

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

Classification

Paragraphs marked (M) and in bold type are Practice Standard. The remainder of the guidance, marked (G) and in normal type, is 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

Purpose

The Financial Services and Markets Act 2000 (Communications by Actuaries) Regulations 2003, often referred to as the “whistleblowing regulations” set out circumstances under which an obligation arises for an actuary carrying out a statutory function to communicate matters of which he or she becomes aware to the FSA. Sometimes communication to the FSA will also be required under FSA Rules for approved persons. This note gives additional guidance to *actuarial function holders*, *with-profits actuaries*, *appropriate actuaries*, the Lloyds actuary, syndicate actuaries to life syndicates and former appointed actuaries to whom these regulations apply.

Definitions

Defined terms appear in italics when used in the standard.

Reference

Definition

actuarial function holder

A Fellow of the Faculty of Actuaries or of the Institute of Actuaries appointed by (or by the FSA for) a *firm* in accordance with SUP4.3.1R or SUP 4.3.3R of the FSA Handbook to perform the role specified in SUP 4.3.1R(1)(a)

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 (including prior to 31 December 2004) (this definition includes *actuarial function holders* and *with-profits actuaries*)

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

close link

As defined in section 343(8) of the Act

firm

An insurance company or friendly society in respect of which the actuary is appointed

FSA	Financial Services Authority
governing body	The board of directors or committee of management of a <i>firm</i>
relevant actuary	An actuary to whom the Regulations apply
threshold conditions	The Threshold Conditions contained in Schedule 6 to the Act and in COND
with-profits actuary	A Fellow of the Faculty of Actuaries or of the Institute of Actuaries appointed by (or by the <i>FSA</i> for) a <i>firm</i> in accordance with SUP 4.3.1R or SUP 4.3.3R of the <i>FSA Handbook</i> to perform the role specified in SUP 4.3.1R(1)(b)

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
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

Relevant actuaries: that is, *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 Lloyds actuary and syndicate actuaries to life syndicates; those who have been *appointed actuaries* in respect of UK insurance companies in the past.

Author

Life and General Insurance Boards

Status

Approved under Due Process

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1 General

- 1.1 (G) The Regulations require an actuary to whom this guidance applies to communicate certain specified matters concerning the *firm* to the *FSA*.
- 1.2 (G) In this standard, the contents of legislation or of *FSA* rules and guidance are specifically referred to as such. Any other guidance is that provided additionally by the profession. The inclusion of summarised references to, or quotations from, particular provisions of the Regulations is not a substitute for referring to the full text of the Regulations.
- 1.3 (G) The specified matters are set out in Regulation 2(4)(a)-(d) of the Regulations and are, in brief:
- (a) that 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*,
 - (b) matters of material significance to the *FSA* in relation to the continued ability of the *firm* to satisfy the *threshold conditions*,
 - (c) 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,
 - (d) 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.

Sections 2 – 3 provide relevant guidance.

- 1.4 (G) The specified matters must have come to the attention of the actuary in his or her capacity as the *relevant actuary* of the *firm* or when acting as an actuary for a *close link* of the *firm*. Section 4 provides relevant guidance.
- 1.5 (G) Sections 342(3) and 343(3) of the Act relieve the *relevant actuary* of any legal duty of confidentiality if he or she gives information or opinion about the *firm* in good faith to the *FSA* on matters of which he or she becomes aware in his or her capacity as *relevant actuary* for the *firm*, or as an actuary acting for a *close link* of the *firm*, 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.
- 1.6 (M) **When the *relevant actuary* first becomes aware of a matter which may be required to be communicated to the *FSA* under the Regulations, he or she must 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 *firm* (where it relates to matters under his or her jurisdiction), other relevant senior management or the *governing body* of the *firm* (or 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*) and seeking agreement on the facts of the**

matter. However, it is the opinion of the *relevant actuary* which determines whether a matter is to be communicated.

- 1.7 (G) The *firm* 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 *relevant actuary* should normally refer to the *firm's* intended actions or remedy in his or her communication to the *FSA*.
- 1.8 (M) **The *firm* may have communicated the matter to the *FSA* or may indicate an intention to do so. This does not remove the requirement on the *relevant actuary* also to communicate the matter.**
- 1.9 (M) **The Regulations require only that the *relevant actuary* reasonably believes 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, rather than that any of these conditions are definitely confirmed.**
- 1.10 (G) If the *firm* is seeking a legal opinion with the object of confirming or disproving a suspected contravention of a relevant requirement, it is likely to be appropriate for the *relevant actuary* to inform the *FSA* of the *firm'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 *firm's* belief that a current practice is compliant, it is not likely to be appropriate for the *relevant actuary* to inform the *FSA* unless he or she does not consider that the *firm's* practice is compliant.
- 1.11 (G) There is no requirement for legally privileged information to be disclosed to the *FSA* by *relevant actuaries*. The actuary, in most cases, will still require to communicate the matter itself to the *FSA* but without the legally privileged information.
- 1.12 (M) **Once the *relevant actuary* is satisfied that a requirement to communicate a matter to the *FSA* has arisen, the matter must 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 normally in addition be communicated by telephone to the *firm's* usual supervisory contact at the *FSA*.**
- 1.13 (G) 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.
- 1.14 (M) **Actuarial function holders and with-profits 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 *firm* or of any group to which the *firm* belongs or**

it may be direct to the *FSA* if there is no such other nominated approved person (or if the *actuarial function holder* or *with-profits actuary* is that nominated person). A single communication may be used provided that it satisfies both the requirements under *APER* and under the Regulations.

- 1.15 (M) Termination of appointment as *relevant 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 (except where the appointment terminated prior to 1 December 2001).
- 1.16 (G) The Financial Services and Markets Act 2000 (Communications by Auditors) Regulations 2001 imposes certain communications requirements on the auditors of *firms*. Actuaries to whom this guidance applies should be aware that relevant matters coming to the attention of auditors, including matters brought to the attention of the auditor by actuaries acting for the auditor, will 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*.
- 1.17 (G) *Relevant actuaries* should be aware that ENF 17.3.2G refers specifically to the duties imposed on such actuaries by the Regulations and of the emphasis in ENF 17.4.4(3) placed on failure to make a required notification to the *FSA* when the *FSA* decides whether to exercise its powers to disqualify an actuary under section 345(1) of the Act.
- 1.18 (G) A *with-profits actuary* should normally assume that relevant matters coming to his or her attention, even if not related directly to the with-profits business, have been obtained in the capacity of *with-profits actuary* unless he or she is certain that it was obtained in another capacity. See also paragraph 4.1 below.

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

- 2.1 (M) A matter is required to be communicated to the *FSA* under Regulation 2(4)(a) if it may be of “material significance to the [*FSA*] in determining whether to exercise, in relation to [*the firm*], any functions conferred on the [*FSA*] by the Act”¹.
- 2.2 (M) For a matter to be required to be communicated to the *FSA* under Regulation 2(4)(b), it must in the reasonable belief of the actuary, potentially be of “...material significance to the [*FSA*] in determining whether [*the firm*] satisfies and will continue to satisfy the *threshold conditions*.”

¹ *Relevant 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.

- 2.3 (G) It is not necessary for the matter to be of material financial consequence for it to be of material significance to the *FSA*.
- 2.4 (G) 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.
- 2.5 **(M) In order to determine whether any communicable matters have arisen, it is not necessary for the *relevant actuary* to carry out any investigations in addition to those necessary in his or her role as *relevant actuary*. However, *relevant actuaries* must be aware of the major requirements of, and key regulations under, the Act, and of the major requirements of the *FSA 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 *firm*.**
- 2.6 (G) 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 *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);
 - material breaches of the high-level rules and standards set by the *FSA* for firms (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);
 - material breaches of prudential rules and reporting requirements imposed on the *firm*;
 - material breaches of conduct of business rules (e.g. mis-selling, communications to policyholders and potential policyholders and the handling of complaints).
- 2.7 **(M) *Relevant actuaries* must be aware of the *threshold conditions*. Of particular relevance are *threshold conditions 3, 4 and 5*.**
- 2.8 **(M) *Threshold condition 3* refers to circumstances in which a close link² of the *firm* may prevent the *FSA* effectively supervising the *firm*. Inappropriate influence being exerted on the *governing body* 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 “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 guidance note. 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*.

- 2.9 (M) *Threshold condition 4* refers to the adequacy of the *firm's* resources. *Relevant actuaries* must 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*.
- 2.10 (M) The guidance accompanying *threshold condition 4* refers specifically to the circumstances of new firms or of firms making major change to their operations. Material inadequacy of the business plan in such circumstances would be a matter needing communicating to the *FSA*.
- 2.11 (M) In particular, for *appropriate actuaries* of friendly societies which do not carry on long-term business, *threshold condition 4* must be interpreted as requiring to be communicated to the *FSA* the fact that there is a significant risk that the *firm* does not or may not in the future have sufficient assets to meet its capital resources requirement.
- 2.12 (M) *Threshold condition 5* refers to the fitness and propriety of the *firm* to carry out its business. In particular, 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. If the *relevant actuary* becomes aware that 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*, this would be a matter needing communicating to the *FSA*.

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

- 3.1 (G) For an *actuarial function holder* of a *firm*, 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, *actuarial function holders* should normally 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*.
- 3.2 (G) 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 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 *relevant actuaries* may take into account 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 *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.

4 Regulations 2(2) and 2(3)

- 4.1 (G) Regulation 2(2) refers to matters of which a current or former *relevant 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, a *relevant actuary* should assume that all matters of which he or she becomes aware (other than from involvement with a *close link*) were whilst acting in the capacity of *relevant actuary*.
- 4.2 (G) Notwithstanding 4.1 above, if a *relevant 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 section 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 (G) Regulation 2(3) refers to matters relating to the *firm* of which the *relevant 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 a *relevant actuary* for the *close link*. In particular, the *close link* does not need to be a *firm* for this requirement to apply. Normally, therefore, a *relevant actuary* should assume that all matters of which he or 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*.
- 4.4 (G) Notwithstanding 4.3 above, if a *relevant 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 342(3) and 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 (G) Matters about a *close link* of which the *relevant actuary* becomes aware in any way, other than if he or she is also the *relevant actuary* of that *close link*, are not subject to the Regulations nor to the protection of section 343(3) of the Act.
- 4.6 (G) 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, *actuarial function holder* or *with-profits actuary* of a *firm* now acts as actuary for a parent. In such a situation, it will normally be appropriate for the former *actuarial function holder* or *with-profits actuary* to contact the current incumbent to ensure that the former *actuarial function holder* or *with-profits 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 should 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 (M) Regulations 2(4)(a) and (d) contain direct and indirect references to matters arising in the past. A *relevant actuary* must communicate a matter which requires to be communicated to the *FSA* when it first comes to his or her attention even if it has already been satisfactorily addressed by the *firm*.**
- 5.2 (G) The extent of retrospectivity is of particular relevance to newly appointed *relevant actuaries*. It is not required that the newly appointed actuary investigate the history of the insurer on these occasions. However, if any matter which came to the actuary's attention prior to his or her taking up the appointment remains of material significance, the matter should still be communicated to the *FSA* after the appointment comes 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 will have led to the *FSA* taking such steps as it considers appropriate, and it is reasonable to conclude that a further communication would not be of material significance to it and therefore need not be re-communicated on appointment unless it has materially deteriorated since last being communicated to the *FSA*.
- 5.3 (M) Any matter which comes to the attention of *relevant actuary* after he or she took up his or her appointment but which took place before that date must be considered for notification to the *FSA* in the same way as if it had taken place after that date.**

6 Status Disclosure

- 6.1 (M) An actuary who intends to act as an actuary for a *close link* of a *firm* and who has been at any time since 1 December 2001, but no longer is, the *actuarial function holder*, *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 or her (i.e. to communicate certain matters about the *firm* to the *FSA* of which he or she might become aware through acting as an actuary for the *close link*).**