

Policy Statement

PS16/18

# Changes to the Decision Procedure and Penalties manual and the Enforcement Guide for the implementation of the Market Abuse Regulation



June 2016



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In this Policy Statement we report on the main issues arising from Consultation Paper 16/13 *Changes to the Decision Procedure and Penalties Manual and the Enforcement Guide for the implementation of the Market Abuse Regulation* and publish the final rules.

Please send any comments or queries to:

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## Abbreviations used in this paper

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<b>Auction Regulation</b>	Commission Regulation (EU) 1031/2010
<b>CP</b>	Consultation Paper
<b>DEPP</b>	Decision Procedures and Penalties manual
<b>EG</b>	Enforcement Guide
<b>EU</b>	The European Union
<b>EU MAR</b>	EU Market Abuse Regulation (2014/596/EU)
<b>FCA</b>	Financial Conduct Authority
<b>FI</b>	Financial Instrument
<b>FSMA</b>	Financial Services and Markets Act 2000
<b>MiFID</b>	Markets in Financial Instruments Directive
<b>MTF</b>	Multilateral Trading Facility
<b>PDMR</b>	Person Discharging Managerial Responsibilities
<b>PS</b>	Policy Statement
<b>RAP Regulations</b>	Recognised Auction Platforms Regulations 2011
<b>SI</b>	Statutory Instrument
<b>STOR</b>	Suspicious Transaction and Order Report

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# 1. Overview

## Introduction

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- 1.1** In this Policy Statement (PS) we summarise the feedback we received to Consultation Paper (CP) 16/13 Changes to the Decision Procedure and Penalties Manual and the Enforcement Guide for the implementation of the Market Abuse Regulation,<sup>1</sup> which closed on 22 May 2016. We have incorporated this feedback into the changes to the Decision Procedures and Penalties manual (DEPP) and the Enforcement Guide (EG) that are required to implement the EU Market Abuse Regulation (EU MAR) from 3 July 2016. We explain these changes in this PS. The final changes to DEPP and EG are set out in Appendix 1.

## Who does this affect?

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- 1.2** This paper will be relevant to, among others, any firm or individual who directly or indirectly deals in, or any firm which issues, financial instruments (FIs):
- admitted to trading on a regulated market or for which a request for admission to trading on such a market has been made
  - traded on a Multilateral Trading Facility (MTF), admitted to trading on an MTF or for which a request for admission to trading on an MTF has been made
  - traded on an Organised Trading Facility
  - not admitted to trading on one of those facilities, but the price or value of which depends on or has an effect on the price or value of an FI
- 1.3** This includes any transaction, order or behaviour concerning these FIs whether or not the transaction, order or behaviour takes place on a trading facility.
- 1.4** This PS will also be of interest to emission allowance market participants, and any person discharging managerial responsibilities (PDMR) within issuers and participants, or any person closely associated with them.

## Is this of interest to consumers?

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- 1.5** This paper will be of interest to consumers who directly or indirectly deal and invest in any of the FIs indicated above.

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<sup>1</sup> <http://www.fca.org.uk/your-fca/documents/consultation-papers/cp16-13>

## Context

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- 1.6** EU MAR updates the civil market abuse framework formerly established by the EU Market Abuse Directive and will apply from 3 July 2016.
- 1.7** In CP15/35 we consulted on changes to the handbook, other than DEPP and EG, for the purposes of implementing EU MAR.<sup>2</sup> CP15/35 noted that the Treasury was preparing a Statutory Instrument (SI) to modify domestic law to meet the UK's obligation to implement EU MAR. The webpage for CP15/35 directed readers to the appropriate contact at the Treasury to request a copy of an early draft of the SI (the preliminary draft).
- 1.8** In CP16/13 we invited comments on changes to DEPP and EG for the purposes of implementing EU MAR in light of the Treasury's preliminary draft, and likely changes to the preliminary draft, including:
- changes to our decision-making procedure in DEPP 2 to include the new powers that we will have under the Financial Services and Markets Act 2000 (FSMA)
  - changes to our statements of policy in DEPP 6 and DEPP 6A to set out how our policy would apply to contraventions of EU MAR and our new sanctioning powers
  - other consequential changes necessary to DEPP and EG in light of EU MAR and the preliminary draft
- 1.9** While the draft instrument annexed to CP16/13 was drafted on the basis of the preliminary draft, our CP noted a number of changes that were likely to be made to the preliminary draft and set out our approach if these changes were made.
- 1.10** On 29 June 2016 the Treasury laid the SI.<sup>3</sup> The SI will come into force on 3 July 2016.
- 1.11** In this paper we make changes to DEPP and EG, as proposed in CP16/13, in light of the SI and the responses we received to CP16/13.

## Summary of feedback and our response

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- 1.12** CP16/13 covered changes to DEPP 2, DEPP 6, DEPP 6A, EG and the Glossary.
- 1.13** We received four responses to CP16/13; two from trade associations, one from a professional representative body and one from a legal representative.
- 1.14** The respondents generally agreed with the proposals and the alignment of our approach to the enforcement of breaches of EU MAR, to the extent appropriate, with our current approach to the enforcement of breaches of the market abuse prohibitions and other requirements under FSMA, so minimising any changes to DEPP and EG.
- 1.15** The respondents did however raise some concerns about our approach, which we have dealt with in turn in Chapter 2.

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<sup>2</sup> PS16/13 outlines the changes to the Handbook other than DEPP and EG for the purpose of implementation of EU MAR

<sup>3</sup> [www.legislation.gov.uk/uksi/2016/680/contents/made](http://www.legislation.gov.uk/uksi/2016/680/contents/made)

## Next steps

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### What do you need to do next?

- 1.16** The final text of the rules and guidance we have made is in Appendix 1. These come into force on 3 July 2016.
- 1.17** While we do not believe that we need to further consult on the final text and are not doing so, we have decided to invite comments within a short period after the publication of this policy statement in relation to the treatment in the final text of contraventions of articles 38 to 42 of the Auction Regulation.

### What will we do?

- 1.18** We will exercise our supervisory and enforcement powers as set out in the final text.
- 1.19** We will consider any comments made in response to our invitation in paragraph 1.17 and respond appropriately.

## 2. Summary of feedback

- 2.1** In this chapter we summarise the feedback received to our proposals in CP 16/13, provide our analysis in light of the final SI and respond to the feedback.

### Decision-making process for new and existing powers

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- 2.2** In CP16/13 we proposed amendments to DEPP 2 Annex 1 in light of our new sanctioning and other powers under Part VIII FSMA.

**Q1:** *Do you agree with the above proposed changes to our decision-making process in DEPP?*

- 2.3** We received no comments on this issue.

#### Our response

We will proceed with the proposed changes, save the following:

- the entry for sections 127A(3)and(4) FSMA in DEPP 2 Annex 1 will not be included and this provision has been deleted in the SI
  - the reference to the Disclosure and Transparency Rules in the entry for section 122I FSMA will be retained as these continue to be relevant as guidance
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### Contraventions of EU MAR: The application of the penalty policy and other consequential changes (including amendments to the Glossary) and suspensions, restrictions, conditions or limitations

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- 2.4** In CP16/13 we set out proposals for how our policy in DEPP 6 and 6A will apply to market abuse and non-market abuse breaches of EU MAR and applicable EU regulations made under it, and to breaches of requirements imposed under Part VIII FSMA. We also proposed some amendments to the Glossary, DEPP 6.2, DEPP 6.5C and DEPP 6A required by the changes introduced by EU MAR and the Treasury's draft instrument, and to give effect to our proposed policy approach.

**Q2:** *Do you agree with the above policy proposal regarding how we will apply our penalty policy to different breaches of EU MAR and the proposed consequential amendments?*

**Q3:** *Do you agree with the application of our current policy on suspensions, restrictions, conditions or limitations when imposing these sanctions for market abuse and the proposed distinction between market abuse and other contraventions in cases against individuals?*

**Q9:** *Do you agree with the proposed amendments to the Glossary?*

- 2.5** Respondents were generally in agreement with our proposed approach of aligning our policy on the enforcement of EU MAR with our current policy.
- 2.6** One respondent welcomed the acknowledgment that the current market abuse penalty policy for individuals set out in DEPP 6.5C will apply to breaches by individuals of the market abuse provisions of EU MAR only, and not the breaches of other provisions of EU MAR by individuals.

### Our response

We will proceed with the proposed changes, save the following:

- amendments in DEPP 6.2 relating to the deletion of section 381 and 383 will not be made, as the corresponding amendments to FSMA do not appear in the final SI.

### Disciplinary prohibitions and the application of the FCA's penalty policy

- 2.7** In CP16/13 we set out our proposals on how DEPP 6A will apply to our new disciplinary prohibition powers to impose a temporary or permanent prohibition on an individual holding an office or position involving responsibility for taking decisions about the management of a MiFID investment firm, and a temporary prohibition on an individual trading financial instruments. We also described how our policy will apply to the market abuse and non-market abuse breaches of EU MAR and applicable EU regulations made under it, and to breaches of requirements imposed under Part VIII FSMA. In CP16/13 we explained how our proposed amendments to DEPP 1, DEPP 6.2 and DEPP 6A will give effect to these policy proposals.
- 2.8** In CP16/13 we also stated how our early settlement discount policy would apply to disciplinary prohibitions, other than permanent prohibitions, and proposed amendments to DEPP 6.7 and DEPP 6A to give effect to this.

**Q4:** *Do you agree with the above proposal regarding our policy on how we decide whether to impose a disciplinary prohibition and the duration of the prohibition?*

**Q5:** *Do you agree with our proposal regarding the application of the early settlement discount policy to disciplinary prohibitions, other than permanent disciplinary prohibitions?*

- 2.9** Respondents were generally in agreement with our proposed approach of aligning our policy on the enforcement of EU MAR with our current policy.
- 2.10** Two respondents noted that we had not fully described our power to impose a temporary prohibition on trading financial instruments in CP16/13, by not referencing trading on the account of third parties or direct and indirect trading. One of the respondents suggested that DEPP 6A.1.2G(5) should be amended to provide a more complete description.

### Our response

We agree with respondents that our new power to impose a temporary prohibition should have been more fully described in CP16/13 and in the proposed definition in DEPP 6A.1.2G(5). We have therefore amended the definition of ‘temporary prohibition’ in DEPP 6A.1.2(5) to refer to trading on the account of third parties and direct and indirect trading, as well as trading on own account.

Save for this amendment, and those in relation to the Auction Regulation (see below), we will proceed with our proposed changes.

### Deletion of the FCA’s policy with regard to the ‘reasonableness defence’

- 2.11** In CP16/13 we proposed deleting DEPP 6.3 which sets out our policy with respect to the ‘reasonableness defence’ under section 123(2) FSMA.

**Q6: *Do you agree with the deletion of our policy regarding the ‘reasonableness defence’, as set out in DEPP 6.3?***

- 2.12** Two respondents disagreed with the deletion of the ‘reasonableness defence’ in section 123(2) FSMA and our related policy in DEPP 6.3, on the basis that these do not absolve persons of liability but rather represent a formal sanctioning policy where liability is found. On this basis, both respondents argued that articles 30 and 31 of EU MAR grant the UK discretion to maintain section 123(2) FSMA and DEPP 6.3 as a formal domestic sanctioning policy. The respondents also argued that, as article 31 gives discretion for a national authority to determine both the type and level of sanctions taking into account all relevant circumstances, it is open to us to take account of the reasonable belief and exercise of due diligence as relevant factors, and that national rules codify that a person will not incur a penalty in these cases. One of the respondents argued that the ‘reasonableness defence’ will become even more important in light of the broadening of the scope of EU MAR to include more instruments and products, a greater range of offences and a magnified range of administrative sanctions.
- 2.13** One respondent acknowledged the deletion of DEPP 6.3 which related to the ‘reasonableness defence’ in section 123(2) FSMA, but suggested that taking reasonable precautions and exercising due diligence to avoid engaging in market abuse would be factors we might consider at the case selection stage under EG 2.2, when deciding whether to take action under DEPP 6.2.2G and DEPP 6A.2, and in assessing the seriousness of the conduct under DEPP 6.5C.2G.
- 2.14** One respondent noted the deletion of section 123(2) FSMA and the change this requires to DEPP 6.3, but suggested that the spirit of the section could be included within DEPP 6.2.

The list of factors there is not exhaustive and there is scope to amend it to include those in 6.3.1G, as these align with considerations on the nature of the behaviour, its seriousness and impact. The respondent believed that we should be required by law to take into account in its supervision and enforcement situations where the individual believed on reasonable grounds that his or her behaviour did not amount to market abuse, or took all reasonable precautions to avoid engaging in market abuse. In such circumstances no enforcement action should then be taken by us. The respondent also argued that regulators should normally seek to pursue criminal proceedings where they suspect deliberate market abuse. They further stated that they considered that innocent breaches of EU MAR (including market abuse) should not usually be enforced and that negligent breaches should be subject to supervisory measures and not, save in the worst cases of systemic breach, enforcement action.

### Our response

The deletion of the 'reasonableness defence' in section 123(2) FSMA is not the subject of this consultation as we have no power to delete or retain it. DEPP 6.3 sets out our policy with respect to the reasonableness defence as required by section 124(3) FSMA. Given the deletion of both sections 123(2) and 124(3) FSMA, we have concluded that DEPP 6.3 can no longer be retained. We do not think that it is appropriate for us to recreate the defence in our policy as a formalised bar to taking enforcement action.

However, as noted in CP16/13, we will take a proportionate approach when deciding whether to take enforcement action for a contravention of EU MAR and other relevant breaches by taking into account the full circumstances of each case as required under DEPP 6.2.1, including matters pertaining to the nature, seriousness and impact of a suspected contravention.

In addition, we note that under article 31 EU MAR, we are required to take into account all relevant circumstances when deciding on the type and level of a sanction to be imposed for a contravention of EU MAR. Where appropriate, this will include 'the degree of responsibility of the person responsible for the infringement'. The reasonableness of a person's belief that their conduct did not amount to market abuse or the taking of reasonable precautions or the exercise of due diligence to avoid engaging in market abuse are all factors that may, in appropriate circumstances, be relevant to the assessment of the responsibility of the person responsible for the infringement, and so relevant to the consideration of the type and level of sanction to be imposed.

We are of the view that our policy in DEPP already allows the consideration of these matters where appropriate when we decide on the type and level of any sanction, and so are not proposing further amendments to expressly include them.

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### Behaviour conforming with the Takeover Code

- 2.15** In CP16/13 we proposed amendments to DEPP 6.2.23G to confirm that certain behaviour is less likely to amount to market abuse, and to refer to the relevant sections of MAR 1 (i.e. MAR 1.10.4G to 1.10.6G).

**Q7: Do you agree with our proposed amendment to DEPP 6.2.23?**

**2.16** We received no comments on this issue.

**Our response**

We will proceed with our proposed changes.

**Behaviour in contravention of articles 38 to 42 of the Auction Regulation**

**2.17** In CP16/13 we noted that the Treasury was separately considering how to provide us with the power to impose sanctions for market abuse in relation to auction platforms. We also noted that while the mechanism for sanctioning this market abuse will depend on the Treasury's SI, we were proposing to apply our penalty policy when imposing sanctions for behaviour prohibited by articles 38 to 42 of the Auction Regulation, and as referred to in the Recognised Auction Platforms Regulations 2011 (RAP Regulations) in the same way as we would apply it to behaviour prohibited by articles 14 and 15 of EU MAR.

**Q8: Do you agree with the proposed approach to the application of our penalty policy when sanctioning market abuse in relation to auctioning platforms?**

**2.18** We received no comments on this issue.

**Our response**

We will proceed with our proposed approach of aligning our policy with respect to imposing sanctions for the contravention of articles 38 to 42 of the Auction Regulation with our policy with respect to imposing sanctions for the contravention of EU MAR. The SI gives us the same enforcement tools, with necessary modifications, with respect to contraventions of articles 38 to 42 of the Auction Regulation as contraventions of EU MAR. A number of consequential amendments to our policy are necessary as a result of the final SI in order to give effect to the proposal in our CP16/13. These are as follows:

- The definition of 'market abuse' in our glossary (as to be amended by PS16/13) will be amended to exclude article 42 of the Auction Regulation. This will mean that our policy for non-market abuse contraventions by individuals will apply with respect to sanctions to be imposed on individuals for a contravention of this article. Contraventions of articles 38 to 41 of the Auction Regulation will be retained in the definition of market abuse and our policy for market abuse contraventions will apply to these accordingly.
- The definition of disciplinary prohibition in DEPP 6A.1.2G (5) will be amended to include a temporary prohibition on trading 'emission auction products' and 'directly or indirectly making a bid at an auction conducted by a recognised auction platform, on his or her own account or the account of a third party'.

## Proposed amendments to EG

**2.19** In CP16/13 we proposed a number of amendments to EG 2, 3, 4, 7, 8, 10, 11, 12 and EG Appendix 3 to reflect:

- that market abuse is now defined in EU MAR,
- that we will have a range of new tools, including new information gathering, investigation and sanctioning powers for contraventions of EU MAR, any directly applicable regulation made under it or requirements imposed under Part VIII FSMA,
- that we will no longer be able to make and enforce the disclosure rules under Part VI FSMA, and that disclosure obligations will be governed by EU MAR and enforced under Part VIII FSMA, and
- the deletion of the specific market abuse injunctions and restitution orders in section 381 and 383 FSMA.

### **Q9: Do you agree with our proposed amendments to EG?**

**2.20** One respondent stated that the power under section 122A of FSMA should be restricted to supporting our supervisory and enforcement functions under EU MAR, and proposed that EG 3.8A.1 should be amended to reflect this.

**2.21** The respondent noted that EG 7.2 contains relatively little guidance as to when we will take remedial or protective action as an alternative or in addition to imposing a penalty or public censure, and invited us to expand on this section in order to provide market participants with greater certainty. The respondent also asked us to give guidance on the use of our new information gathering powers under sections 122A-D FSMA and called for the reading down of the new section 122B FSMA information gathering power which applies to the world at large. Citing human rights concerns and articles 23(2)(a) and (b) of EU MAR they called for our power under section 122B to be used only where there is a reasonable suspicion of a breach and the documents or information are relevant to the investigation.

### **Our response**

In CP16/13 we stated that we can use our section 122A FSMA power to require information and documents to support our supervisory and enforcement functions under EU MAR. This was not intended to be an exhaustive statement of circumstances where the power could be exercised. In order to clarify this however, we have amended proposed EG 3.2A.1 to make it clear that the power will be used for our supervisory and enforcement functions generally, including those under EU MAR and directly applicable EU regulations made under it.

The powers referred to in EG 7.2 are intended to protect the market and consumers and are therefore not alternatives to sanctions. We consider that we cannot provide further guidance on their use as 'alternatives'. We note, however, that the DTRs already provide guidance with respect to the power to suspend trading. We will keep the use of these powers under review and provide further guidance if we determine in the future that it would be appropriate to

do so. We are similarly not proposing any additional guidance in relation to the use of our powers under sections 122A-D FSMA.

Article 23 imposes minimum powers: it does not circumscribe the powers which Member States may bestow on competent authorities. EU MAR requires competent authorities like the FCA to have all supervisory and investigatory powers necessary to fulfil their duties. This includes the ability to obtain information within short time frames in order to ensure that markets are operating properly for the protection of market participants and market integrity more broadly. If we were to limit ourselves to using these powers within the context of investigations, we would be seriously curtailing our ability to monitor the markets, thereby failing to fulfil our duties under EU MAR. In all cases, we will exercise our powers reasonably and proportionately in furtherance of our statutory functions.

A number of consequential amendments to EG have also been made necessary by the final SI in order to give effect to our policy proposals. These are as follows:

- EG 3.2A.1 will be amended to exclude a proposed reference to 'emissions allowance market participants' from the scope of the section 122A FSMA power as described in that paragraph.
- EG 3.2B.1 and 3.8A will be amended to make it clear that our powers under sections 122B and 122D can be exercised with respect to the Auction Regulation.
- EG 7.2.1 will be amended to include reference at subparagraph (4a) to the power to suspend trading in auctioned products and to exclude a proposed reference to 'emissions allowance market participants' from the scope of the section 122G FSMA power as described in subparagraph (6).
- EG 11.5.2 will be amended to reflect that we may use a range of powers as well as seeking restitution if a person has breached EU MAR or articles 38 to 42 of the Auction Regulation.
- EG 19.25.1 will be amended to direct that our policy in relation to regulation 6 and Schedule 1 of the RAP Regulations 2011 is set out in DEPP and EG.
- Paragraph 3.1.3 of Appendix 3 to EG will be amended to state that we have powers under FSMA to investigate contraventions of the Auction Regulation.
- Paragraph 3.1.4 of Appendix 3 to EG will also be amended to include the amended disciplinary powers in relation to emission auction products.

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### Other matters

- 2.22** Some of the respondents provided comments that dealt generally with the approach to the implementation of EU MAR and CP16/13, rather than with our specific proposals.

- 2.23** One respondent queried the absence of a cost benefit analysis from our consultation. They claimed that EU MAR signals a major change in the law requiring huge investment in systems and process changes and cited in particular obligations relating to investment recommendations, disclosure and suspicious transaction and order report (STOR) monitoring. They called for us to take into account the time given for compliance and efforts at compliance by the firm with EU MAR when deciding whether to take enforcement action in the first 24 months of EU MAR coming into operation. The respondent further stated that enforcement action should only be considered when the firm or individual has wilfully failed to use best efforts to comply.

#### Our response

Concerns about costs relate to compliance with the obligations imposed by EU MAR, and not our policy with respect to how we will enforce contraventions of EU MAR. The proposals in our CP were concerned with the latter only.

Regarding the approach to enforcement in the first 24 months, we will not fetter our discretion as to when to take enforcement action by stating that we would only take enforcement action when there has been wilful failure to use best efforts to comply.

- 2.24** Two respondents suggested that we should re-consult on any consequential changes needed in light of the final SI.

#### Our response

We have made a number of consequential changes to our final text in Appendix 1 in light of the changes introduced by the final SI. These are changes that were either indicated as potential changes in our CP16/13 or which are only required to give effect to the substance of our proposals in that CP. We therefore do not believe a further consultation is necessary with respect to these changes.

However, we recognise that the provisions providing our powers for the enforcement of contraventions of article 38 to 42 of the Auction Regulation did not appear in the preliminary draft. We do not believe it is necessary to further consult on how our policy will apply to these powers, as our powers for these contraventions mirror (with necessary modifications) our powers for contraventions of EU MAR and our general approach to the use of these powers was specified in CP16/13. However we have decided to invite comments, for a short period after publication of this PS, on how we have decided to exercise these powers. We will consider any comments made in response to this invitation and respond appropriately.

# Annex 1

## List of non-confidential respondents

1. The City of London Law Society (CLLS)
2. Association for Financial Markets in Europe (AFME) and British Bankers' Association (BBA)
3. Alternative Investment Management Association (AIMA)

# Appendix 1

## Made rules (legal instrument)

## **ENFORCEMENT (MARKET ABUSE REGULATION) INSTRUMENT 2016**

### **Powers exercised by the Financial Conduct Authority**

- A. The Financial Conduct Authority makes this instrument in the exercise of the following powers and related provisions of the Financial Services and Markets Act 2000 (“the Act”)
- (1) section 69 (Statement of Policy);
  - (2) section 124 (Statement of Policy);
  - (3) section 139A (Power of the FCA to give guidance);
  - (4) section 210 (Statement of Policy); and
  - (5) section 395 (The FCA’s and PRA’s procedures).

### **Commencement**

- B. This instrument comes into force on 3 July 2016 immediately after the Market Abuse Regulation Instrument 2016 comes into effect.

### **Amendments to the Handbook**

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

### **Material outside the Handbook**

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

### **Citation**

- F. This instrument may be cited as the Enforcement (Market Abuse Regulation) Instrument 2016.

By order of the Board  
29 June 2016

## Annex A

### Amendments to the Glossary of definitions

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

Amend the following definition as shown.

- |                     |  |
|---------------------|--|
| <i>breach</i>       | <p><i>in DEPP:</i></p> <p>...</p> <p>(4) <del>behaviour amounting to <i>market abuse</i>, in respect of which the <i>FCA</i> takes action pursuant to section 123 (Power to impose penalties in cases of market abuse)</del> <u>a contravention in respect of which the <i>FCA</i> takes action pursuant to sections 123, 123A or 123B of the <i>Act</i>,</u></p> <p>...</p> |
| <i>market abuse</i> | <p>(1) behaviour prohibited by:</p> <p>(a) articles 14 and 15 of the <i>Market Abuse Regulation</i>; or</p> <p>(b) articles 38 to <del>42</del> <u>41</u> of <del>Regulation (EU) No 1031/2010</del> the <i>auction regulation</i>.</p>  |

**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 indicated otherwise.

**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:

...

(2A) the *FCA*'s policy with respect to the imposition of suspensions ~~or~~ restrictions and disciplinary prohibitions, and the period for which those ~~suspensions or restrictions~~ sanctions are to have effect, under the *Act* (see *DEPP* 6A);

...

...

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

...

Section of the Act	Description	Handbook reference	Decision maker
...	...	...	...
126(1)/ 127(1)	when the <i>FCA</i> is proposing or deciding to impose a <del>sanction for market abuse</del> <u>penalty or public censure</u> under section 123 of the <i>Act</i> , <u>a disciplinary prohibition</u> under section 123A of the <i>Act</i> , or a <u>suspension or restriction</u> under section 123B of the <i>Act</i> *		<i>RDC</i>
...			

...

**2 Annex 2 Supervisory notices**

Section of the Act	Description	Handbook reference	Decision maker
...			
96C 122I	when the <i>FCA</i> is proposing to suspend or suspends trading in a <i>financial instrument</i>	<i>DTR</i>	<i>Executive procedures</i>
...			

## 6 Penalties

...

### 6.2 Deciding whether to take action

...

6.2.2 G When deciding whether to take action for *market abuse* ~~or requiring or encouraging~~, the *FCA* may consider the following additional factors:

...

...

6.2.12 G ~~Persons discharging managerial responsibilities within an issuer and their connected persons, who have requested or approved the admission of a financial instrument to trading on a regulated market, and connected persons have their own responsibilities under the disclosure rules, as set out in *DTR* 3, for which they are primarily responsible. Accordingly, disciplinary action for a breach of the disclosure rules will not necessarily involve the issuer.~~

~~[Note: In paragraph 6.2.12, 'connected person' has the meaning in relation to a person discharging managerial responsibilities within an issuer attributed to it in subsection (5) of the definition of 'connected person' in the Handbook Glossary.] [deleted]~~

...

6.2.22 G In relation to ~~behaviour~~ behaviour which may have happened or be happening in the context of a *takeover bid*, the *FCA* will refer to the *Takeover Panel* and give due weight to its views. Where the *Takeover Code* has procedures for complaint about any behaviour, the *FCA* expects parties to exhaust those procedures. The *FCA* will not, save in exceptional circumstances, take action under any of section 123 (*FCA's* power to impose penalties), section 123A (Power to prohibit individuals from managing or dealing), section 123B (Suspending permission to carry on regulated

activities etc.), section 129 (Power of court to impose penalties), section 381 (Injunctions), sections 383 or 384 (Restitution) in respect of ~~behaviour~~ behaviour to which the *Takeover Code* is relevant before the conclusion of the procedures available under the *Takeover Code*.

- 6.2.23 G The *FCA* will not take action against a *person* over ~~behaviour~~ behaviour which does not amount to market abuse. Behaviour is less likely to amount to market abuse where it (a) conforms with the *Takeover Code* or rules of an *RIE* and (b) falls within the terms of ~~any provision of the Code of Market Conduct~~ MAR 1.10.4G to 1.10.6G which ~~states~~ state that ~~behaviour~~ behaviour so conforming ~~does not~~ is unlikely to, of itself, amount to *market abuse*. The *FCA* will seek the *Takeover Panel's* or relevant *RIE's* views on whether ~~behaviour~~ behaviour complies with the *Takeover Code* or *RIE* rules and will attach considerable weight to its views.

...

- 6.2.25 G In any case where the *FCA* considers that the use of its powers under any of sections 123, 123A, 123B, 129, 381, 383 or 384 of the *Act* may be appropriate, if that use may affect the timetable or outcome of a *takeover bid* or where it is appropriate in the context of any exercise by the *Takeover Panel* of its powers and authority, the *FCA* will consult the *Takeover Panel* before using any of those powers.

- 6.2.26 G Where the ~~behaviour~~ behaviour of a *person* which amounts to *market abuse* is ~~behaviour~~ behaviour to which the *Takeover Code* is relevant, the use of the *Takeover Panel's* powers will often be sufficient to address the relevant concerns. In cases where this is not so, the *FCA* will need to consider whether it is appropriate to use any of its own powers under the *market abuse regime*. The principal circumstances in which the *FCA* is likely to consider such exercise are:

- (1) where the ~~behaviour~~ behaviour falls within ~~sections 118(2), 118(3) or 118(4) of the Act~~ the prohibition in article 14 of the *Market Abuse Regulation*;
- (2) where the *FCA's* approach in previous similar cases (which may have happened otherwise than in the context of a *takeover bid*) suggests that a ~~financial penalty~~ sanction should be imposed;

...

...

### 6.3 Penalties for market abuse

- 6.3.1 G ~~Section 123(2) of the Act states that the FCA may not impose a penalty on a person if there are reasonable grounds to be satisfied that:~~
- (1) ~~the person concerned believed, on reasonable grounds, that his behaviour did not amount to market abuse or requiring or~~

~~encouraging; or~~

- (2) ~~the *person* concerned took all reasonable precautions and exercised all due diligence to avoid engaging in *market abuse* or *requiring or encouraging*. [deleted]~~

6.3.2 G The factors which the *FCA* may take into account when deciding whether either of the two conditions in *DEPP* 6.3.1G are met include, but are not limited to:

- (1) ~~whether, and if so to what extent, the *behaviour* in question was or was not analogous to *behaviour* described in the *Code of Market Conduct* (see *MAR* 1) as amounting or not amounting to *market abuse* or *requiring or encouraging*;~~
- (2) ~~whether the *FCA* has published any *guidance* or other materials on the *behaviour* in question and if so, the extent to which the *person* sought to follow that *guidance* or take account of those materials (see the Reader's Guide to the *Handbook* regarding the status of *guidance*.) The *FCA* will consider the nature and accessibility of any *guidance* or other published materials when deciding whether it is relevant in this context and, if so, what weight it should be given;~~
- (3) ~~whether, and if so to what extent, the *behaviour* complied with the rules of any relevant *prescribed market* or any other relevant market or other regulatory requirements (including the *Takeover Code*) or any relevant codes of conduct or best practice;~~
- (4) ~~the level of knowledge, skill and experience of the *person* concerned;~~
- (5) ~~whether, and if so to what extent, the *person* can demonstrate that the *behaviour* was engaged in for a legitimate purpose and in a proper way;~~
- (6) ~~whether, and if so to what extent, the *person* followed internal consultation and escalation procedures in relation to the *behaviour* (for example, did the *person* discuss the *behaviour* with internal line management and/or internal legal or compliance departments);~~
- (7) ~~whether, and if so the extent to which, the *person* sought any appropriate expert legal or other expert professional advice and followed that advice; and~~
- (8) ~~whether, and if so to what extent, the *person* sought advice from the market authorities of any relevant *prescribed market* or, where relevant, consulted the *Takeover Panel*, and followed the advice received. [deleted]~~

...

**6.5C The five steps for penalties imposed on individuals in market abuse cases**

...

Step 2 – the seriousness of the market abuse

6.5C.2 G ...

(13) Factors tending to show the *market abuse* was deliberate include:

...

(h) for *market abuse* falling within ~~section 118(2) of the Act~~ the prohibition in article 14(a) of the Market Abuse Regulation, the individual knew or recognised that the information on which the *dealing* was based was *inside information*.

...

...

...

## 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, restriction, condition ~~or~~ limitation or disciplinary prohibition (see *DEPP* 6A), and other conditions which the *FCA* seeks to impose by way of such action. 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, as they offer the potential for securing earlier redress or protection for consumers and a cost saving to the *person* concerned and to the *FCA* in contesting the financial penalty or other disciplinary action. The penalty that might otherwise be payable, or the length of the period of suspension, restriction ~~or~~ condition or disciplinary prohibition that might be imposed, 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, restrictions ~~and~~ conditions and disciplinary prohibitions

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, restriction ~~or~~ condition or disciplinary prohibition (other than a permanent disciplinary prohibition), having regard to the *FCA*'s statement of policy as set out in *DEPP* 6A.3. No settlement discount is available with respect to a permanent disciplinary prohibition. 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, restriction, condition or limitation or disciplinary prohibition**

### 6A.1 **Introduction**

6A.1.1 G *DEPP* 6A sets out the *FCA's* statement of policy with respect to:

- (1) 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, as required by sections 88C(1), 89S(1) and 210(1) of the *Act* ;
- (2) ~~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) ; and
- (3) the imposition of disciplinary prohibitions, suspensions or restrictions under sections 123A and 123B of the *Act*, as required by section 124(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, "suspension" refers to the suspension of:

- (a) any *permission* which an *authorised person* has to carry on a *regulated activity* (under ~~section~~ sections 123B or 206A of the *Act*),

...

(2) "restriction" refers to limitations or other restrictions in relation to:

- (a) the carrying on of a *regulated activity* by an *authorised person* (under ~~section~~ sections 123B or 206A of the *Act*),

...

(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*) ; and

- (5) “disciplinary prohibition” refers to a temporary or permanent prohibition on an individual holding an office or position involving responsibility for taking decisions about the management of a *MiFID investment firm* (under section 123A(2)(a) and (3) of the *Act*) or a temporary prohibition on an individual directly or indirectly acquiring or disposing of *financial instruments* (or *emission auction products*) on his or her own account or the account of a third party, (under section 123A(2)(b) of the *Act*) or a temporary prohibition on an individual directly or indirectly making a bid at an auction conducted by a *recognised auction platform*, on his or her own account or the account of a third party (under section 123A(2)(c) of the *Act*).

**[Note: see Regulation 6 and Schedule 1 to the *RAP Regulations* for application of the powers to contraventions of the *auction regulation*]**

- 6A.1.3 G The power to impose a suspension, restriction, condition or limitation or disciplinary prohibition 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 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. These measures are tools that the *FCA* may employ to help it to achieve its *statutory objectives*. Examples of measures that we may impose include:

...

- 6A.1.4 G The powers to impose a suspension, restriction, condition or limitation in relation to *authorised persons* and *approved persons*, and to impose a disciplinary prohibition in relation to individuals, 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 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.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, restriction, condition ~~or~~ limitation, or disciplinary prohibition. 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, restriction, condition ~~or~~ limitation or disciplinary prohibition. 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, restriction, condition ~~or~~ limitation or disciplinary prohibition 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 take such action include:

...

(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 ; and

(8) where, in view of the nature and seriousness of an individual's misconduct, the *FCA* considers it appropriate to impose a disciplinary prohibition.

...

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

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, restriction ~~or~~ condition or disciplinary prohibition (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, restriction ~~or~~ condition or disciplinary prohibition to be imposed on a *person* under the *Act*:

## (1) Deterrence

When determining the appropriate length of the period of suspension, restriction or condition or disciplinary prohibition 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.

## (2) The seriousness of the breach

The FCA will have regard to the seriousness of the *breach*. In assessing this, it will consider the impact and nature of the *breach*, and whether it was committed deliberately or recklessly. Where the *breach* was committed by an *authorised person*, relevant factors may include those listed in DEPP 6.5A.2G(6) to (9). Where the *breach* was committed by an ~~approved person~~ individual in a non-market abuse case, relevant factors may include those listed in DEPP 6.5B.2G(8) to (11). Where the breach was committed by an individual in a market abuse case, relevant factors may include those listed in DEPP 6.5C.2G(11) to (14). There may also be other factors, not listed in these sections, that are relevant.

## (3) Aggravating and mitigating factors

The FCA will have regard to factors that may aggravate or mitigate a *breach*. Where the ~~breach~~ *breach* was committed by an *authorised person, sponsor or primary information provider*, relevant factors may include those listed in DEPP 6.5A.3G(2). Where the *breach* was committed by an ~~approved person~~ individual in a non-market abuse case, relevant factors may include those listed in DEPP 6.5B.3G(2). Where the breach was committed by an individual in a market abuse case, relevant factors may include those listed in DEPP 6.5C.3G(2). There may also be other factors, not listed in these sections, that are relevant.

## (4) The impact of suspension, restriction or condition or disciplinary prohibition on the person in breach

...

The following considerations may be relevant to the assessment of the impact of suspension or condition on an *approved person* or the impact of a disciplinary prohibition on an individual:

...

- (f) the ~~approved person's~~ expected lost earnings from not being able to carry out the suspended or restricted or prohibited

activity; and

- (g) whether the suspension ~~or~~ restriction or disciplinary prohibition would cause the *approved person* serious financial hardship.

- (5) The impact of suspension ~~or~~ restriction or disciplinary prohibition on persons other than the person in breach

The following considerations may be relevant to the assessment of the impact of suspension ~~or~~ restriction or disciplinary prohibition on *persons* other than the *person* in *breach*:

...

- (b) the impact of the suspension ~~or~~ restriction or disciplinary prohibition on markets.

- 6A.3.3 G The *FCA* may delay the commencement of the period of suspension ~~or~~ restriction or disciplinary prohibition. In deciding whether this is appropriate, the *FCA* will take into account all the circumstances of a case. Considerations that may be relevant in respect of an *authorised person*, *sponsor* or *primary information provider* include:

...

- 6A.3.4 G The *FCA* and the *person* on whom a suspension ~~or~~ restriction or disciplinary prohibition is to be imposed may seek to agree the length of the period of suspension ~~or~~ restriction or disciplinary prohibition 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 or disciplinary prohibition (other than a permanent disciplinary prohibition) which might otherwise have been imposed will be reduced to reflect the stage at which the *FCA* and the *person* concerned reached an agreement.

...

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

- 6A.4.1 G The deterrent effect and impact on a *person* of a ~~suspension, restriction, condition or limitation, by itself or in combination with a financial penalty, combination of sanctions~~ may be greater than where only a ~~financial penalty~~ single sanction is imposed. The *FCA* will consider the overall impact and deterrent effect of the sanctions it imposes when determining the level of any penalty and the length of suspension, restriction, condition ~~or~~ limitation or disciplinary prohibition.

- 6A.4.2 G The *FCA* expects usually to take the following approach in respect of the interaction between a ~~suspension, restriction, condition or limitation and a~~

~~financial penalty or public censure~~ sanctions:

...

- (3) If the *FCA*, following the approach set out in *DEPP* 6A.2, considers it appropriate to impose a suspension, restriction, condition ~~or~~ limitation or disciplinary prohibition (or some combination of these), it will calculate the appropriate length of the period (or periods) of ~~this measure~~ sanction, 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, restriction, condition or limitation a~~ combination of sanctions, 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, restriction, ~~or~~ condition, or disciplinary prohibition, and the amount of ~~the~~ any 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 or sanctions to reduce after considering all the circumstances of the case.
- (6) In deciding the final level of ~~the~~ any financial penalty and the length of ~~the~~ any period of suspension, restriction, condition ~~or~~ limitation or disciplinary prohibition, 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, restriction, condition ~~or~~ limitation or disciplinary prohibition 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, restriction, condition ~~or~~ limitation or disciplinary prohibition and may decide not to impose such a measure if it considers such action would result in serious financial hardship.

## Annex C

### Amendments to the Enforcement Guide (EG)

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

## 1 Introduction

### 1.1 Overview

...

1.1.2 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*.

...

- (3) section 124 requires the *FCA* to publish a statement of its policy on the imposition and amount, of financial penalties for *market abuse* type and level or period of administrative sanctions it may impose under Part VIII of the *Act*;

...

...

## 2 The FCA's approach to enforcement

...

### 2.2 Case selection: Firms and individuals, market abuse cases and listing matters

...

2.2.1 Other than in the area of a *firm's* failure to satisfy the *FCA's Threshold Conditions* for authorisation (see ~~paragraph~~ EG 2.3.1), the selection method for cases involving *firms* and individuals, *market abuse* and listing matters (for example, breaches of the listing, or prospectus or disclosure rules) occurs at two main levels:

- (1) strategic planning; and
- (2) decisions on individual cases.

...

### 2.6 Assisting overseas regulators

- 2.6.1 The *FCA* views co-operation with its overseas counterparts as an essential part of its regulatory functions. Section 354A of the *Act* imposes a duty on the *FCA* to take such steps as it considers appropriate to co-operate with others who exercise functions similar to its own. This duty extends to authorities in the UK and overseas. In fulfilling this duty the *FCA* may share information which it is not prevented from disclosing, including information obtained in the course of the *FCA*'s own investigations, or exercise certain of its powers under Part XI of the *Act*. Further details of the *FCA*'s powers to assist overseas regulators are provided at *EG* 3.7.1 – 3.7.4 (Investigations to assist overseas authorities), *EG* 3.8.1 – 3.8.4 (Information requests and investigations to assist EEA regulators in relation to short selling), *EG* 3.8A (Information requests and entry of premises under warrant to assist EEA regulators in relation to the Market Abuse Regulation), *EG* 4.7.1 (Use of statutory powers to require the production of documents, the provision of information or the answering of questions), *EG* 4.11.9 – 4.11.11 (Interviews in response to a request from an overseas regulator or EEA regulator), and *EG* 8.6.1 – 8.6.8 (Exercising the power under section 55Q to vary or cancel a firm's Part 4A permission or to impose requirements on a firm in support of an overseas regulator: the *FCA*'s policy). The *FCA*'s statement of policy in relation to interviews which representatives of overseas regulators or *EEA regulators* attend and participate in is set out in *DEPP* 7.

...

### **3 Use of information gathering and investigation powers**

#### **3.1 Introduction**

- 3.1.1 The *FCA* has various powers under sections 97, 122A, 122B, 122C, 131E, 131FA, 165 to 169 and 284 of the *Act* and Schedule 5 to the *CRA* to gather information and appoint investigators, and to require the production of a report by a *skilled person*. In any particular case, the *FCA* will decide which powers, or combination of powers, are most appropriate to use having regard to all the circumstances. Further comments on the use of these powers are set out below.

...

After *EG* 3.2 insert the following new chapters *EG* 3.2A and *EG* 3.2B. All the text is new and is not underlined.

#### **3.2A Information requests (section 122A)**

- 3.2A.1 The *FCA* may use its section 122A power to require information and documents from an *issuer*, a *person discharging managerial responsibilities* or a *person* closely associated with a *person discharging managerial responsibilities* to support its supervisory and its enforcement functions, including those under the *Market Abuse Regulation* or any directly applicable *EU* regulation made under the *Market Abuse Regulation*.

- 3.2A.2 An officer with authorisation from the *FCA* may exercise the section 122A power to require information and documents. This includes an *FCA* employee or an agent of the *FCA*.

### **3.2B Information requests (section 122B)**

- 3.2B.1 The *FCA* may use its section 122B power to require information and documents from a person to support both its supervisory and its enforcement functions under the *Market Abuse Regulation* or any directly applicable *EU* regulation made under the *Market Abuse Regulation*, or under the *auction regulation*.

[**Note:** see Regulation 6 and Schedule 1 to the *RAP Regulations* for application of the power in relation to functions under the *auction regulation*]

- 3.2B.2 An *officer* with authorisation from the *FCA* may exercise the section 122B power to require information and documents. This includes an *FCA* employee or an agent of the *FCA*.

After EG 3.8 insert the following new chapter EG 3.8A. All the text is new and is not underlined.

### **3.8A Information requests and entry of premises under warrant to assist EEA regulators in relation to the Market Abuse Regulation or the auction regulation**

- 3.8A.1 The *FCA* may use its section 122B power to require information and documents from natural or legal persons to support both its supervisory and its enforcement functions.

- 3.8A.2 The *FCA*'s power to require information to assist *EEA regulators* in respect of the *Market Abuse Regulation* or any directly applicable *EU* regulation made under the *Market Abuse Regulation* or the *auction regulation* is contained in section 122B(6) of the *Act*. The section provides that at the request of an *EEA regulator*, the *FCA* may use its power under section 122B to require the production of information.

[**Note:** see Regulation 6 and Schedule 1 to the *RAP Regulations* in relation to the *auction regulation*]

- 3.8A.3 Section 122B(7) of the *Act* states that the *FCA* must, in deciding whether or not to exercise its power to require information, consider whether the exercise of that power is necessary to comply with the *Market Abuse Regulation* or any directly applicable *EU* regulation made under the *Market Abuse Regulation* or the *auction regulation*.

- 3.8A.4 The *FCA* may give information under 122D(1) or 176(1) (Entry of premises under warrant) at the request of an *EEA regulator* where the regulator makes the request in the exercise of its functions under the *Market Abuse Regulation*. Section 122D(11) of the *Act* states that the *FCA* must, in deciding whether or not to exercise its powers of entry of premises under warrant, consider whether the exercise of that power is necessary for the purpose of the exercise by it of its obligations under the *Market Abuse Regulation* or any directly applicable *EU* regulation made under the *Market Abuse Regulation* or the *auction regulation*.

...

Amend the following text as indicated

## **4 Conduct of investigations**

...

### **4.12 Search and seizure powers**

- 4.12.1 Under ~~section~~ sections 176 and 122D of the *Act*, the *FCA* has the power to apply to a justice of the peace for a warrant to enter premises where documents or information is are held. The circumstances under which the *FCA* may apply for a search warrant include:

...

- 4.12.2 A warrant obtained pursuant to ~~section~~ sections 176 and 122D of the *Act* authorises a police constable or an *FCA* investigator in the company, and under the supervision, of, a police constable, to do the following, amongst other things: to enter and search the premises specified in the warrant and take possession of any documents or information appearing to be documents or information of a kind in respect of which the warrant was issued or to take, in relation to any such documents or information, any other steps which may appear to be necessary for preserving them or preventing interference with them.

...

## **7 Financial penalties and other disciplinary sanctions**

### **7.1 The FCA's use of sanctions**

- 7.1.1 Financial penalties, suspensions, restrictions, conditions, limitations, disciplinary prohibitions, 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 formal disciplinary sanctions. 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 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*.

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

(1) It may publish a statement:

...

(e) ~~where there has been market abuse~~, against a *person* under section 123 of the *Act*;

...

(2) It may impose a financial penalty:

...

(c) ~~where there has been market abuse~~, on ~~any~~ a *person*, under section 123 of the *Act*;

...

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

...

(d) on ~~a firm~~ an authorised person under ~~section~~ sections 123B or 206A of the *Act*.

...

(5) It may impose a disciplinary prohibition on an individual under section 123A of the Act.

...

## 7.2 **Alternatives to ~~financial penalties and public censures~~ sanctions**

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

...

(4) ~~where there are reasonable grounds to suspect non-compliance with the disclosure rules, the FCA may require the suspension of trading of a financial instrument with effect from such time as it may determine; and~~

where the FCA considers it necessary for the purpose of the exercise by it of functions under the *Market Abuse Regulation* or any directly applicable *EU* regulation made under the *Market Abuse Regulation*, the FCA may

suspend trading in a financial instrument under section 122I of the Act;

- (4a) where the FCA considers it necessary for the purpose of the exercise by it of functions under the auction regulation the FCA may suspend trading in emission auction products under section 122I of the Act;

[Note: see Regulation 6 and Schedule 1 to the RAP Regulations for power in relation to emission auction products]

- (5) ...
  - (b) suspend or prohibit admission of transferable securities to trading on a regulated market as set out in section 87L of the Act ;
- (6) where the FCA considers it necessary for the purposes set out in section 122G of the Act the FCA may, by notice in writing, require an issuer to publish specified information or a specified statement as set out under section 122G of the Act; and
- (7) where the FCA considers it necessary for the purposes set out in section 122H of the Act the FCA may, by notice in writing, require a person to publish corrective information or a corrective statement as set out under section 122H of the Act.

...

### **7.3 FCA’s statements of policy**

7.3.1 The FCA’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 FCA’s statement of policy 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 financial penalties for late submission of reports is set out in *DEPP* 6.6. The FCA’s statement of policy in relation to the imposition of suspensions, ~~or~~ restrictions, conditions ~~and~~ limitations and disciplinary prohibitions is set out in *DEPP* 6A (The power to impose a suspension, restriction, condition ~~or~~ limitation or disciplinary prohibition). 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.

...

## **8 Variation and cancellation of permission and imposition of requirements on the FCA’s own initiative and intervention against incoming firms**

...

### **8.6 Exercising the power under section 55Q to vary or cancel a firm’s Part 4A permission or to impose requirements on a firm in support of an overseas**

**regulator: the FCA's policy**

...

- 8.6.2 Relevant Community obligations which the *FCA* may need to consider include those under the Capital Requirements Directive, the *Solvency II Directive*, the Investment Services Directive/Markets in Financial Instruments Directive; ~~and~~ , the Insurance Mediation Directive and the *Market Abuse Regulation*. Each of these ~~Directives~~ legislative acts imposes general obligations on the relevant *EEA competent authority* to cooperate and collaborate closely in discharging their functions under the ~~Directives~~ legislative acts.

...

**11 Restitution and redress**

...

**11.2 Criteria for determining whether to exercise powers to obtain restitution**

- 11.2.1 In deciding whether to exercise its powers to seek or require restitution under sections 382, 383 or 384 of the *Act*, the *FCA* will consider all the circumstances of the case. The factors which the *FCA* will consider may include, but are not limited to, those set out below.

...

- (6) Is redress available through another regulator?

The *FCA* will consider the availability of redress through another regulatory authority. Where another regulatory authority, such as the *Takeover Panel*, is in a position to require appropriate redress, the *FCA* will not generally exercise its own powers to do so. If the *FCA* does consider that action is appropriate and the matters in question have happened in the context of a *takeover bid*, the *FCA* will only take action during the bid in the circumstances set out in ~~DEPP 6.2.25G~~ 6.2.26G if the *person* concerned has responsibilities under the *Takeover Code*. If another *regulatory body* has required redress and a *person* has not met that requirement, the *FCA* will take this into account and (subject to all other relevant factors and circumstances) may consider it appropriate to take action to ensure that such redress is provided.

...

- (11) Other factors which may be relevant

The *FCA* will consider the context of the conduct in question. In any case where the *FCA* believes that the exercise of its powers under section 383 or 384 of the *Act* may affect the timetable or outcome of a *takeover bid*, it will consult the *Takeover Panel* before taking any steps to exercise such powers,

and will give due weight to its views.

~~Where the FCA is considering applying to court for a restitution order in relation to *market abuse* under section 383 of the Act, it will also consider whether the court would be prevented from making that order by section 383(3) of the Act. A similar provision to section 383(3) applies where the FCA proposes to exercise its powers to require restitution in relation to market abuse under section 384(2). The conditions set out in section 383(3)(a) and section 384(a) and (b) are the same as those that apply to penalties for *market abuse* and the FCA will take the same factors into account when considering whether the conditions have been met. DEPP 6.3 lists those factors.~~

...

## 11.5 Other relevant powers

...

- 11.5.2 The FCA may consider taking disciplinary action for a financial penalty, or public censure, using a range of powers as well as seeking restitution, if a *person* has breached a relevant requirement<sup>13</sup> of the Act or any directly applicable Community regulation or decision under MiFID or the UCITS Directive or the auction regulation, or has engaged in, ~~or required or encouraged others to engage in,~~ *market abuse*.

...

...

## 12 Prosecution of Criminal Offences

...

### 12.3 Criminal prosecutions in cases of market abuse

- 12.3.1 In some cases there will be instances of market misconduct that may arguably involve a breach of the criminal law as well as *market abuse* ~~as defined in section 118 of the Act~~. When the FCA decides whether to commence criminal proceedings rather than impose a sanction for *market abuse* in relation to that misconduct, it will apply the basic principles set out in the Code for Crown Prosecutors. When deciding whether to prosecute market misconduct which also falls within the definition of *market abuse*, application of these basic principles may involve consideration of some of the factors set out in ~~paragraph~~ EG 12.3.2.

...

## 19 Non-FSMA powers

...

### 19.25 Recognised Auction Platforms Regulations 2011

19.25.1 The *FCA's* policy for using the powers given to it by the *RAP Regulations* is set out in *REC*. This includes, for example, its policy in relation to the power to impose a financial penalty on or censure an *RAP* (*REC* 2A.4) and its policy in relation to the power to give directions to an *RAP* (*REC* 4.6). The *FCA's* policy in relation to regulation 6 and Schedule 1 of the *RAP Regulations* is set out in *DEPP* and *EG*.

...

### **Appendix 3 Appendix to the guidelines on investigation of cases of interest or concern to the Financial Conduct Authority and other prosecuting and investigating agencies**

#### **3.1 The FCA**

...

3.1.3 Under the 2000 Act the *FCA* has powers to investigate concerns including:

...

- suspected ~~market abuse~~ under s.118 of the 2000 Act contraventions of the *Market Abuse Regulation* or any directly applicable *EU* regulation made under the *Market Abuse Regulation* or for contraventions of the *auction regulation*;

[Note: see Regulation 6 and Schedule 1 to the *RAP Regulations* for powers in relation to contraventions of the *auction regulation*]

...

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

...

- impose civil penalties ~~in cases of market abuse~~ under s.123 of the 2000 Act;

[Note: see Regulation 6 and Schedule 1 to the *RAP Regulations* for the application of this power and those below to contraventions of the *auction regulation*]

- temporarily prohibit an individual from exercising management functions in *MiFID investment firms* or from dealing in *financial instruments* or *emissions auction products* on their own account or on the account of a third party, under s.123A(2) of the 2000 Act;
- temporarily prohibit an individual from making a bid, on his or her own account or the account of a third party, directly or indirectly, at an auction conducted by a *recognised auction platform* under s.123A(2) of the 2000 Act;

- permanently prohibit an individual from exercising management functions in MiFID investment firms under s.123A(3) of the 2000 Act;
- suspend the permission of an *authorised person* or impose limitations or other restrictions in relation to the carrying on of a *regulated activity* by an *authorised person* under s.123B of the 2000 Act;
- prohibit an individual from being employed in connection with a *regulated activity*, under s.56 of the 2000 Act;

...

Financial Conduct Authority



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