of the Institute and Faculty of Actuaries
Regulations	The Financial Services and Markets Act 2000 (Communications by Actuaries) Regulations 2003

Relevant Actuary	Actuarial Function Holders and With-Profits Actuaries appointed by or in respect of UK authorised insurance companies and Friendly Societies; Appropriate Actuaries of Friendly Societies to which SUP 4 applies, the Lloyd's actuary and syndicate actuaries to life syndicates
Specified Circumstances	The circumstances detailed in regulation 2(4) of the Regulations
SUP	The Supervision Manual published by the FSA
SYSC	The part of the FSA Handbook in High Level Standards which has the title Senior Management Arrangements, Systems and Controls
Threshold Conditions	The Threshold Conditions contained in Schedule 6 to the Act and in COND
With-Profits Actuary	A Fellow of the Institute and Faculty of Actuaries appointed by (or by the FSA for) a Firm in accordance with SUP 4.3.1R or SUP 4.3.3R to perform the role specified in SUP 4.3.1R (1) (b)