

Response paper

Revision of our Powers and Procedures Guidance

Response to consultation
on revisions to our PPG

June 2020

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1 Executive summary

We have issued a new version of our Powers and Procedures Guidance (PPG) along with an updated Chapter 7 of our guidance on the Interchange Fee Regulation 2015 (IFR). This document explains, at a high level, the final changes we have made to both sets of guidance, following consultation on our proposed revisions.

Background

- 1.1** Our original PPG outlined the procedures and processes that we would generally apply in relation to our regulatory and enforcement powers and functions under the Financial Services (Banking Reform) Act 2013 (FSBRA). The PPG was published in March 2015, before the operational launch of the Payment Systems Regulator (PSR). We acknowledged at the time of publication the need to keep its contents under review and to update it when necessary.
- 1.2** Between July and October 2019, we consulted on a number of proposed revisions to our PPG, which we published in CP19/7, *Consultation on proposed revisions to our Powers and Procedures Guidance* (July 2019).¹ We considered that the PPG may need updating for two main reasons. Firstly, because the powers we can use, and the functions we can perform, have increased significantly since the PPG was first published. Secondly, because we have significantly developed our procedures and processes to reflect the first-hand experience that we have gained while using our powers and carrying out our functions.
- 1.3** For the most part, we did not propose to change our procedures but our proposed revisions provided more information about them. However, in some places we considered that there were ways in which our procedures could be improved, and we highlighted these in the consultation paper. Our overall objective was to make our guidance as clear and accessible to users as possible.
- 1.4** We also consulted on revisions to Chapter 7 of our IFR guidance. Chapter 7 describes our powers and procedures to monitor compliance with, and enforce some of, the obligations under the IFR. For the most part, our powers in respect of the IFR mirror our FSBRA powers, as there are advantages in applying the same procedures to the use of our FSBRA powers in different contexts (as far as it is appropriate and practical to do so). Consequently, in the interests of consistency, any revisions made to the PPG would need to be reflected in the relevant part of our IFR guidance.
- 1.5** As part of the consultation, we also asked consultees whether they considered that any other PSR guidance would need updating to reflect the proposed changes to the PPG. We explained that we would conduct a review of our other guidance, once the wording of the PPG was settled, to ensure consistency with the updated PPG. We identified two documents that would potentially need to be amended, with consultation where appropriate: our Penalties Guidance² and our Administrative Priority Framework (APF).³

¹ www.psr.org.uk/psr-publications/consultations/cp197-psr-powers-and-procedures-consultation

² *Penalties Guidance* (March 2015): www.psr.org.uk/administrative-priority-framework

³ *Administrative Priority Framework* (March 2015): www.psr.org.uk/psr-penalties-guidance

- 1.6** We consulted on our proposals for a period of three months. During this period, we held a stakeholder event to explain the proposed changes to the PPG and IFR guidance. This event was attended by approximately 30 stakeholders.

Consultation responses, our reply and the changes made to the PPG

- 1.7** We received seven written consultation responses (including one response from UK Finance, a trade body representing a large number of industry stakeholders). All were supportive of our proposals. Two made no substantive comments. We held follow-up meetings with some of the seven respondents (those who submitted the most detailed responses) to discuss their comments.
- 1.8** Some of the respondents' comments have led us to make amendments to the version of the PPG consulted on. Where we did not consider that a particular comment justified an amendment to the content and wording of the PPG, we provide an explanation for this within this document.
- 1.9** Furthermore, after considering all of the comments received, we undertook a further review of the text. This led us to make further amendments in the interests of clarity. We explain where this type of change has been made in the next chapter.
- 1.10** Most respondents only commented on the parts of the PPG that they considered relevant to them and where they felt the wording merited further clarification or amendment. Respondents expressed support generally for the proposed revisions to both sets of guidance, but most respondents did not comment specifically on the IFR guidance.
- 1.11** The majority of the comments related to Chapters 2, 4 and 5 of the PPG guidance, which outline in most detail our ways of working (Chapter 2) and the processes we follow when exercising our regulatory (Chapter 4) and enforcement (Chapter 5) powers under FSBRA. Consequently, it is these three Chapters that have changed the most from the proposed version of the PPG that we consulted on. Chapters 1 and 3 contain only minor, consequential amendments.
- 1.12** We are grateful to all of the respondents who engaged constructively with the consultation.
- 1.13** The revised PPG⁴ will replace the existing PPG from 16 June 2020.
- 1.14** The updated Chapter 7 of our IFR guidance⁵, which reflects the changes to the PPG, will also replace the existing Chapter 7 of our IFR guidance from 16 June 2020.
- 1.15** It is important that stakeholders read the final, revised PPG and the final, revised section of our IFR guidance, so that they are aware of, and understand all, the changes to these publications.

⁴ www.psr.org.uk/powers-and-procedures-guidance-2020

⁵ www.psr.org.uk/IFR-guidance-2020

Next steps

- 1.16** At the date of this publication, we have issued a new revised version of our PPG and an updated version of our IFR guidance containing a revised Chapter 7.
- 1.17** The final versions of the PPG and Chapter 7 of the IFR guidance apply from 16 June 2020. The previous versions of the PPG and IFR guidance cease to apply on these dates.
- 1.18** We are in the process of reviewing other PSR guidance, to identify whether any consequential updates need to be made to reflect the new PPG and IFR guidance, and whether any necessary changes require further consultation.

2 Consultees' responses, our reply and the changes made to the PPG

We received seven written responses to our consultation. Six came from regulated firms and one came from an industry body. Most respondents only commented on the parts of the PPG that they considered were relevant to them and where they felt the wording merited further clarification or amendment.

The majority of the comments related to Chapters 2, 4 and 5 of the PPG guidance. Respondents generally supported the revisions to both sets of guidance but most respondents did not comment specifically on the revised IFR guidance.

In this chapter, we summarise the issues raised by respondents, and how we took their comments into account. We have made a number of changes to the wording of the versions of the PPG and the IFR guidance consulted on. Our final versions of the guidances are available on our website.

Chapter 2 of the PPG – The role of the PSR and our ways of working

Background

2.1 Chapter 2 of the PPG explains 'The Role of the PSR and Our Ways of Working'. There was no equivalent chapter in the original PPG, and it contains mostly new content. It also contains some sections of the original PPG that applied across all of our work and could be retained with appropriate updates.

2.2 Chapter 2 provides a clearer, fuller narrative of:

- the PSR's role and remit
- how we reach decisions about whether to take action; and
- the procedures and processes we use when exercising powers and carrying out our functions under FSBRA

It also provides information on some of our supplemental processes and practices that help us perform our statutory functions effectively and efficiently.

Comments received and our response and position

- 2.3** There were a number of issues raised by respondents in relation to the content of Chapter 2. The first related to the section titled 'Working with others'; the second and third related to the section titled 'Receiving and gathering information'; and the fourth related to our explanation of how PSR General Direction 1 interacts with our FSBRA powers and functions. One further matter that drew comment was the replacement of some sections of the PPG with signposting (within Chapter 2) to other published PSR guidance.
- 2.4** The issues raised and our replies are summarised in the following table and explained in more detail below.

Comment	Reply
Working with others	
General questions around how the PSR works and coordinates with other financial services regulators.	No changes need to be made to the text of the PPG to address the general points made.
Specific query as to whether the language used in paragraph 2.21 of the PPG fully reflected the duty in section 98 of FSBRA (to ensure the coordinated exercise of the PSR's functions with the Bank of England (BoE), the Financial Conduct Authority (FCA) and the Prudential Regulatory Authority (PRA) and the intent behind it).	Changes made to paragraphs 2.21 and 2.22 highlighting the fact that any decisions as to which regulator (if any) takes a matter forward will be made in accordance with the provisions of the relevant Memorandums of Understanding (MoUs). Clarified that arrangements for coordination with the Competition and Markets Authority (CMA) are addressed under a separate MoU.
Receiving and gathering information	
Whether the PPG suggests that the 'PSR will rely on and use intelligence and complaints that they receive from other regulators to decide whether to take enforcement, but will not necessarily share similar intelligence and complaints with regulators outside of the PSR jurisdiction, which could deny those regulators the same opportunity'.	Changes made to the re-titled 'Receiving, gathering and handling information', to clearly express the intent behind this section of the PPG.
Request for further clarity around why the PSR chooses to take a particular course of action and assesses the relative merits of action available to it.	This information has been moved to a separate section of Chapter 2, titled 'Deciding when to take action' (paragraphs 2.61 to 2.68). Reference made to a need to consider our strategic objectives and priorities alongside our APF (paragraph 2.62).

Comment	Reply
General Direction 1	
Query as to whether there is an expectation that all compliance failures should be reported under General Direction 1.	No changes need to be made to the text of the PPG.
Questions on the application of General Direction 1 to both formal and informal PSR information requests.	No further changes need to be made to the text of the PPG.
Removal of content from the PPG	
Concern over removal of the explanation of how we exercise our dispute resolution powers under section 57 of FSBRA.	No further changes need to be made to the text of the PPG. This information will be included in our refreshed guidance on section 56/57 of FSBRA and PSD2.

Working with others

- 2.5** Two respondents raised general questions around how the PSR works and coordinates with other financial services regulators. In doing so, they also made reference to the Treasury's (then ongoing) Financial Services Future Regulatory Framework Review and its call for evidence on regulatory coordination.⁶
- 2.6** UK Finance emphasised the vital need to achieve 'effective coordination between multiple bodies responsible for regulatory change'. They drew on 'recent experience in the payments industry of competing regulatory requirements', noting that 'similar technical change requirements often draw on the same constrained technical capability in firms for delivery'. They expressed the view that 'this draw focuses that resource on regulatory compliance and risks crowding out innovation, reducing the development of competitive services and, ultimately, negatively impacting the end-user'.
- 2.7** Nationwide submitted that they had not yet seen 'any evidence of joined up regulation between yourselves, the PRA, FCA, CMA and BoE' to avoid duplication, confusion and inefficiency over roles and responsibilities and to minimise the burden on the industry'. They urged us to 'engage with industry stakeholders sufficiently before undertaking any significant workstreams to ensure these are appropriately framed to deliver maximum benefit considering the inevitable resource costs which will be incurred, both by the PSR and the industry generally, and so that confusion and regulatory duplication is avoided'.

⁶ HM Treasury, *Financial Services Future Regulatory Framework Review, Call for evidence: regulatory coordination* (July 2019).

- 2.8** Nationwide was also concerned about how the PSR coordinated its data requests with other financial services regulators. It suggested that ‘it seems proportionate for the PSR to leverage and capitalise on the access to financial and/or operational data already made available to other regulatory bodies such as the FCA/the PRA, given the PSR already has access to the FCA’s intelligence’.
- 2.9** It also commented that ‘where additional information is required that goes beyond current requirements, consideration should be given to extending the requirements laid down by other regulatory bodies in order to gain commonality of approach and ensure efficiencies of scale in its production and delivery. For example, the re-use of existing reporting information would help restrict cost implications for firms without compromising the PSR’s objectives’.
- 2.10** We have taken note of these comments; however, we did not consider that they directly related to the text of the PPG itself or that they required us to make any amendment to its content. The PPG does not seek to explain how we give effect to either the duty of cooperation in relation to the other financial services regulators (section 98 of FSBRA) or the duties we have to consult and coordinate with the CMA (under the competition concurrency regime). That information is contained within the relevant MoUs that we are required to have with those organisations.⁷
- 2.11** Since our consultation closed, the Treasury has published a response to its call for evidence. This includes an explanation of how the financial services regulators and competition authorities that are working with the Treasury propose to improve regulatory coordination in the short term through the introduction of a new mechanism to manage the pipeline of new regulatory initiatives.
- 2.12** The Treasury’s response emphasises that the existing MoUs are instrumental in the coordination between financial services regulators and competition authorities. It also recognises that one regulator does not automatically have access to another’s collected data, as data sharing is subject to legal and other restrictions. The Treasury has indicated that the government is considering a statutory framework for information sharing between regulators, as well as suggested changes that could be made to improve data sharing.
- 2.13** It is important to highlight that the PSR does not ‘already have access to the FCA’s intelligence’. The PSR is a subsidiary of the FCA, but is also a separate entity subject to its own legislative regime in respect of information sharing. Further, as we have different functions to the FCA (for example, we are not a supervisory body but do carry out monitoring compliance functions), the purposes that we require information for will be different to those behind the FCA’s reporting requirements, and therefore the opportunities for us to ‘re-use’ that information are limited.
- 2.14** In addition to its more general comments, UK Finance specifically queried whether the language used in paragraph 2.21 of the PPG (in the later section titled ‘Receiving and gathering information’) fully reflected the duty in section 98 of FSBRA (to ensure the coordinated exercise of our functions with the BoE, the FCA and the PRA) and the intent behind it.

⁷ We will soon begin reviewing the MoUs that we have with other financial services regulators as part of our usual annual review process.

2.15 Paragraph 2.21 of the PPG, as consulted upon, read as follows:

Where the issues are within both our jurisdiction and that of another regulator or competition authority (for example, the FCA and the BoE), we will typically discuss the matter with the appropriate team within that organisation. Each organisation will consider its own priorities to decide which, if any, takes further action.

2.16 The version of the PPG consulted upon also referred explicitly (within the 'Working with others' section, now paragraph 2.13) to our duty of cooperation with the financial service regulators under section 98 of FSBRA, and to the fact that we have an MoU in place with them to give effect to this; we had intended paragraph 2.21 to be read with this in mind.

2.17 However, in light of this comment from UK Finance, we decided to make some changes to the text, which now reads (paragraphs 2.24 and 2.25):

Sometimes, the information may relate to issues that are within both our jurisdiction and that of another financial services regulator. In this case, we will discuss the matter with that organisation and agree with them which of us, if any, will take further action, in accordance with the provisions of the FSBRA MoU.

Where the information raises competition issues we will consult with the CMA and, where appropriate, other competition authorities, in accordance with the concurrency regime and the CMA MoU.

2.18 The changes make clearer the fact that any decisions as to which regulator (if any) takes a matter forward will be made in accordance with the provisions of the relevant MoU. We also felt it would be helpful to make it clearer that our arrangements for coordination with the CMA are addressed under a separate MoU.

Receiving and gathering information

2.19 This section of the PPG (as consulted on) covered a number of different matters. It sought to explain how information that comes into our possession is treated and assessed, leading to decisions as to whether or not we should take action.

2.20 One concern raised by Nationwide related to the first paragraph (2.17) of this section of the PPG and how it interacted with the contents of paragraph 2.20.

2.21 Paragraph 2.17 read as follows:

There are many ways in which information which may lead to us considering whether to take regulatory or enforcement action under FSBRA comes to our attention. For example: by regulated parties self-reporting to us; by intelligence and complaints received from other regulators, firms, other organisations and individuals, including consumers and whistleblowers; and through our own proactive, information gathering, including monitoring of compliance with directions or statutory requirements.

2.22 Meanwhile, the second sentence of paragraph 2.20 stated (correctly), 'we do not generally forward complaints and intelligence received to another regulator or organisation'.

2.23 The consultee submitted that 'this appears to highlight a contrast between regulators sharing information, as the PSR will rely on and use intelligence and complaints that

they receive from other regulators to decide whether to take enforcement, but will not necessarily share similar intelligence and complaints with regulators outside of the PSR jurisdiction, which could deny those regulators the same opportunity’.

- 2.24** The purpose of the wording in paragraph 2.17 was to explain the different ways in which we may receive information, one of which is when another regulator (including but not limited to the financial services regulators) provides us with intelligence or forwards us a complaint. In those circumstances, the other regulator will have considered whether it was appropriate to share that information with us before doing so, and we will then consider if it involves a matter we can and should take action on.
- 2.25** The purpose of the wording in paragraph 2.20, in contrast, was to explain that where we receive information on a matter unrelated to our work, then we won't automatically forward it on to another regulator or organisation. There may be good reasons for not doing so. We will need to consider first whether it is appropriate to share the information, including whether there is a lawful basis for doing so.
- 2.26** In light of this comment, we decided that the wording in this section of the PPG could be clearer in expressing the intent behind it. We have therefore made the following changes to the re-titled 'Receiving, gathering and handling information' section of Chapter 2.
- Removed the term 'intelligence' from this section of the PPG, as we considered that its use may result in ambiguity.
 - Separated further our discussion of how we receive information from how we handle/respond to it.
 - Explained more clearly that there may be three types of information that we receive: that which does not relate to what we do, that which does relate to both what we and another regulator does, and that which only relates to us.
 - Separated discussion of how we might discuss information received with the financial regulators from how we might discuss information with other competition authorities.
 - Clarified that there are different ways of handling information that might relate to a compliance issue.
- 2.27** We also felt that, taking into account other comments made regarding how we make decisions about whether to take action, we could assist stakeholders by further clarifying our processes around receiving, gathering and handling information.
- 2.28** For example, UK Finance expressed the view that 'industry would like to see a clear rationale as to why the PSR is proposing to use one type of approach rather than another, and the relative merits of the chosen measure compared to the alternatives at its disposal', and 'a bias in favour of enforcement over regulatory action unless the former is demonstrated to be insufficient to addressing the relevant issue'.

2.29 The PPG sets out the different options that we have when considering taking action, and the criteria we use to decide whether to take action of any type (i.e. our APF). Information about our strategic approach to using our different regulatory and enforcement tools is a matter for documents other than the PPG. We are currently considering how we can best communicate our strategic approach to stakeholders, and intend to publish a strategy-focused document addressing this in the near future.

2.30 To help clarify where the PPG deals with the questions of what our options are and the criteria we use for deciding between them, we have now placed this information in a separate section of Chapter 2, titled 'Deciding when to take action' (paragraphs 2.61 to 2.68). We have also referenced the need to consider our strategic objectives and priorities alongside the APF (paragraph 2.62).

General Direction 1

2.31 In our consultation document, we explained that the PPG needed to be updated to reflect recent improvements we had made to our original 'day one' general directions. We have now made final amendments to the text (now paragraphs 2.36 and 2.37), to ensure that it refers to the exact wording used in the final version of our updated directions, published on 5 March 2020.⁸

2.32 We also explained how General Direction 1, in particular, is relevant to the content of the PPG. This direction governs the relationship that participants in payment systems and regulated parties have with us and has two aspects.

- Firstly, it requires participants and regulated parties to deal with us in an open and cooperative way.
- Secondly, it requires participants and regulated parties to inform us of anything relating to them that we would reasonably expect to be told about.

2.33 In its updated form, General Direction 1 contains a number of explanatory notes, giving more detail of what is required under each aspect of the direction. Specifically, it clarifies that the requirement of dealing with us in an open and cooperative way applies to all dealings that participants and regulated parties have with us, and that this is an ongoing obligation. It applies equally to interactions with us following the receipt of a formal Information Requirement Notice (IRN) and in the context of informal conversations and other engagements with us. This is to ensure that we receive accurate and sufficient information that enables us to carry out our functions and achieve our statutory objectives.

2.34 It also explains that, while we do not expect participants and regulated persons to notify us about the minutiae of running their businesses, we do need regulated persons and participants to tell us, in an appropriate and effective way, about matters which may be relevant to, or have an impact on, our objectives. We provide a number of examples of the matters we expect notification of: for example, a set of facts giving rise to potential issues under any applicable competition law; and a failure to comply with any of our own direction and requirements or any legislation that we have monitoring and enforcement functions in respect of.

⁸ RP20/1, *Review of existing Directions: Response to consultation CP19/3 on draft Directions* (March 2020): <https://www.psr.org.uk/psr-publications/policy-statements/rp20-1-final-revised-day-one-directions-and-response-to-consultation>

- 2.35** The consultation document explained that the updated General Direction 1 was being taken into account in the following two ways.
- As 'self-reporting' is one way that information about a matter of potential regulatory concern may come to our attention, Chapter 2 included a new section on how we handle information that arises from a firm 'self-reporting' to us.
 - The possibility of our bringing enforcement action under General Direction 1 against a party who does not deal with us in an open or cooperative way – whether information is sought as a result of an IRN or the party is being asked to provide it on a voluntary basis – was explained more clearly in Chapters 2, 4 and 5.
- 2.36** In addition, in order to ensure that General Direction 1 applies consistently to all types of formal and informal requests for information we may make, we proposed making one specific amendment to the content of the original PPG. We removed the suggestion that we would not consider exercising our powers to take enforcement action under FSBRA for non-compliance with General Direction 1 if a party fails to respond to an information request in circumstances where we have appointed investigators but have not followed the usual course of requesting information via an IRN (under section 85 of FSBRA). We do not think there are good reasons for having a different approach to these types of information request.
- 2.37** The majority of respondents made no specific comment in relation to the section of Chapter 2 dealing with General Direction 1 or to the amendment set out above. Generally, respondents considered that our revisions relating to General Direction 1 would, alongside the publication of our updated general directions, bring greater clarity to this aspect of our work. One consultee commented that the revised version of General Direction 1 'will bring positive additional clarity regarding notification... which aligns to the clarity in the revised PPG and alignment of powers'.
- 2.38** Lloyds raised a question on the issue around whether there is an expectation that all compliance failures should be reported under General Direction 1. Lloyds questioned whether, in reality, it would be up to 'firms to make a judgement as to whether a potential or actual compliance failure is of a materiality that would warrant reporting it to the PSR'. It suggested that the position should be the latter, and the wording of the PPG should be amended to reflect this. However, we have not amended the final version of the PPG in this way.
- 2.39** The issue of materiality, in respect of matters that the PSR would expect to be reported to it, was previously raised by respondents to our consultation on our revised general directions. In our policy statement accompanying the final directions, we acknowledged in general terms that we usually do expect firms to make a judgement call regarding the materiality of a particular matter that they consider may require disclosure under General Direction 1.
- 2.40** However, we also make it clear in the explanatory notes to General Direction 1 (under 'examples of when to report to us') that the nature of particular matters will mean that they will generally always meet the materiality 'threshold' for disclosure to us. One of these types of matters is compliance failures: as the wording of the explanatory notes specifies, there is an expectation that we will be told about all

compliance failures, current or potential, as soon as a regulated party becomes aware of these or has information that reasonably suggests the same. The wording of the PPG (as consulted on) correctly reflected this position and therefore should, in our view, remain.

- 2.41** One final consultee, Pay.UK, raised some important questions about the scope and ambit of General Direction 1, and queried how far the revisions to the PPG amounted to actual changes to our procedures rather than clarifications. It commented as follows:

Based on the history of General Direction 1 (GD1), our understanding of the scope of the GD1 obligation is that it requires us to proactively identify issues that Participants consider that the PSR would need to be aware of and to highlight these to the PSR in a timely manner. We do this where relevant. However, we have concerns regarding the effective expansion of the scope of GD1 that appears to be proposed via the revised PPG. We think the proposal to link responses to informal information requests with GD1 compliance risks undermining the effectiveness of the information sharing arrangements...

The current PPG is also clear that should a party fail to comply with an information or investigatory requirement imposed through the PSR's formal powers, that failure may bring compliance proceedings under GD1... From the Consultation Document, it appears that the PSR is now looking to increase the scope of GD1 by creating an obligation to also comply with informal information requests...

In addition, the current arrangements provide the PSR with a formal power to require the disclosure of specific information when appropriate and contain sufficient protections for Participants – i.e. via a section 81 request. If there are concerns about a Participant's approach to meeting informal information requests, then the PSR has a powerful tool that it can use to ensure it receives the information that it requires. We note that no evidence has been provided in the consultation to justify such a significant change from the current arrangements as is proposed...

Finally and importantly, we note that the PSR's recent 'Day One Directions review' consultation did not contain any explicit (or implicit) proposal that the scope of the GD1 obligation would be expanded in the way that the PPG consultation now appears to be proposing.

- 2.42** After considering these issues carefully, we have concluded that they do not require us to amend the text of the PPG further, for a number of reasons.

- 2.43** Firstly, in our view, the comment above reflects a narrow interpretation of General Direction 1 – one which is not reflective of its purpose as described above and discussed within the consultation and policy documents published as part of our general directions review. One of the reasons for revising General Direction 1 in the way that we have was to enable participants and regulated parties to better understand the two aspects of General Direction 1: the aspect that requires a party to deal with us in an open and cooperative way whenever interacting with us; and the aspect that requires the reporting of particular matters to us. General Direction 1 has always embodied both of these aspects, but the new version of General Direction 1 sets them out more clearly.

- 2.44** Secondly, the wording of General Direction 1 (in both its original and revised form) is broad enough to encompass all types of interactions that participants and regulated parties might have with us, including where they may need to respond to 'informal' requests for information made by us (those made without the use of a formal IRN). An 'extension' of General Direction 1 to informal information requests was not proposed in either the consultation published in respect of our general directions or the consultation on the PPG, because the direction has always applied in this way. The fact that the original PPG specifically dis-applied General Direction 1 to a particular type of 'informal request' confirms this (i.e. the issuing of voluntary requests for information by PSR-appointed investigators).
- 2.45** The wording of the PPG (as consulted on) does not substantively change the effect of General Direction 1, except where it re-applies the direction to voluntary requests issued by appointed investigators. The wording more clearly explains to participants and regulated parties the effect (both previously and currently) of General Direction 1 when a participant or regulated party fails to be open and cooperative in its dealing with us. It also reinforces the purpose and message of General Direction 1 to those who fall within its ambit.
- 2.46** Pay.UK went on to express the view that if General Direction 1 was to be used as a tool to enforce cooperation with informal information requests, this may have a negative effect on our ability to obtain information in a timely manner from participants and regulated parties.

We consider that the implications of the proposed change could be significant for [us] and our engagement approach with the PSR, as the change would create legal uncertainty and additional enforcement risk. It could, in order to mitigate this potential risk, result in Pay.UK becoming more formal and cautious in its engagement with the PSR which would in turn reduce the overall effectiveness of Pay.UK's engagement with the PSR...

For example, the PSR currently makes a large volume of informal requests to [us]... However, strengthening the PPG/GD1 in the way proposed would exacerbate the risk attached to meeting these requests. [Pay.UK] may then need to be less flexible in the way it meets the PSR's requests in order to mitigate the increased legal risk that is being created.

- 2.47** We agree that regulated parties need to be clear when dealing with us as to their regulatory obligations and the consequences of not complying with them. This includes the possibility of the PSR taking action under General Direction 1 where information requested by us is either: not provided at all or is insufficient when provided; provided outside of the requested timeframe; or is misleading or inaccurate. It is for this reason that the PPG was revised to make our position on the application of General Direction 1 as clear as possible.
- 2.48** Participants and regulated parties who interact with us should be conscientious about their obligations under General Direction 1. In addition, we would encourage regulated parties to adopt internal processes that enable them to provide appropriate, accurate responses within deadlines set by us, as a matter of course.

- 2.49** We would encourage anyone with concerns as to how they should deal with our (formal or informal) requests, or who has identified a risk that means they cannot provide full, timely and/or accurate information, to discuss this with us at the earliest opportunity (see paragraphs 2.100 to 2.104 below).
- 2.50** Pay.UK went on to raise two related matters. The first highlighted the possibility that it may be unclear to a participant or regulated party whether a particular interaction with the PSR was one to which General Direction 1 would apply.

We also note that there is a lack of clarity around what constitutes an informal information request. Might it, for example, include oral requests? The lack of a record of such requests creates clear challenges from a compliance perspective – which again increases legal and compliance risk.

- 2.51** We agree that certainty over the nature of a particular request is important when a participant or regulated party is assessing how to respond to it. We are mindful of this when issuing requests, and will always try to ensure that the scope and purpose of requests are as clear as possible. As explained in the new General Direction 1, this direction applies to all types of interactions with us, written or verbal. Also, as above, in these circumstances, we would request anyone who is uncertain about the nature of a particular request, or in what capacity they are being requested to respond to it, to contact us directly with their concerns.
- 2.52** We would also encourage parties to adopt good practice when dealing with regulatory requests made – of whatever type and in whatever form. This would include keeping an appropriate record of such. We have our own processes and procedures to record requests of participants and regulated parties; we expect recipients of those requests to likewise keep an appropriate record.
- 2.53** The second matter related to whether we could avoid the perceived difficulties around using informal requests by instead using our formal information gathering powers. Pay.UK saw a number of advantages in adopting this approach, and expressed concern as to whether using General Direction 1 to enforce informal requests might erode the distinction between formal and informal requests.

The PSR can also make formal requests for information from Participants using the powers granted to it under section 81 of FSBRA... Importantly, Participants have a right to make formal representations... This helps to ensure that the scope of a request for information is correctly understood and sized, that it takes into account what type of information a Participant is actually able to gather and in what format, and the time it will take to gather that information considering the resources available, potential other competing priorities and any information system constraints...

The proposal also appears to be aligning the consequences of non-compliance with an informal information request with the consequences of non-compliance with a section 81 (formal) request for information (i.e. both could bring proceedings for breach of GD1)... For example, paragraphs 3.74 and 3.75.

- 2.54** We have a variety of powers, under FSBRA (sections 81 and 85) and other legislation, to formally require information from participants and regulated parties. However, using our formal powers may not always be the best way to further our statutory objectives and enable us to perform our functions. An informal request for information may elicit a better response and help maintain an existing cooperative relationship; furthermore, it

may not always be practical or proportionate to issue a formal notice. Where information needs to be obtained quickly, or where the material being requested is readily available, it may be more in line with one of our regulatory principles, (to use our resources in the most efficient and economical way - section 53(a) of FSBRA), to request the information without the use of a formal notice.

2.55 We acknowledge that, in some circumstances, there can be advantages to participants and regulated parties receiving formal information requests. For example, it may be easier to share confidential information with us under a formal request. We would ask recipients of our information requests to discuss with us any particular issues that they may have. We will consider any reasonable submissions made about the format of the request. However, we will not always provide a draft of an IRN issued under any of our statutory powers. The question of whether we will do so is a matter of discretion, as explained in both the original PPG (paragraph 26.5) and the version of the PPG consulted on (paragraphs 4.7 and 5.21). We may sometimes need the information requested to be provided quickly, while in other instances the information may be of a type that can be provided without needing to consider the scope of the request first (see paragraph 2.90 below).

2.56 In the case of IRNs, we have a number of additional powers under FSBRA to enforce non-compliance with these. We can use our powers under FSBRA (see paragraph 4.41 of the final PPG) to:

- bring contempt of court proceedings against the regulated party who fails to comply with one of our information requirements
- bring criminal proceedings against a person who falsifies, conceals, destroys or otherwise disposes of a document that they know or suspect is relevant to an ongoing PSR investigation
- bring criminal proceedings against a person who obstructs the execution of a search warrant

Therefore, a failure to comply with an IRN continues to have more serious potential consequences than a failure to comply with an informal request for information.

2.57 In conclusion, after considering respondents comments, we have not made any further changes to the sections of the PPG dealing with General Direction 1. We consider the changes already made to be sufficient to make the intention and consequences of this direction clear. We encourage participants and regulated parties with questions about the application of General Direction 1 to specific issues or interactions with us, to discuss these with us as and when appropriate.

Removal of some sections of the original PPG

2.58 As explained in the consultation document, because we have developed separate, specific guidance on the procedures and processes to be followed when we exercise some of our FSBRA functions, we could mostly remove content from the existing PPG that covers these areas. Where appropriate, the version of the PPG consulted on signposted readers to the relevant separate guidance on a particular topic.

2.59 For example, we have published separate guidance on our market review function under section 64 of FSBRA. The text of the PPG refers stakeholders who require more information on how we exercise this function to this guidance (paragraph 1.8).

- 2.60** Likewise, we have published separate guidance in relation to our access powers and functions, under both sections 56 and 57 of FSBRA and under the second Payment Services Directive 2015 (PSD2),⁹ which the revised PPG references.
- 2.61** Pay.UK expressed concern that we had removed an explanation of how we exercise our dispute resolution powers under section 57 of FSBRA from the PPG, although our powers under that section apply more widely than to access disputes. It is correct that section 57 of FSBRA is not wholly confined to access matters and that some elements of PSD2 are also not restricted to addressing access issues.
- 2.62** We are in the process of revising our current guidance on both access and PSD2. As indicated in the consultation document (paragraphs 3.39 to 3.43), we intend to consult soon on a proposal to publish single guidance on both our monitoring and enforcement role under PSD2 and our administrative decision-making role under sections 56 and 57 of FSBRA. We also intend for this guidance to cover all aspects of our dispute resolution powers under section 57, as well as all aspects of PSD2, even where they go beyond the question of access.
- 2.63** Respondents can be assured that, once this refreshed guidance and our final version of the PPG have been published, there will be no areas of our work that are no longer covered which have previously been covered by guidance.

Other changes made

- 2.64** In light of all of the comments received from stakeholders, we also considered that it would be helpful to further clarify two other parts of Chapter 2 of the guidance.
- 2.65** Firstly, we have taken into account comments made in relation to how our consultation processes are explained in Chapter 4 of the PPG, as well as our approach to consultation more generally (see paragraphs 2.72 onwards, below). As a result of these, we have revised Chapter 2 in the following ways.
- Include a new section (paragraphs 2.45 to 2.48) setting out our approach to consultation generally, including: consultation on our policy development; consultation before issuing guidance; calls for views/evidence in relation to a potential issue in the market; and consultation when considering whether to use our direction and requirement powers.
 - Revised the section called 'Information handling and confidentiality' (paragraphs 2.49 to 2.60) to be more specific as to how we assess claims of confidentiality and sensitivity regarding information submitted to us, and how such claims can and should be made by the person submitting the information.
- 2.66** Secondly, we have made some minor, consequential amendments that reflect other changes made to Chapters 4 and 5 (see paragraphs 2.65 to 2.130 below).

⁹ Directive 2015/2366/EU.

Chapter 4 of the PPG – Regulatory action

Background

- 2.67** Chapter 4 of the version of the PPG consulted on explains our powers to take regulatory action through our direction and requirement powers under FSBRA. It also sets out in detail our powers to gather and obtain information, to conduct investigations and to take urgent, interim action in relation to potentially harmful behaviour, all of which apply when we are considering taking either regulatory or enforcement action (see Chapter 5).
- 2.68** Chapter 4 additionally reflected our proposed changes to our consultation processes, explained in the consultation document (paragraphs 3.47 to 3.59).

Comments received and our response and position

- 2.69** We received a variety of comments in respect of the content of Chapter 4: most relate to the consultation processes used when we are considering whether to exercise our directions and requirement powers. Some comments also referred to parts of Chapter 2, where we described our approach to stakeholder engagement when considering all of the options available to us, including the taking of no action or informal action.
- 2.70** Other comments were made in relation to setting and enforcing deadlines for responding to IRNs and the issue of notifying a party that we will not be taking action on an issue that we have been looking into.
- 2.71** The issues raised and our replies are summarised in the following table, and explained in more detail below.

Comment	Reply
Suggestion that we could consider routinely publishing all non-confidential responses to consultations.	Changes made to reflect a presumption that we publicly make available all consultation responses, subject to certain considerations.
Suggestions as to the approach we should take to setting IRN deadlines and enforcing them, in terms of what is a reasonable timeframe, the factors to be taken into account and when a party should notify us of potential issues with submitting their response in time.	Wording added to clarify that when we do send a draft IRN we will allow a reasonable timeframe for the recipient to respond. Also clarified: what we expect parties to do when they receive an IRN from us and how this relates to the making of extension applications.
Suggestion that we should always notify a party that we will not be taking action on an issue that we have been looking into, where it is aware that we were doing so.	Amended to explain that we will inform the relevant parties, unless there is good reason not to do so.

Consultation

- 2.72** Three respondents expressed support for our recognition of the importance of open and transparent consultation and early engagement with stakeholders. UK Finance commented that it is 'pleased that as well as outlining the formal processes the PSR undertakes and the internal mechanisms it uses, such as the Administrative Priority Framework, the PPG recognises the value of informal consultation with firms and their representative bodies, and that it is now approachable'.
- 2.73** Lloyds also expressed support for our reference to 'using other methods to try to secure good regulatory outcomes – including engaging with industry to encourage it to find solutions to issues arising in the market or to encourage further innovation as set out in Section 229'. They commented further: 'It is important, though, that any such early engagement includes the whole range of firm types and sizes that could be affected by upcoming legislation or regulation, and therefore various engagement approaches are likely to be needed to ensure a representative range of inputs.'
- 2.74** In addition, another consultee submitted that 'In 4.6 of the new PPG, the PSR confirm that they will "usually consult on the draft specific direction or rule requirement more widely to seek the views of affected parties"'. This is a welcome strengthening of the PSR's commitment to consult more widely when proposing a specific direction to allow a greater diversity of views from all potentially affected participants to be considered before giving the specific direction. We support this change to the PPG: we can gain assurance that consultation will usually, and in most non-urgent cases, precede any giving of a specific direction.'
- 2.75** In addition, UK Finance requested that the PSR go one step further in enabling transparency when consulting in the context of its direction and requirement powers. It was suggested that we could consider routinely publishing all non-confidential responses to consultations.
- 2.76** We have carefully assessed the advantages and disadvantages of adopting UK Finance's proposed approach to publishing consultation responses, and have compared our own approach with the current approach of other financial services and sector regulators and competition authorities.
- 2.77** The request for us to publish all consultation responses in full goes much further than the statutory requirements in FSBRA. It also extends beyond the specific types of consultation we were originally addressing in the version of the PPG consulted on (consultations on directions and requirements) and would include more general consultations we carry out: in relation to policy development, issuing guidance, calls for evidence, and so on.
- 2.78** In general, we are supportive of the suggestion from UK Finance and seek to be as transparent as possible in our consultation processes. Therefore, in principle, we are open to publishing all consultation responses received in full, unless there is a good reason not to do so.
- 2.79** One concern with publishing consultation responses in full, however, relates to the fact that consultations on our direction and requirement powers can often result in us receiving confidential and sensitive information. A commitment to publishing all consultation responses in full, bar any confidential and sensitive material, would require us to regularly redact (or otherwise actively manage) that confidential information prior

to publication. In some cases, this may prove to be a more difficult and resource-intensive exercise than summarising the response so that any confidential and sensitive information is not referred to in our response documents and policy papers.

2.80 Consequently, we have amended the wording of the relevant sections of Chapter 4 of the PPG and (as also explained above at paragraph 2.60) aligned the wording of Chapter 2 to reflect this approach.

2.81 In summary, we have given ourselves wider discretion as to how we might publish consultation responses in different scenarios, taking into account the presumption that we publicly make available all consultation responses.

- In Chapter 2, we have explained our usual approach to publishing consultation responses and the reasons why, in some cases, we may need to take a different approach.
- In Chapter 4, we have amended the sections relating to general and specific directions and requirements (and disposal requirements) in line with our usual approach. We also highlight that the issue of confidentiality may be more significant when dealing with these types of consultations.

2.82 One further comment from UK Finance related to the question of whether a change in approach – which may take place between the point of consulting on a draft general direction and the issuing of a final version – would require the PSR to engage in further consultation before issuing that direction or requirement.

2.83 We agree with UK Finance that there will be cases where a material change of approach develops between proposing a draft direction and giving a final version, requiring us to re-consult. We also consider that this could be the case in respect of general requirements and specific directions and requirements. The relevant sections of the final version of the PPG has now been amended to reflect this (paragraphs 4.53, 4.65 and 4.75).

2.84 HSBC also commented on the question of consultation, in the context of our direction and requirement powers, but in a different respect.

Our only point of comment concerns the period allowed for notice/consultation upon a proposed direction or requirement. The revised PPG states that the PSR will generally allow three weeks for representations in the case of either a specific or general direction or requirement. It is noted that the precise duration of the consultation period will depend on [various factors]. We regard this approach as sensible and pragmatic but note that three weeks is a very short timeframe to prepare a high quality response, even for reasonably straightforward proposals. HSBC will generally need to provide a response on behalf of both HSBC UK Bank plc and HSBC Bank plc requiring internal consultation with subject matter experts and relevant lines of business, to ensure we are able to provide a well-considered, thorough and accurate response to the PSR. We would invite the PSR to consider the timeframe linked to each individual direction or requirement, to ensure participants and directed institutions have sufficient time to review and respond in the right way that supports the PSR's statutory objectives.

2.85 As HSBC notes, the PPG as consulted on proposed to generally allow three weeks to make representations on specific directions and allow a minimum of three weeks to make representations on general directions. This is subject in each case to the

statement that ‘the precise duration of the consultation will depend on the complexity of the proposed action and the circumstances surrounding it, including, for example, how much meaningful engagement we have already had with stakeholders on the particular issues’.

2.86 These amendments increased the typical timeframe for representations in relation to specific directions from that set out in the original PPG (two weeks), and aligned the typical timeframe for comments on a draft general direction with that for specific directions. We also removed the upper limit on the time we will usually allow to make representations on general directions (previously up to 12 weeks). We want to be more consistent in our timeframes for consultation; these changes aim to achieve that while recognising a need to retain discretion surrounding different types of consultation and appropriate timescales.

2.87 Overall, HSBC’s request that we consider the timeframe linked to each individual direction and requirement corresponds with and is supportive of the approach we adopted in the PPG (as consulted on). However, there are some additional questions arising from this response concerning how we consider particular factors when assessing the exact deadline for responses to individual consultations. These factors are discussed below, as they also relate to other comments made by respondents in respect of response times in IRNs.

Deadlines for responses

2.88 UK Finance made two comments on the issue of IRN responses:

- The first suggested that paragraph 4.7 should be amended to state that the usual timeframe for responding to an IRN will be six weeks, and it should be clear that it will be the default or normal approach to share a draft IRN, with a reasonable timeframe for comment (i.e. a minimum of two weeks), before a final version is sent.
- The second made reference to a specific factor that UK Finance consider we should take into account when setting deadlines and/or dealing with extensions to deadlines for responses to IRNs: namely, difficulties faced by firms receiving multiple IRNs from one or more regulators.

2.89 Lloyds raised a related issue about when and how a party should inform us of difficulties responding to an IRN by the deadline. They commented as follows.

LBG is mindful of the guidance provided in section 4.14 which states that, if a recipient does not raise early concerns when providing a response to an Information Requirement Notice, the PSR could consider this as an indication that the recipient is not properly complying with the information requirement and will consider what, if any, other action to take. In LBG’s view, there are sometimes good reasons in practice why a recipient might not raise early concerns, specifically in instances when issues only become apparent once the information gathering has progressed and a more detailed explanation of issues and timelines can be provided. We are therefore concerned that reference to the PSR considering further action in such circumstances risks driving the wrong behaviour from organisations choosing to exercise caution and routinely applying for early requests for extensions. We therefore suggest that the PSR nuances sections 4.13 and 4.14 in relation to organisations raising early concerns on receipt of an IRN as to whether they are able to comply with its requirements.

- 2.90** In respect of UK Finance’s first comment, the PPG (as consulted on) clearly stated that we will generally give four weeks to respond to an IRN issued under either section 81 or 85 of FSBRA (now paragraphs 4.12 and 5.21), but this may be less (particularly in the context of enforcement action) or more depending on the circumstances. In the original PPG, we gave no typical timeframe for responses, and it has not been our usual practice to allow six weeks for responses.
- 2.91** The original PPG also explained that while we would usually expect to give advance notice of an IRN, we would only provide a draft IRN where it is practical and appropriate to do so. The version of the PPG consulted on maintained discretion as to whether a draft IRN will be sent, explaining that when we decide to issue an IRN we will always consider sending a draft, but there may be circumstances where it will not be necessary and/or appropriate to do so. One such circumstance is where we believe that the information required is readily available and the intended recipient of the request is likely to provide it relatively easily. Another is if we think such advance notice may prejudice our enquiries. We may also choose not to give advance notice where we need to act quickly.
- 2.92** As explained in the consultation document, we are of the view that the proposed revisions to the PPG made it clearer and more useful for parties who need to reply to IRNs than the original PPG was. We remain of the view that the text strikes the right balance between:
- making clear to potential recipients of our IRNs that we expect them to respond promptly, and more quickly in particular types of case, while retaining discretion to set longer timeframes for other cases, where appropriate; and
 - allowing us the scope to use a draft IRN to adjust the request to reduce the burden on the intended recipient, while enabling us to issue an IRN without inviting comments where that is more appropriate
- 2.93** We have made one amendment to the final version of the PPG as a result of this comment from UK Finance. We have added wording to clarify (now paragraph 4.9) that when we do send a draft IRN, we will allow a reasonable timeframe for the recipient to respond, determined by the circumstances at the time. This is a suggested change that we agree with.
- 2.94** In respect of UK Finance’s second comment, we are mindful that a variety of different factors may affect the ability of a regulated party to respond to a request from us within a particular timeframe. One such factor is the number of IRNs that a firm may be receiving at any one time, and another is their own internal processes for gathering information and quality assuring responses before they are provided (as highlighted by HSBC when commenting on consultation response times).
- 2.95** We recognise that there is a balance to be struck between providing information swiftly and ensuring good quality responses. As explained above (paragraph 2.47), both General Direction 1 and the IRN place an obligation on regulated parties to provide information to us that is both timely and accurate.
- 2.96** Whether or not the presence of a particular factor justifies the granting of a longer response period will depend on the circumstances and the context of the IRN being issued. The final version of the PPG (now paragraph 4.14) refers to the fact that a recipient of an IRN could be responding to several notices at once, and that this generally will not of itself be an acceptable reason for delay. Much will depend on

the nature of the IRN and the response it requires, as well as the urgency of it. We are likely to require a fuller explanation of the situation and why more time is needed from the recipient.

2.97 This approach aligns with that adopted by other financial services and sector regulators, and seeks to encourage a culture within industry where IRNs from all regulators are treated equally.

2.98 Likewise, operation of a regulated party's internal practices for processing an IRN will generally not be an acceptable reason for delay. We encourage regulated parties to adopt structures/processes that enable them to provide appropriate responses within deadlines set, in response to requests from both ourselves and other regulators, as a matter of course.

2.99 However, we will always consider the potential impact of different relevant factors before setting a final deadline for responding to any IRN, and also when considering any application for an extension to a deadline. The final text of the PPG states (now paragraph 4.11):

When deciding upon the period for responding to an IRN, we will consider the availability, nature, complexity and volume of the information sought, together with the circumstances within which we are imposing the requirement and any representations we receive on any draft IRN.

This reflects our approach to assessing the appropriate timeframe for responding to consultations, as highlighted by HSBC (see paragraph 2.85 above).

2.100 As explained above, in the context of discussing the effect of General Direction 1 on failures to comply with information requests and requirement notices, we encourage any participant or regulated party in receipt of a draft or final IRN from us, who has any concerns over its ability to comply, to contact us to discuss the issues as soon as they become aware of them.

2.101 The final comment on this matter, made by Lloyds, specifically relates to a situation where an issue only becomes apparent at the point where the recipient has received a final version of the IRN – either because it was a case where it was not necessary/appropriate to first provide a draft version or because the issue is only identified at that stage. Lloyds' primary concern in this situation was in regard to the wording of paragraph 4.14 of the version of the PPG consulted on, which explained that a recipient of an IRN should raise with us any concerns that they would not be able to meet an IRN deadline, at the earliest opportunity.

If a recipient does not raise such concerns at the earliest opportunity and applies for an extension close to the deadline, we could consider this an indication that the recipient is not properly complying with the information requirement. In these circumstances, the information will still be required, and we will also consider what, if any, other action we should take. Where the requirement applies to a regulated party this could include enforcement action in relation to non-compliance with its obligations under General Direction 1.

2.102 The purpose behind this wording was to encourage IRN recipients to make us aware of any risks which may limit their ability to comply with a particular deadline. The recipient should alert us when they become aware of the potential risk of delay, not only when it

materialises. As the wording indicates, notifying us of a potential risk of delay is not the same as making an application for an extension of time to respond to an IRN. It was not our intention to encourage recipients of IRNs to make premature and potentially unnecessary extension requests.

2.103 By informing us about the existence of such risks when they are identified, and letting us know about attempts to mitigate them, the recipient of an IRN will be providing assurance that it is doing everything possible to comply with the IRN. We will also have evidence on the issue, if an application for a deadline extension is later made. We considered that inclusion of wording to this effect is therefore of assistance to IRN recipients, as well as ourselves.

2.104 That said, in light of the comment by Lloyds, we have amended this part of the final version of the PPG. We have now made clearer: what we expect parties to do when they receive an IRN from us; how they should communicate any anticipated difficulties with complying with any deadline to us; and how this relates to the making of extension applications.

2.105 Specifically, we have amended the language in the PPG (now paragraphs 4.15 and 4.16) to state that:

- we expect a party to consider an IRN upon receipt;
- we expect a recipient to notify us of any risks which mean they may not be able to comply with the deadline, at the earliest possible opportunity (i.e. when they become aware of that risk, not when the risk materialises); and
- once the recipient has assessed that the risk justifies an application for an extension then that application should be made without delay.

Notification when taking no action

2.106 One other change made to Chapter 4 was suggested by Lloyds: 'section 4.42 states that, if a matter [that could lead to us using our direction and requirement powers, and we have previously informed regulated parties that we were considering whether to take action] is closed, the PSR may, or may not confirm this to the relevant parties. In our view, the PSR should always aim to inform the relevant parties of the outcome of a matter under consideration for the purposes of good governance and completeness.'

2.107 We agree with Lloyds on this issue, and have therefore amended the wording of the final PPG at (now) paragraph 4.45 to reflect that our default position is that we will inform the relevant parties of the outcome in this type of case, unless there is good reason not to do so.

Other changes made

2.108 The final change made to Chapter 4, after considering all comments by stakeholders during the consultation period, relates to how we expect regulated parties to inform us of any claims to Legal Professional Privilege that they wish to make in respect of any information required by us. Paragraph 4.17 now sets out more clearly our requirements and expectations.

Chapter 5 of the PPG – Enforcement action

Background

- 2.109** Chapter 5 explains how the PSR investigates whether it is appropriate to take enforcement action, engages with regulated parties subject to potential enforcement action, and makes decisions to take enforcement action.
- 2.110** Since our launch, we have significantly developed the procedures that we use when exercising our FSBRA enforcement powers, and we better understand how we can and should exercise those powers.
- 2.111** The information contained in Chapter 5 therefore expands upon that provided in the original PPG about our enforcement function, and is more detailed in its explanation of our ways of working. It provides additional information in relation to our process for assessing whether to open an enforcement case to investigate a potential compliance failure and how such a case would proceed – both before and after it is referred to the EDC.
- 2.112** Chapter 5 also sets out two proposed amended processes: one for the settlement of enforcement cases; and one for the disclosure of underlying evidence during the course of enforcement proceedings.

Comments received, our response and position

- 2.113** We received comments relating to our proposals for updating our settlement and disclosure processes, as well as our more detailed explanation of the EDC process. All respondents were supportive of our approach, which seeks to provide stakeholders with better information about the operation of our enforcement function and our decision-making procedure.
- 2.114** The issues raised and our replies are summarised in the following table, and explained in more detail below.

Comment	Reply
Request that we provide more information on what is required as part of the settlement process.	More information added on the content of settlement agreements.
Request to ensure 'a clear and comprehensive explanation as to why cases are placed in the hands of the EDC is provided to ensure that parties' responses should be comprehensive'.	No changes to the text of the PPG required.

Comment	Reply
Suggestion that consideration is given as to whether the PSR is bound under a duty of candour to disclose confidential information.	Clarification that our obligations, in the context of regulatory proceedings, are to disclose any supportive and undermining evidence in the possession of the enforcement team: subject to our statutory duties of confidentiality (primarily towards third parties), Legal Professional Privilege and public interest; and after giving due consideration to what is required to achieve fairness for the party subject to enforcement action.
Suggestion that correspondence between EDC colleagues could be disclosed during regulatory proceedings.	Clarified in this response that such correspondence is not disclosable during regulatory proceedings.

Settlement

- 2.115** While there was general agreement about our approach to revising our settlement processes, Lloyds asked whether we could provide more information to help regulated parties understand what would be required as part of the process.

[Lloyds] recognises that the settlement procedure set out in Section 5.32 now more closely mirrors the guidance set out by the FCA, which helpfully provides additional clarity. However, we consider that the PSR could go further to mirror the FCA guidance, which we find to be more detailed. For example, the FCA guidance sets out what may be included as part of the agreement made between the regulator and the organisation concerned.

- 2.116** We agreed with Lloyds that more additional, helpful information on the content of settlement agreements could be added to this section; the final version of the PPG has now been updated to reflect this (now paragraphs 5.44 and 5.45). After reviewing the section further, we also concluded that the paragraphs dealing with partial settlements and other aspects of the settlement process, including where they interact with the EDC process, could be expressed more clearly. We have made changes to the text accordingly (now paragraphs 5.36, 5.41 to 5.42, 5.46 to 5.48, 5.51, 5.54, 5.65 and 5.70 to 5.72).

EDC process

- 2.117** Lloyds also commented on our explanation of the EDC process, saying ‘it is important that a clear and comprehensive explanation as to why cases are placed in the hands of the EDC is provided to ensure that parties’ responses should be comprehensive. If engagement is open and transparent from the outset, it will avoid the necessity to provide additional material to the EDC as set out in section 5.89.
- 2.118** We agree with Lloyds that when a matter is either being considered for or placed before the EDC, the case for doing so should be clear in both, any communications that we have with the party regarding our preliminary findings, and any Warning Notice

issued by the EDC. We likewise agree that, in most cases, it should be unnecessary for a regulated party to introduce new information at a later stage of proceedings. This comment does not require any amendment to be made to the PPG.

Disclosure

- 2.119** In relation to our plans for introducing a more transparent disclosure regime, one consultee commented:

In 5.78-5.83 of the new PPG, the PSR confirms its intent to issue a warning notice to the regulated party under enforcement action to allow the parties to make representations on the enforcement action being proposed. This provision aims to ensure that Panel members, EDC and Regulated parties will receive relevant material when under enforcement subject to considerations of confidentiality under section 91 of FSBRA, legal privilege and PII. Again, this is a sensible change ... This will align with the approach of other regulatory bodies.

- 2.120** They also went on to explore the underlying features of the regime in more detail.

In 5.102 of the new PPG, the PSR confirms it will consider whether fairness requires the PSR to disclose any other relevant evidence to recipients including any evidence that we consider may undermine recommendations to the ERC. While supportive of the intention to share information on a fairer basis, we would suggest that consideration is given as to whether the PSR is bound under a duty of candour to disclose confidential information.

- 2.121** We clarify here that, as stated in the final PPG, we will always give due consideration to what is required to achieve fairness for the party subject to enforcement action. However, the disclosure requirements in regulatory proceedings are not the same as the requirements applicable to Judicial Review proceedings, which are the only legal proceedings within which the concept of ‘the duty of candour’ applies, when carrying out a disclosure exercise.¹⁰

- 2.122** In light of this comment, we reconsidered whether any of the language used in this section of the PPG may be liable to cause confusion for regulated parties as to the type of disclosure regime applicable to regulatory proceedings. We concluded that it would help stakeholders to better understand the scope and nature of our disclosure obligations if we were to amend the wording in paragraphs 5.106 to 5.110.

- 2.123** As a result of these changes, the final PPG explains more clearly that our obligations in the context of regulatory proceedings are to disclose any supportive and undermining evidence in the possession of the PSR’s enforcement team: subject to our statutory duties of confidentiality (primarily towards third parties), LPP and public interest; and after giving due consideration to what is required to achieve fairness for the party subject to enforcement action.

¹⁰ For an explanation of the duty of candour, please see Guidance on discharging the duty of candour in judicial review proceedings (January 2010, Treasury Solicitor and The Administrative Court, Judicial Review Guide (July 2017, Administrative Court Office).

- 2.124** One final comment received from Lloyds referred to one specific type of material that they thought might be disclosable in EDC proceedings.

We welcome the additional guidance on the Enforcement Decisions Committee set out from section 5.62. We consider that correspondence between EDC colleagues could be key to the party being investigated as part of their right of defence as it is likely to show the thinking and decision-making of EDC.

- 2.125** There appears, however, to have been a misunderstanding as to whether or not the new disclosure framework within the version of the PPG consulted on allowed for disclosure of this material. Correspondence between EDC panel members is not disclosable to the parties to regulatory proceedings, this type of disclosure was not envisaged in the consultation and nothing in the revised PPG suggested that it was.

- 2.126** In light of this comment, we reviewed this section of the PPG again to ensure that we have been as clear as possible as to what is and is not disclosable to regulated parties. As a result, we have made one further amendment to the final PPG text (now paragraph 5.78). This clarifies that advice provided to the EDC by external persons (particularly legal advice) is treated the same as advice provided by internal persons.

Other changes made

- 2.127** After considering all of the comments received from stakeholders during the consultation period, we have made the following additional clarifications to the text of the PPG.

- 2.128** Firstly, we have given more information as to how the EDC panels make decisions (now paragraph 5.75). We set out that the EDC will not indicate whether decisions were reached unanimously or by majority; and that the Chair will have the casting vote in the event of a tie.

- 2.129** Secondly, we have explained (now paragraph 5.84) that while section 74 of FSBRA requires us to issue a Warning Notice whenever we propose to impose a sanction as a consequence of a finding of a compliance failure, it does not require us to do the same in circumstances where we propose a finding of a compliance failure without also making a recommendation of a sanction.¹¹ Nonetheless, we have chosen to continue to follow the same procedure in both scenarios, and will ask the EDC to issue a Warning Notice in every case where we propose that a finding of a compliance failure is made. This is to ensure that all of our enforcement decision-making processes are open, transparent and consistent.

- 2.130** Thirdly, we have provided more detail as to how the EDC interacts with the enforcement case team during decision-making proceedings where a party under investigation choose not to make oral representations. We clarify (now paragraph 5.100) that in these circumstances the EDC may still invite the case team to attend its decision-making meeting and request oral submissions from the team. We also clarify how we will record such meetings and invite the party's comments on that record, where appropriate.

¹¹ Once we have issued a Warning Notice, then section 74 of FSBRA requires us to issue a Decision Notice whether or not a sanction is actually imposed (see paragraph 5.114 of the final PPG).

- 2.131** Fourthly, we have clarified that if the EDC wishes to seek further evidence during the course of enforcement proceedings, it will request that the enforcement case team issues an IRN rather than issuing one itself (now paragraph 5.104).
- 2.132** Finally, we clarify that once a finding of non-compliance has been made, whether or not a sanction has been imposed on the party subject to that finding, we are able to take regulatory action by way of making a direction (general or specific) to remedy the failure and prevent its continuance where appropriate (now paragraph 5.117). Additionally, we can use our injunctive powers to ensure the rectification of a compliance failure (now paragraph 5.125).

IFR guidance

Background

- 2.133** We explained in the consultation document that if we adopted any proposed revisions to the PPG, we would also need to update Chapter 7 of our guidance on the IFR. Our IFR monitoring and enforcement powers, as set out in the Payment Card Interchange Fee Regulations 2015 (PCIFRs)¹² replicate some provisions of FSBRA for IFR purposes. They also apply (or apply with modification) other provisions of FSBRA to our IFR function. This effectively allows us to use a number of our FSBRA powers in relation to any person on whom an obligation or prohibition is imposed by any provision of the IFR ('regulated persons').
- 2.134** As a result, Chapter 7 of our IFR guidance mostly mirrors the existing PPG. There are significant advantages in applying the same procedures to the use of our FSBRA power in different contexts (as far as it is appropriate and practical to do so).
- 2.135** We have therefore reflected on all the comments received as a result of the consultation when finalising both the PPG and the IFR guidance.

Comments received, our response and position

- 2.136** The majority of stakeholders did not comment specifically on the revised IFR guidance published as part of the consultation. Those who did were supportive of our amendments.
- 2.137** One consultee commented, for example:
- This change confirms that complaints and disputes received under IFR will now be addressed under the complaints handling process rather than a separate application process to resolve disputes that existed in the previous PPG. Bringing into the general PPG complaints handling process and removing the 'application process' seems appropriate on the rationale provided that a dispute would always be received on the back of a complaint. As long as that is the case, and that a dispute can't be logged without a complaint being received, we are supportive of this change.*
- 2.138** No changes were made to the revised IFR guidance as a result of the consultation responses received, other than those to align it with the final version of the PPG.

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Other changes made

- 2.139** On reviewing the updated IFR guidance against the final version of the PPG, we considered that one area where more useful detail could be given was in relation to how and when we may use directions under the PCIFRs. Consequently, we have now expanded this section of the IFR guidance to give more information in on our powers to make directions, and the factors we might take into account when we exercise these (now paragraphs 7.104 to 7.109).

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