

# PS 11/3

Financial Services Authority

## Decision Procedure and Penalties manual and Enforcement Guide review



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This Policy Statement reports on the main issues arising from Consultation Paper 10/23: *Decision Procedure and Penalties manual and Enforcement Guide review 2010*. It publishes final amendments to the *Glossary*, the *General Provisions* module, the *Decision Procedure and Penalties* manual and the *Enforcement Guide*.

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# Acronyms used in this paper

<b>CBA</b>	Cost benefit analysis
<b>CTA</b>	Counter Terrorism Act 2008
<b>DEPP</b>	Decision Procedure and Penalties manual
<b>EG</b>	Enforcement Guide
<b>FSMA</b>	Financial Services and Markets Act 2000
<b>FSMT</b>	Financial Services and Markets Tribunal
<b>GEN</b>	General Provisions module
<b>IMA</b>	Investment Management Association
<b>PS</b>	Policy Statement
<b>RDC</b>	Regulatory Decisions Committee



# 1

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## Overview

### Introduction

- 1.1 In this Policy Statement (PS) we respond to comments received on Consultation Paper 10/23 (CP10/23): *Decision Procedure and Penalties manual and Enforcement Guide review 2010* and publish amendments to the text of the *Glossary*, the *General Provisions* module (GEN), the *Decision Procedure and Penalties* manual (DEPP) and the *Enforcement Guide* (EG).
- 1.2 We received 11 responses to CP10/23. A list of the respondents is included in Annex 1. We are grateful to all respondents for taking the time to share their views with us. We have carefully considered the comments made and have amended our proposals where appropriate as a result.

### Main feedback

- 1.3 CP10/23 contained five main proposals:
- To impose a new rule in GEN that an authorised firm, except a sole trader, must not pay a financial penalty imposed on a present or former employee, director or partner of the firm or an affiliated company.
  - To include in EG our policy for publishing decision notices. This followed an amendment made by the Financial Services Act 2010 to section 391 of the Financial Services and Markets Act 2000 (FSMA) to allow us to publish decision notices. Our proposed approach was that we would only publish a decision notice if a person decided to refer the matter to the Upper Tribunal, unless we considered there to be a compelling reason to publish before the person had decided whether to refer.
  - To amend our policy for reviewing whether published notices and related press releases should remain published on our website. Our existing policy states that we will review published notices and related press releases that are published on our website after

six years. Our proposed new approach was that we would only carry out a review on request, with the expectation that we will usually conclude that notices and related press releases that have been published for less than six years should not be removed from our website.

- To apply the settlement discount scheme to the length of suspension periods.
- To adopt a penalties policy and decision maker for using our enforcement powers under the Cross-Border Payments in Euro Regulations 2010 (the ‘Cross-Border Regulations’).

- 1.4 The CP also contained other proposals for amending DEPP, EG and the Glossary.
- 1.5 Most of the comments we received focused on our proposed approach to publishing decision notices. Respondents mostly disagreed with our proposal. They thought that in most cases publication would not be justified because the potential harm caused to a person’s reputation by publishing a decision notice would exceed the potential benefits. They therefore suggested that we should instead only publish decision notices in exceptional cases – for example, if there is a specific need at that time for consumers or the market to be aware of our decision.
- 1.6 The amendments made by Parliament to section 391 of FSMA give us the discretion to publish every decision notice, provided we consider that publication would be appropriate and would not be unfair to the person for whom the action was taken or prejudicial to the interests of consumers. We consider that our proposed approach accords with Parliament’s intention that there should be greater transparency about our concerns and we believe that the benefits from publication will usually exceed any potential detriment. We have therefore decided to broadly adopt our proposed approach.
- 1.7 Several respondents also disagreed with our proposed approach to reviewing published notices and related press releases, preferring our existing policy. Reasons for this included a belief that we should manage our own records and concern that it would make it harder for firms and consumers to find relevant information. We disagree with the objections raised and have decided to adopt our proposed approach. However, we have taken up a suggestion made by one respondent and have included some guidance on the criteria that we will use to determine if continued publication is appropriate.
- 1.8 We are also proceeding with all the other changes we proposed although, in response to feedback, we have made some minor amendments to the proposed new rule preventing a firm from paying a financial penalty imposed on an employee.



## Structure of this PS

- 1.9 The remainder of this PS is set out as follows:
- Chapter 2 summarises the responses we received to CP10/23 and outlines how we have addressed the issues raised.
  - Annex 1 lists the non-confidential responses we received to CP10/23.
  - Appendix 1 contains the final text of the amendments we are making to the Glossary, GEN, DEPP and EG.

## Next steps

- 1.10 The amendments contained in Appendix 1 to this PS will come into effect on 6 March 2011.

## Who should read this PS?

- 1.11 This PS will be of general interest as it gives guidance on aspects of our use of enforcement action as a regulatory tool. It will be particularly relevant to both the regulated community and to those unregulated persons against whom we may use our enforcement powers.

### CONSUMERS

This PS will not directly affect consumers, although its contents may be of interest to consumers and consumer groups to the extent that they benefit from, and so may wish to know about, our approach to enforcement.

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# 2

## Responses received to CP10/23

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### Introduction

- 2.1 This chapter summarises the responses we received to CP10/23 and explains how we have addressed respondents' comments.

### New rule preventing firms from paying employees' fines

- 2.2 We proposed to introduce in GEN a new rule that an authorised firm, except a sole trader, must not pay a financial penalty imposed on a present or former employee, partner or director of the firm or an affiliated company.

- 2.3 We asked:

*Q1: Do you have any comments on our proposed new rule preventing firms (except sole traders) from paying financial penalties imposed on a present or former employee, partner or director of the firm or an affiliated company?*

- 2.4 The majority of respondents agreed with our proposal, although some had concerns. One respondent thought there should not be a restriction on authorised firms paying financial penalties imposed on an affiliated company. Another respondent asked for clarification that the rule is not intended to prevent firms from indemnifying employees in relation to the costs of defending an investigation. They also commented that our proposal did not address transitional issues; for example, how firms should deal with existing contractual obligations owed to present or former employees or directors. Another respondent thought we should

not prevent a firm from paying an individual's financial penalty where the individual was reasonably acting in accordance with their firm's practices. Another respondent thought the amount an individual should pay should be proportionate to their resources, and suggested that penalties imposed on individuals should be based on their net earnings, rather than their gross earnings.

### Our response

In light of the responses we have decided to adopt the rule, although we have made a couple of amendments to it.

The rule is not intended to prevent authorised firms from paying financial penalties imposed on an affiliated company. Rather, authorised firms should not pay financial penalties imposed on an employee of an affiliated company. We have made a minor amendment to the rule to make this clear.

We have moved the rule to GEN 6.1.4A R and have referred to the rule in GEN 6.1.7 to make it clear that it does not prevent firms from indemnifying employees in relation to the costs of defending an FSA enforcement action.

We do not consider there are any transitional issues that we need to address. The rule will take effect from 6 March 2011. It is for firms to decide how to deal with any existing contractual obligations, although the potential existence of such provisions supports our view that this new rule is needed.

The fact that an individual was acting in accordance with the firm's practices may be relevant to our decision on whether to take action and, if so, the level of sanction we would impose; it is not relevant to the appropriateness of this rule.

Our penalties policy is beyond the scope of this consultation. The reason why we decided that the level of financial penalties imposed on individuals should be based on gross income is explained in PS10/4: *Enforcement financial penalties*.

## Publishing decision notices

- 2.5 The Financial Services Act 2010 amended section 391 of FSMA so that we are required to 'publish such information about the matter to which a *decision notice* or final notice relates as it considers appropriate' (section 391(4)). The revised section 391 also prevents a recipient of a decision notice from publishing the notice or any details concerning it unless we have published the notice or those details (section 391(1A)). These changes came into force on 12 October 2010 and apply in cases where a warning notice was given on or after 12 October 2010.

2.6 We consulted on the approach we should take to publishing decision notices. Our proposed approach was that we would generally only publish a decision notice if a person decided to refer a matter to the Upper Tribunal, unless we considered there to be a compelling reason to publish a decision notice before the person had decided whether to refer. If a person decided not to refer a matter to the Upper Tribunal, we would generally only publish a final notice.

*Q2: Do you have any comments on our proposed approach to publishing decision notices?*

2.7 Although some respondents understood why we wished to adopt our proposed approach, respondents generally disagreed with it. Some respondents considered that it meant we would automatically publish a decision notice if a person referred a matter to the Upper Tribunal, and that we would not consider on a case-by-case basis whether publication was appropriate. They believed that our proposed approach disregards section 391(4) of FSMA, which states that we must publish such information about a matter as we consider appropriate, and section 391(6) of FSMA, which states that we may not publish information that we consider would be unfair to the person with respect to whom the action was taken or prejudicial to the interests of consumers. One respondent thought our proposal was inconsistent with the underlying policy reason for the change to section 391, which they believed was to be able to protect consumers in specific cases, rather than to be able to ordinarily publish decision notices. Another respondent thought that a policy of automatically publishing decision notices went beyond our powers and could be challenged in the courts.

2.8 Many respondents thought that in most cases publication would not be justified because the harm caused to a person's reputation by publishing a decision notice would exceed the consumer protection benefits. Some respondents commented that, as our approach could cause reputational damage, we were incorrect to state in the CP that our proposed approach imposes no costs on firms. Another respondent argued that our proposed approach did not balance the interests of consumers and a person's right not to be publicly accused of wrongdoing before they have had the opportunity to defend themselves, and thought that the Financial Services Bill Committee Report identified the need for such a balance.

2.9 Some respondents proposed that, where the Upper Tribunal does not uphold an FSA decision, we should indemnify the person for any detriment suffered as a result of the publication of the decision, while other respondents thought that in this situation we should be obliged to issue a statement rectifying any adverse publicity. One respondent thought that our proposed approach could give rise to defamation proceedings against the FSA. They also thought that consumers could suffer loss if they take financial decisions on the basis of a decision notice that is later overturned. They stated that consumers currently would have no recourse to bring a claim against the FSA to recover their loss, unless, in accordance with paragraph 19(3) of Schedule 1 of FSMA, they can show that the FSA acted in bad faith or contrary to section 6(1) of the Human Rights Act 1998. They proposed that FSMA should be amended to be fairer to consumers and subjects of decision notices in these situations.

- 2.10** Some respondents appreciated that the Upper Tribunal should not be used as a means to delay public knowledge of our action, but were concerned that the proposed policy may deter referral of appropriate cases to the Upper Tribunal and that this could be an incentive for us to publish. One respondent therefore thought that our decision to publish should be completely independent of a person's decision to refer the matter to the Upper Tribunal. Other respondents also believed that a successful referral to the Upper Tribunal following publication of a decision notice could undermine confidence in the FSA. One respondent thought that the publication of a decision notice could be equivalent to the FSA prejudging the outcome of the Upper Tribunal's hearing and may also damage public confidence in the Upper Tribunal. They claimed that the FSA, rather than the person under investigation, often causes delays in the Upper Tribunal's processes. They also thought that both the amendments to section 391 of FSMA and the publication of a decision notice before there has been an independent third-party review of the decision could breach human rights legislation.
- 2.11** One respondent thought we should only publish a decision notice before a person had decided whether to make a referral to the Upper Tribunal in exceptional circumstances and asked for guidance on what would constitute a compelling reason for early publication. Another respondent asked why we believed it was appropriate to normally publish a press release alongside a decision notice or final notice. They also thought our policy should take account of the different natures of decision notices and final notices, and also whether it may be appropriate to publish different information in different contexts. For example, they thought that in cases relating to authorisations or approvals it may be appropriate to publish brief details about a case rather than a decision notice.
- 2.12** One respondent said they could not think of any cases where consumer protection may have benefited from early publication of a decision notice. They thought that, except in relation to unauthorised activities, there is no need for early publication of our action against an individual because an individual would need to be associated with an FSA-authorized firm to perform any function in relation to regulated activities in the UK. They also thought that, where we have consumer protection concerns with an authorised firm, we should issue a supervisory notice rather than a decision notice, and argued that the firm should be permitted to refer the supervisory notice to the Upper Tribunal on an expedited basis. They also thought that, unless there was an exceptional risk of immediate harm to consumers, early publication would breach our obligation under section 2(3)(c) of FSMA to impose a burden or restriction on a person that is proportionate to the benefits expected to result from the imposition of that burden or restriction.
- 2.13** Some respondents suggested alternative approaches. These were that we should publish the decision notice on a case-by-case basis and that we should only do so:
- once the Upper Tribunal has made its decision;
  - in exceptional cases involving significant harm to consumers;
  - if there is a specific need at that time for consumers or the market to understand our decision;

- if there are compelling reasons to do so, perhaps to be determined by the Regulatory Decisions Committee (RDC); or
- if consumers need to be put on notice of ongoing unauthorised regulated activities.

2.14 One respondent thought we should notify the subject and third parties of our intention to publish a decision notice and give them a reasonable opportunity to object to publication.

### **Our response**

The amendments made by Parliament to section 391 of FSMA give us the discretion to publish every decision notice, provided we act in accordance with sections 391(4) and 391(6) of FSMA. We consider that our proposed approach accords with Parliament's intention that there should be greater transparency about the FSA's concerns. We therefore do not think it is appropriate to adopt a policy that would mean we would only publish a decision notice in exceptional cases.

Instead, we have decided to broadly adopt the approach we consulted on. We consider this approach to be consistent with sections 391(4) and 391(6) of FSMA, as we already make it clear in EG 6.7 and EG 6.9 that we will only publish appropriate information about a matter and that we will not publish if it would be unfair to do so. Nevertheless, we have amended our proposed approach to clarify that we will decide on a case-by-case basis whether to publish information about the matter to which a decision notice relates. In making this decision, we will consider whether publication is proportionate and the type of information it is appropriate to publish. Our expectation, however, is that we will normally publish a decision notice if the subject of enforcement action decides to refer the matter to the Upper Tribunal. As decisions relating to the publication of a statutory notice are not 'statutory notice associated decisions', as made clear in the new DEPP 1.2.6A G (see paragraph 2.38 below), the decision whether to publish will be taken by the Enforcement & Financial Crime Division, not by the RDC.

Our policy also allows for discretion to publish a decision notice before a person has decided whether to make a referral if there is a compelling reason to do so. We consider it necessary to have this option as there may be circumstances where we believe we need to make public the action we have taken as soon as possible. Situations where we may do this include where we consider it necessary for market confidence reasons or to allow consumers to avoid any potential harm arising from a firm's actions.

In CP10/23 we explained that we did not carry out a separate cost benefit analysis (CBA) because we did not expect our proposals to impose any costs or costs of greater than minimal significance. While we accept that our approach to publishing decision notices has the potential to impose reputational costs on firms and individuals, our assessment has not changed. While there may be potential

reputational costs in individual cases where the Upper Tribunal upholds a referral following publication of a decision notice, the overall proportion of FSA enforcement decisions that are overturned by the Upper Tribunal is small, so the associated costs are of minimal significance. Between 1 April 2007 and 31 March 2010, the Financial Services and Markets Tribunal (FSMT) made 24 decisions and only found in favour of the applicant on four occasions (and one of these decisions was subsequently overturned by the Court of Appeal).<sup>1</sup> Since the Upper Tribunal replaced the FSMT in April 2010 it has made eight decisions in favour of the FSA and only one in favour of the applicant.<sup>2</sup> Further, many more enforcement decisions have been taken by the FSA that have not been referred to the Upper Tribunal.

Furthermore, any reputational costs in individual cases are likely to be outweighed by the overall benefits, including:

- we will get our message across to the market sooner, consistent with our enforcement strategy of credible deterrence;
- consumers will be able to act on the concerns we have raised at an earlier stage; and
- there will be more transparency about the decisions we make.

It is also because we think it is important to raise awareness of our actions that we normally publish a press release alongside a final notice or decision notice.

In proceeding with this policy, it is not our intention to deter persons from referring a matter to the Upper Tribunal, and we do not believe that our policy will have that effect. We accept there is a risk that, should a published decision notice be overturned by the Upper Tribunal, there could be some reputational damage to the FSA, but given the small proportion of FSA enforcement decisions that the Upper Tribunal overturns, this is also likely to be a cost of minimal significance. Specifically, we consider the benefits to be gained from the transparency of our decision making outweigh this risk. We do not agree that early publication could affect the public's confidence in the Upper Tribunal. We also consider that the claim that the FSA often causes delays in the Upper Tribunal's processes is irrelevant to the matter under consideration, which is not concerned with whether there may be such delays, but rather with the fact that a referral to the Upper Tribunal necessarily results in a delay in the publication of the action we have taken.

We disagree with the claim that, except in relation to unauthorised activities, there is no need to publish a decision notice for an individual. This is because, if we decided to prohibit an individual working at an authorised firm, the prohibition would only come into effect after the individual has been given a final notice. We believe that our approach would have benefited consumers in the past, for example, because consumers would have been made aware at an earlier stage

<sup>1</sup> These statistics are taken from Enforcement's Annual Performance Account for the past three years: [www.fsa.gov.uk/pubs/annual/ar09\\_10/enforcement\\_report.pdf](http://www.fsa.gov.uk/pubs/annual/ar09_10/enforcement_report.pdf), [www.fsa.gov.uk/pubs/annual/ar08\\_09/Enforcement\\_report.pdf](http://www.fsa.gov.uk/pubs/annual/ar08_09/Enforcement_report.pdf) and [www.fsa.gov.uk/pubs/annual/ar07\\_08/Enforcement\\_report.pdf](http://www.fsa.gov.uk/pubs/annual/ar07_08/Enforcement_report.pdf)

<sup>2</sup> A summary of the decisions made by the Upper Tribunal can be found here: [www.tribunals.gov.uk/financeandtax/Decisions.htm#fs](http://www.tribunals.gov.uk/financeandtax/Decisions.htm#fs)



of our intention to prohibit a person on the grounds that they are not fit and proper. We also consider that publishing a decision notice is the most effective way of bringing the action we have taken to the attention of consumers.

Parliament has made no provision for us to indemnify a person for any detriment they suffer as a result of the publication of a decision notice which the Upper Tribunal later overturns, and so we do not intend to do so. The actions we will take should a person successfully refer a matter to the Upper Tribunal are explained in the section below on our approach to reviewing published notices.

We consider it is for Parliament to decide whether any changes should be made to FSMA relating to the ability for a person to bring a claim against the FSA. We also consider the exercising of the discretion given to us by section 391 of FSMA to determine when to publish a decision notice is not contrary to human rights legislation and that it is unlikely that our approach will give rise to defamation proceedings.

We have made one further amendment to our proposed approach. In accordance with a suggestion made by one respondent, we now include at EG 6.8A an explanation that, if we intend to publish a decision notice, we will give advance notice of our intention to the recipient of the decision notice and to any third party that receives a copy of the notice. Our policy also now states that we will consider any representations made, but we will normally not decide against publication solely because it is claimed that publication could have a negative impact on a person's reputation. In addition, the policy makes it clear that we will not decide against publication solely because a person asks for confidentiality when they refer a matter to the Upper Tribunal.

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## Review of published notices

- 2.15** Our current policy for reviewing whether final notices and related press releases should remain published on our website is set out in EG 6.10, which states: 'Publishing final notices is important to ensure the transparency of FSA decision-making; it informs the public and helps to maximise the deterrent effect of enforcement action. The FSA will review final notices and related press releases that are published on the FSA's web site after a period of six years. The FSA will determine at that time whether continued publication is appropriate, or whether notices and publicity should be removed or amended.' EG 6.12 contains similar wording for reviewing supervisory notices and related press releases.
- 2.16** We proposed to amend this policy so that we are no longer committed to automatically carrying out these reviews after six years. Our proposed revised approach was to only carry out a review on request, with the expectation that we will usually conclude that notices and related press releases that have been published for less than six years should not be removed from our website. On review, we could decide to retain, remove or amend the notice.



**2.17** We proposed that this approach would apply to all notices, including decision notices. We also proposed that in cases where we publish a decision notice relating to a person, but the person successfully refers the matter to the Upper Tribunal, we would make it clear on our website that the decision notice no longer applies. We stated that we would normally do this by publishing a notice of discontinuance.

*Q3: Do you have any comments on our proposed amendments to our approach to reviewing published notices and related press releases?*

**2.18** One respondent agreed with our proposed approach to carrying out reviews, but others believed we should not change our current approach. One respondent believed that our proposed approach would lead to more notices remaining published and so make it harder for firms and consumers to find relevant information, which in turn could reduce their deterrence value and reduce market confidence. Another respondent disagreed with our view that the current policy could give the misleading impression that a notice is likely to be removed after six years, and in fact thought that the new approach could give that impression. They also thought the new approach could result in an increased use of resources as we would have to explain the decision we had taken to the person making the request.

**2.19** One respondent thought we should manage our own records, rather than rely on third parties to contact us to delete information after six years. They also mentioned that, as personal data cannot be held without a time limit, the Information Commissioner may question the proposed approach if it is deemed that any published material contains personal data.

**2.20** One respondent suggested that, for transparency reasons, we should provide guidance on how firms should initiate a review and the criteria that we will use to determine if continued publication is appropriate or not. Another respondent asked in what circumstances we might conclude that we will remove a notice from our website before six years has elapsed.

**2.21** Although one respondent agreed with our proposal, most other respondents who commented thought that, in cases where we publish a decision notice and the subject of enforcement action successfully refers the matter to the Upper Tribunal, we should not only publish a notice of discontinuance, but also remove the decision notice from our website. They commented that we had not provided any justification for retaining the decision notice on our website. One respondent thought that, if the decision notice remains published, it should be overtly linked to the notice of discontinuance on the FSA website so it is clear the two notices are related. Another respondent thought there should be a mechanism by which the subject of enforcement action or a third party may make representations for the removal of the notice of discontinuance from the FSA website.

## Our response

After considering respondents' views we have decided to proceed with our proposed amendment to our approach and so will only carry out reviews on request, with the expectation that we will not remove notices that have been published for less than six years. We do not agree that this approach could reduce the deterrence value of our published notices; we think it more likely that the removal of published notices could hinder deterrence. We also think this approach makes it clear that we will consider at the time we receive the request whether it is appropriate to remove a published notice, and we believe it does not give the impression that we are likely to remove a notice after six years, although that scenario is more likely than if a notice had been published for less than six years. We also consider that this new approach is unlikely to result in an increased use of resources, as we expect we would carry out fewer reviews than we currently do and we already receive requests to remove a notice under our current approach.

We consider that the comments regarding the management of our records, and the possible questioning by the Information Commissioner of our approach, concern our record-keeping policy. They therefore do not address the issue under consideration, which is the approach we should take to decide whether notices should remain published.

We do not consider it necessary to include guidance on how a person may initiate a review; if a person wishes to do so, they can write to our Enforcement & Financial Crime Division and explain why they believe the notice should be removed. However, we have taken up the suggestion that, for transparency reasons, we should set out the criteria that we will use to determine if continued publication is appropriate. The criteria are based on the approach we have used internally in the past in determining whether or not a notice should be removed and can be found in a new EG 6.10A. It explains that we will consider all relevant factors; for example, whether continued publication is necessary for deterrence, consumer protection or market confidence reasons, and any representations made by the person on the continuing impact on them of the publication. We also state that we expect to usually conclude that notices and related press releases relating to prohibition orders that are still applicable should not be removed from the website. We will have regard to these criteria whenever we receive a request to review the continued publication of a notice, including where a notice has been published for less than six years.

We have also decided that, in cases where we publish a decision notice and the subject of enforcement action successfully refers the matter to the Upper Tribunal, we will adopt our proposed approach, which is now included at EG 6.10B. This means we will publish a discontinuation notice, but we will not also remove the decision notice. We consider that retaining published decision notices on our website is important for transparency reasons. However, we appreciate that the

link between a decision notice and the Upper Tribunal's decision needs to be made clear, and we will take steps to ensure this is the case. If a person believes we should remove the decision notice and the discontinuation notice then they should write to us setting out their reasons.

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## Suspensions and the settlement discount scheme

- 2.22 We operate a settlement discount scheme in cases involving financial penalties. This scheme is set out in DEPP 6.7 and provides that a person will receive a discount of up to 30% for settling, with the applicable percentage discount dependant on the stage at which they settle.
- 2.23 The Financial Services Act 2010 gave us a new power to impose suspensions or restrictions on authorised persons, under section 206A of FSMA, and on approved persons, under section 66 of FSMA (the 'suspension power'). We can impose a suspension<sup>3</sup> on an authorised person for a period not exceeding 12 months and on an approved person for a period not exceeding two years.
- 2.24 We proposed to apply the settlement discount scheme to the length of periods of suspension.

*Q4: Do you have any comments on our proposal to apply the settlement discount scheme to the period of suspension?*

- 2.25 Most respondents agreed with this proposal, although one respondent pointed out that it is unlikely to make much difference to a firm's decision to settle as the possibility of suspension at all will be the crucial factor. They were also concerned that the proposal could put individuals in a difficult position. They thought it could be difficult for an individual to judge the severity of a proposed suspension, that an individual may not have the necessary information to make a sensible decision, and that any suspension could have a large effect on an individual's career prospects. They therefore urged us to take care when agreeing a suspension with an individual and thought there may need to be further controls around this process. Another respondent had similar concerns, believing that poor decisions to settle may result from a person's wish to avoid the potential costs that could be incurred if they unsuccessfully referred the matter to the Upper Tribunal.
- 2.26 One respondent commented that a reduction in a financial penalty is not far removed from a financial inducement. Another respondent questioned how our proposal would work, especially for lifetime suspensions. They thought that if a person is carrying out an activity that is inappropriate, the suspension should not be reduced, and if they have already stopped acting inappropriately then the suspension is not required.

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<sup>3</sup> For the purposes of this PS we will use the terms 'suspension/suspend' to cover both the power to suspend and the power to impose limitations or restrictions.

### Our response

We accept that in many cases the possibility of suspension at all may influence a firm's decision to settle. We are also aware that when we conduct settlement discussions with an individual, we need to take care to ensure we do not pressure them to settle, particularly where they are not legally represented. However, we believe it is better for both firms and individuals to have this option than not. We therefore have adopted our proposed approach.

The comment that a reduction in a financial penalty is not far removed from a financial inducement is relevant to the application of the settlement discount scheme to financial penalties, and is not relevant to this consultation. We introduced the settlement discount scheme following consultation. PS07/12, *Decision Procedure and Penalties Manual and the Enforcement Guide* explains why, following feedback, we thought it appropriate to introduce the scheme.

We consider that the comments on how our proposal would work misunderstand the suspension power. As we explain in DEPP 6A, the suspension power is a disciplinary measure, not a protective measure. It may therefore be appropriate to impose a suspension even if we consider a person does not pose a threat to consumers. A suspension is also limited in duration: section 206A of FSMA provides that we can impose a suspension on an authorised person for a period not exceeding 12 months, and section 66 of FSMA provides that we can impose a suspension on an approved person for a period not exceeding two years.

## Cross-Border Payments in Euro Regulations 2010

- 2.27 We are required under the Cross-Border Regulations to prepare and issue a statement of policy regarding both the imposition and amount of penalties and also our procedure for giving warning notices and decision notices under the Cross-Border Regulations. We proposed to apply our penalties policy set out in DEPP Chapter 6 when imposing a penalty under the Cross-Border Regulations. We also proposed that the Regulatory Decisions Committee (RDC) should be the decision maker, and proposed to amend DEPP 2 Annex 1 to make this clear. We also proposed to include new paragraphs in EG Chapter 19 to explain the powers we have under the Cross-Border Regulations and our approach to using them, which we proposed should mirror our approach to using our enforcement powers given to us by FSMA.

*Q5: Do you have any comments on our proposed approach for our powers under the Cross-Border Regulations?*

- 2.28 All respondents who commented agreed with our proposed approach.

### Our response

We are proceeding with our proposed approach.

## Other proposed amendments to DEPP and EG

**2.29** We proposed a number of other amendments to DEPP and EG, which we grouped in the following categories:

- The adoption of a decision maker for giving statutory notices under various parts of FSMA.
- The description of the new enforcement powers we have been given under legislation other than FSMA.
- Other proposed amendments to DEPP, EG and the Glossary.

### Decision maker for giving statutory notices

**2.30** We proposed to amend DEPP 2 Annex 1 to set out who will make the decisions to issue warning notices and decision notices under parts of FSMA that have recently been amended or that were previously mistakenly omitted from the Annex. We proposed the following decision makers:

- The RDC would make decisions for giving a warning notice and a decision notice under sections 89K(2)/(3) and 256(4)/(5) of FSMA.
- FSA staff under executive procedures would make decisions for the giving of warning notices and decision notices under Part 18A of FSMA (sections 313A – 313D of FSMA).

**2.31** We proposed to make amendments to clarify the table of decision makers in respect of the Payment Services Regulations 2009, also set out in DEPP 2 Annex 1.

**2.32** We proposed to amend DEPP 2 Annex 2 to set out who will make the decisions to give supervisory notices under parts of FSMA that have recently been amended. We proposed that FSA staff under executive procedures would make decisions for giving supervisory notices under sections 78A(2)/(8)(b), 191B(1) and 301J(1) of FSMA.

**2.33** We also proposed to include a new paragraph in DEPP, DEPP 2.5.7A G, to explain that FSA staff under executive procedures, rather than the RDC, will take decisions to give a supervisory notice for a firm that agrees not to contest our exercise of our own initiative power.

*Q6: Do you have any comments on the decision makers we are proposing for the giving of these statutory notices?*

- 2.34 We only received one comment, which concerned our proposed new DEPP 2.5.7A G. The respondent thought it was unclear how savings in time and cost would be made.

#### **Our response**

This proposal will lead to savings in time and cost because decisions made by FSA staff under executive procedures are quicker and less resource intensive than decisions made by the RDC.

We have therefore decided to proceed with the proposed amendments.

### **Our enforcement powers under legislation other than FSMA**

- 2.35 We proposed to include in EG Chapter 19 a description of our powers, and our approach to using those powers, under the Counter Terrorism Act 2008 (CTA) and the Insurance Accounts Directive (Lloyd's Syndicate and Aggregate Accounts) Regulations 2008 (the 'Lloyd's Regulations').

*Q7: Do you have any comments on our proposed descriptions of our powers under the CTA and the Lloyd's Regulations?*

- 2.36 We received no comments on our proposals.

#### **Our response**

We are proceeding with our proposed amendments to EG chapter 19. We have also made a consequential change to EG 19.84, which relates to our approach to carrying out enforcement under the Money Laundering Regulations 2007, to reflect our approach to publishing decision notices.

### **Other proposed amendments to DEPP, EG and the Glossary**

- 2.37 We proposed to make other amendments to DEPP, EG and the Glossary, in order either to update our existing policies to ensure they are consistent with recent amendments to FSMA or other legal developments, or to clarify our enforcement policy.

### **Proposed amendments to DEPP**

- 2.38 We proposed to make the following additional changes to DEPP:
- To include a new paragraph, DEPP 1.2.6A G, to clarify that statutory notice associated decisions do not include decisions relating to publishing a statutory notice.

- To amend DEPP 4.2.1 G and DEPP 5.1.1 G(3) to clarify that decisions made by directors can also be made by ‘acting directors’. This also required an amendment to the definition of ‘settlement decision maker’ in the Glossary.
- To include a new paragraph, DEPP 6.5D.4A G, to amend our serious financial hardship policy regarding firms to make it clear that, where we are also withdrawing a firm’s authorisation, we will have regard to the effect this will have on the firm’s ability to pay the financial penalty.

### **Proposed amendments to EG**

**2.39** We proposed to make the following additional changes to EG:

- To amend paragraphs 2.1, 6.20, 7.1, 11.3(10) of EG and paragraph 1.1 of the Appendix to EG to reflect the following amendments to our regulatory objectives: the addition of ‘financial stability’ and the deletion of ‘public awareness’.
- To amend EG 7.4 to include a reference to our policy for the imposition of financial penalties for the late submission of reports, set out in DEPP 6.6.
- To amend EG 8.1 to state that we can use our powers under section 45 of FSMA to vary or cancel an authorised person’s Part IV permission if it is desirable to do so to meet any of our statutory objectives.
- To delete the last sentence of EG 8.17, which provides that an example of a situation where we may decide not to cancel a firm’s Part IV permission (which would consequently require us to withdraw their authorisation) is where we propose to impose a financial penalty on the firm under section 206 of FSMA.
- To amend the explanation in EG 12.1 regarding our ability to prosecute criminal offences. We proposed to state that we may prosecute criminal offences where to do so would be consistent with meeting any of our statutory objectives.
- To mention in EG 12.11, which explains how we liaise with other prosecuting authorities in relation to prosecuting criminal offences, that we are a signatory to the Prosecutors’ Convention and the Investigators’ Convention.
- To amend EG 19.73 to include a reference to SYSC 6.1.1, so the financial crime requirements under SYSC for common platform firms are mentioned.
- To amend paragraph 1.4 of the Appendix to EG to mention that we have the power to impose penalties on persons that perform controlled functions without approval under section 63 of FSMA.

### Proposed amendment to the Glossary

- 2.40 We also proposed to amend the definition of ‘Tribunal’ in the Glossary of definitions, and to delete the definition of ‘Financial Services and Markets Tribunal’, to reflect the fact that, from 6 April 2010, the Upper Tribunal replaced the Financial Services and Markets Tribunal.

*Q8: Do you have any comments on the other amendments we are proposing to make to DEPP, EG and the Glossary?*

- 2.41 We received no comments on our proposals.

#### **Our response**

We are proceeding with all these proposed amendments, but have provided a more detailed definition of ‘Tribunal’.

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## Annex 1

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# List of respondents to CP10/23

Allen & Overy LLP

AXA UK

BBA

City of London Law Society Regulatory Committee

Investment Management Association (IMA)

Kingsley Napley

Lloyd's

LV= Liverpool Victoria

Withers LLP

Two respondents asked for their response to remain confidential.



## Appendix 1

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# Final instrument: Decision Procedure and Penalties Manual and Enforcement Guide (Review) 2011

**DECISION PROCEDURE AND PENALTIES MANUAL AND ENFORCEMENT  
GUIDE (AMENDMENT NO 2) INSTRUMENT 2011**

**Powers exercised**

- A. The Financial Services Authority makes this instrument in the exercise of the following powers and related provisions in or under:
- (1) the following sections of the Financial Services and Markets Act 2000 (“the Act”):
- (a) section 69(1) (Statement of policy) as applied by paragraph 1 of the Schedule to the Cross-Border Payment in Euro Regulations 2010 (SI 2010/89) (“the Regulations”);
  - (b) section 138 (General rule-making power);
  - (c) section 157(1) (Guidance);
  - (d) section 210(1) (Statements of policy) as applied by paragraph 3 of the Schedule to the Regulations; and
  - (e) section 395(5) (The Authority’s procedures) as applied by paragraph 5 of the Schedule to the Regulations, and by paragraph 7 of Schedule 5 to the Payment Services Regulations 2009 (SI 2009/209); and
- (2) regulation 14 (Guidance) of the Regulations.
- B. The rule-making power listed above is specified for the purpose of section 153(2) (Rule-making instruments) of the Act.

**Commencement**

- C. This instrument comes into force on 6 March 2011.

**Amendments to the Handbook**

- D. The modules of the FSA’s Handbook of rules and guidance listed in column (1) below are amended in accordance with the Annexes to this instrument listed in column (2).

(1)	(2)
Glossary of definitions	Annex A
General Provisions (GEN)	Annex B
Decision Procedure and Penalties manual (DEPP)	Annex C

**Amendments to the Enforcement Guide**

- E. The Enforcement Guide (EG) is amended in accordance with Annex D to this instrument.

**Citation**

- F. This instrument may be cited as the Decision Procedure and Penalties Manual and Enforcement Guide (Amendment No 2) Instrument 2011.

By order of the Board  
24 February 2011

## Annex A

### Amendments to the Glossary of definitions

In this Annex, underlining indicates new text and striking through indicates deleted text, unless otherwise stated.

Insert the following new definitions in the appropriate alphabetical position. The text is not underlined.

*Cross-Border Payments in Euro Regulations*      the Cross-Border Payments in Euro Regulations 2010 (SI 2010/89).

*EU Cross-Border Regulation*      Regulation (EC) No. 924/2009 of the European Parliament and of the Council on cross-border payments in the European Community.

Amend the following as shown.

*employee*      ...

(2) (for the purposes of:

...

(aa) *GEN 4* (Statutory status disclosure);

(ab) *GEN 6.1* (Payment of financial penalties);

...

*restriction notice*      a notice served under ~~section~~ sections 191B or 301J of the *Act*.

*settlement decision makers*      (in *DEPP* and *EG*) two members of the *FSA*'s executive of at least director of division level (which may include an acting director) with responsibility for deciding whether to give *statutory notices* in the circumstances described in *DEPP 5*.

*settlement discount scheme*      (in *DEPP* and *EG*) the scheme described in *DEPP 6.7* by which the financial penalty that might otherwise be payable, or the length of the period of suspension or restriction that might otherwise be imposed, in respect of a *person*'s misconduct or contravention may be reduced to reflect the timing of any settlement agreement.

*Tribunal*      the ~~*Financial Services and Markets Tribunal*~~ Upper Tribunal, namely the Tribunal established under section 3 of the Tribunals, Courts and Enforcement Act 2007, and to which the functions of the Financial Services and Markets Tribunal were transferred on 6 April 2010 by the Transfer of Tribunal Functions Order 2010.

Delete the following definition. The deleted text is not shown.

*Financial Services and Markets Tribunal*

## Annex B

### Amendments to the General Provisions sourcebook (GEN)

In this Annex, underlining indicates new text and striking through indicates deleted text.

#### 6.1 ~~Insurance against~~ Payment of financial penalties

...

- 6.1.4 R In this chapter ‘financial penalty’ means a financial penalty that the *FSA* has imposed, or may impose, under the *Act*. It does not include a financial penalty imposed by any other body.

##### Payment of a penalty imposed on an employee

- 6.1.4A R No firm, except a sole trader, may pay a financial penalty imposed by the FSA on a present or former employee, director or partner of the firm or of an affiliated company.

...

- 6.1.7 G GEN 6.1.4AR, GEN 6.1.5R and GEN 6.1.6R do not prevent a *firm* or *member* from entering into, arranging, claiming on or making any payment under a *contract of insurance* which indemnifies any *person* against all or part of the costs of defending *FSA* enforcement action or any costs they may be ordered to pay to the *FSA*.



**Annex C**

**Amendments to the Decision Procedure and Penalties manual (DEPP)**

In this Annex, underlining indicates new text and striking through indicates deleted text.

1.1.2 G The purpose of *DEPP* is to satisfy the requirements of sections 63C(1), 69(1), 93(1), 124(1), 131J(1), 169~~(7)~~ (9), 210(1) and 395 of the *Act* that the *FSA* publish the statements of procedure or policy referred to in *DEPP* 1.1.1G.

**1.2 Introduction to statutory notices**

Statutory and related notices

...

1.2.6A G Statutory notice associated decisions do not include decisions relating to the publication of a statutory notice.

...

2.5.7 G The *RDC* will take the decision to give a *supervisory notice* exercising the *FSA*'s own initiative power (by removing a regulated activity, by imposing a limitation or requirement or by specifying a narrower description of regulated activity) if the action involves a fundamental change (see *DEPP* 2.5.8G) to the nature of a *permission*. Otherwise, the decision to give the *decision notice* will be taken by *FSA* staff under *executive procedures*.

2.5.7A G Notwithstanding *DEPP* 2.5.7G, *FSA* staff under *executive procedures* will be the decision maker whenever a *firm* agrees not to contest the *FSA*'s exercise of its own initiative power, including where the *FSA*'s action involves a fundamental change to the nature of a *permission*.

...

**2 Annex 1G Warning notices and decision notices under the Act and certain other enactments**

...

Section of the Act	Description	Handbook reference	Decision maker
...			

<u>89K(2)/(3)</u>	<u>when the FSA is proposing or deciding to publish a statement that an issuer of securities admitted to trading on a regulated market is failing or has failed to comply with an applicable transparency obligation</u>		<u>RDC</u>
...			
<u>256(4)/(5)</u>	<u>when the FSA is proposing or deciding to refuse a request for the revocation of the authorisation order of an AUT</u>		<u>RDC</u>
...			
313B(9)	<u>when the FSA has required an institution to suspend a financial instrument from trading and it is proposing or deciding to refuse an application by the institution or the issuer for the cancellation of the suspension. [deleted]</u>	<del>REC 4.2D</del>	<i>Executive procedures</i>
313B(10)/ (11)	<u>when the FSA has required an institution to suspend a financial instrument from trading and it is proposing or deciding to refuse an application by the institution or the issuer for the cancellation of the suspension [deleted]</u>	<del>REC 4.2D</del>	<i>Executive procedures</i>
<u>313BB(5)/ 313BC(5)</u>	<u>when, upon the application of an institution, the FSA is proposing or deciding not to revoke a requirement imposed on an institution under section 313A or is proposing or deciding that a requirement imposed on a class of institutions under section 313A will continue to apply to the applicant</u>	<u>REC 4.2D</u>	<u>Executive procedures</u>
<u>313BD(5)/ 313BE(4)</u>	<u>when, upon the application of an issuer, the FSA is proposing or deciding not to revoke a requirement imposed on an institution or a class of institutions under section 313A or to revoke a</u>	<u>REC 4.2D</u>	<u>Executive procedures</u>

	<u>requirement imposed on a class of institutions under section 313A in relation to the class apart from one or more specified members of it, or one or more specified members of the class only</u>		
...			

<b>Payment Services Regulations</b>	<b>Description</b>	<b>Handbook reference</b>	<b>Decision maker</b>
Regulations 9(7) and 14	when the <i>FSA</i> is proposing to refuse an application for authorisation as an <i>authorised payment institution</i> , or for registration as a <i>small payment institution</i> , or <u>to impose a requirement, or to refuse an application to vary an authorisation</u>		<i>Executive procedures</i>
Regulations 9(8)(a) and 14	when the <i>FSA</i> is deciding to refuse an application for authorisation as an <i>authorised payment institution</i> , or for registration of a <i>small payment institution</i> , or <u>to impose a requirement, or to refuse an application to vary an authorisation</u>		<i>Executive procedures</i> where no representations are made in response to a warning notice, otherwise by the <i>RDC</i>
...			

<b>Regulated Covered Bonds Regulations 2008</b>	<b>Description</b>	<b>Handbook reference</b>	<b>Decision maker</b>
...			
Regulation 35(1)/(3)	when the <i>FSA</i> is proposing or deciding to impose a penalty on a person under regulation 34*	RCB 6	<i>RDC</i>

<u>Cross-Border Payments in Euro Regulations 2010</u>	<u>Description</u>	<u>Handbook reference</u>	<u>Decision maker</u>
<u>Regulations 7(1) and 7(3)</u>	<u>when the FSA is proposing or deciding to impose a financial penalty*</u>		<u>RDC</u>
<u>Regulations 7(1) and 7(3)</u>	<u>when the FSA is proposing or deciding to publish a statement that a <i>payment service provider</i> has contravened the <i>EU Cross-Border Regulation</i> *</u>		<u>RDC</u>
<u>Regulations 10(1) and 10(3)</u>	<u>when the FSA is proposing or deciding to exercise its powers to require restitution *</u>		<u>RDC</u>
<u>Schedule paragraph 1</u>	<u>when the FSA is proposing or deciding to publish a statement that a relevant person has been knowingly concerned with a contravention of the <i>EU Cross-Border Regulation</i> (Note 1)</u>		<u>RDC</u>
<u>Schedule paragraph 1</u>	<u>when the FSA is proposing or deciding to impose a financial penalty against a relevant person (Note 1)</u>		<u>RDC</u>
<p><u>Note:</u>  <u>(1) The <i>Cross-Border Payments in Euro Regulations</i> do not require third party rights and access to FSA material when the FSA exercises this power. However, the FSA generally intends to allow for third party rights and access to material when exercising this power.</u></p>			

## 2 Annex 2G Supervisory notices

...

<b>Section of the Act</b>	<b>Description</b>	<b>Handbook reference</b>	<b>Decision maker</b>
---------------------------	--------------------	---------------------------	-----------------------

...			
<u>78A(2)/(8)(b)</u>	<u>when the FSA discontinues or suspends the listing of a security on the application of the issuer of the security</u>	<u>LR 5</u>	<u>Executive procedures</u>
...			
<u>191B(1)</u>	<u>when the FSA gives a restriction notice under section 191B</u>		<u>Executive procedures</u>
<u>197(3)/(6)/(7)(b)</u>	when the FSA is exercising its power of intervention in respect of an incoming firm	SUP 14	RDC or executive procedures  See DEPP 2.5.7G and 2.5.7AG
...			
<u>301J(1)</u>	<u>when the FSA gives a restriction notice under section 301J</u>		<u>Executive procedures</u>
...			

...

- 4.2.1 G If FSA staff recommend that action be taken and they consider that the decision falls within the responsibility of a *senior staff committee*:

...

the decision may be taken by a member of the FSA’s executive of at least director of division level (which may include an acting director) or, in the case of a *senior staff committee* which reports directly to the FSA’s senior executive committee, by a member of that committee.

...

- 5.1.1 G ...

- (3) The decision will be taken jointly by two members of the FSA’s executive of at least director of division level (which may include an acting director) (the “*settlement decision makers*”).

...

Withdrawal of authorisation

- 6.5D.4A G The FSA may withdraw a firm's *authorisation* under section 33 of the *Act*, as well as impose a financial penalty. Such action by the FSA does not affect the FSA's assessment of the appropriate financial penalty in relation to a *breach*. However, the fact that the FSA has withdrawn a firm's *authorisation*, as a result of which the firm may have less earning potential, may be relevant in assessing whether the penalty will cause the firm serious financial hardship.

...

- 6.7.1 G *Persons* subject to enforcement action may be prepared to agree the amount of any financial penalty, or the length of any period of suspension or restriction, and other conditions which the FSA seeks to impose by way of such action. Such conditions might include, for example, the amount or mechanism for the payment of compensation to consumers. The FSA recognises the benefits of such agreements, in that they offer the potential for securing earlier redress or protection for consumers and the saving of cost to the *person* concerned and the FSA itself in contesting the financial penalty, suspension or restriction. The penalty that might otherwise be payable, or the length of the period of suspension or restriction that might otherwise be imposed, in respect of a *breach* by the *person* concerned will therefore be reduced to reflect the timing of any settlement agreement.

The settlement discount scheme applied to financial penalties

- 6.7.2 G In appropriate cases the FSA's approach will be to negotiate with the *person* concerned to agree in principle the amount of a financial penalty having regard to the FSA's statement of policy as set out in DEPP 6.5 to DEPP 6.5D and DEPP 6.6. (This starting figure will take no account of the existence of the *settlement discount scheme* described in this section.) Such amount ("A") will then be reduced by a percentage of A according to the stage in the process at which agreement is reached. The resulting figure ("B") will be the amount actually payable by the *person* concerned in respect of the *breach*. However, where part of a proposed financial penalty specifically equates to the disgorgement of profit accrued or loss avoided then the percentage reduction will not apply to that part of the penalty.

...

The settlement discount scheme applied to suspensions and restrictions

- 6.7.6 G The *settlement discount scheme* which applies to the amount of a financial penalty, described in DEPP 6.7.2G to DEPP 6.7.5G, also applies to the length of the period of a suspension or restriction, having regard to the FSA's statement of policy as set out in DEPP 6A.3.

...

6A.3.4 G The FSA and the person on whom a suspension or restriction is to be imposed may seek to agree the length of the period of suspension or restriction and other terms. In recognition of the benefits of such agreements, DEPP 6.7 provides that the length of a period of suspension or restriction which might otherwise have been imposed will be reduced to reflect the stage at which the FSA and the person concerned reached an agreement.

**Schedule 3 Fees and other required payments**

...

Sch 3.2	G	The FSA’s power to impose financial penalties is contained in:
		...
		the <i>Payment Services Regulations</i>
		<u>the <i>Cross-Border Payments in Euro Regulations</i></u>

**Schedule 4 Powers Exercised**

Sch 4.1	G	The following powers and related provisions in or under the <i>Act</i> have been exercised by the <i>FSA</i> to make the statements of policy in <i>DEPP</i> :
		...
		Section 69 (Statement of policy) (including as applied by paragraph 1 of Schedule 5 to the <i>Payment Services Regulations</i> and by <u>paragraph 1 of the Schedule to the <i>Cross-Border Payments in Euro Regulations</i></u> )
		...
		Section 210(1) (Statements of policy) (including as applied by regulation 86(6) of the <i>Payment Services Regulations</i> and by <u>paragraph 3 of the Schedule to the <i>Cross-Border Payments in Euro Regulations</i></u> )
		Section 395 (The Authority’s procedures) (including as applied by paragraph 7 of Schedule 5 to the <i>Payment Services Regulations</i> and by <u>paragraph 5 of the Schedule to the <i>Cross-Border Payments in Euro Regulations</i></u> )
		...

Sch 4.2 G

The following additional powers and related provisions have been exercised by the <i>FSA</i> to make the statements of policy in <i>DEPP</i> :	
...	
	Regulation 93 (Guidance) of the <i>Payment Services Regulations</i>
	<u>Regulation 14 (Guidance) of the <i>Cross-Border Payments in Euro Regulations</i></u>



## Annex D

### Amendments to the Enforcement Guide (EG)

In this Annex, underlining indicates new text and striking through indicates deleted text.

- 2.1 The FSA's effective and proportionate use of its enforcement powers plays an important role in the pursuit of its *regulatory objectives* of protecting *consumers*, maintaining confidence in the *financial system*, financial stability ~~promoting public awareness~~ and reducing *financial crime*. For example, using enforcement helps to contribute to the protection of *consumers* and to deter future contraventions of FSA and other applicable requirements and *financial crime*. It can also be a particularly effective way, through publication of enforcement outcomes, of raising awareness of regulatory standards.
- ...
- 5.14 The *settlement discount scheme* allows a reduction in a financial penalty, period of suspension or period of restriction that would otherwise be imposed on a *person* according to the stage at which the agreement is reached. Full details of the scheme are set out in *DEPP* 6.7.
- ...
- 5.19A The procedure for the *settlement discount scheme* where the outcome is potentially a financial penalty, described in paragraphs 5.14 to 5.19, will also apply where the outcome is potentially a suspension or restriction.
- ...
- 6.7 For ~~both~~ *supervisory notices* (as defined in section 395(13)) which have taken effect, *decision notices* and *final notices*, section 391 of the *Act* requires the FSA to publish, in such manner as it considers appropriate, such information about the matter to which the notice relates as it considers appropriate. However, section 391 provides that the FSA cannot publish information if publication of it would, in its opinion, be unfair to the *person* with respect to whom the action was taken or prejudicial to *consumers*.
- Decision notices and ~~Final~~ *final* notices
- 6.8 The FSA will consider the circumstances of each case, but will ordinarily publicise enforcement action where this has led to the issue of a *final notice*. The FSA may also publicise enforcement action where this has led to the issue of a *decision notice*. The FSA will decide on a case-by-case basis whether to publish information about the matter to which a *decision notice* relates, but expects normally to publish a *decision notice* if the subject of enforcement action decides to refer the matter to the *Tribunal*. The FSA may also publish a *decision notice* before a person has decided whether to refer the matter to the *Tribunal* if the FSA considers there is a compelling reason to do so. For example, the FSA may consider that early publication of the detail of its reasons for taking action is necessary for market

confidence reasons or to allow *consumers* to avoid any potential harm arising from a *firm's* actions. If a *person* decides not to refer a matter to the *Tribunal*, the FSA will generally only publish a *final notice*. Publication will generally include placing the notice on the FSA web site and this will often be accompanied by a press release. The FSA will also consider what information about the matter should be included on the *FSA Register*. Additional guidance on the FSA's approach to the publication of information on the *FSA Register* in certain specific types of cases is set out at the end of this chapter.

6.8A If the FSA intends to publish a *decision notice*, it will give advance notice of its intention to the *person* to whom the *decision notice* is given and to any third party to whom a copy of the notice is given. The FSA will consider any representations made, but will normally not decide against publication solely because it is claimed that publication could have a negative impact on a *person's* reputation. The FSA will also not decide against publication solely because a *person* asks for confidentiality when they refer a matter to the *Tribunal*.

6.8B Publication will generally include placing the *decision notice* or *final notice* on the FSA website and this will often be accompanied by a press release. The FSA will also consider what information about the matter should be included on the *FSA Register*. Additional guidance on the FSA's approach to the publication of information on the *FSA Register* in certain specific types of cases is set out at the end of this chapter.

6.9 However, as required by the *Act* (see paragraph 6.7 above), the FSA will not publish information if publication of it would, in its opinion, be unfair to the *person* in respect of whom the action is taken or prejudicial to the interests of *consumers*. It may make that decision where, for example, publication could damage market confidence or undermine market integrity in a way that could be damaging to the interests of *consumers*.

6.10 Publishing ~~*final notices*~~ notices is important to ensure the transparency of FSA decision-making; it informs the public and helps to maximise the deterrent effect of enforcement action. The FSA will upon request review *decision notices*, *final notices* and related press releases that are published on the FSA's website ~~after a period of six years~~. The FSA will determine at that time whether continued publication is appropriate, or whether notices and publicity should be removed or amended.

6.10A In carrying out its review the FSA will consider all relevant factors. In particular, the FSA will take into account:

- the seriousness of the *person's* misconduct;
- the nature of the action taken by the FSA and the level of any sanction imposed on the *person*;
- whether the FSA has continuing concerns in respect of the *person* and any risk they might pose to the FSA's objectives;
- whether the *person* is a *firm* or an individual;

- whether the publication sets out the FSA’s expectations regarding behaviour in a particular area, and if so, whether that message still has educational value;
- public interest in the case (both at the time and subsequently);
- whether continued publication is necessary for deterrence, consumer protection or market confidence reasons;
- how much time has passed since publication; and
- any representations made by the person on the continuing impact on them of the publication.

6.10B The FSA expects usually to conclude that notices and related press releases that have been published for less than six years should not be removed from the website, and that notices and related press releases relating to prohibition orders which are still applicable should not be removed from the website regardless of the length of time they have been published.

6.10C In cases where the FSA publishes a *decision notice* and the subject of enforcement action successfully refers the matter to the *Tribunal*, the FSA will make it clear on its website that the *decision notice* no longer applies. The FSA will normally do this by publishing a discontinuation notice.

...

6.12 Publishing the reasons for variations of *Part IV permission* (and interventions), and maintaining an accurate public record, are important elements of the FSA’s approach to its *consumer* protection objective. The FSA will always aim to balance both the interests of *consumers* and the possibility of unfairness to the *person* subject to the FSA’s action. The FSA will publish relevant details of both fundamental and non-fundamental variations of *Part IV permission* and interventions which it imposes on *firms*. But it will use its discretion not to do so if it considers this to be unfair to the person on whom the variation is imposed or prejudicial to the interests of consumers. Publication will generally include placing the notice on the FSA web site and this may be accompanied by a press release. As with *decision notices* and *final notices*, *supervisory notices* and related press releases that are published on the FSA’s ~~web site~~ website will be reviewed upon request ~~after a period of six years~~. The FSA will determine at that time whether continued publication is appropriate, or whether notices and related press releases should be removed or amended. The FSA will determine this on the same basis as it will decide whether a *decision notice* or *final notice* should be removed (see paragraphs 6.10, 6.10A and 6.10B above). The FSA expects usually to conclude that *supervisory notices* and related press releases that have been published for less than six years should not be removed from the website.

...

6.18 Where the behaviour to which a *decision notice*, *final notice*, civil action, or criminal action relates has occurred in the context of a *takeover bid*, the FSA will

consult the *Takeover Panel* over the timing of publication if the FSA believes that publication may affect the timetable or outcome of that bid, and will give due weight to the *Takeover Panel's* views.

...

6.20 To help it fulfil its *regulatory objectives* of protecting *consumers* and ~~promoting public awareness~~, the FSA will keep on the *FSA Register* a record of *firms* or individual auditors or actuaries who have been the subject of disqualification orders.

...

7.1 Financial penalties and *public censures* are important regulatory tools. However, they are not the only tools available to the FSA, and there will be many instances of non-compliance which the FSA considers it appropriate to address without the use of financial penalties or *public censures*. Having said that, the effective and proportionate use of the FSA's powers to enforce the requirements of the *Act*, the *rules* and the Statements of Principle for Approved Persons will play an important role in the FSA's pursuit of its *regulatory objectives*. Imposing financial penalties and *public censures* shows that the FSA is upholding regulatory standards and helps to maintain market confidence, ~~promote public awareness of regulatory standards~~ and deter *financial crime*. An increased public awareness of regulatory standards also contributes to the protection of *consumers*.

...

7.4 The FSA's statement of policy in relation to the imposition of financial penalties is set out in *DEPP* 6.2 (Deciding whether to take action), *DEPP* 6.3 (Penalties for market abuse) and *DEPP* 6.4 (Financial penalty or public censure). The FSA's statement of policy in relation to the amount of a financial penalty is set out in *DEPP* 6.5 to *DEPP* 6.5D. The FSA's statement of policy in relation to financial penalties for late submission of reports is set out in *DEPP* 6.6.

#### **Apportionment of financial penalties**

7.5 In a case where the FSA is proposing to impose a financial penalty on a *person* for two or more separate and distinct areas of misconduct, the FSA will consider whether it is appropriate to identify in the *decision notice* and *final notice* how the penalty is apportioned between those separate and distinct areas. Apportionment will not however generally be appropriate in other cases.

...

7.8A Chapter 6 of the General Provisions of the FSA Handbook also contains a rule prohibiting a *firm*, except a *sole trader*, from paying a financial penalty imposed by the FSA on a present or former *employee*, *director* or *partner* of the *firm* or of an *affiliated company*.

...

8.1 The FSA has powers under section 45 of the *Act* to vary or cancel an *authorised*

*person's Part IV permission*. The FSA may use these powers where:

- (1) the person is failing or is likely to fail to satisfy the threshold conditions;
- (2) the person has not carried on any *regulated activity* for a period of at least 12 months; or
- (3) it is desirable to exercise the power ~~vary or cancel the person's *Part IV permission*~~ in order to meet any of its regulatory objectives ~~protect the interests of consumers or potential consumers.~~

...

8.17 However, where the FSA has cancelled a *firm's Part IV permission*, it is required by section 33 of the *Act* to go on to give a direction withdrawing the *firm's authorisation*. Accordingly, the FSA may decide to keep a *firm's Part IV permission* in force to maintain the *firm's* status as an *authorised person* and enable it (the FSA) to monitor the *firm's* activities. An example is where the FSA needs to supervise an orderly winding down of the *firm's* regulated business (see SUP 6.4.22 (When will the FSA grant an application for cancellation of *permission*)). Alternatively, the FSA may decide to keep a *firm's Part IV permission* in force to maintain the *firm's* status as an *authorised person* to use administrative enforcement powers against the *firm*. ~~This may be, for example, where the FSA proposes to impose a financial penalty on the *firm* under section 206 of the *Act*.~~

...

9.6 Where the FSA issues a *prohibition order*, it may indicate in the *decision notice* or *final notice* that it would be minded to revoke the order on the application of the individual in the future, in the absence of new evidence that the individual is not fit and proper. If the FSA gives such an indication, it will specify the number of years after which it would be minded to revoke or vary the prohibition on an application. However, the FSA will only adopt this approach in cases where it considers it appropriate in all the circumstances. In deciding whether to adopt this approach, the factors the FSA may take into account include, but are not limited to, where appropriate, the factors at paragraphs 9.9 and at 9.17. The FSA would not be obliged to revoke an order after the specified period even where it gave such an indication. Further, if an individual's *prohibition order* is revoked, he would still have to satisfy the FSA as to his fitness for a particular role in relation to any future application for approval to perform a *controlled function*.

...

9.10 The FSA may have regard to the cumulative effect of a number of factors which, when considered in isolation, may not be sufficient to show that the individual is not fit and proper to continue to perform a *controlled function* or other function in relation to *regulated activities*. It may also take account of the particular *controlled function* which an *approved person* is performing for a *firm*, the nature and activities of the *firm* concerned and the markets within which it operates.

...

11.3

...

- (10) The behaviour of the persons suffering loss

The FSA will consider the conduct of the persons who have suffered loss. As part of its *regulatory objectives* objective of ~~increasing consumer awareness of the financial system~~ and protecting *consumers*, the FSA is required to publicise information about the *authorised* status of *persons* and is empowered to give information and guidance about the regulation of financial services. This information should help *consumers* avoid suffering losses. When the FSA considers whether to obtain restitution on behalf of *persons*, it will consider the extent to which those *persons* may have contributed to their own loss or failed to take reasonable steps to protect their own interests.

...

...

12.1

The FSA has powers under sections 401 and 402 of the *Act* to prosecute a range of criminal offences in England, Wales and Northern Ireland. The FSA may also prosecute criminal offences where to do so would be consistent with meeting any of its statutory objectives ~~for which it is not the statutory prosecutor, but where the offences form part of the same criminality as the offences it is prosecuting under the *Act*.~~

...

12.5

In some cases, the FSA may decide to issue a formal caution rather than to prosecute an offender. In these cases the FSA will follow the Home Office Guidance on the cautioning of offenders, currently contained in the Home Office Circular ~~18/1994~~ 16/2008.

...

12.11

The FSA has agreed guidelines that establish a framework for liaison and cooperation in cases where one or more other authority (such as the Crown Prosecution Service or Serious Fraud Office) has an interest in prosecuting any aspect of a matter that the FSA is considering for investigation, investigating or considering prosecuting. These guidelines are set out in annex 2 to this guide. The FSA is also a signatory to the Prosecutors' Convention and the Investigators' Convention.

...

19.73

The *Money Laundering Regulations* add to the range of options available to the FSA for dealing with anti-money laundering failures. These options are:

...

- to take regulatory action against authorised firms for failures which breach the

FSA's rules and requirements (for example, under Principle 3 or SYSC 3.2.6R or SYSC 6.1.1R); and

...

...

19.84 The FSA will apply the approach to publicity that it has outlined in EG 6. However, as the *Money Laundering Regulations* do not require the FSA to issue final notices, the FSA will publish such information about the matter to which the decision notice relates as it considers appropriate. This will generally involve publishing the decision notice on the FSA's website, with or without an accompanying press release, and updating the Public Register. ~~The timing of publicity will be consistent with the FSA's approach in comparable cases under the Act.~~

...

### **Counter Terrorism Act 2008**

19.89A The FSA has investigation and sanctioning powers in relation to both criminal and civil breaches of the Counter Terrorism Act 2008 ("the Counter Terrorism Act"). The Counter Terrorism Act allows the Treasury to issue directions imposing requirements on relevant persons in relation to transactions or business relationships with designated persons of a particular country. Relevant persons may be required to take the following action:

- apply enhanced customer due diligence measures;
- apply enhanced ongoing monitoring of any business relationship with a designated person;
- systematically report details of transactions and business relationships with designated persons; or
- limit or cease business with a designated person.

19.89B The FSA is responsible for monitoring and enforcing compliance with requirements imposed by the Treasury under the Counter Terrorism Act by 'credit institutions' that are authorised persons and by 'financial institutions' (except money service businesses that are not authorised persons and consumer credit financial institutions). 'Credit institutions' and 'financial institutions' are defined in Part 2 of Schedule 7 to the Counter Terrorism Act.

19.89C The investigation and sanctioning powers given to the FSA by the Counter Terrorism Act are similar to those given to the FSA by the *Money Laundering Regulations*. The FSA's approach to using its powers under the Counter Terrorism Act will be consistent with its approach to using its powers under the *Money Laundering Regulations*, described in paragraphs 19.78 to 19.84 above.

### **Insurance Accounts Directive (Lloyd's Syndicate and Aggregate Accounts) Regulations 2008**

19.89D The Lloyd's Accounting Regulations implement the Audit and Accounts Directives in relation to the Lloyd's insurance market. They aim to increase the transparency of the accounts published by Lloyd's syndicates by imposing requirements in relation to the preparation and disclosure of the accounts. The Regulations give the FSA the power to institute criminal proceedings for an offence committed under the Regulations.

19.89E Our policy in relation to the prosecution of criminal offences and the circumstances in which we would expect to commence criminal proceedings is set out in EG 12.

...

### ***Imposition of penalties under the Payment Services Regulations***

19.101 When imposing a financial penalty the FSA's policy includes having regard to the relevant factors in *DEPP 6.2*, ~~*DEPP 6.3*~~ and *DEPP 6.4*. The FSA's policy in relation to determining the level of a financial penalty includes having regard, where relevant, to *DEPP 6.5* to *DEPP 6.5D*.

...

19.103 The *Payment Services Regulations* apply section 169 of the *Act* which requires the FSA to publish a statement of policy on the conduct of certain interviews in response to requests from overseas regulators. For the purposes of the *Payment Services Regulations* the FSA will follow the procedures described in *DEPP 7*.

...

### **Cross-Border Payments in Euro Regulations 2010**

19.118 The *Cross-Border Payments in Euro Regulations* lay down rules on cross-border payments in euros, to ensure that compliance with the *EU Cross-Border Regulation* is guaranteed by effective, proportionate and dissuasive sanctions. The main aim of the *EU Cross-Border Regulation* is to ensure that the charges for cross-border payments in euro are equal to the charges for identical national payments in euro within a Member State. The *Cross-Border Payments in Euro Regulations* give the FSA investigation and sanctioning powers in relation to *breaches* of the *EU Cross-Border Regulation*, including:

- the power to require information
- the power of public censure; and
- the power to impose financial penalties.

19.119 The FSA's policy for using the powers given to it by the *Cross-Border Payments in Euro Regulations* is the same as its policy for using the equivalent powers given to it by the *Payment Services Regulations*, set out in EG 19.90 to 19.103, as, for the most part, these powers are very similar. As the *Payment Services Regulations*, for the most part, mirror the FSA's investigative, sanctioning and regulatory powers under the *Act*, the FSA will therefore adopt enforcement procedures akin to those



used under the Act.

## **Annex 2 – Guidelines on investigation of cases of interest or concern to the Financial Services Authority and other prosecuting and investigating agencies**

...

1. These guidelines have been agreed by the following bodies (the agencies):

...

- the Department for Business, ~~Enterprise and Regulatory Reform (BERR)~~ Innovation and Skills (BIS);

...

9. The following are indicators of whether action by the FSA or one of the other agencies is more appropriate. They are not listed in any particular order or ranked according to priority. No single feature of the case should be considered in isolation, but rather the whole case should be considered in the round.

...

(a) Tending towards action by the FSA

...

- Where the suspected conduct in question would be best dealt with by:
  - ...
  - regulatory action which can be referred to the ~~Financial Services and Markets Tribunal~~ Tribunal (including proceedings for market abuse); and

...

(b) Tending towards action by one of the other agencies

...

- Where the suspected conduct in question would be best dealt with by:
  - criminal proceedings for which the *FSA* is not the statutory prosecutor;
  - proceedings for disqualification of directors under the Company Directors Disqualification Act 1986 (normally appropriate for ~~BERR~~ BIS action);

- winding up proceedings which the FSA does not have statutory powers to bring (normally appropriate for ~~BERR~~ BIS action); or
- criminal proceedings in Scotland.

...

## APPENDIX TO THE GUIDELINES ON INVESTIGATION OF CASES OF INTEREST OR CONCERN TO THE FINANCIAL SERVICES AUTHORITY AND OTHER PROSECUTING AND INVESTIGATING AGENCIES

### 1. The FSA

1.1 The FSA is the single statutory regulator for all financial business in the UK. Its regulatory objectives under the Financial Services and Markets Act 2000 (the 2000 Act) are:

- market confidence;
- financial stability;
- ~~public awareness~~;
- the protection of consumers; and
- the reduction of financial crime.

...

1.4 The FSA has the power to take the following enforcement action:

- discipline authorised firms under Part XIV of the 2000 Act and approved persons under s66 of the 2000 Act;
- impose penalties on persons that perform controlled functions without approval under s.63A of the 2000 Act;

...

(except in Scotland) prosecute certain offences, including under the Money Laundering Regulations 2007, the Transfer of Funds (Information on the Payer) Regulations 2007, Part V Criminal Justice Act 1993 (insider dealing) and various offences under the 2000 Act including (**Note:** The FSA may also prosecute any other offences where to do so would be consistent with meeting any of its statutory objectives ~~which are incidental to those which it has express statutory power to prosecute~~):

...

**2. BERR BIS**

2.1 The Secretary of State for Business, ~~Enterprise and Regulatory Reform~~ Innovation and Skills exercises concurrently with the FSA those powers and functions marked with an asterisk in paragraphs 1.3 above. The investigation functions are undertaken by Companies Investigation Branch (CIB) and the prosecution functions by the Legal Services Directorate.

...

2.3 The Solicitors Office advises on investigation work carried out by CIB and undertakes criminal investigations and prosecutions in respect of matters referred to it by CIB, the Insolvency Service or other directorates of ~~BERR~~ BIS or its agencies.

...

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