

PS15/29 Strengthening accountability in banking: Final amendments (including feedback on CP14/13) to the Decision Procedure and Penalties Manual and the Enforcement Guide

December 2015



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In this Policy Statement we report on the main enforcement issues for the FCA arising from Consultation Paper FCA CP14/13/PRA CP14/14 *Strengthening accountability in banking: a new regulatory framework for individuals*. We also publish our final amendments to the Decision Procedure and Penalties Manual and the Enforcement Guide.

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You can download this Policy Statement from our website: www.fca.org.uk.

Abbreviations in this document

The Banking Reform Act	Financial Services (Banking Reform) Act 2013
CBA	Cost benefit analysis
COCON	Code of Conduct sourcebook (Handbook)
CP	Consultation Paper
DEPP	Decision Procedure and Penalties Manual
EG	Enforcement Guide
FCA	Financial Conduct Authority
FSMA	Financial Services and Markets Act 2000
NED	Non-executive director
PCBS	Parliamentary Commission on Banking Standards
PRA	Prudential Regulation Authority
RDC	Regulatory Decisions Committee
Senior Manager	A person approved to perform a senior management function
SMR	Senior Managers Regime

1. Overview

Introduction

1. In CP 15/22¹, we, the Financial Conduct Authority (FCA), set out our final rules in relation to:
 - the Senior Managers Regime (SMR)
 - the Certification Regime, and
 - the Conduct Rules
2. In this paper, we set out our amendments to the Decision Procedure and Penalties Manual (DEPP) and the Enforcement Guide (EG), to give guidance on how we will enforce these rules, and use the new powers created by the Financial Services (Banking Reform) Act 2013 (the Banking Reform Act).

Who does this affect?

3. This paper will mainly be of interest to UK banks, building societies, credit unions, PRA-designated investment firms, and incoming branches of overseas firms (collectively referred to in this paper as 'relevant firms'). The new regime will affect a large number of individuals at these firms. It may also be of interest to Solvency II firms and Non-Directive firms. Staff at these firms approved by us or the PRA will be subject to the Conduct Rules.

Is this of interest to consumers?

4. This paper will mainly be of interest to firms. Consumers may be interested in how our approach sits within our and the PRA's broader initiative to improve culture and governance in firms.

What does this paper cover?

5. In CP14/13 in July 2014², we consulted on, amongst other things, guidance on how we would bring enforcement action against individuals under the new accountability regime, including

1 CP15/22 *Strengthening accountability in banking: Final rules (including feedback on CP14/31 and CP15/5) and consultation on extending the Certification Regime to wholesale market activities*

2 FCA CP14/13/PRA CP14/14 *Strengthening accountability in banking: a new regulatory framework for individuals*

under the Conduct Rules. This paper sets out our feedback to the responses on our proposed amendments to DEPP and EG set out in CP14/13, and our final amendments to DEPP and EG.

Context

The SMR, the Certification Regime and the Conduct Rules

6. The Banking Reform Act reformed UK financial services regulation. Following recommendations by the Parliamentary Commission on Banking Standards (PCBS) in its final report³ on professional standards and culture in the UK banking sector, the Banking Reform Act introduced, amongst other things, the SMR and the Certification Regime, a criminal offence relating to a decision causing a financial institution to fail, and the 'presumption of responsibility'.

The SMR

7. The SMR will apply to individuals performing a senior management function (Senior Managers), specified by either us or the PRA on behalf of relevant firms. Individuals performing a senior management function specified by the PRA will require the PRA's pre-approval and our consent to do so. Individuals performing a senior management function that we specify will require our pre-approval only.
8. When applying for regulatory pre-approval for an individual to perform a senior management function, a relevant firm will be required to submit a Statement of Responsibilities to the regulators. This must set out the areas of the firm that the prospective Senior Manager will be responsible for managing. The firm must resubmit the Statement of Responsibilities whenever there is a significant change in the Senior Manager's responsibilities. Relevant firms must also prepare a management responsibilities map, setting out their governance and management arrangements, and how responsibilities have been allocated to individuals within the firm. When bringing enforcement action against a Senior Manager, the FCA will have regard to the statement of responsibilities and the firm's management responsibilities map when determining the extent of the Senior Manager's responsibilities in the firm.
9. Some Senior Managers will be subject to a new criminal offence relating to a decision that causes a financial institution to fail. The criminal offence applies only to Senior Managers working in UK banks, building societies and PRA-designated investment firms. It does not extend to Senior Managers in credit unions or UK branches of overseas firms.
10. We will also have the power to vary, on our own initiative, an approval given by us or the PRA for the performance of a designated senior management function, where we consider that it is desirable to do so to advance one or more of our operational objectives.

The Certification Regime

11. The Certification Regime will require relevant firms to assess the fitness and propriety of employees, who we or the PRA consider pose a risk of significant harm to the firm or its customers, on their appointment to their role, and at least once a year from then on.

The Conduct Rules

12. The Conduct Rules will replace the existing Statements of Principle and Code of Practice for Approved Persons. They will apply to a much broader range of people, capturing the vast majority of staff in relevant firms. The Conduct Rules articulate basic standards of good conduct for staff. We may take disciplinary action against individuals whose conduct falls short

³ *Changing banking for good: Report of the Parliamentary Commission on Banking Standards*

of these standards. A subset of the Conduct Rules, which place an increased emphasis on responsible delegation, will only apply to Senior Managers. We will enforce the Conduct Rules proportionately. When considering whether to take enforcement action against an individual, we will take account of their position and responsibilities. When enforcing the Conduct Rules, we will follow our deterrence-based strategy: we will take effective and robust enforcement action across a wide range of firms and individuals, so that people believe that they will be held to account where they are at fault and subject to meaningful sanctions.

The Approved Persons Regime for Insurers

13. We and the PRA are transposing the Solvency II Directive. Persons at Solvency II firms and Non-Directive Firms who are approved by us or the PRA will be subject to Conduct Rules, mirroring those for individuals at relevant firms. A subset of the Conduct Rules, which increase the emphasis on responsible delegation, will apply to persons performing significant influence functions. Firms will be required to produce a document called a 'scope of responsibilities' to clarify the responsibilities allocated to each person performing a significant influence function within the firm.

Extension of the SMR and Certification Regime to all FSMA Authorised Persons, and the 'duty of responsibility'

14. The Government now considers it appropriate to extend the SMR and Certification Regime to all financial services firms and to replace the 'presumption of responsibility' for Senior Managers with a 'duty of responsibility'.⁴ We will therefore not be publishing final guidance on the presumption of responsibility (on which we consulted in CP14/13, and, in March 2015, in CP 15/9).⁵

Wider context

15. This paper should be read in conjunction with:
- CP15/22, which sets out the FCA's final rules under the new accountability framework for UK banks.
 - CP15/10 feedback statement⁶, which sets out the FCA's near-final rules under the new accountability framework for UK branches of foreign banks.
 - Supervisory Statement SS28/15, which sets out the PRA's approach to strengthening individual accountability in banking, including in relation to the presumption of responsibility.⁷
 - PS15/21, which sets out the FCA's final rules in relation to the Approved Persons Regime for Solvency II firms.⁸
 - CP15/25, which sets out the FCA's proposed rules in relation to the Approved Persons Regime for Non-Directive firms.⁹

4 HM Treasury, *Senior Managers and Certification Regime: extension to all FSMA authorised persons*, October 2015

5 CP15/9 *Strengthening accountability in banking: a new regulatory framework for individuals – Feedback on FCA CP14/13 / PRA CP14/14 and consultation on additional guidance*

6 *Strengthening accountability in banking: UK branches of foreign banks – Feedback on FCA CP15/10/PRA CP9/15*

7 Supervisory Statement SS28/15 *Strengthening individual accountability in banking*, July 2015

8 PS15/21 *Changes to the Approved Persons Regime for Solvency II firms: Final rules (including feedback on CP14/25, CP15/5 and CP15/16), and consequentials relating to CP22/15 on strengthening accountability in banking*

9 CP15/25 *Changes to the Approved Persons Regime for insurers not subject to Solvency II: reforms for larger Non-Directive Firms, feedback on CP15/15, forms, consequentials and transitional aspects*

Summary of feedback and our response

We have made no substantive changes to DEPP and EG, in light of the responses to CP14/13.

Equality

- 16.** We considered the potential discriminatory impact on groups with protected characteristics (age, gender, disability, race or ethnicity, pregnancy and maternity, religion, sexual orientation and gender reassignment), and also the need to eliminate discrimination and advance equality of opportunity for individuals carrying out activities that we regulate. We did not receive any responses to our consultations expressing concern that our guidance would result in direct or indirect discrimination towards groups with protected characteristics. As such, we do not consider that our guidance in DEPP and EG will affect any of the groups with protected characteristics.

Cost benefit analysis

- 17.** In our consultation last July (CP14/13), we set out a cost benefit analysis (CBA) for the accountability regime for UK relevant firms. In CP15/10, we set out a CBA of proposed changes to the accountability regime for incoming branches. We also discussed CBAs in our consultation papers on forms, and transitional and consequential aspects of the new regime (CP14/31), the role and responsibilities of NEDs (CP15/5), changes to the approved persons regime for Solvency II firms (CP14/25, CP15/5 and CP15/16), and Non-Directive firms (CP15/25). We have made no substantive changes to our guidance in DEPP and EG since our consultation in CP14/13. Our guidance does not create material additional costs for firms beyond those costs intended by the legislation under which the SMR and the Certification Regime was introduced.

Next steps

- 18.** The guidance in DEPP and EG will apply from 7 March 2016.
- 19.** Senior Managers will be subject to the criminal offence relating to a decision that causes a financial institution to fail for conduct that takes place on or after 7 March 2016.
- 20.** Individuals subject to either the SMR or the Certification Regime will be subject to the Conduct Rules from 7 March 2016. The Conduct Rules will apply to other staff at relevant firms from 7 March 2017. Firms will need to make sure that their staff are aware of and understand the Conduct Rules before they come into force.
- 21.** The Approved Persons Regime for Solvency II firms and Non-Directive firms will apply from 7 March 2016.
- 22.** The Government's proposal to extend the SMR and Certification Regime to all financial services firms and to replace the presumption of responsibility for Senior Managers with a duty of responsibility is subject to Parliamentary approval. We will consider whether and what guidance to give on the duty of responsibility, if it is created, in due course.

2.

Feedback on responses to DEPP and EG amendments proposed in FCA CP14/13/PRA CP14/14 *Strengthening accountability in banking: a new regulatory framework for individuals*

1. In CP14/13, we asked:

Q14: *Do you agree with the proposals set out in the FCA's proposed statements of policy contained in the draft chapters of SUP 10C and DEPP 8?*

Q26: *Does the guidance attached at Annex 6 give helpful clarity on the behaviours the FCA expects under each of the rules?*

2. Responses and our final policy in relation to SUP10C were set out in CP15/22.
3. Other than in relation to the presumption of responsibility, we received very few responses to our proposed amendments to DEPP and EG in CP14/13. We summarise our feedback to the responses relating to DEPP and EG that did not concern the presumption of responsibility below.

Criminal offence

4. Under the Banking Reform Act, Senior Managers (but not those of credit unions or UK branches of overseas banks) may be prosecuted by the PRA or FCA in certain prescribed circumstances for taking a decision that causes a financial institution to fail. For the offence to have been committed, the Senior Manager must, at the time the decision was taken, have been aware of a risk that its implementation could cause the failure of the institution. In addition, the Senior Manager's conduct in relation to the taking of the decision must fall far below what could reasonably be expected of a person in the Senior Manager's position.
5. One respondent asked for guidance on the types of conduct that we consider will fall far below what could reasonably be expected of a Senior Manager, when considering whether to bring criminal proceedings for a decision that causes a financial institution to fail in England, Wales or Northern Ireland, or to refer the matter to another prosecuting authority.

Our response:

Significant guidance on the standards expected of Senior Managers is already available in the FCA Handbook (including under the Conduct Rules) and elsewhere. We have therefore decided not to give guidance on the standards expected of Senior Managers specifically in relation to this offence.

Variation of a Senior Manager's approval on the FCA's own initiative

6. Under the Banking Reform Act, we have the power to vary, on our own initiative, an approval given by us or the PRA for the performance of a designated senior management function, where we consider that it is desirable to do so to advance one or more of our operational objectives.
7. In relation to DEPP 8, a small number of respondents asked for guidance on when we will deal with any concerns about a Senior Manager informally, instead of using the own-initiative variation of approval power, and when we will use the own-initiative variation of approval power, as opposed to seeking to impose a prohibition order. One respondent asked about the process that we will follow when using the own-initiative variation of approval power. One respondent urged us to use the own-initiative variation of approval power transparently. Another respondent asked whether our use of attestations would change as a result of our use of the own-initiative variation of approval power. Some respondents asked for more guidance on how we would use the power proportionately.

Our response:

When the FCA will use the own-initiative variation of approval power

We have already consulted on guidance on when we may use the own-initiative variation of approval power (DEPP 8), and given guidance on when we may seek a prohibition order (EG 9). The DEPP 8 guidance explains that, when considering the use of the variation of approval power to deal with a particular concern, we will have regard to the range of regulatory tools that are available. We will consider dealing with any concerns informally through discussion and agreement with the firm and the Senior Manager rather than use the power. Our guidance explains that we may use the variation of approval power where we consider that it is desirable to do so to advance one or more of our operational objectives. We will assess this on a case-by-case basis, taking into account the specific circumstances of the firm and the Senior Manager. We set out in DEPP 8.3 examples of situations where we may use the power. In DEPP 8.4, we explain when we may use the power as a matter of urgency. As described in more detail below, we will seek to exercise the power transparently.

Proportionality

We have decided not to give further guidance on how we will apply the power proportionately, as it would be of limited use. What is proportionate will depend on the circumstances, which will differ in each case. As described in DEPP 8.2, we will assess whether it is desirable to use the power to advance one or more of our operational objectives on a case-by-case basis, taking into account the specific circumstances of the firm and the Senior Manager.

Procedure

We will follow the process set out in DEPP 2.5 when using the power.

Our staff under executive procedures will take the decision to vary an approval given to a Senior Manager if all of the interested parties agree not to contest our use of the power. Interested parties are defined in FSMA as the firm that applied for the Senior Manager to be approved, or the firm by whom the Senior Manager's services are retained, if different, and the Senior Manager.

If an interested party contests our use of the power, the Regulatory Decisions Committee (RDC) will decide whether to vary an approval given to a Senior Manager. We believe that the RDC has a sufficient level of objectivity, independence, legal expertise and industry experience to take the decision.

Transparency

Checks and balances built into the process, including by FSMA, will ensure that we exercise the power transparently.

Under section 63ZC of the Act, if we propose to vary a Senior Manager's approval or vary an approval with immediate effect, we must give each of the interested parties written notice. The notice must:

- give details of the variation
- state our reasons for the variation
- inform the interested parties that each of them may make representations within such period as may be specified by the notice
- inform the interested parties of when the variation takes effect
- inform the interested parties of the right of each of them to refer the matter to the Upper Tribunal

We must also give the interested parties written notice, once we have considered their representations.

When the own-initiative variation of approval power takes effect in a particular case, we must publish such information about the matter to which the notice relates as we consider appropriate. We will not publish information if, in our opinion, publishing it would be:

- unfair to the person with respect to whom the action was taken
- prejudicial to the interests of consumers, or
- detrimental to the stability of the UK financial system

Attestations

We plan to retain our current approach to requesting attestations for the time being, but we will keep it under review on an ongoing basis.

Annex 1: List of non-confidential respondents to CP14/13

Armagh Credit Union
Association of British Credit Unions Limited
Association of Foreign Banks
Ballinderry Credit Union
Banbridge Credit Union Ltd
Bannvale Credit Union Limited
Barclays Bank PLC
Bath Building Society
BBA & AFME
Berwin Leighton Paisner
11 Building Societies Association
12 Capital Credit Union
Cattellyst Consultancy
Chartered Banker Institute
Chartered Banker Professional Standards Board
Chartered Institute for Securities and Investment
Coalisland Credit Union Ltd
Council of Mortgage Lenders
Coventry Building Society
Crossmaglen Credit Union Ltd
Darlington Building Society

Deutsche Bank
Employment Lawyers Association (ELA)
Enniskillen Credit Union Ltd
FCA Practitioner Panel
FCA Smaller Business Practitioner Panel
Financial Services Consumer Panel
Freshfields Bruckhaus Deringer LLP
Glasgow Credit Union
Global Witness, Anti-Corruption APPG, Transparency International UK
Herbert Smith Freehills LLP
HSBC
ICAEW
Intermediary Mortgage Lenders Association (IMLA)
Investment & Life Assurance Group
Investment Management Association (IMA)
Irish League of Credit Unions
Japanese Bankers Association
Kilkeel Credit Union Ltd
Kingsley Napley LLP
Labour Finance and Industry Group
Leeds City Credit Union
Lisburn Credit Union Ltd
Lloyds Banking Group
Mansfield Building Society
Moody's Analytics UK Ltd
Mr Tony Davison
Nationwide Building Society

Newington Credit Union

Omagh Credit Union Ltd

Partners Credit Union

Pennyburn Credit Union Ltd

PWC

Questionmark

Santander

Scottish Building Society

Scotwest Credit Union

Secure Trust Bank

Simmons & Simmons LLP

Taylor Wessing LLP

Termonmaguirk Credit Union Ltd

Tesco Bank

TSB Bank PLC

UKCreditUnions Limited (UKCU) and ACE Credit Union Services (ACE)

Ulster Federation of Credit Unions

Unite the Union

West Bromwich Building Society

Which?

Appendix 1: Made guidance and rules (legal instrument)

INDIVIDUAL ACCOUNTABILITY (ENFORCEMENT) INSTRUMENT 2015

Powers exercised

- A. The Financial Conduct Authority makes this instrument in the exercise of the following powers and related provisions in the Financial Services and Markets Act 2000 (“the Act”):
- (1) section 59 (Approval for particular arrangements);
 - (2) section 60 (Applications for approval);
 - (3) section 60A (Vetting candidates by relevant authorised persons);
 - (4) section 61 (Determination of applications);
 - (5) section 62A (Changes to responsibilities of senior managers);
 - (6) section 63ZA (Variation of senior manager’s approval at request of relevant authorised person);
 - (7) section 63ZB (Variation of senior manager’s approval on initiative of regulator);
 - (8) section 63ZD (Statement of policy relating to conditional approval and variation);
 - (9) section 63C (Statement of policy);
 - (10) section 63E (Certification of employees by relevant authorised persons);
 - (11) section 63F (Issuing of certificates);
 - (12) section 64A (Rules of conduct);
 - (13) section 64C (Requirements for relevant authorised persons to notify regulator of disciplinary action);
 - (14) section 69 (Statement of policy);
 - (15) section 137A (The FCA’s general rules);
 - (16) section 137T (General supplementary powers);
 - (17) section 139A (Power of the FCA to give guidance);
 - (18) section 210(1) (Statements of policy); and
 - (19) section 395 (The FCA’s and PRA’s procedures).
- B. The rule-making powers listed above are specified for the purpose of section 138G(2) (Rule-making instruments) of the Act.

Commencement

- C. This instrument comes into force on 7 March 2016.

Amendments to the Handbook

- D. The Glossary of definitions is amended in accordance with Annex A to this instrument.
- E. The Decision Procedure and Penalties manual (DEPP) is amended in accordance with Annex B to this instrument.

Amendments to the material outside the Handbook

- F. The Enforcement Guide (EG) is amended in accordance with Annex C to this instrument. The general guidance in EG does not form part of the Handbook.

Notes

- G. In Annex B to this instrument, the “notes” (indicated by “**Note:**”) are included for the convenience of readers, but do not form part of the legislative text.

Citation

- H. This instrument may be cited as the Individual Accountability (Enforcement) Instrument 2015.

By order of the Board
3 December 2015

Annex A**Amendments to the Glossary of definitions**

In this Annex, underlining indicates new text.

Amend the following definition as shown.

supervisory notice (as defined in section 395(13) of the *Act* (The FCA's and PRA's procedures)) a notice given by the *appropriate regulator* in accordance with section 55Y(4), (7) or (8)(b); 63ZC(4), 63ZC(8) or 63ZC(9)(b); 78(2) or (5); 197(3), (6) or (7)(b); 259(3), (8) or (9)(b); 268(3), (7)(a) or (9)(a) (as a result of subsection (8)(b)); 282(3), (6) or (7)(b); or 321(2) or (5).

Annex B

Amendments to the Decision Procedure and Penalties manual (DEPP)

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

1.1 Application and Purpose

Application

- 1.1.1 G This manual (*DEPP*) is relevant to *firms, approved persons* and other *persons*, whether or not they are regulated by the *FCA*. It sets out:
- ...
- (3) ... ;
- (4) the *FCA*'s policy regarding the variation of an *SMF manager*'s approval on the *FCA*'s initiative under section 63ZB of the *Act* (see *DEPP* 8).

Purpose

- 1.1.2 G The purpose of *DEPP* is to satisfy the requirements of sections 63C(1), 63ZD(1), 69(1), 88C(1), 89S(1), 93(1), 124(1), 131FA, 131J(1), 169(9), 192N(1), 210(1), 312J(1), 345D(1) and 395 of the *Act* that the *FCA* publish the statements of procedure or policy referred to in *DEPP* 1.1.1G.
- ...

1.2 Introduction to statutory notices

- 1.2.4A G Section 395 of the *Act* also requires the *FCA* to publish a statement of its procedure for decisions which ~~gives~~ give rise to an obligation for the *PRA* to include a statement under section 387(1A) in a *warning notice* or a statement under section 388(1A) in a *decision notice* as follows:
- (1) Section 387(1A) provides that where the *FCA* proposes to refuse consent for the purposes of section 55F, 55I or 59 of the *Act*, or to give conditional consent as mentioned in section 55F(5), ~~or 55I(8) or 61(2D)~~, the *warning notice* given by the *PRA* must (a) state that fact, and (b) give the reasons for the *FCA*'s proposal.
- (2) Section 388(1A) provides that where the *FCA* has decided to refuse consent for the purposes of section 55F, 55I or 59 of the *Act*, or to

give conditional consent as mentioned in section 55F(5), ~~or 55I(8)~~, or 61(2D), the *decision notice* given by the *PRA* must (a) state that fact, and (b) give the reasons for the *FCA's* decision.

...

- 1.2.4D G Where an application to perform a *controlled function* is made to the *PRA* as the appropriate regulator, the *PRA* can only approve a person to perform a *controlled function* with the consent of the *FCA* (section 59(4)(b)) of the *Act*). Where the application is a *relevant senior management application*, the *FCA's* consent can be conditional on the *PRA* imposing conditions, or the *PRA* giving approval only for a limited period.

...

2 Statutory notices and the allocation of decision making

...

2.5 Provision for certain categories of decision

...

- 2.5.3 G *FCA* staff under *executive procedures* will take the decision to give a *warning notice* if the *FCA* proposes to:

...

(4A) grant a *relevant senior manager application*, subject to any conditions or only for a limited period;

(4B) refuse an application to vary an approval under section 59 of the *Act* that was granted subject to conditions;

...

...

- 2.5.5 G If representations are made in response to a *warning notice* proposing the action set out at *DEPP* 2.5.3G(1), *DEPP* 2.5.3G(4), *DEPP* 2.5.3G(4A), *DEPP* 2.5.3G(4B) or *DEPP* 2.5.3G(5), then the *RDC* will take the decision to give a *decision notice*.

...

Decisions relating to applications for *PRA* authorisation or approval

- 2.5.6A G *FCA* staff under *executive procedures* will take the decision where the *FCA* is proposing or deciding to:

...

- (3) refuse its consent to the granting by the *PRA* of an application to perform a *controlled function*, or give its consent subject to conditions.

...

The FCA’s power to vary SMF manager’s approval on its own initiative

2.5.8A G The RDC will take the decision under section 63ZB of the Act to vary an approval given to an SMF manager (by imposing a condition, varying a condition, removing a condition or limiting the period for which the approval is to have effect).

2.5.8B G Notwithstanding DEPP 2.5.7G, FCA staff under executive procedures will be the decision maker whenever all of the interested parties (as defined by section 63ZC(6) of the Act) agree not to contest the FCA’s exercise of its power under section 63ZB of the Act.

2.5.8C G The FCA’s statement of policy on the use of the power to vary an SMF manager’s approval on its own initiative is set out in DEPP 8.

...

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

...

Section of the Act	Description	Handbook reference	Decision maker
...			
62(2)	when the <i>FCA</i> is proposing to refuse an application for approval of a <i>person</i> performing a <i>controlled function</i> <u>or to grant the application subject to conditions or for a limited period (or both)</u>	SUP 10A and SUP 10C	<i>Executive procedures</i>
62(3)	when the <i>FCA</i> is deciding to refuse an application for approval of a <i>person</i> performing a <i>controlled function</i> <u>or to grant the application subject to conditions or for a limited period (or both)</u>	SUP 10A and SUP 10C	<i>RDC or executive procedures</i> See <i>DEPP 2.5.5G</i>
...			

<u>63ZA(4)(b)</u> <u>and 62(2)</u>	<u>when the FCA is proposing to refuse an application for variation of an approval granted to an SMF manager, subject to conditions</u>	<u>SUP 10C</u>	<u>Executive procedures</u>
<u>63ZA(8) and 62(3)</u>	<u>when the FCA is deciding to refuse an application for variation of an approval granted to an SMF manager, subject to conditions</u>	<u>SUP 10C</u>	<u>RDC or executive procedures</u> <u>See DEPP 2.5.5G</u>
67(1)/(4)	when the FCA is proposing or deciding to take action against an approved person <u>individual</u> by exercising the disciplinary powers conferred by section 66*		<u>RDC</u>
...			
<u>142T(1)/ (4)</u>	<u>when the FCA is proposing or deciding to take action against a person under section 142S*</u>		<u>RDC</u>
...			

2 Annex Supervisory notices 2G

Section of the Act	Description	Handbook reference	Decision maker
...			
55Y(4) 55Y(7) 55Y(8)(b)	...		
<u>63ZC(4)</u> <u>63ZC(8)</u> <u>63ZC(9)(b)</u>	<u>when the FCA is exercising its power to vary, on its own initiative, an approval granted to an SMF manager</u>		<u>RDC or executive procedures</u> <u>See DEPP 2.5.8AG and DEPP 2.5.8BG</u>
...			

...

6 Penalties

...

Action against ~~approved persons~~ individuals under section 66 of the Act

- 6.2.4 G ~~The primary responsibility for ensuring compliance with a *firm's* regulatory obligations rests with the *firm* itself. However, the *FCA* may take disciplinary action against an *approved person* where there is evidence of personal culpability on the part of that *approved person*. Personal culpability arises where the *behaviour* was deliberate or where the *approved person's* standard of *behaviour* was below that which would be reasonable in all the circumstances at the time of the conduct concerned. Disciplinary action against senior managers of *firms* and other individuals is one of the *FCA's* key tools in deterring *firms* and individuals from committing breaches.~~
- 6.2.5 G In some cases it may not be appropriate to take disciplinary measures against a *firm* for the actions of an *approved person individual* (an example might be where the *firm* can show that it took all reasonable steps to prevent the *breach*). In other cases, it may be appropriate for the *FCA* to take action against both the *firm* and the *approved person individual*. For example, a *firm* may have breached the *rule* requiring it to take reasonable care to establish and maintain such systems and controls as are appropriate to its business (*SYSC 3.1.1R* or *SYSC 4.1.10R*), and an *approved person individual* may have taken advantage of those deficiencies to front run orders or misappropriate assets.
- 6.2.6 G In addition to the general factors outlined in *DEPP 6.2.1G*, there are some additional considerations that may be relevant when deciding whether to take action against an ~~*approved person*~~ *individual* under section 66 of the *Act*. This list of those considerations is non-exhaustive. Not all considerations below may be relevant in every case, and there may be other considerations, not listed, that are relevant.
- (1) The ~~*approved person's*~~ *individual's* position and responsibilities. The *FCA* may take into account the responsibility of those exercising *significant influence functions* or *designated senior management functions* in the *firm* for the conduct of the *firm*. The more senior the *approved person individual* responsible for the misconduct, the more seriously the *FCA* is likely to view the misconduct, and therefore the more likely it is to take action against the ~~*approved person individual*~~.
 - (2) Whether the most appropriate regulatory response would be disciplinary action against the *firm*, rather than the *approved person* ~~would be a more appropriate regulatory response~~ *individual* or both.

- (3) Whether disciplinary action would be a proportionate response to the nature and seriousness of the ~~breach~~ misconduct by the ~~approved person~~ individual.

- 6.2.6A G DEPP 6.2.6BG to DEPP 6.2.9G apply to action taken by the FCA under section 66 of the Act.
- 6.2.6B G The FCA may take disciplinary action against an individual where there is evidence of personal culpability on the part of that individual. Personal culpability arises if the individual's behaviour was deliberate or below the standard which would be reasonable in all the circumstances at the time of the conduct concerned.
- 6.2.7 G The FCA will not discipline ~~approved persons~~ individuals on the basis of vicarious liability (that is, holding them responsible for the acts of others), provided appropriate delegation and supervision has taken place (see *APER* 4.6.13G, ~~and~~ *APER* 4.6.14G, *COCON* 4.1.8G and *COCON* 4.2.17G to *COCON* 4.2.24G). In particular, disciplinary action will not be taken against an *approved person* performing a *significant influence function* or a *senior conduct rules staff member* simply because a regulatory failure has occurred in an area of business for which ~~he is~~ they are responsible. The FCA will consider that an *approved person* performing a *significant influence function* may have breached *Statements of Principle* 5 to 7, or that a *senior conduct rules staff member* may have breached *rules SC1/SI1 to SC4/SI4* in *COCON* 2.2, only if ~~his~~ their conduct was below the standard which would be reasonable in all the circumstances at the time of the conduct concerned (see also *APER* 3.1.8AG and *COCON* 3.1.6G).
- 6.2.8 G An ~~approved person~~ individual will not be in breach if ~~he has~~ they have exercised due and reasonable care when assessing the information available to them, ~~has~~ have reached a reasonable conclusion and ~~has~~ have acted on it.
- 6.2.9 G Where disciplinary action is taken against an ~~approved person~~ individual the onus will be on the FCA to show that the ~~approved person~~ individual has been guilty of misconduct.

Action under section 63A of the Act against persons that perform a controlled function without approval

- 6.2.9A G ...
- (2) The extent to which the *person* could reasonably be expected to have known that ~~he was~~ they were performing a *controlled function* without approval. The circumstances in which the FCA would expect to be satisfied that a *person* could reasonably be expected to have known that ~~he was~~ they were performing a *controlled function* without approval include:

...

- (d) ... ;
- (e) the person's approval was subject to a condition or was granted for a limited period, and they failed to act in accordance with that condition or time limitation.

...

6.5B The five steps for penalties imposed on individuals in non-market abuse cases

...

6.5B.2 G ...

- (9) Factors relating to the nature of a *breach* by an individual include:

...

- (r) in relation to a contravention of section 63A of the *Act*, the extent to which the individual could reasonably be expected to have known that ~~he was~~ they were performing a *controlled function* without approval. The circumstances in which the *FCA* would expect to be satisfied that a *person* could reasonably be expected to have known that ~~he was~~ they were performing a *controlled function* without approval include:

...

- (iv) ... ;

- (v) the person's approval was subject to a condition or was granted for a limited period, and they failed to act in accordance with that condition or time limitation.

...

6.6 Financial penalties for late and incomplete submission of reports

...

- 6.6.3 G In addition, in appropriate cases, the *FCA* may bring disciplinary action against the ~~approved persons~~ individuals within the *firm's* management who are ultimately responsible for ensuring that the *firm's* reports are completed and returned to the *FCA*.

...

6.7 Discount for early settlement

- 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, condition or limitation~~ (see *DEPP 6A*), and other conditions which the *FCA* seeks to impose by way of such action. ~~Such~~ These conditions might include, for example, the amount or mechanism for the payment of compensation to consumers. The *FCA* recognises the benefits of such agreements, ~~in that~~ as they offer the potential for securing earlier redress or protection for consumers and ~~the a cost saving of cost~~ to the *person* concerned and to the *FCA* itself in contesting the financial penalty, ~~suspension or restriction or other disciplinary action~~. The penalty that might otherwise be payable, or the length of the period of suspension, ~~or restriction or condition~~ that might otherwise be imposed, ~~in respect of~~ for a *breach* by the *person* concerned will therefore be reduced to reflect the timing of any settlement agreement.

...

The settlement discount scheme applied to suspensions, ~~and~~ restrictions and conditions

- 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 or condition~~, having regard to the *FCA's* statement of policy as set out in *DEPP 6A.3*. The *settlement discount scheme* does not apply to the length of the period for which approvals under section 59 of the *Act* have effect as a result of a limitation, as different considerations apply to determining the appropriate length of this period: see *DEPP 6A.1.5G* and *DEPP 6A.3AG*. However, the *FCA* will take into account that the *approved person* is willing to enter into a settlement agreement when determining the appropriate period.

6A The power to impose a suspension, ~~or restriction, condition or limitation~~

6A.1 Introduction

- 6A.1.1 G *DEPP 6A* sets out the *FCA's* statement of policy with respect to the imposition of suspensions or restrictions under sections 88A, 89Q and 206A of the *Act*, and the period for which those suspensions or restrictions are to have effect, ~~under the *Act*~~, as required by sections ~~69(1)~~, 88C(1), 89S(1) and 210(1) of the *Act*. It also sets out the *FCA's* statement of policy on the imposition of suspensions, conditions or limitations under section 66 of the *Act*, the period for which suspensions or conditions are to have effect, and the period for which approvals under section 59 have effect as a result of a limitation, as required by section 69(1). *DEPP 6A* does not concern limitations or conditions imposed under section 61(2B), 63ZA or 63ZB of the *Act*.

- 6A.1.2 G (1) For the purposes of *DEPP* 6A, ...
- ...
- (d) ; ~~and~~
- (2) “restriction” refers to limitations or other restrictions in relation to:
- ...
- (b) ~~the performance by an *approved person* of any function to which any approval relates (under section 66 of the Act);~~
[deleted]
- ...
- (d) ... ;
- (3) “condition” refers to a condition imposed in relation to any approval of the performance by an *approved person* of any function to which the approval relates (under section 66 of the Act); and
- (4) “limitation” refers, apart from in *DEPP* 6A.1.2G(2), to a limitation of the period for which any approval of the performance by an *approved person* of any function to which the approval relates is to have effect (under section 66 of the Act).
- 6A.1.3 G The power to impose a suspension, ~~or a restriction, condition or limitation~~ is a disciplinary measure which the *FCA* may use in addition to, or instead of, imposing a financial penalty or issuing a *public censure*. The principal purpose of imposing ~~a suspension or a restriction~~ such a measure is to promote high standards of regulatory and/or market conduct by deterring *persons* who have committed *breaches* from committing further *breaches*, helping to deter other *persons* from committing similar *breaches*, and demonstrating generally the benefits of compliant behaviour. ~~Suspensions and restrictions~~ These measures are therefore tools that the *FCA* may employ to help it to achieve its *statutory objectives*. Examples of ~~restrictions~~ measures that we may impose include:
- (1) we may ~~limit~~ restrict an *authorised person's* carrying on of a *regulated activity* so that they can only sell certain products or provide certain services;
- (2) we may ~~restrict~~ place a condition on an *approved person's* performance of their *controlled functions* so that they can only give advice to *consumers* or deal in certain products if they are appropriately supervised.
- 6A.1.4 G The powers to impose a suspension, ~~or a restriction, condition or limitation~~ in relation to *authorised persons* and *approved persons* are disciplinary measures; where the *FCA* considers it necessary to take action, for example,

to protect *consumers* from an *authorised person*, the *FCA* will seek to cancel or vary the *authorised person's permissions*. If the *FCA* has concerns with a *person's* fitness to be approved, and considers it necessary to take action, the *FCA* will seek to prohibit the *approved person* or withdraw ~~its~~ their approval. For an *SMF manager*, the *FCA* may instead vary their approval by imposing one or more conditions, if the *FCA* is satisfied that they would be a fit and proper person to perform functions in relation to regulated activities if the conditions are imposed, and that it is appropriate to do so. While the powers to impose a suspension or a restriction in relation to *sponsors* and *primary information providers* under sections 88A(2)(b)/(c) and 89Q(2)(b)/(c) of the *Act* are disciplinary measures, the *FCA* can impose suspensions, limitations or other restrictions in relation to *sponsors* and *primary information providers* in other circumstances.

6A.1.5 G The *FCA* expects to impose a limitation in two situations. The *FCA* may impose a limitation where it considers it appropriate for an approval to cease to have effect:

- (1) after a certain period, unless the *approved person* demonstrates during the period of limitation that it is appropriate for them to be reapproved without the limitation;
- (2) after a short period, without giving the *approved person* the opportunity to demonstrate that they should be re-approved.

The imposition of a limitation in (2) is equivalent to a withdrawal of approval, apart from that it is carried out for disciplinary reasons and the *FCA* will have made no finding of lack of fitness or propriety. The *FCA* recognises that the use of this power will have serious consequences for the *approved person* concerned; therefore, it will exercise its power in a proportionate manner. The *FCA's* policy on determining the length of the limitation is set out in *DEPP* 6A.3AG.

6A.2 Deciding whether to take action

- 6A.2.1 G The *FCA* will consider the full circumstances of each case and determine whether it is appropriate to impose a suspension, ~~or a restriction,~~ condition or limitation. The *FCA* will usually make this decision at the same time as it determines whether or not to impose a financial penalty or a *public censure*.
- 6A.2.2 G The *FCA* will take into account relevant factors in deciding whether it is appropriate to impose a suspension, ~~or restriction,~~ condition or limitation. These may include factors listed in *DEPP* 6.2. There may also be other factors, not listed in *DEPP* 6.2, that are relevant.
- 6A.2.3 G The *FCA* will consider it appropriate to impose a suspension, ~~or restriction,~~ condition or limitation where it believes that such action will be a more effective and persuasive deterrent than the imposition of a financial penalty alone. This is likely to be the case where the *FCA* considers that direct and

visible action in relation to a particular *breach* is necessary. Examples of circumstances where the *FCA* may consider it appropriate to ~~impose a suspension or restriction~~ take such action include:

...

(6) ... ;

(7) where, in view of the nature and seriousness of an *approved person's* misconduct, the *FCA* considers it appropriate to impose a limitation on part or all of their approval.

- 6A.2.4 G The *FCA* expects usually to ~~suspend or restrict a *person* from carrying out~~ impose a suspension, restriction, condition or limitation in relation to activities directly linked to the *breach*. However, in certain circumstances the *FCA* may also ~~suspend or restrict a *person* from carrying out~~ impose a suspension, restriction, condition or limitation in relation to activities that are not directly linked to the *breach*, for example, where an *authorised person's* relevant business area no longer exists or has been restructured.

...

6A.3 **Determining the appropriate length of the period of suspension, ~~or~~ restriction or condition**

- 6A.3.1 G The *FCA* will consider all the relevant circumstances of a case when it determines the length of the period of suspension, ~~or~~ restriction or condition (if any) that is appropriate for the *breach* concerned, and is also a sufficient deterrent. Set out below is a list of factors that may be relevant for this purpose. The list is not exhaustive: not all of these factors may be applicable in a particular case, and there may be other factors, not listed, that are relevant.

- 6A.3.2 G The following factors may be relevant to determining the appropriate length of the period of suspension, ~~or~~ restriction or condition to be imposed on a *person* under the *Act*:

(1) Deterrence

When determining the appropriate length of the period of suspension, ~~or~~ restriction or condition, the *FCA* will have regard to the principal purpose for which it imposes sanctions, namely to promote high standards of regulatory and/or market conduct by deterring *persons* who have committed *breaches* from committing further *breaches* and helping to deter other *persons* from committing similar *breaches*, as well as demonstrating generally the benefits of compliant business.

...

- (4) The impact of suspension, ~~or restriction~~ or condition on the person in breach

The following considerations may be relevant to the assessment of the impact of suspension or restriction on an *authorised person*, *sponsor* or *primary information provider*:

...

- (e) whether the suspension or restriction would cause the *authorised person*, *sponsor* or *primary information provider* serious financial hardship.

The following considerations may be relevant to the assessment of the impact of suspension or condition ~~restriction~~ on an *approved person*:

...

...

After DEPP 6A.3 insert the following new section. The text is not underlined.

6A.3A Determining the appropriate length of the period of limitation for approvals under section 59 of the Act

6A.3A.1 G The *FCA* will consider all the relevant circumstances when it determines the period of limitation. Set out below is a list of factors that may be relevant for this purpose. The list is not exhaustive: not all of these factors may be applicable and there may be other factors, not listed, that are relevant.

6A.3A.2 G The following factors may be relevant when determining the period of limitation:

- (1) whether the *FCA* may be minded to reapprove the *approved person* in the future, for example if the *approved person* takes action specified by the *FCA* during the period of limitation;
- (2) the *approved person's* expected lost earnings if the *FCA* imposes a short period of limitation;
- (3) whether imposing a short period of limitation would cause the *approved person* serious financial hardship.

Amend the following as shown.

6A.4 The interaction between the power to impose suspensions, ~~or restrictions,~~ conditions and limitations and the power to impose penalties or public censures

- 6A.4.1 G The deterrent effect and impact on a *person* of a suspension, ~~or~~ restriction, condition or limitation by itself or in combination with a financial penalty, may be greater than where only a financial penalty is imposed. The *FCA* will consider the overall impact and deterrent effect of the sanctions it imposes when determining the level of penalty and the length of suspension, ~~or~~ restriction, condition or limitation.
- 6A.4.2 G The *FCA* expects usually to take the following approach in respect of the interaction between a suspension, ~~or~~ restriction, condition or limitation and a financial penalty or *public censure*:
- ...
- (3) If the *FCA*, following the approach set out in *DEPP* 6A.2, considers it appropriate to impose a suspension, ~~or~~ restriction, condition or limitation, it will calculate the appropriate length of the period of ~~suspension or restriction~~ this measure, following the approach set out in *DEPP* 6A.3 or *DEPP* 6A.3A, as appropriate.
 - (4) Where the *FCA* considers it appropriate to impose both a financial penalty and a suspension, ~~or~~ restriction, condition or limitation, it will decide whether the combined impact on the *person* is likely to be disproportionate in respect to the *breach* and the deterrent effect of the sanctions.
 - (5) If the *FCA* considers the combined impact on the *person* is likely to be disproportionate, it will decide whether to reduce the period of suspension, ~~or~~ restriction, or condition, the amount of the financial penalty or both, so that the combined impact of the sanctions is proportionate in relation to the *breach* and the deterrent effect of the sanctions. The *FCA* will decide which sanction to reduce after considering all the circumstances of the case.
 - (6) In deciding the final level of the financial penalty and the length of the period of suspension, ~~or~~ restriction, condition or limitation, the *FCA* will also take into account any representations by the *person* that the combined impact will cause them serious financial hardship. The *FCA* will take the approach set out in *DEPP* 6.5D in assessing this.
- 6A.4.3 G The *FCA* may depart from the approach set out in *DEPP* 6A.4.2G. For example, the *FCA* may at the outset consider that a financial penalty is the only appropriate sanction for a *breach* but, having determined the appropriate level of financial penalty, may consider it appropriate to reduce the amount of the financial penalty for serious financial hardship reasons. In such a situation, the *FCA* may consider it appropriate to impose a suspension, ~~or~~ restriction, condition or limitation even if the *FCA* at the outset did not consider such a sanction to be appropriate. The *FCA* will take into account whether the *person* would suffer serious financial hardship in deciding the length of the period of suspension, ~~or~~ restriction, condition or limitation and may decide not to impose a ~~suspension or restriction~~ such a

measure if it considers such action would result in serious financial hardship.

...

Insert the following new chapter after DEPP 7. This text is not underlined.

8 Variation of SMF managers' approval on the FCA's own initiative

8.1 Introduction

8.1.1 G *DEPP 8 sets out the FCA's statement of policy on the exercise of its power under section 63ZB of the Act to vary, on its own initiative, an approval given by the FCA or the PRA for the performance of a designated senior management function in relation to the carrying on of a regulated activity by a relevant authorised person. The FCA is required to publish this statement of policy by section 63ZD of the Act.*

[**Note:** the *FCA's* statement of policy on the exercise of its power under section 63ZA of the Act to vary an approval at the request of a *relevant authorised person* is set out in *SUP 10C*]

8.1.2 G In *DEPP 8*, the power under section 63ZB of the *Act* described in *DEPP 8.1.1G* is referred to as the *FCA's* "own-initiative variation of approval power".

8.2 Use of the own-initiative variation of approval power: general

8.2.1 G The *FCA* may use the own-initiative variation of approval power where it considers that it is desirable to do so to advance one or more of its operational objectives. The *FCA* will assess this on a case-by-case basis, taking into account the specific circumstances of the *firm* and the *SMF manager*.

8.2.2 G When considering the use of this power to deal with a particular concern, the *FCA* will have regard to the range of regulatory tools that are available. The *FCA* will consider dealing with any concerns informally through discussion and agreement with the *firm* and the *SMF manager*, instead of using the own-initiative variation of approval power.

8.2.3 G The power to impose a conditional or time-limited approval does not depend on the *SMF manager* being unfit without that condition or time limitation. The *FCA* can impose a condition or time limitation even if the candidate would still be fit and proper without it. Conversely, where an *SMF manager* is not fit and proper but might be if a condition or time limitation is imposed, the *FCA* is not obliged to impose a condition or time limitation, and may take the view that a *prohibition order* or withdrawal of approval is the appropriate course of action.

- 8.2.4 G The *FCA* may vary an approval by:
- (1) imposing a condition;
 - (2) varying a condition;
 - (3) removing a condition; or
 - (4) limiting the period for which the approval is to have effect.
- 8.2.5 G The *FCA* may use the own-initiative variation of approval power in a wide range of circumstances. A number of examples are set out in *DEPP* 8.3. These are not exhaustive.
- 8.2.6 G The circumstances which will lead to a condition or time limitation being imposed on a *candidate* for an *SMF manager* role will, where appropriate, also lead to an existing *SMF manager's* approval being varied. *SUP* 10C is therefore relevant to the *FCA's* use of the own-initiative variation of approval power.

8.3 Use of the own-initiative variation of approval power: specific examples

- 8.3.1 G Examples of situations where the *FCA* may use the own-initiative variation of approval power include where:
- (1) it has concerns about an *SMF manager's* fitness to remain approved in relation to the performance of a *designated senior management function* but, in all the circumstances, it considers it appropriate to vary their approval by imposing one or more conditions or a time limitation, rather than making a *prohibition order* or withdrawing approval;
 - (2) the nature or scope of the *SMF manager's* role has changed, for example where they have taken on additional or different responsibilities. In this situation, the *FCA* may consider it appropriate to impose a condition that they undertake training to enhance their competency and capability regarding their new responsibilities, or a condition that they receive mentoring;
 - (3) the size, nature, scope or complexity of the *firm's* activities has significantly changed since the *SMF manager* was first approved;
 - (4) the *SMF manager* is required to personally support supervisory action in relation to the *firm*. For example, where a *firm* is running a remedial programme the *FCA* may impose a condition that the *SMF manager* take responsibility for managing or overseeing delivery of aspects of that programme;
 - (5) it is appropriate to use the own-initiative variation of approval power

as a matter of urgency (see *DEPP* 8.4);

- (6) the *SMF manager's* approval is subject to an existing condition but the *FCA* considers that condition is insufficient to mitigate the risk in respect of which it was imposed. In this case, the *FCA* will vary the condition to make it more effective. The *FCA* may also, or instead, limit the period of the approval;
- (7) the *SMF manager's firm* applies to the *FCA* to remove a condition, or vary a condition to make it less onerous, where the condition was imposed by the *FCA* on its own initiative, and the *FCA* considers that it is desirable to remove or vary the condition in order to advance one or more of its operational objectives. The *FCA* expects that such a removal or variation would normally occur on the application of the *firm*.

8.4 Use of the own-initiative variation of approval power in urgent cases

- 8.4.1 G The *FCA* may impose a variation of approval to take effect immediately, or on a specified date, if it reasonably considers that this is necessary having regard to the reasons for which it is exercising the own-initiative variation of approval power.
- 8.4.2 G The *FCA* will consider exercising its own-initiative variation of approval power as a matter of urgency where:
 - (1) the information available to it indicates serious concerns about the *SMF manager* or their *firm* that need to be addressed immediately; and
 - (2) circumstances indicate that it is appropriate to use statutory powers immediately to require and/or prohibit certain actions by the *SMF manager* to ensure these concerns are addressed.

8.5 Effects of a breach of condition or time limitation

- 8.5.1 G The effects of breaching a condition or time limitation are set out in *SUP* 10C and *DEPP* 6.2.9A.

Amend the following as shown

Sch 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>FCA</i> to make the statements of policy in <i>DEPP</i> :
--

Section 63C (Statement of policy)		
<u>Section 63ZD (Statement of policy relating to conditional approval and variation)</u>		
...		

Annex C

Amendments to the Enforcement Guide

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

1 Introduction

...

1.2 In the areas set out below, the *Act* expressly requires the *FCA* to prepare and publish statements of policy or procedure on the exercise of its enforcement and investigation powers and in relation to the giving of *statutory notices*.

(1) ...

(1-A) section 63ZD requires the *FCA*, among other things, to publish a statement of its policy on the exercise of its power to vary an approval under section 63ZB;

(1A) sections 69 and 210 require the *FCA* to publish statements of policy on the imposition of financial penalties, suspensions, ~~or~~ restrictions, conditions or limitations on firms, ~~approved persons~~ individuals and unauthorised persons to whom section 404C applies, the amount of financial penalties imposed, ~~and~~ the period for which suspensions, ~~or~~ restrictions or conditions are to have effect, and the period for which approvals under section 59 are to have effect as a result of a limitation;

2 The *FCA*'s approach to enforcement

...

Case selection: Firms and ~~approved persons~~ individuals, market abuse cases and listing matters

2.5 Other than in the area of a *firm's* failure to satisfy the *FCA's Threshold Conditions* for authorisation (~~as to which~~, see paragraph 2.11), the selection method for cases involving *firms* and ~~approved persons~~ individuals, *market abuse* and listing matters (for example, breaches of the listing, prospectus or disclosure *rules*) occurs at two main levels:

...

...

Senior management responsibility

2.31 The *FCA* is committed to ensuring that senior managers of *firms* fulfil their

responsibilities. The *FCA* expects senior management to take responsibility for ensuring *firms* identify risks, develop appropriate systems and controls to manage those risks, and ensure that the systems and controls are effective in practice. ~~The *FCA* will not pursue senior managers where there is no personal culpability.~~ ~~However, where~~ Where senior managers have failed to meet our standards are themselves responsible for misconduct, the *FCA* will, where appropriate, bring cases against individuals as well as, or instead of, *firms*. The *FCA* believes that deterrence will most effectively be achieved by ~~bringing home to such~~ making these individuals realise the consequences of their actions. The *FCA*'s policy on disciplinary action against senior management and against other ~~approved persons~~ individuals under section 66 of the *Act* is set out in *DEPP* 6.2.4G to *DEPP* 6.2.9-BG. The *FCA*'s policy on prohibition and withdrawal of approval is set out in chapter *EG* 9 ~~of this guide~~.

...

4 Conduct of investigations

...

- 4.9 ~~*Firms, and approved persons*~~ *and conduct rules staff* have an obligation to be open and co-operative with the *FCA* (as a result of Principle 11 for Businesses, ~~and~~ Statement of Principle 4 for Approved Persons ~~and~~ Rule 3 of COCON 2.1 respectively). The *FCA* will make it clear to the *person* concerned whether it requires them to produce information or answer questions under the *Act* or whether the provision of answers is purely voluntary. The fact that the *person* concerned may be a regulated person does not affect this.
- 4.10 The *FCA* will not bring disciplinary proceedings against a *person* ~~under the above Principles~~ for failing to be open and co-operative with the *FCA* simply because, during an investigation, they choose not to attend or answer questions at a purely voluntary interview. However, there may be circumstances in which an adverse inference may be drawn from the reluctance of a *person* (whether or not they are a *firm* or ~~approved person~~ individual) to participate in a voluntary interview. If a *person* provides the *FCA* with misleading or untrue information, the *FCA* may consider taking action against them.
- 4.11 If a *person* does not comply with a requirement imposed by the exercise of statutory powers, they may be held to be in contempt of court. The *FCA* may also choose to bring proceedings for breach of *Principle* 11, ~~or~~ Statement of Principle 4 or COCON 2.1.3R as this is a serious form of non-cooperation.

Scoping discussions

- 4.12 For cases involving ~~*firms, or approved persons*~~ *or conduct rules staff*, the *FCA* will generally hold scoping discussions with the *firm* or individuals concerned close to the start of the investigation (and may do so in other cases). The purpose of these discussions is to give the *firm* or individuals concerned in the investigation an indication of: why the *FCA* has appointed investigators

(including the nature of and reasons for the *FCA's* concerns); the scope of the investigation; how the process is likely to unfold; the individuals and documents the team will need access to initially and so on. There is a limit, however, as to how specific the *FCA* can be about the nature of its concerns in the early stages of an investigation. The *FCA* team, for the purposes of the scoping discussions, will normally include the nominated supervisor if the subject is a fixed portfolio *firm*.

...

5 Settlement

...

The settlement discount scheme

5.14 The *settlement discount scheme* allows a reduction in a financial penalty; or period of suspension, ~~or period of restriction~~ or condition 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.

...

5.16 The scheme does not apply to civil or criminal proceedings brought in the courts, or to *public censure, prohibition orders*, withdrawal of *authorisation* or approval, limitations of the period for which any approval is to have effect, or the payment of compensation or redress.

...

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~~ or condition.

...

6 Publicity

...

Warning notice statements

6.7B The *FCA* may publish information about *warning notices* which fall within section 391(1ZB) of the *Act*. These are essentially disciplinary *warning notices*, for example, where the *FCA* is proposing to censure, fine, ~~suspend or restrict~~ impose a suspension, restriction, condition or limitation on a firm or individual. The power to publish information does not apply, for example, to *warning notices* which only propose to prohibit an individual, withdraw the approval of an

individual or cancel the permission of a *firm*.

...

6.7G If, after consulting the persons to whom the notice is given or copied, the *FCA* still considers it is appropriate to publish information about a *warning notice*, it will publish this information in a statement (a warning notice statement). This will ordinarily include a brief summary of the facts which gave rise to the *warning notice* to enable consumers, *firms* and market users to understand the nature of the *FCA*'s concerns. Where the *FCA* considers it appropriate to identify the subject of the *warning notice*, it will also include details of:

...

(3) in the case of an *approved person* or *conduct rules staff*, his or her employer at the relevant time.

...

Supervisory notices varying a firm's Part 4A permission, ~~or~~ imposing a requirement or varying an approval on the *FCA*'s own initiative (see ~~chapter~~ EG 8 of this guide and DEPP 8)

...

6.12 ~~Publishing~~ It is important that the *FCA* maintains an accurate public record. One of the ways the *FCA* does this is by publishing the reasons for variations of *Part 4A permission*, the imposition of requirements, and variations of the approval of *SMF managers*. ~~and maintaining an accurate public record, are important elements of the *FCA*'s approach to its statutory objectives.~~ The *FCA* will always aim to balance ~~both~~ the interests of *consumers* and the possibility of unfairness to the *person* subject to the *FCA*'s action. The *FCA* will publish relevant details of ~~both~~ fundamental and non-fundamental variations of *Part 4A permission* and requirements which it imposes on *firms*, and variations of approval of *SMF managers*. 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, prejudicial to the interests of *consumers*, or detrimental to the stability of the *UK financial system*. Publication will generally include placing the notice on the *FCA* website and this may be accompanied by a press release. As with warning notice statements, *decision notices* and *final notices*, *supervisory notices* and related press releases that are published on the *FCA*'s website will be reviewed upon request. The *FCA* will determine at that time whether continued publication is appropriate, or whether notices and related press releases should be removed or amended. The *FCA* 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.

6.12A The *FCA* will amend the *Financial Services Register* to reflect a *firm*'s actual *Part 4A permission* or the terms of an *SMF manager*'s actual approval under section 59 of the Act following any variation.

...

7 **Financial penalties, ~~suspensions and public censures~~ and other disciplinary sanctions**

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

7.2 The *FCA* has the following powers to impose a financial penalty and to publish a *public censure*.

(1) It may publish a statement:

(a) against an *approved person* or conduct rules staff under section 66 of the *Act*;

...

(2) It may impose a financial penalty:

...

(aa) on an *approved person* or conduct rules staff, under section 66 of the *Act*;

...

(3) It may impose a suspension, limitation or other restriction:

(a) ~~on an approved person~~ under section 66 of the *Act*; [deleted]

...

(4) It may impose a suspension, condition or limitation on an approved person under section 66 of the *Act*.

...

Alternatives to financial penalties and public censures

7.3 The *FCA* also has measures available to it where it considers it is appropriate to take protective or remedial action. These include:

(1) where a *firm's* continuing ability to meet the *threshold conditions* or where an *approved person's* or other individual's fitness and propriety to perform the *controlled functions* to which his approval relates are called into question:

...

(1A) where it is desirable to do so in order to advance one or more of its operational objectives, the *FCA* may vary the approval of an *SMF manager* (see *DEPP 8*);

...

FCA's statements of policy

7.4 The *FCA's* statement of policy ~~in relation to~~ on 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 *FCA's* statement of policy ~~in relation to~~ on the amount of a financial penalty is set out in *DEPP 6.5* to *DEPP 6.5D*. The *FCA's* statement of policy ~~in relation to~~ on financial penalties for late submission of reports is set out in *DEPP 6.6*. The *FCA's* statement of policy ~~in relation to~~ on the imposition of suspensions, ~~or~~ restrictions, conditions and limitations is set out in *DEPP 6A* (The power to impose a suspension, ~~or~~ restriction, condition or limitation). The *FCA's* statement of policy on the variation of an *SMF manager's* approval on its own initiative is set out in *DEPP 8*.

...

7.13 Generally, the *FCA* would expect to use private warnings in the context of *firms*, ~~and~~ *approved persons* and *conduct rules staff*. However, the *FCA* may also issue private warnings in circumstances where the *persons* involved may not necessarily be authorised or approved. For example, private warnings may be issued in potential cases of *market abuse*; cases where the *FCA* has considered making a *prohibition order* or a disapplication order; or cases involving breaches of provisions imposed by or under Part VI of the *Act* (Official Listing).

7.14 In each case, the *FCA* will consider the likely impact of a private warning on the recipient and whether any risk that *person* poses to the *statutory objectives* requires the *FCA* to take more serious action. Equally, where the *FCA* gives a private warning to an *approved person* or *conduct rules staff*, the *FCA* will consider whether it would be desirable and appropriate to inform the *approved person's firm* (or employer, if different) of the conduct giving rise to the warning and the *FCA's* response.

...

9 Prohibition Orders and withdrawal of approval

...

Prohibition orders and withdrawal of approval – approved persons

...

9.9 When ~~it~~ the FCA decides whether to make a *prohibition order* against an *approved person* and/or withdraw ~~its~~ their approval, the *FCA* will consider all the relevant circumstances of the case. These may include, but are not limited to those set out below.

...

- (3) Whether, and to what extent, the *approved person* has:
- (a) failed to comply with the *Statements of Principle* or *COCON* issued by the *FCA* with respect to the conduct of *approved persons*; or

...

- (10) Where the *approved person* is an *SMF manager*, whether they would be a fit and proper person to perform functions in relation to *regulated activities* if the *FCA* varied their approval by imposing one or more conditions. If so, whether it is appropriate for the *FCA* to exercise its power to impose such conditions, instead of making a prohibition order or withdrawing the *approved person's* approval.

...

Applications for variation or revocation of prohibition orders

...

9.21 If the individual applying for a revocation or variation of a *prohibition order* proposes to take up an offer of employment to perform a *controlled function*, ~~the *approved persons* regime will also apply to him~~ the *FCA* will take this into account when considering whether to grant or refuse the application. ~~In these cases, the *firm* concerned will be required to apply to the *FCA* for approval of that individual's employment in that capacity. The *FCA* will assess the individual's fitness and propriety to perform *controlled functions* on the basis of the criteria set out in *FIT 2.1* (Honesty, integrity and reputation); *FIT 2.2* (Competence and capability) and *FIT 2.3* (Financial soundness).~~

9.22 The *FCA* will not generally grant an application to vary or revoke a *prohibition order* unless it is satisfied that: the proposed variation will not result in a reoccurrence of the risk to *consumers* or confidence in the *financial system* that resulted in the order being made; and the individual is fit to perform functions in

relation to *regulated activities* generally, or to those specific *regulated activities* in relation to which the individual has been prohibited. The FCA will assess the individual's fitness and propriety to perform these functions on the basis of the criteria in FIT 2.1 (Honesty, integrity and reputation), FIT 2.2 (Competence and capability) and FIT 2.3 (Financial soundness).

...

12 Prosecution of Criminal Offences

...

FCA cautions

...

- 12.6 Where the *FCA* decides to administer a formal caution, a record of the caution will be kept by the *FCA* and on the Police National Computer. The *FCA* will not publish the caution, but it will be available to parties with access to the Police National Computer. The issue of a caution may influence the *FCA* and other prosecutors in their decision whether or not to prosecute the offender if ~~he~~ they offend again. ~~If the offender is a firm or an approved person, a~~ A caution given by the *FCA* will form part of the ~~firm's or approved person's~~ regulatory record for the purposes of DEPP 6.2.1G(3). If relevant, the *FCA* will take the caution into account in deciding whether to take ~~disciplinary~~ action for subsequent ~~regulatory~~ misconduct by the ~~firm or the approved person~~. The *FCA* may also take a caution into account when considering a *person's* honesty, integrity and reputation and ~~his~~ their fitness or propriety to perform controlled or other functions in relation to *regulated activities* (see FIT 2.1.3G).

...

Annex 2 - Guidelines on investigation of cases of interest or concern to the Financial Conduct Authority and other prosecuting and investigating agencies

...

Indicators for deciding which agency should take action

- 9 The following are indicators of whether action by the *FCA* 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 *FCA*
- ...
- Where the likely defendants are *authorised persons*, ~~or approved persons~~ or conduct rules staff.

...

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

...

1.4 The *FCA* has the power to take the following enforcement action:

- discipline authorised firms under Part XIV of the 2000 Act and approved persons and other individuals under s.66 of the 2000 Act;

...



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