



BANK OF ENGLAND  
PRUDENTIAL REGULATION  
AUTHORITY



Policy Statement | FCA PS17/1  
PRA PS2/17

# Implementation of the Enforcement Review and the Green Report

February 2017



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In this Policy Statement we report on the main issues arising from Consultation Paper 16/10 *Proposed Implementation of the Enforcement Review and the Green Report*. It publishes final amendments to the FCA's *Glossary*, the *Decision Procedure and Penalties* manual and the *Enforcement Guide*.

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We have carried out this work in the context of the existing UK and EU regulatory framework. We will keep it under review to assess whether any amendments may be required in the event of changes in the UK regulatory framework, including as a result of any negotiations following the UK's vote to leave the EU.

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## Abbreviations used in this paper

<b>CMA</b>	Competition and Markets Authority
<b>CP</b>	Consultation Paper
<b>DEPP</b>	Decision Procedure and Penalties Manual
<b>EG</b>	Enforcement Guide
<b>EMO</b>	Enforcement and Markets Oversight Division
<b>ERD</b>	Enforcement Referral Document
<b>FCA</b>	Financial Conduct Authority
<b>FEMR</b>	Fair and Effective Markets Review
<b>FSA</b>	Financial Services Authority
<b>FSMA</b>	Financial Services and Markets Act 2000
<b>MOA</b>	Memorandum of Appointment of investigators
<b>MOU</b>	Memorandum of Understanding between the FCA and PRA
<b>PIR</b>	Preliminary Investigation Report
<b>PRA</b>	Prudential Regulation Authority
<b>RAD</b>	Regulatory Action Division
<b>RDC</b>	Regulatory Decisions Committee
<b>SDM</b>	Settlement Decision Maker
<b>UKLA</b>	UK Listing Authority



# 1. Overview

## Introduction

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- 1.1** In this Policy Statement (PS) the Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA) respond to comments we received on our Consultation Paper (CP) 16/10 Proposed Implementation of the Enforcement Review and the Green Report and explain what changes we are going to make to our enforcement policies and processes.
- 1.2** We received 13 responses to CP16/10. A list of the non-confidential respondents is included in Annex 1. We are grateful to all respondents for taking the time to share their views with us.
- 1.3** The FCA has incorporated the feedback received from the CP into the changes to the FCA Handbook. We explain these changes in the remaining chapters of this PS. The final changes to the Decision Procedure and Penalties manual (DEPP) and the Enforcement Guide (EG) are set out in Appendix 1.

## Who does this affect?

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- 1.4** This PS will be of interest to all firms and individuals involved in providing financial services as it builds on our existing statements about our use of enforcement powers. It will be of particular interest to all firms and individuals (and their professional advisers) that are, or which anticipate that they are likely to be, subject to FCA and/or PRA investigation.

## Is this of interest to consumers?

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- 1.5** As we noted in CP16/10, the changes to DEPP and EG do not directly affect consumers. However, they concern the transparency of the FCA's approach to enforcement decision-making and its enforcement process, and may therefore be of general interest to consumers.

## Context

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- 1.6** On 18 December 2014, the Treasury published its *Review of enforcement decision-making at the financial services regulators* (referred to in this PS as 'the Review').<sup>1</sup> The focus of the Review was on the transparency, fairness, effectiveness and speed of the FCA's and PRA's enforcement decision-making processes.
- 1.7** The Review made a number of recommendations to the FCA and the PRA, with the aim of improving current enforcement decision-making processes and arrangements. The recommendations ranged across the whole enforcement process, from referral to contested decision-making.
- 1.8** On 19 November 2015, the PRA and the FCA published two reports: (1) A joint report into the failure of HBOS plc; and (2) Andrew Green QC's Report into the FSA's enforcement actions following the failure of HBOS ('the Green Report').<sup>2</sup>
- 1.9** The Green Report made four recommendations, three of which were relevant to the Review recommendations, and relate to: (1) pre-referral decision-making, (2) ongoing dialogue between Enforcement and Market Oversight (EMO) and Supervision during an investigation, and (3) informing the subject of an investigation about the matters under investigation.
- 1.10** We noted in CP16/10 that, while certain recommendations will also apply to regulatory market abuse investigations, they will be less relevant to criminal investigations and civil litigation such as unauthorised business cases and criminal insider dealing. It remains true that there will be enforcement cases where it would not be efficient or appropriate to adopt the processes and policy developed in CP16/10 and set out in this PS.

## Joint PRA and FCA consultation

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- 1.11** Chapters 3 and 4 of CP16/10 were a joint consultation in respect of regulator cooperation and subjects' understanding and representations in the context of enforcement investigations. Chapters 2, 5 and 6 were FCA only proposals.
- 1.12** We have taken the same approach with this PS, in that it sets out the PRA's policy in relation to joint investigations and cooperation between both regulators as well as the FCA's policy in relation to those issues.

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<sup>1</sup> Available online at:  
[www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/389063/enforcement\\_review\\_response\\_final.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/389063/enforcement_review_response_final.pdf)

<sup>2</sup> See online at:  
[www.bankofengland.co.uk/publications/Pages/news/2015/086.aspx](http://www.bankofengland.co.uk/publications/Pages/news/2015/086.aspx) and  
[www.fca.org.uk/news/publication-of-hbos-failure-review](http://www.fca.org.uk/news/publication-of-hbos-failure-review)

### Summary of feedback and our response

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- 1.13** We received 13 responses to CP16/10; six were from law firms, two from individuals, four from representative bodies, and one from the Financial Services Consumer Panel.
- 1.14** The responses were broadly supportive of our proposals, many of which were amendments to our existing enforcement process and centred on increasing transparency. Not all respondents expressed a view on every question. Any additional comments tended to suggest where more information would be welcomed. We also received comments from respondents that made more general points about the enforcement process. The FCA will consider these comments in a further review of EG. We intend to start that piece of work once we have completed our financial penalty policy review, and have had an opportunity to bed in our partly contested cases process.
- 1.15** There were two areas where the tenor of the responses was to disagree with the FCA's proposed approach:
- to abolish penalty discounts at stage 2 and 3 of settlement, and
  - to retain the same panel that gave the warning notice to hear representations and decide whether to give a decision notice
- 1.16** On the partly contested cases issue, the respondents agreed with the FCA's proposal but all (bar one) of the respondents urged us to go further and extend the proposal beyond the ability to contest penalty only.

### Next steps

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- 1.17** The FCA's proposals which have not already been put into practice will be implemented by the amendments to EG and DEPP presented in Appendix 1. The majority of these will come into effect on 31 January 2017. Two proposals will come into effect on 1 March 2017:
- the introduction of partly contested cases, and
  - the abolition of stage 2 and 3 discounts to penalty in settlement
- 1.18** In 2017 the PRA intends to issue a policy statement following on from its consultation on the establishment of the Enforcement Decision Making Committee<sup>3</sup> and a short guide to the PRA's enforcement processes.

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<sup>3</sup> [www.bankofengland.co.uk/publications/Pages/other/edmc/cpedmc2016.aspx](http://www.bankofengland.co.uk/publications/Pages/other/edmc/cpedmc2016.aspx)

## 2. Referral decision-making (FCA)

- 2.1** In CP16/10, we set out the FCA's proposals for implementing the Review and Green Report recommendations relating to the purposes of enforcement and the referral process's role in identifying the right regulatory response and transparency of enforcement activities.
- 2.2** In July 2015, in response to the Review's recommendations in this area, the FCA published a summary of the referral process and framework, which explained how EMO and Supervision work together in the enforcement referral process to identify the right regulatory response. We advised that the framework will continue to be kept under review. We also published revised referral criteria and set out our case selection approach. We proposed that we would amend EG to reflect the new referral criteria and case selection approach, in the terms set out in Annex C to CP16/10.
- 2.3** Following the Green Report recommendations, the FCA has built on the referral decision-making process and has amended the Enforcement Referral Document (ERD) to include a table that sets out all potential subjects, and a summary of the circumstances and reasons why a firm or individual is not being referred for investigation. The FCA ensures that the appropriate seniority of decision-making is maintained by having the Head of Department sign the ERD.
- 2.4** The Enforcement Annual Performance Account will continue to publish information about disciplinary outcomes, including cases where no further action was taken, and the number of cases opened during that year and their related issues - such as client assets, integrity, mis-selling, etc. We confirmed that the FCA will endeavour to publish more information about early intervention work, where it is legally able to do so.
- 2.5** We proposed that we will make no change to the policy of not normally making public whether or not a particular firm or individual is under investigation unless there are exceptional circumstances. We also said that we would try to identify useful examples to publish on the FCA website of cases where a firm's or individual's exceptional cooperation and subsequent remedial action have been a major factor in the decision that formal enforcement action is not the right regulatory response. In the CP, we welcomed views on different vehicles for publication and suggestions about the level of detail that firms and others interested in the approach to early intervention would find useful, while avoiding the pitfalls we identified in the CP.
- 2.6** We asked:
- Q1:** *Do you agree with this approach to referral decision-making?*
- Q2:** *Do you have any comments on the proposed implementation of the Green Report?*

- 2.7** Respondents were generally in agreement with our proposed approach, with some respondents suggesting ways in which information about referrals could be given. For example, a number of respondents suggested that, in addition to providing examples of when a firm's or an individual's response has been an important factor in the decision that formal enforcement action is not the right regulatory response, we should also give examples of cases explaining why we have decided that enforcement is the right regulatory response. One respondent called for us to set out how we exercise our discretion in applying the criteria, and one suggested that the FCA consider introducing a steering committee to challenge and check the decision to refer a case to enforcement. Another respondent suggested that we should allow regulated firms more time to self-investigate issues and report them to us prior to referral to EMO for investigation.
- 2.8** A number of respondents suggested that the FCA publish more information on its early intervention work to better understand the FCA's outlook and priorities. Some suggested that the ERD should be routinely disclosed. One respondent suggested that we notify the firm under investigation of others we are considering to put under investigation, so that the firm can consider whether suspension or disciplinary action should be taken by the firm – in order, for example, to assess whether an individual is fit and proper under the new Senior Managers and Certification Regime.

### Our response

The referral criteria pose the overarching question of whether an enforcement investigation is, in all the circumstances, the right regulatory response.

At the time the Review was published, the FCA had revised its decision-making framework to incorporate a wider range of EMO, Supervision or Markets senior management views at an early stage. Two teams are dedicated to liaising between EMO and referring areas and the teams meet with managers in each area of Supervision and Markets on a regular basis, in order to understand current priorities and issues.

In October 2016, the FCA published a consultation on its future mission, which is designed to provide a guiding set of principles around the strategic choices the FCA makes. In Section 13, we noted that when we start investigations we begin a forensic process, and that this process does not mean we have decided to apply a sanction, that a sanction is inevitable, or that it is even likely. We also noted that there is substantial public interest in the FCA investigating suspected material breaches of our standards, in our detecting them as early as possible, and investigating them fully and quickly. Where appropriate, a full FCA investigation helps engender public confidence in the financial system and markets where wrongdoing is properly identified and dealt with. The consultation period on our future mission closed on 26 January 2017. We will consider, including in light of any responses we received on our future mission, whether the summary of our referral process and framework, and our published referral criteria, need further amendment to improve the message regarding the value of enforcement investigations as a forensic review of what has happened which then allows us to consider whether (and, if so, what) action should be taken by the FCA as a result.

In most cases, potential referrals are considered by a steering group, the members of which will be a range of heads of department from the relevant areas within the Supervision and EMO Divisions. Referral decisions at the FCA are formally agreed between the head of the relevant supervisory department (usually the department with responsibility for supervision of the firm or the relevant thematic review) and the head of the enforcement department that would conduct the investigation. We are not minded, as some respondents suggested, to develop further layers of procedure and process, such as formal pre-referral meetings and representations.

Respondents generally recognised the need for flexibility in the referral criteria, and noted that there remains a significant degree of discretion in making a decision to refer for investigation. We do not think that general guidelines on how we will exercise that discretion would be helpful as the guidance would necessarily have to be broad to avoid effectively fettering our exercise of discretion. The statutory test for referral is that circumstances suggest that a potential breach of (for example) the FCA's Principles for Businesses may have occurred. The Green Report noted the problem in only referring cases based on an assessment that assumes that the outcome of an investigation would be the imposition of a disciplinary sanction. It is in the whole of the FCA's interest to find out what may have gone wrong and what may be needed to put it right, and there will be cases where an investigation is necessary to get to that point. There may be cases where that may not be achieved through remediation alone and where we may need to use our investigation powers to see if root causes can be identified, or whether other parties have been involved.

In addition, there were some interesting suggestions on how best to deliver messages to the wider market, with the possible use of press releases, guidance or case studies at the point an issue is referred for investigation to highlight what are the areas of concern and what our expectations are, rather than those matters coming to light on the publication of a final notice.

The FCA will implement the changes to EG that we set out in the CP, subject to one change to make EG 2.2.6B more succinct, pending further consideration of the issues set out in Section 13 of the FCA's Mission statement and any responses we receive in response to that consultation exercise. There was broad agreement that more information about when we will carry out early intervention work (rather than formally open an investigation) and information about the choices that are made in opening investigations following thematic reviews would be likely to better assist firms' and individuals' understanding of how the referral process works. The PRA intends to publish a short guide to its enforcement processes, including its enforcement referral framework, when it implements the other HMT Review recommendations in 2017.

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## 3. Cooperation between the regulators in enforcement investigations

### Involvement of supervisors during the investigation phase

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- 3.1** In CP16/10, both the FCA and the PRA set out proposals for implementing the recommendations on the way the FCA and PRA work together on joint or dual-regulated firm investigations and related investigations concerning individuals.
- 3.2** We explained that the detail of the coordination of formal regulatory processes and of enforcement and legal intervention is set out in Annex 1 to the Memorandum of Understanding between the FCA and PRA (MOU). In CP16/10, we noted that under the main MOU, both regulators have agreed to proactively offer information of material interest to the other. At the working level, the PRA and the FCA investigation teams have a primary responsibility to keep each other and their respective supervisory teams regularly informed about the investigation's progress.
- 3.3** Those arrangements are in line with the Review's recommendation that updates between the FCA and the PRA on enforcement investigations should generally involve representatives from the enforcement and supervisory teams of both regulators, and that supervisors should be encouraged to promptly bring potentially relevant information to the attention of investigators.
- 3.4** The Green Report recommended that such meetings should take place at least quarterly and, in particular, that they should specifically consider the issue of the appropriateness of scope (including whether to continue with the investigation, or increase or narrow the scope of the investigation in relation to the subject already under investigation), and a review of whether any new subjects should be referred for investigation.
- 3.5** We asked:

**Q3:** *Do you agree with the approach outlined above?  
Are there any particular adjustments that you consider  
should be made in relation to the process of involving  
supervisors in the investigation phase?*

- 3.6** Most respondents welcomed the proposals. Three respondents suggested that where a firm under investigation does not have a dedicated supervisor, it may still be appropriate for a representative from Supervision to attend scoping meetings, or for a Supervision contact to be nominated. Two respondents called for the meetings to be held monthly as a requirement, rather than quarterly. One respondent suggested that the meetings be aligned with the FCA's update meeting with the subject – so that any significant decisions can be shared with the subject – and also that the subject be told the date of these meetings so that the subject could make representations on issues they wished to be considered at the meeting between EMO and Supervision. One said that representations on scope should be allowed before change in scope.

#### Our response

Both the FCA and the PRA have considered the responses and believe it is appropriate that the recommended meetings take place at least quarterly. We agree that there should be a degree of flexibility in the timing of the quarterly meetings in order to accommodate specific development or milestones in the investigation phase.

The recommendations' aim is to ensure that there is a broader look at the progress of the investigation and a continuing review of scope. The point of the meeting is to ensure that EMO is alerted to any relevant supervisory developments that may have an impact on the firm or individual under investigation, that Supervision are also aware of any developments in the investigation that may impact on the supervisory function, and that both review the scope of the investigation together. We do not agree that there should be a round of representations before a change in scope is made, for the same reasons that we do not think that formal representations in advance of a case being opened for investigation is necessary. While it may be useful to align the time of the meetings with updating the subject under investigation on some occasions, we believe that the different aims of the two (meeting with Supervision and updates to the subject under investigation) mean that there will often be no link between them.

The FCA and the PRA will implement the recommendations on the basis of the proposals set out in CP16/10. The FCA has introduced quarterly regular meetings between an EMO head of department and the investigation team, and a representative from the referring division (which will usually be Supervision). The PRA will ensure that quarterly meetings take place attended by a member of management of its enforcement division, the Regulatory Action Division (RAD), a member of the investigation team and a member of the referring supervisory area.

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### Joint investigations and FCA/PRA cooperation

- 3.7** The Review recommended that the FCA and the PRA should provide more guidance about the conduct of joint investigations and how they will approach decision-making in contested cases following joint investigations. We explained in CP16/10 that the regulators propose to implement the recommendation that the FCA and PRA provide more guidance. This can occur once the PRA has consulted on, and set out its plans for, a functionally independent Enforcement Decision Making Committee – and once we have had more experience of joint investigations. The PRA consulted on its plans for an Enforcement Decision Making Committee in July 2016.<sup>4</sup>
- 3.8** The Review also recommended that the FCA should publish high-level information about its cooperation with the PRA. The FCA noted that the FCA reports the information about its coordination with the PRA in its Annual Report, and will continue to do so. The PRA similarly reports information about its coordination with the FCA and will continue to do so.
- 3.9** The Review recommended that, in the context of joint information requests, the PRA and the FCA should indicate to which investigation(s) the information sought is relevant, so that subjects can be satisfied that the information is within scope. The FCA proposed to amend EG to reflect that an information request should make it clear which parts of the request relate to which investigation. The PRA proposed to adopt the same approach in its enforcement investigation.
- 3.10** We asked:
- Q4:** *Do you agree that the PRA and FCA should identify the information requested by each regulator within the same information request?*
- 3.11** All respondents to this point agreed that the PRA and FCA should take this approach in joint information requests.

#### Our response

The FCA will make the proposed amendments to EG and the PRA will adopt the same approach in relation to joint information requests. The PRA's approach to other information requests will be set out in the PRA's guide to its enforcement processes to be published in 2017.

<sup>4</sup> [www.bankofengland.co.uk/publications/Documents/other/edmc/cpedmc2016.pdf](http://www.bankofengland.co.uk/publications/Documents/other/edmc/cpedmc2016.pdf)

## 4.

# Subjects' understanding and representations in enforcement investigations

### Initial notice of investigation

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- 4.1** The Review recommended that the FCA and the PRA provide more information (within the Memorandum of Appointment of investigators (MOA) or in accompanying documents) on the basis for a subject's referral to enforcement for investigation. It recommended that explanations for referral should link expressly to the published referral criteria.
- 4.2** The Green Report also recommended that the regulators should include within the MOA (or alternatively in a separate document which is also sent to the subject of an investigation) a summary of the potential breaches and an explanation of the matters that are said to give rise to those breaches, along the lines of the summary set out in the ERD (unless there were compelling reasons not to do so).
- 4.3** The FCA proposed to amend EG to formally reflect that if a decision to refer to enforcement for investigation is made, the FCA now sets out in writing (and gives to the subject at the time the MOA is issued) a succinct summary of the potential breaches, explanation of the matters that are said to give rise to those breaches, and an explanation of the criteria they have applied in coming to the decision to refer.
- 4.4** The PRA proposed to include more information within the investigation MOA, or accompanying documents, about the basis for a subject's referral to enforcement for investigation, including more of the context in which the alleged breaches occurred.
- 4.5** We asked:

**Q5: *Do you agree with the above approach in respect of the initial notice of investigation?***

- 4.6** Two respondents welcomed the provision of more information at the outset and other respondents broadly agreed with the proposals for implementing the recommendations. There was one suggestion that the FCA explain to the subject why they have decided to use enforcement as opposed to supervisory or early intervention powers, and another that the ERD should be disclosed. In cases where a thematic review has been carried out, or the behaviour is understood to be prevalent across a sector, there was also a call for more detail that explains the FCA's decision and highlights the factors which led to that firm being referred while others were not. One respondent suggested that if the FCA would prefer not to provide the information set out in writing, it could provide this information to subjects of investigations verbally during scoping meetings.

### Our response

The FCA has already implemented the recommendation in practice, and will amend to update EG as set out in CP10/16. The PRA will ensure that the subject of an investigation is provided with more information in the MOA, or accompanying documents, about why they have been referred for investigation, including more information about the context in which the alleged breaches occurred.

### Scoping meetings

- 4.7** The Review recommended that scoping meetings should usually take place once investigators are in a position to share their indicative plans on the direction of the investigation and timetabling of key milestones. This was on the basis that the most useful scoping meetings are those that are carefully planned to take into account the specific circumstances of the case, which take place once investigators are in a position to discuss their thinking on the direction and timescale of the investigation. However, it also noted that the requirements and expectations of subjects will differ, and that those who have been through the enforcement process previously, or have appointed experienced legal advisers, may not consider discussion on the mechanics to be valuable, but that discussion may be useful for other firms and individuals. It also recommended that subjects are expressly invited, at scoping meetings or otherwise at an early stage, to provide an indication as to whether they accept the suspected misconduct, or specific aspects of it.
- 4.8** We asked:
- Q6: *Do you agree with the regulators' proposals around the scoping meetings?***
- 4.9** Some respondents welcomed the recommendation that scoping meetings should take place once investigators are in a position to share indicative plans, and also supported the regulators retaining flexibility about the timing of scoping meetings. One respondent suggested that scoping meetings can be uninformative and do not provide clarity as to the next steps in the investigation. One respondent suggested that the scoping meeting is not particularly useful for firms that are familiar with the investigation process. Further suggestions for discussion at the scoping meeting stage included, for example, proposed requests for information, expectations around document management and retention, and that (if possible and known at the scoping meeting stage), whether the alleged culpability is viewed as inadvertent, reckless or deliberate.
- 4.10** One respondent suggested that proper protocols should be established requiring the regulators to keep firms informed of the scope and progress of investigations and provide firms under investigation with realistic indications of the range of potential penalty to which they might ultimately be subject.

### Our response

The FCA and the PRA propose to adopt the recommendation that scoping meetings should *usually* take place once investigators are in a position to share their indicative plans on the direction of the investigation and timetabling of key milestones based on the particular circumstances of the case. However, the FCA and the PRA will need to retain flexibility about the timing of scoping meetings.

This may result in scoping meetings taking place at a later date after the investigation has been opened than has been the practice in the past – when a scoping meeting generally followed very shortly after the MOA had been issued – but such a practice will follow the tenor of the recommendation that the scoping meeting is as informative as it can be. However, we recognise that individuals in particular are likely to want an early meeting even if, at that stage, it is not possible to do much more than introduce the team and give an outline of the enforcement process. We also recognise, as did some of the responses, that some issues that would have been discussed at the scoping meeting may now be better addressed through a later update.

**4.11** The Review recommended that subjects be expressly invited, at an early stage of the investigation, to provide an indication as to whether or to what extent they accepted the suspected misconduct. It also suggested consideration of whether it may be appropriate to expressly incentivise admissions at an early stage, acknowledging that this may form part of the FCA's review of its penalty setting framework.

**4.12** We asked:

**Q7: *Pending consideration of whether it may be appropriate expressly to incentivise admissions at scoping meetings (in the context of the FCA's forthcoming review of its penalty policy and the PRA's forthcoming review of its settlement policy), do the regulators' current approaches to discounts for early settlement provide sufficient incentive for early admissions at scoping meetings?***

**4.13** Most respondents did not agree that the current enforcement process and approach to discounts created a sufficient incentive to make early admissions in enforcement investigations, and one respondent suggested that admissions should be made on a fully informed basis. Many agreed that it would be difficult to give any such indication unless considerably more information is given to subjects at or around the time of scoping meetings than is currently the practice. One respondent did not consider it appropriate or necessary for subjects to be expressly invited, either at scoping meetings or at an early stage in the investigation, to provide an indication as to any admission. It was suggested that smaller firms and individuals might feel unduly pressurised to proceed with early admissions when there is an early settlement discount available.

- 4.14** Some respondents suggested that, rather than provide discounts for admissions at the scoping meeting, any penalty determined should take into account the degree of openness and co-operation provided. One respondent noted that when considering whether early settlement at or around the time of a scoping meeting is feasible, the FCA and PRA should consider whether other regulators or authorities are – or could become – interested in the same issues, it may not be possible for firms or individuals to reach an early settlement with the FCA.

#### Our response

We recognise that any further incentivisation of early settlement will need to balance the desirability of the matter concluding quickly with the need to ensure that the full extent of the misconduct is understood and can be set out to the subject under investigation.

The FCA intends to explore this recommendation as part of the penalty policy review. That will allow the FCA to assess the impact, if any, that partly contested cases have had. Issues relevant to incentivising early admissions are also likely to be relevant to broader considerations of cooperation as a mitigating factor in arriving at the appropriate penalty. The PRA intends to review its settlement policy in early 2017.

### The involvement of supervisors

- 4.15** The Review recommended that the regulators consider how best to utilise the referring area's knowledge of the firm's financial sector, and that supervisors of relationship-managed firms should ordinarily attend scoping and progress meetings with the firm under investigation. It also recommended that investigators and supervisors should ensure that they maintain an open dialogue throughout investigations. The majority of the firms the FCA regulates do not have specific supervisors, but where a firm is a relationship-managed firm, the FCA proposed to amend and clarify the involvement of supervisors during the investigation phase in EG. All large PRA deposit-taking, insurance and investment firms are relationship-managed and in such cases, where appropriate, supervisors attend scoping and progress meetings. Investigators and supervisors maintain an open dialogue in PRA investigations and, in particular, at certain key stages of those investigations.

**4.16** We asked:

**Q8:** *Do you agree with the above approach to supervisory involvement in enforcement investigations?*

**4.17** Most of the respondents agreed with this recommendation. One respondent observed that Supervision is usually unwilling to comment or provide views on the investigation process once the matter is referred to EMO. One respondent suggested that Supervision should provide the subject under investigation with information or documents at an early stage and be involved in the scoping meeting. However, there were a few respondents that had concerns about the recommendation. One respondent suggested that the institutional separation of Supervision and EMO is necessary to improve objectivity and ensure the investigation is kept within fair and proportionate parameters. One respondent pointed out that Supervision may have already reached its own conclusions, which may result in less independence and limits the intended ‘fresh pair of eyes’.

#### **Our response**

This recommendation has a degree of cross over with the Green Report recommendation that EMO and the referring area continue to meet regularly to review the scope of the investigation, which will also assist help to achieve the aim of the Review’s recommendation to promote a broad symmetry of information through an open dialogue between the referring area and EMO for the FCA and RAD for the PRA. Where the issues involve, for example, a consideration of market practice issues, or the firm’s business model, involvement of Supervision will be helpful. We recognise the concerns expressed around too close an involvement in the investigation process; we would not expect Supervision to routinely comment or give an opinion of the investigation process to a subject under investigation. The FCA proposes to amend EG to reflect that, in most (if not all) cases, assistance from a referring area in informing the investigation team of matters such as the firm’s business model and market practice issues will be helpful. The involvement of the referring area is valuable in identifying and addressing important issues that arise in the course of the investigation, but the FCA believes that there needs to be clarity as to who is carrying out what work, so that the various needs of the investigation and supervisory function are not lost. The PRA recognises the importance of Supervision being kept informed of the investigation’s progress and being consulted in advance if there are any significant changes or developments. The PRA will set out this approach in the PRA’s guide to enforcement processes, which will be published in 2017.

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## Periodic updates and constructive dialogue

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**4.18** The Review recommended that investigators provide periodic updates to subjects about the progress of investigations in appropriate cases, and that investigators should also reference and update the indicative timeline set out at the scoping meeting. The FCA proposed to amend EG to reflect the aim to give periodic updates on at least a quarterly basis, covering the steps taken in the investigation to date, and the next steps we anticipate taking. In addition, the FCA proposed to amend EG to reflect the practice that, in joint investigations with the PRA, discussions with the firm or individual under investigation will normally occur with representatives of both regulators present - and that, where possible, the regulators will seek to ensure that the respective enforcement processes are coordinated.

**4.19** We asked:

**Q9:** *Do you agree with the above approach to periodic updates in the context of enforcement investigations?*

**4.20** There was broad agreement with the principle behind the recommendation. One respondent suggested that the FCA should clarify its approach to declining to provide information on the basis of the statutory requirements regarding the use of confidential information set out in section 348 of the Financial Services and Markets Act (FSMA). One respondent suggested that the FCA aim to give periodic updates on at least an eight-week basis, as well as communicate when a key stage has been reached. One respondent suggested that they would like to see monthly updates rather than quarterly. There was a suggestion that there should be recognition and acknowledgment that the views expressed are preliminary and may change as the investigation evolves. Three respondents suggested that the FCA maintain an element of flexibility when updating the subject of an investigation: for example, where significant developments occur, the investigation team provides an update to the subject, and it should not be subject to an inflexible timetable.

### Our response

The FCA and the PRA will implement the changes that we proposed in the CP. In line with the recommendation, the focus will largely be on the practical steps that have been taken in the investigation, and the steps that the investigation team proposes to take. If a subject wants to request a face-to-face meeting, they can do so, but it may sometimes be more efficient and effective for the updates to be carried out through telephone calls or by letter.

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**4.21** The Review also recommended that the regulators should consider how to promote early, constructive engagement between investigators and subjects. It was suggested that consideration be given to the provision of specific training, increased involvement of senior staff from both the regulators and firms under investigation, and encouragement of greater cooperation from subjects.

**4.22** The FCA acknowledged that the involvement in an investigation of project sponsors, heads of department and directors within EMO may not be apparent to a subject under investigation. We noted that, while increased or more obvious involvement of senior management may help, the right level of experience and expertise in the investigation team is a key factor, and together with the PRA, proposed to continue to coordinate certain training for EMO staff. The PRA also highlighted the proposal by the Bank of England to establish an Enforcement Decision Making Committee, which will be functionally independent of senior management and will take decisions in contested enforcement cases. This proposal was the subject of a CP whose consultation period closed on 21 October 2016.

**4.23** We asked:

**Q10: *Do you agree with the proposed approach set out above to constructive engagement in the context of enforcement investigations?***

**4.24** There were two suggestions that there be greater visibility in terms of which senior member of the FCA has responsibility for the investigation. One respondent suggested that while training will help, constructive engagement depends on the tone from the top (and may require a cultural change within the regulators). One respondent expressed their disappointment that any informal understanding reached might be subsequently overturned by senior staff; they hoped this would happen rarely. One respondent commented that involvement of senior management would only be useful if they have been briefed on the day-to-day running of the case.

#### **Our response**

The FCA and the PRA will implement the proposals that we set out in the CP and believe that the other changes to the enforcement process - and in particular the updates - should also assist in achieving constructive engagement. We agree with the respondents who commented on Q9 that at any early stage views are likely to change as they are forming. These respondents observed that if and when an investigation team is able to share its emerging thinking, it may not necessarily commit the investigation team to any particular position, as the evidence is analysed and new evidence obtained.

### Time limits for responding to a Preliminary Investigation Report (PIR) and a warning notice

- 4.25** The Review recommended that, to enhance transparency, the regulators should set out the factors that they might consider relevant to an application to extend the period for responding to a PIR or warning notice.
- 4.26** In (and annexed to) the CP, the FCA proposed amendments to DEPP to include some non-exhaustive factors that the FCA would take into account when considering a request to extend the response period to a warning notice; and proposed to amend EG to reflect similar factors that it would take into account when it considers a request for an extension of time to respond to a PIR. The PRA proposed to adopt the same factors in setting out those that it would consider relevant to an application to extend the response period to a PIR or warning notice.
- 4.27** We asked:

**Q11: Do you agree with the proposed list as constituting factors that the regulators will take into account when considering whether to grant an extension of time to respond to a PIR or warning notice, in full or in part? Are there any further factors that you consider should be taken into account?**

- 4.28** Respondents agreed with the proposal. There was a suggestion that the availability of key decision makers could also usefully be added to the proposed list of factors. One respondent suggested that the fact that smaller firms cannot dedicate the same level or resource as larger firms should be considered when deciding what timescale is fair. One respondent suggested that the FCA should be required not to exercise its discretion to allow or disallow a time extension arbitrarily or capriciously, or as a punitive measure. It was also suggested that when the FCA is considering abandoning stage 2 and stage 3 discounts, the impact of this would be felt more profoundly as extensions of time for responding to PIRs and warning notices are rarely permitted. There was general agreement by all of the respondents that the FCA and the PRA should have a flexible approach.

#### Our response

The FCA will amend DEPP and EG as set out in the draft outlined in the CP. In addition, although not a formal recommendation, the Review suggested that we should consider giving more specific guidance about the circumstances in which we will give a PIR. In the CP, we said we would keep under review whether or not it would be helpful to give more guidance on this point, once we had considered the responses. There were very few comments from respondents on this issue. Two respondents thought that the provision of a PIR was useful in the context of answering the question addressed to the provision of information at stage 1; as noted below, other responses suggested a number of ways in which the key evidence and basis of our case could be set out at stage 1. We will keep under review the question of giving further guidance, but the responses to date suggest that firms and individuals are more interested in what information is given to them rather than the type of document in which the information is given. The PRA will consider these matters when drafting the guide to its enforcement processes which it intends to publish in 2017.

## 5. Settlement (FCA only)

- 5.1** The Review did not recommend a longer stage 1 period in settlement discussions, but focused on the effectiveness of the stage 1 period itself. As a result of its recommendations, we proposed to amend EG to:
- incorporate early notification of the start of stage 1 to allow administrative arrangements to be made, such as ensuring that key staff will be available, and
  - allow for the incorporation of pre-stage 1 preliminary meetings; and
  - Furthermore, where it is necessary to help resolve factual disputes or to assist the firm or individual to make an informed decision about whether to resolve the dispute by agreement, the FCA will identify the key evidence on which its case relies at the commencement of stage 1, unless the firm or individual already has that information.

- 5.2** We asked:

***Q12: Do you agree with the proposed changes to the pre-stage 1 process?***

- 5.3** Most respondents welcomed the proposals and some acknowledged that they had already been involved in some investigations where pre-stage 1 meetings took place. Three respondents suggested that senior or sufficiently senior members of staff should attend the preliminary meetings, with two respondents observing that this facilitates constructive discussions.
- 5.4** Two respondents expressed the view that the preliminary meetings should take place before the investigation team have put their views to the Settlement Decision Makers (SDMs). One respondent called for one or more of the SDMs to attend the preliminary meeting. One respondent requested that we amend EG to say we will use the meetings to set out our proposed findings and key evidence.

- 5.5** We also asked:

***Q13: Do you have any comments on the proposed approach to the information provided at stage 1?***

- 5.6** A number of respondents wanted our disclosure of documents to go beyond that proposed in the CP, and called for the FCA to provide, or consider providing, proposed findings and the key evidence in advance of stage 1 (particularly where this involved large volumes of evidence). Some suggested this should be done in all instances. One respondent considered that, where this information was not provided in advance, there should be provision for a second 'without prejudice' meeting, at which the subject can respond and identify areas of dispute. Other suggestions included using a spreadsheet or a list of documents to identify key evidence. Some respondents agreed that copies of documents that subjects already have (or have access to) do not need to be provided. One respondent disagreed and thought the FCA should provide or offer to provide these documents in all cases.
- 5.7** Two respondents considered that, in some or all cases, it may be desirable for the FCA to undertake a wider disclosure exercise. One respondent requested we give further explanation of the extent of the disclosure that we will give.
- 5.8** One respondent suggested that it would be helpful, once the subject has been given 28 days' notice of stage 1 commencing, if the FCA would tell the subject if service of settlement papers is likely to be delayed.

#### Our response

We will aim to give 28 days' notice of the beginning of stage 1 and where appropriate, we will offer a preliminary without prejudice meeting to explain the FCA's view of the misconduct (including the key factual and legal bases for our view). We believe that providing the proposed findings and key evidence at the start of stage 1 should be sufficient to enable the subject to understand the nature and extent of the case against them. We do not believe that it would be useful to be too prescriptive about how that information is given. We also do not believe that it is necessary to provide a list of all documents we have received in the course of the investigation, or to provide those that we do not rely on.

### Partly contested cases

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- 5.9** In the CP, we sought to address respondents' concerns about the Review's call for evidence, proposing to introduce a streamlined procedure to narrow the issues between the FCA and the subject in an enforcement action by entering into a 'focused resolution agreement' on the facts and liability, with the Regulatory Decisions Committee (RDC) then determining only the action to be taken (the Proposal).
- 5.10** We explained the outline to the Proposal, including the proposed amendments to the EG and DEPP to allow for this procedure. We also identified two alternative types of focused resolution agreement that we had considered:
- Alternative 1: The subject agrees all facts relevant to the proposed enforcement action, but wishes to make submissions and contest whether the breaches as alleged by the FCA arise from those facts. In these circumstances there would also be a dispute about the appropriate outcome.
  - Alternative 2: The subject agrees one or more issues relevant to the proposed enforcement action, but not all, and wishes to contest narrowed down issues.
- 5.11** We invited comments on the proposal, as well as thoughts on whether we should also introduce the additional alternative types of focused resolution agreement.
- 5.12** We asked:
- Q14:** *Do you agree that the FCA should amend the DEPP and EG to make provision to contest penalty only before the RDC?*
- Q15:** *Do you have any comments on the proposed framework and procedure for contesting penalty only?*
- 5.13** All respondents supported the introduction of the procedure to allow the FCA and the subject to enter into a focused resolution agreement with the RDC determining the penalty.
- 5.14** Two respondents asked for clarification on the procedure, including who can initiate the procedure and what factors the FCA will consider when determining whether it will enter into a focused resolution agreement. A further respondent requested clarification on the treatment/position of third parties in this procedure. One respondent recognised that there may be evidence to which the subject may wish to refer, over and above the agreed facts of the case (for example evidence of personal hardship), noting that these would and should not be inconsistent with the agreed facts.
- 5.15** Several respondents commented on the FCA's ability to release information about a warning notice through a warning notice statement, and were concerned that the ability of the FCA to issue a warning notice statement would act as a deterrent to firms and individuals seeking to enter into a focused resolution agreement. Another respondent requested clarification on whether entering into a focused resolution agreement would affect the FCA's discretion to publish a warning notice statement. One respondent suggested that RDC hearings for focused resolutions could be fast tracked, which would mean that the case was resolved more quickly and any benefit of publishing a warning notice statement would be reduced.

- 5.16** One respondent commented that the subject must have assurance regarding the text of the warning notice to be issued, insofar as it relates to the agreed facts and liability in respect of breach or breaches. The respondent suggested that the text should be appended to the focused resolution agreement. The respondent raised an ancillary point, that the subject should have certainty about the wording of any proposed warning notice statement, and that the agreement about whether or not to publish a warning notice statement could form part of the focused resolution agreement.
- 5.17** In general, respondents supported the 30% discount. However, one respondent questioned having the same discount level given that a partly contested case, even on penalty only, will inevitably use more resources.

### Our response

As proposed in the CP, we will implement the necessary changes to the DEPP and EG to allow for a contest on penalty only in front of the RDC, as well as implementing both other alternative options for partly contested cases. We will consider, on a case-by-case basis, the question of whether to publish a warning notice statement, but we believe that it would normally be inappropriate to issue a warning notice statement given that the final notice is likely to follow shortly thereafter.

- 5.18** We indicated in our CP that one possible challenge to Alternatives 1 and 2 achieving time and resource savings was the potential breadth of the number of issues that would remain unresolved that would need to be contested before the RDC. Unless the issues are narrowed considerably, the savings in resources for both the FCA and the subject compared with a fully contested case may be limited. We also took the view that the question of how much credit ought to be given to a subject who is found liable by the RDC is more complex and less suitable for a fixed and guaranteed discount. It follows that the process would have to give the RDC a discretion to set the appropriate discount, and that there would then be some uncertainty as to the discount that would be applied.
- 5.19** We asked:
- Q16: Do you have any comments on Alternatives 1 and 2?**
- 5.20** Only one respondent felt that both Alternatives 1 and 2 would not result in the savings in time and expense that we sought.
- 5.21** All other respondents favoured extending the proposal to at least one of the two alternatives. There was a general preference for Alternative 2, on the basis that it gives maximum flexibility. Although agreeing with the prospect of introducing more flexibility into the procedure, one respondent was concerned that in cases involving multiple parties, the availability of an option to partly contest the case may further complicate the timing and outcomes of such cases.

## Our response

We appreciate that the two alternative proposals could have some benefits: for example, in cases where we have decided that it is appropriate to take action against an individual where the ability to narrow issues may help resolve cases more efficiently. It may also help develop a body of more detailed decisions that can be understood and translated into clear advice to firms and individuals.

Responses indicated agreement with certain key matters that would need to underpin both Alternatives 1 and 2 to mitigate the possible issues we identified with implementing any extension of the proposal beyond contesting penalty only. Specifically, we would need to have formed the view that issues had been sufficiently narrowed, matters cannot be reopened in front of the RDC, and the RDC would determine the appropriate amount of discount. We are aware that difficulties could arise in a case with many parties, and it may be that that could be a factor in deciding whether it is appropriate to enter into one or more focused resolution agreements.

The responses demonstrated a widely held view that both alternatives would be valuable in resolving enforcement at an earlier stage and at a lower cost for the FCA and the subject, and would give maximum flexibility to narrow issues. Accordingly, we propose to extend amendments of EG and DEPP to incorporate both Alternatives 1 and 2, so that partly contested cases will have the ability to encompass contesting penalty only, contesting liability and penalty, or a focused narrowed down combination of facts, liability and penalty that will give a discount reflecting the extent of agreement.

It will still be possible to settle cases fully during stage 1. Partly contested cases will proceed on the basis of a focused resolution agreement and where possible, the process will closely follow our existing process for settlement through a decision of our settlement decision makers.

## Extending Stage 1

- 5.22** The Review recommended that we should set out the factors that we consider relevant to an application for extension of the stage 1 period. Our view remains that, in most cases, 28 days is a reasonable period in which to respond to a stage 1 letter. We proposed to clarify EG to reflect our view that extensions should be in exceptional circumstances only, but that those circumstances will generally involve factors outside the firm's and individual's control, and that will have a material impact on their ability to engage with the investigation team during stage 1.
- 5.23** We also reiterated our view that where new information has come to light that has a material effect on the FCA's findings or proposed disciplinary outcome, it may be more appropriate to withdraw the stage 1 letter and consider issuing a new stage 1 letter when the new information has been assessed.

5.24 We asked:

**Q17: Do you have any comments on this approach to extending stage 1?**

5.25 Most respondents agreed that our approach to extending stage 1 should be on a case-by-case basis, and that if stages 2 and 3 are abolished, extensions of time may more frequently be an appropriate step. One respondent agreed that generally 28 days should be sufficient, but that, in exceptional cases, stage 1 should be extended and the discount maintained (e.g. investigations involving international law enforcement or overseas regulators).

### Our response

We will implement the proposals in the CP, and remain of the view that in most cases, 28 days will be sufficient time to respond to a stage 1 letter. Implementing other recommendations – such as periodic updates during the investigation, and notice of the likely start of stage 1 and pre-stage 1 meetings – should provide sufficient focus on the substantive issues in settlement discussions to allow both the FCA and the subject to establish which matters can be agreed and those that remain in dispute. The introduction of all types of partly contested case procedures will still allow a firm or individual to obtain up to a 30% discount if an issue cannot be agreed within the stage 1 period.

### Making representations in settlement negotiations

- 5.26 The Review sought to address the concern that representations made during settlement - where material to the regulators' assessment of the case or penalty and not previously considered or given sufficient weight - should be assimilated by the regulator prior to it reaching a decision.
- 5.27 The Review suggested that this may be best achieved, in the case of the FCA, by the relevant EMO Head of Department, where necessary, acting as a suitably senior conduit between the case team and the SDMs. The Review also recommended that, in most cases, the Head of Department should attend a without-prejudice settlement meeting during stage 1. Where attendance at this level is not possible, an appropriately senior substitute should attend in their place.
- 5.28 The FCA proposed to clarify the involvement of senior management in settlement negotiations in EG. The Review raised a concern that insufficiently senior staff are involved in settlement discussions and liaising with the settlement decision makers. We proposed that, where appropriate and having regard to the size complexity and seriousness of the case, the Head of Department will attend a without-prejudice meeting during settlement discussions or will arrange for the attendance of an appropriately senior FCA representative.

**5.29** We asked:

**Q18:** *Do you have any comments on our proposed approach to implementing the Review's recommendations on representations in settlement discussions?*

**5.30** Most welcomed more clarity about the involvement of the Head of Department in settlement negotiations. One respondent noted that senior FCA individuals should be directly involved in settlement negotiations and that there was an asymmetry of seniority between the FCA and the firm's representatives, leading to a perception that the EMO team did not have the authority to negotiate beyond the case presented in the draft warning notice. Others thought that it was useful to have someone less involved in the day-to-day investigation who could act more impartially as a moderating influence and not an advocate for the case team to address concerns that the EMO team would be unwilling to revisit their findings, even in the face of cogent and persuasive representations.

#### Our response

In all cases, senior management (either heads of department or directors) will be aware of the nature of any settlement discussions and how they are progressing, in addition to the input of the project sponsor. We intend to implement our proposal in the CP, which should also increase the visibility of the project sponsor - both in relation to liaising with the SDMs and having a more transparent role in the actual settlement negotiations.

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#### Settlement discounts

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**5.31** The Review considered that 'removing the discounts currently available at stages 2 and 3 will assist in demarcating, at an early stage, between those cases that can be settled, and those that must be contested'.

**5.32** The present settlement discount scheme is set out in DEPP 6.7. Settlement can be reached at any stage of an investigation, but the settlement discount scheme provides for graduated reductions in penalty depending on the stage at which settlement is reached.

- Stage 1: 30% reduction if settlement is reached between the start of an investigation and the point at which the FCA has a sufficient understanding of the nature and the gravity of the breach to make a reasonable assessment of the appropriate penalty, has communicated our assessment to the person under investigation, and has allowed a reasonable opportunity to reach agreement about the amount of the penalty.

- Stage 2: 20% reduction if settlement is reached between the end of stage 1 and the date when the period for making written representations to the RDC has expired (or the date on which written representations were sent in response to a warning notice).
- Stage 3: 10% reduction if settlement is reached between the end of stage 2 and the date when a decision notice is given.

**5.33** The Review recommended that the FCA should consider reviewing the graduated discount scheme and applying a discount only to those cases that settle in stage 1, but retain the ability to apply a discretionary discount in cases that settle outside stage 1, where we consider it appropriate. The reason for this was a general view from the consultation, that cases either settle or do not, and that an extended graduated discount scheme may not optimise settlement prospects. As the Review noted, between 2012 and 2014, only nine cases settled in stage 2 or beyond.

**5.34** We proposed that the discount of 30% should remain in fully settled cases where agreement is reached during stage 1, and the same fixed discount of 30% should be applied where a focused settlement agreement to contest penalty only is reached during stage 1. We also proposed to adopt the recommendation to abolish the stage 2 and 3 discounts.

**5.35** We asked:

**Q19:** *Do you have any comments on the proposed discount for entering into a focused resolution agreement to contest penalty only? In particular, should there be a difference in discount between cases that settle fully and those that contest penalty only?*

**Q20:** *Do you agree with the proposal to accept the Review's recommendation to abolish stage 2 and stage 3 discounts?*

**5.36** All bar one respondent supported a discount of 30% where a subject under investigation challenges penalty only. Arguments against abolishing stage 2 and 3 penalty discounts centred around three main points:

- The potential for increasing pressure on a subject under investigation to settle at stage 1, in cases where the discount was a major factor in the affordability of the financial penalty;
- They allow the firm to test the conclusions of the EMO team with the RDC and there should not be a penalty for testing the FCA's case beyond stage 1.
- They provide an additional option for a subject of an investigation and still give an incentive to settle later in the process, which would save some time and resources.

- 5.37** One respondent suggested that, where the case is reframed to remove one element of disagreement which was an impediment to earlier settlement, a discount should still be available to take into account the fact that under the new terms there would have been a settlement. A number of respondents believed that if the discounts are abolished, the FCA should show a greater willingness to extend stage 1.

#### Our response

We recognise that there will always be some additional work involved in a case where penalty is contested around preparing for and attending the RDC meeting. However, we balanced that against the improved transparency benefits and have decided that we will still set the discount for contesting penalty only at 30%.

As one respondent noted, in many cases a subject is likely to have decided whether they are able to settle on the basis of the draft warning notice in stage 1, and pressure of time will be further reduced by the other proposed amendments to the settlement process set out above. We looked back at cases that did settle in stages 2 and 3 and noted that most of them did not settle shortly after stage 1 but much further on in the RDC process. Given that the stage 2 discount can be obtained up to the point when the RDC give a decision notice, a great deal of resource involved in the RDC process is front-loaded, such as producing the investigation report, completing the disclosure process and the RDC meeting at which the decision to give a warning notice is made.

More importantly, the partly contested case procedure enables a subject under investigation to potentially obtain up to a 30% discount to penalty without settling all matters and test elements of the FCA's case. We appreciate that respondents framed their comments on the basis that the CP proposed to implement the ability to contest penalty only, but given our intention to extend the partly contested cases process, we think that the concerns about being penalised for testing elements of the FCA's case fall away, and there should be much earlier identification and narrowing of issues. For those reasons, and the reasons that the Treasury set out in making this recommendation, we intend to abolish stage 2 and stage 3 discounts.

#### Ongoing settlement review

- 5.38** The Review recommended that the contested case decision makers (in the FCA's case, the RDC) should regularly review the regulator's processes in settled cases. It recommended that the review should include seeking comments from all or a sample of those who have settled cases and speaking with the relevant EMO staff. The RDC should monitor the effectiveness of the recommended changes to the settlement process, identify whether there may be settlement process lessons to be learned, and make generic public recommendations.

**5.39** The FCA proposed that the RDC's review should be based on a sample of cases that the RDC consider sufficient to enable it to form a view on the effectiveness and fairness of the revised settlement process from the perspective of all interested parties and the extent to which it contributes to a consistency of approach. We also proposed that the review will focus on practical and procedural aspects of the settlement process. It will only consider the substantive facts of the case and its outcome to the degree necessary to consider the effectiveness and fairness of the process and how much it contributes to a consistent approach. Where that review identifies scope for improvement of the process, it may lead to further consultation on changes to EG, and is likely to be included in the RDC's report, which we proposed will form part of the FCA's Annual Report.

**5.40** We asked:

***Q21: Do you agree with the proposed approach to ongoing settlement review?***

**5.41** There was general agreement that the review should not extend to the review of the substance of the case as it would lead to unacceptable uncertainty for settled matters and that it should focus on testing the application of the settlement process.

#### **Our response**

We intend to implement our proposal as set out in the CP and will publish any recommendations arising out of the settlement review in the RDC's Annual Review.

## 6. Contested decision-making (FCA only)

### Access to the Tribunal

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- 6.1** The Review recommended that the regulators put in place a clearly signposted, expedited procedure for subjects to proceed straight to the Tribunal (as defined in the FCA Handbook Glossary). If they choose to challenge the regulator's case within a tribunal environment without first making representations to the regulator's decision maker.
- 6.2** We proposed to amend DEPP to provide for a person who has received a warning notice (whether from the RDC or SDMs in a partly contested case) to elect not to make representations to the RDC or SDMs. The FCA would then move straight to issuing a decision notice in substantially the same terms as the warning notice. We further proposed to amend DEPP to allow a subject to choose to use the expedited route to the Tribunal prior to the issue of a warning notice. If the subject uses the expedited route prior to the issue of a warning notice, the settlement decision makers will issue both the warning and decision notices; the subject can then seek to refer the matter or partly contested element to the Tribunal.
- 6.3** We asked:
- Q22: Do you agree with the proposal for access to the Tribunal without representations being made to the FCA's decision maker?***
- 6.4** One respondent suggested that the FCA needs to set out the options and potential benefits for defending the case very clearly to respondents who have made representations to the FCA's decision maker which have then resulted in the case being narrowed or not pursued. One respondent was concerned that the subject may elect to refer the matter to the Tribunal, only for the FCA to conduct further information gathering at the Tribunal stage in circumstances where the outcome might have been different had the FCA investigated prior to stage 1.
- 6.5** One respondent suggested that the circumstances in which the proposal might be used is likely to be rare for firms. Another noted that, unless privacy is granted, the Tribunal (which is a public forum) may not prove to be attractive to all investigation subjects, especially individuals.

- 6.6** Two respondents asked the FCA for clarity on its approach on enforcement cases where one of the individual subjects might opt for direct tribunal access while others do not. One suggested that the FCA defer publication of the decision notice in respect of that individual until the point at which it would propose to make a warning notice statement in respect of the remaining subjects.
- 6.7** One respondent suggested a leapfrog mechanism, which will allow the RDC to have more capacity for other contested cases. Under this mechanism, subjects refer cases where the interpretation of a regulatory rule or obligation is in dispute and it would be more attractive to obtain a Tribunal decision without the delay and cost of going through the RDC process first.

### Our response

Under the existing enforcement process, a person who has received a decision notice and has not previously made any response or representations to the FCA may nevertheless refer the FCA's decision to the Tribunal. However, we propose to implement the recommendation and make it clearer to subjects under investigation that this option is available. We are aware of potential issues that may arise in multiparty cases; however, these are issues that already arise in such cases where one party wishes to settle and one to contest proceedings, and are therefore not new to this proposal.

### RDC performance and efficiency

- 6.8** The Review recommended that the RDC reports annually on its performance, and that this report might include the results of the annual operational review and the review of settled cases. The Review recommended that a regular review of the RDC should take place and be published. It recommended that the review should consider:
- the extent to which the RDC membership includes expertise appropriate to the areas in which the FCA is likely to take enforcement action
  - its operational performance, including the time taken to deal with contested cases following submission of papers by investigators, and
  - the sufficiency of resource generally (the size of membership, the available administrative and legal staff) to deal with cases efficiently

- 6.9 We proposed that the annual report should be included in the FCA's annual report and should include the matters recommended by the Review.

**Q23: Do you consider that there are other matters on which the RDC could usefully report?**

- 6.10 One respondent considered that it would be useful for the industry to be informed of the type of briefing and training the RDC members receive before being appointed and selected for a panel.
- 6.11 One respondent suggested that it would be helpful to publish feedback on its review of the effectiveness and fairness of the revised settlement process from the perspective of all interested parties and the extent to which it contributes to a consistency of approach.
- 6.12 There was one suggestion that the FCA keep under review whether it would be useful to publish additional information about the RDC's work. For example, if the FCA adopts focused resolution agreements, it would be helpful to publish certain information; for example, how many focused resolution agreements it has entered and in how many of these cases the RDC upheld the FCA's original findings or sanction proposal.

#### Our response

We will publish an annual review of the RDC's work covering the topics suggested in the Review's recommendation, a report on our settlement process review and are considering what other useful information we might also publish. We have already published the first RDC Annual Review (as an annex to the FCA's most recent Annual Report).

- 6.13 We also proposed that the RDC panel considering the representations and deciding whether to give a decision notice will usually be the same members of the RDC who previously considered the matter, i.e. it will not be standard practice that new members are added to the panel, so that (usually) five RDC members are involved in deciding whether or not to give a decision notice.

- 6.14 We asked:

**Q24: Do you agree with the proposal that, usually, the panel that gave a warning notice will be the same panel that considered representations and decided whether or not to give a decision notice?**

- 6.15 Generally, there was disagreement with this proposal. There were two respondents that had no issues with the same panel considering both a warning notice and a decision notice. There was a concern that individuals on the panel who issued a warning notice would be less likely to move away from their initial position than panel members looking at the issue afresh following representations.

- 6.16** One respondent stated that they do not believe this amendment is necessary as it may cause cases to be delayed and it is sufficient for the panel to include at least one member who previously considered the matter
- 6.17** One respondent suggested that if amendment is necessary, DEPP 3.2.3G should state that the composition and size of panels of the RDC may vary depending on the nature of the particular matter under consideration, and leave determination of the size and composition of the panel to the RDC chairman, taking into account its efficient operation and any specific experience needed in any particular case.

### Our response

We believe that the additional flexibility and scope for arranging representation hearings more swiftly without the presumption that in all cases, the panel will increase to include additional RDC members, are good reasons for implementing the proposal. We will amend DEPP to reflect that it will be usual for the same panel to decide whether to issue a warning notice and a decision notice in the same case. However, this is not intended to be an absolute rule. In particularly complex cases involving novel points of law or practice, it might be appropriate for a larger panel to consider the case at both the warning notice and representations stage, and there may still be cases where it is appropriate to enlarge the panel to include additional RDC members at the decision notice stage.

# Annex 1

## List of non-confidential respondents

Allen & Overy LLP  
Berwin Leighton Paisner LLP  
British Bankers' Association  
City of London Law Society Regulatory Law Committee  
Financial Services Consumer Panel  
Freshfields Bruckhaus Deringer LLP  
Institute and Faculty of Actuaries  
Investment and Life Assurance Group Limited  
Linklaters LLP  
Mr Hamish Ogston CBE  
Simmons & Simmons LLP  
TLT LLP

## Annex 2

# List of questions

- Q1:** *Do you agree with this approach to referral decision-making?*
- Q2:** *Do you have any comments on the proposed implementation of the Green Report?*
- Q3:** *Do you agree with the approach outlined above? Are there any particular adjustments that you consider should be made in respect of the process of involving supervisors in the investigation phase?*
- Q4:** *Do you agree that the PRA and the FCA should identify the information requested by each regulator within the same information request?*
- Q5:** *Do you agree with the above approach in respect of the initial notice of investigation?*
- Q6:** *Do you agree with the regulators' proposals around the scoping meeting?*
- Q7:** *Pending consideration of whether it may be appropriate expressly to incentivise admissions at scoping meetings (in the context of the FCA's forthcoming review of its penalty policy and the PRA's forthcoming review of its settlement policy), do the regulators' current approaches to discounts for early settlement provide sufficient incentive for early admissions at scoping meetings?*
- Q8:** *Do you agree with the above approach to supervisory involvement in enforcement investigations?*
- Q9:** *Do you agree with the above approach to periodic updates in the context of enforcement investigations?*
- Q10:** *Do you agree with the proposed approach set out above to constructive engagement in the context of enforcement investigations?*

- Q11:** *Do you agree with the proposed list as constituting those factors that the regulators will take into account in considering whether to grant an extension of time to respond to a PIR or warning notice, in full or in part? Are there any further factors that you consider should be taken into account?*
- Q12:** *Do you agree with the proposed changes to the pre-stage 1 process?*
- Q13:** *Do you have any comments on the proposed approach to the information provided at stage 1?*
- Q14:** *Do you agree that the FCA should amend DEPP and EG to make provision to contest penalty only before the RDC?*
- Q15:** *Do you have any comments on the proposed framework and procedure for contesting penalty only?*
- Q16:** *Do you have any comments on Alternatives 1 and 2?*
- Q17:** *Do you have any comments on this approach to extending stage 1?*
- Q18:** *Do you have any comments on our proposed approach to implementing the Review's recommendations on representations in settlement discussions?*
- Q19:** *Do you have any comments on the proposed discounts for partly contested cases? In particular, should there be a difference in discount between cases that settle fully and those that contest penalty only?*
- Q20:** *Do you agree with the proposal to accept the Review's recommendation to abolish stage 2 and stage 3 discounts?*
- Q21:** *Do you agree with the proposed approach to ongoing settlement review?*
- Q22:** *Do you agree with our proposal for access to the Tribunal without representations being made to the FCA's decision-maker?*
- Q23:** *Do you consider that there are other matters that the RDC could usefully report on?*
- Q24:** *Do you agree with the proposal that, usually, the panel that gave a warning notice will be the same panel that considered representations and decided whether or not to give a decision notice?*

# Appendix 1

## Amendments to FCA Handbook and material outside the Handbook

**DECISION PROCEDURE AND PENALTIES MANUAL AND ENFORCEMENT  
GUIDE (REVIEW) INSTRUMENT 2017**

**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 63C (Statement of policy);
  - (2) section 69 (Statement of policy);
  - (3) section 88C (Action under section 88A: statement of policy);
  - (4) section 89S (Action under section 89Q: statement of policy);
  - (5) section 93 (Statement of policy);
  - (6) section 124 (Statement of policy);
  - (7) section 131J (Imposition of penalties under section 131G: statement of policy);
  - (8) section 137T (General supplementary powers);
  - (9) section 139A (Power of the FCA to give guidance);
  - (10) section 192N (Imposition of penalties under section 192K: statement of policy);
  - (11) section 210 (Statements of policy);
  - (12) section 312J (Statement of policy);
  - (13) section 345D (Imposition of penalties on auditors or actuaries: statement of policy);  
and
  - (14) 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 as follows:
- (1) Part 1 of Annex B (DEPP) and Part 1 of Annex C (EG) come into force on 31 January 2017; and
  - (2) the remainder of this instrument comes into force on 1 March 2017.

**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 material outside the Handbook**

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

**Notes**

G. In the Annex 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**

G. This instrument may be cited as the Decision Procedure and Penalties Manual and Enforcement Guide (Review) Instrument 2017.

By order of the Board  
25 January 2017

## Annex A

### Amendments to the Glossary of definitions

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

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

<i>focused resolution agreement</i>	(in <i>DEPP</i> ) a <i>settlement agreement</i> that:
	(1) concerns proposed enforcement action that requires the <i>FCA</i> to issue a <i>warning notice</i> ; and
	(2) sets out an agreed position on one or more, but not all, of the issues relevant to a proposed enforcement action.

Amend the following definitions as shown.

<i>settlement agreement</i>	(1) (in <i>SYSC</i> 18) (Whistleblowing) an agreement between the <i>firm</i> and a <i>worker</i> which sets out the terms and conditions agreed by these parties for the purposes of settling a potential employment tribunal claim, other court proceedings or employment disputes.
	(2) <u>(in <i>DEPP</i>) an agreement reached between a <i>person</i> who is or may be subject to enforcement action and <i>FCA</i> staff as part of the <i>settlement decision procedure</i>.</u>
<i>settlement discount scheme</i>	(in <i>DEPP</i> and <i>EG</i> ) the scheme described in <i>DEPP</i> 6.7 by which the financial penalty that might otherwise be payable, or the length of the period of suspension or restriction that might otherwise be imposed, in respect of a <i>person's</i> misconduct or contravention may be reduced to reflect the timing of any <del>settlement agreement</del> <u><i>settlement agreement</i></u> .

## 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.

#### Part 1: Comes into force on 31 January 2017

### 3 The nature and procedure of the RDC

...

#### 3.2 The operation of the RDC

RDC meetings and composition of panels

...

- 3.2.3 G The composition and size of panels of the *RDC* may vary depending on the nature of the particular matter under consideration. ~~In cases in which representations are made, it~~ It will be usual for the panel that is to consider the representations and decide whether to give a *decision notice* to ~~include additional~~ comprise the same members of the *RDC* who ~~have not~~ previously considered the matter. In particularly complex cases, or those raising novel points of law or practice, it might be appropriate for a larger panel to consider the case at both the warning notice and representations stage, and there may still be cases where it is appropriate that the panel is enlarged to include additional RDC members at the decision notice stage.

...

Procedure: representations

...

- 3.2.16 G (1) The recipient of a *warning notice* or a first *supervisory notice* may request an extension of the time allowed for making representations. Such a request must normally be made within ~~sevendays~~ seven days of the notice being given.
- (2) If a request is made, the Chairman or a Deputy Chairman of the *RDC* will decide whether to allow an extension, and, if so, how much additional time is to be allowed for making representations. In reaching his ~~his~~ their decision he ~~they~~ will take into account all relevant factors including the legal and factual complexity of the case, as well as whether there are any factors outside the control of the *firm* or *individual* that would materially

impact on their ability to respond within the period set out in the *warning notice* or first supervisory notice. They may also take account of any relevant comments from the *FCA* staff responsible for the matter.

...

...

- 3.2.18 G The chairman of the relevant meeting will ensure that the meeting is conducted so as to enable:

...

but the chairman may ask the recipient of the notice or *FCA* staff to limit their representations or response in length or to particular issues arising from the *warning notice* or first *supervisory notice*. If the *warning notice* was given on the basis of a *focused resolution agreement*, the recipient will be required to limit their representations to the issues that remain in dispute.

...

Procedure: decision notices and second supervisory notices

...

- 3.2.22A G If the *person* subject to enforcement action notifies the *RDC* that they wish to make an expedited reference to the *Tribunal* under *DEPP* 5.1.8GG, the *RDC* shall decide whether to give a *decision notice* in the light of any representations by any third party under section 393 of the *Act* and any other *interested party* under section 63 or 67 of the *Act* (see *DEPP* 5.1.8IG).

- 3.2.23 G ~~However, if representations are made,~~ In any case in which representations are made, and in accordance with *DEPP* 2.3.1G<sub>2</sub>, the *RDC* will consider whether it is right in all the circumstances to give the *decision notice* or a second *supervisory notice* (as appropriate).

...

## **Part 2: Comes into force on 1 March 2017**

Amend the following as shown.

### **1.1 Application and Purpose**

...

- 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:

...

- (1B) the *FCA's* decision-making procedure where it is deciding under section 391(1)(c) of the *Act* to publish information about the matter to which a *warning notice* relates (see *DEPP* 3.2.14AG to *DEPP* 3.2.14HG and *DEPP* 5.1.8KG to *DEPP* 5.1.8QG);

...

...

### 3 The nature and procedure of the RDC

...

#### 3.2 The operation of the RDC

...

Procedure: general

...

- 3.2.11A G Where a *warning notice* is given on the basis of a *focused resolution agreement*, the *RDC* shall accept and not in any circumstances depart from the agreed position on the issues set out in that agreement.

...

- 3.2.14A G If *FCA* staff consider that it is appropriate to publish information about the matter to which a *warning notice* falling within section 391(1ZB) of the *Act* and given by the *RDC* relates, they will make a recommendation to the *RDC* that such information should be published.

- 3.2.14B G The *RDC* will then consider whether it is appropriate in all the circumstances to publish information about the matter to which a the *warning notice* falling within section 391(1ZB) of the *Act* relates. The *FCA's* policy on publishing such information is set out in *EG* 6.

...

### 5 Settlement decision procedure

...

#### 5.1 Settlement decision makers

Introduction

- 5.1.1 G (1) A *person* subject to enforcement action may agree to a financial penalty or other outcome rather than contest formal action by the *FCA*. Alternatively, they may enter into a *focused resolution agreement* and in this way partly contest the proposed action (see *DEPP 5.1.8AG* to *DEPP 5.1.8DG*).
- (1A) Further, even if the *person* subject to enforcement action wishes to fully contest the proposed enforcement action, they may choose to do so by (i) agreeing to the *FCA* issuing the required *statutory notices* and (ii) then making an expedited reference of the matter to the *Tribunal* (see *DEPP 5.1.8EG* to *DEPP 5.1.8JG*).
- (2) The fact that ~~he~~ a *person* does so ~~any of these things~~ will not usually obviate the need for a ~~statutory notice~~ *statutory notices* recording the *FCA*'s proposal and decision to take that action. Where, however, the *person* subject to enforcement action agrees not to contest the content of a proposed *statutory notice*, the decision to give that *statutory notice* will be taken by senior *FCA* staff. As set out in this chapter, senior *FCA* staff have a role to play in giving the requisite *statutory notices*:
- (a) where a *person* enters into a *settlement agreement* (other than a *focused resolution agreement*), senior *FCA* staff will give both the *warning notice* and *decision notice*;
- (b) where a *person* enters into a *focused resolution agreement*, senior *FCA* staff will give the *warning notice* and the *RDC* will decide whether to give a *decision notice* and the terms of any notice given; and
- (c) where a *person* elects to make an expedited reference to the *Tribunal* before a *warning notice* has been issued, senior *FCA* staff will then give the *warning notice* and *decision notice*.
- (3) These decisions by senior *FCA* staff will be taken jointly by two members of the *FCA*'s senior management, one of whom will be of at least director of division level (which may include an acting director) and the other of whom will be of at least head of department level (the "*settlement decision makers*").

...

...

Insert the following new provisions after *DEPP 5.1.8G*. The text is not underlined.

5.1.8 G ...

## Procedure: focused resolution agreements

- 5.1.8A G The issues which may be agreed under a *focused resolution agreement* include, but are not limited to:
- (1) questions of fact;
  - (2) whether specified facts amount to a *breach* (or more than one *breach*);
  - (3) whether action for a financial penalty and/or *public censure* is warranted;
  - (4) the appropriate level of a financial penalty;
  - (5) whether action for a suspension, restriction, condition or limitation (as defined for the purposes of *DEPP* 6A) is warranted;
  - (6) the appropriate length of a suspension, restriction, condition or limitation (as defined for the purposes of *DEPP* 6A);
  - (7) whether a *prohibition order* is warranted; and/or
  - (8) the appropriate scope of such a *prohibition order*.
- 5.1.8B G The terms of any proposed *focused resolution agreement*:
- (1) will be put in writing and be agreed by *FCA* staff and the *person* concerned;
  - (2) may refer to a draft of the proposed *warning notice*; and
  - (3) may, depending upon the stage in the enforcement process at which agreement is reached, include an agreement by the *person* concerned to:
    - (a) waive and not exercise any rights under sections 387 (Warning notices) and 394 (Access to Authority material) of the *Act* to notice of, or access to, material relied upon by the *FCA* and any secondary material which might undermine the *FCA* decision to give the *statutory notice*, except in relation to material that is relevant to issues which remain in dispute; and
    - (b) not dispute the issues agreed with the *FCA* when:
      - (i) making representations to the *RDC* in respect of a *warning notice* (whether in exercise of rights under section 387 of the *Act* or otherwise); or
      - (ii) on any subsequent reference of the matter to the *Tribunal* under (except where the *Tribunal* decides of its own motion to reopen an issue or issues).

- 5.1.8C G Where the proposed settlement is on the basis of a *focused resolution agreement*, the role of the *settlement decision makers* shall be as follows:
- (1) The *settlement decision makers* will decide whether or not to give a *warning notice*. (For the avoidance of doubt, the *settlement decision makers* may meet the relevant *FCA* staff or the *person* concerned in accordance with *DEPP* 5.1.5G and any such meeting shall not affect the *settlement decision makers*' ability to decide whether or not to give a *warning notice*).
  - (2) If the *settlement decision makers* decline to give a *warning notice* based on the proposed *focused resolution agreement*, they may invite *FCA* staff and the *person* concerned to enter into further discussions to try to achieve an outcome the *settlement decision makers* would be prepared to endorse.
  - (3) If the *settlement decision makers* are satisfied with the proposed *focused resolution agreement*, they shall give a *warning notice* based on the proposed resolution agreement which records the agreed position on the agreed issues and the position of the *FCA* on those issues which remain in dispute.
  - (4) Where the *settlement decision makers* give a *warning notice*, the notice will specify the time allowed for making representations. This will not be less than 14 *days*.
  - (5) The *settlement decision makers* will promptly inform the *RDC* that a *warning notice* has been given. The *FCA* will then specify a time within which the *recipient* of the notice is required to indicate whether they wish to make oral representations.
  - (6) It will then be for the *RDC* to decide whether to give a *decision notice* under the procedure set out in *DEPP* 3.2.16G to *DEPP* 3.2.25G.
- 5.1.8D G For the avoidance of doubt, the decision whether to agree a proposed *focused resolution agreement* is entirely within the discretion of the *settlement decision makers*.

Procedure: expedited references to the Tribunal

- 5.1.8E G (1) The purpose of this section is to define a procedure (the “expedited reference procedure”) enabling a *person* subject to enforcement action to challenge the proposed action before the *Tribunal* without engaging with the *FCA*'s internal decision-making process.
- (2) *DEPP* 5.1.8FG to *DEPP* 5.1.8IG set out the circumstances in which the expedited reference procedure is available, the steps a *person* must take to make use of the procedure, and how the procedure operates, depending on whether it is invoked before or after the *warning notice* is given.

- 5.1.8F G The expedited reference procedure is available only if:
- (1) the proposed action requires the *FCA* to issue a *warning notice*;
  - (2) the *FCA* considers that it has a sufficient understanding of the nature and gravity of the *breach* to make a reasonable assessment of the appropriate penalty or other outcome; and
  - (3) the *FCA* has communicated that assessment to the *person* concerned.
- 5.1.8G G To use the expedited reference procedure, the *person* subject to enforcement action must notify the *FCA* that they:
- (1) wish to make an expedited reference to the Tribunal; and
  - (2) waive and will not exercise any rights under section 387(2) of the *Act* in respect of the *warning notice* given (or to be given) in relation to the proposed action.
- 5.1.8H G To use the expedited reference procedure before a *warning notice* has been given:
- (1) the notification set out in *DEPP* 5.1.8GG must be given to *FCA* staff;
  - (2) the decision to issue a *warning notice* will then be taken by the *settlement decision makers*; and
  - (3) the decision to issue a *decision notice* will also be taken by the *settlement decision makers*, taking into consideration any representations by any third party under section 393 of the *Act* or any *interested party* under section 63 or 67 of the *Act*.
- 5.1.8I G To use the expedited reference procedure after a *warning notice* has been given:
- (1) the notification set out in *DEPP* 5.1.8GG must be given to the *RDC*; and
  - (2) the decision to issue a *decision notice* will then be taken by the *RDC* in light of any representations by any third party under section 393 of the *Act* and any *interested party* under section 63 or 67 of the *Act*.
- 5.1.8J G Once a *decision notice* has been given as part of the expedited reference procedure (whether by the *settlement decision makers* or the *RDC*), it is the responsibility of the *person* subject to enforcement action to seek to refer the matter to the *Tribunal* under the *Act* if they so wish. If the matter is not referred to the *Tribunal* within the time required under section 390(1) of the *Act*, the *FCA* will, on taking the action to which the *decision notice* relates, give a *final notice*.

Procedure: warning notice statements

- 5.1.8K G If *FCA* staff consider that it is appropriate to publish information about the matter to which a *warning notice* falling within section 391(1ZB) of the *Act* relates and is given by the *settlement decision makers*, they will make a recommendation to the *settlement decision makers* that such information should be published.
- 5.1.8L G The *settlement decision makers* will then consider whether it is appropriate in all the circumstances to publish information about the matter to which the *warning notice* falling within section 391(1ZB) of the *Act* relates. The *FCA*'s policy on publishing such information is set out in *EG 6*.
- 5.1.8M G If the *settlement decision makers* propose that the *FCA* should publish information about the matter to which a *warning notice* falling within section 391(1ZB) of the *Act* relates:
- (1) the *settlement decision makers* will settle the wording of the statement it proposes the *FCA* should publish (warning notice statement);
  - (2) the *FCA* staff will make appropriate arrangements for the warning notice statement that the *settlement decisions makers* propose the *FCA* should publish to be given to the *persons* to whom the *warning notice* was given or copied;
  - (3) the proposed warning notice statement will specify the time allowed for the *recipient* to respond in writing to the *settlement decision makers*. This will normally be 14 days;
  - (4) the *recipient* of a proposed warning notice statement may request the *settlement decision makers* to grant an extension of the time allowed for its response. Such a request must normally be made within seven *days* of the proposed warning notice statement being given; and
  - (5) the *settlement decision makers* will not normally grant a request by a *person* to whom the warning notice statement was given to make their response in person.
- 5.1.8N G If no response to the proposed warning notice statement is received, the *FCA* will make appropriate arrangements to publish the warning notice statement.
- 5.1.8O G If the *settlement decision makers* receive a response from the *person* to whom the proposed warning notice statement was given, the *settlement decision makers* will consider their response and decide whether it is appropriate in all the circumstances to publish information about the matter to which the *warning notice* relates.
- 5.1.8P G If the *settlement decision makers* decide that the *FCA* should publish a warning notice statement:

- (1) the *settlement decision makers* will notify the relevant parties (including the relevant *FCA* staff) in writing of that decision;
- (2) the *settlement decision makers* will settle the wording of the warning notice statement; and
- (3) the *FCA* will make appropriate arrangements for the warning notice statement to be published.

5.1.8Q G If the *settlement decision makers* decide that the *FCA* should not publish a warning notice statement they will notify the relevant parties (including the relevant *FCA* staff) in writing of that decision.

Amend the following as shown.

## 6 Penalties

...

### 6.7 Discount for early settlement

...

The settlement discount scheme applied to ~~suspensions, restrictions, conditions, and disciplinary prohibitions~~ financial penalties

6.7.2 G In appropriate cases the *FCA's* approach will be to negotiate with the *person* concerned to agree in principle the amount of a financial penalty having regard to the *FCA's* statement of policy as set out in *DEPP* 6.5 to *DEPP* 6.5D and *DEPP* 6.6. (This starting figure will take no account of the existence of the *settlement discount scheme* described in this section.) Such amount ("A") will then be reduced by a percentage of A according to the ~~stage in the process at which agreement is reached~~ scheme set out in *DEPP* 6.7.3G to *DEPP* 6.7.3CG. The resulting figure ("B") will be the amount actually payable by the *person* concerned in respect of the *breach*. However, where part of a proposed financial penalty specifically equates to the disgorgement of profit accrued or loss avoided then the percentage reduction will not apply to that part of the penalty.

6.7.3 G (1) ~~The *FCA* has identified four stages of an action for these purposes:~~ Subject to *DEPP* 6.7.3G(4) a settlement discount is available only in cases where a *settlement agreement* (which may be a *focused resolution agreement*) is reached during the period from commencement of an investigation until the *FCA* has:

(a) ~~the period from commencement of an investigation until the *FCA* has:~~ a sufficient understanding of the nature and gravity of the *breach* to make a reasonable assessment of the appropriate

penalty; and

- (i) ~~a sufficient understanding of the nature and gravity of the breach to make a reasonable assessment of the appropriate penalty; and~~
  - (ii) ~~communicated that assessment to the person concerned and allowed a reasonable opportunity to reach agreement as to the amount of the penalty ("stage 1");~~
  - (b) ~~the period from the end of stage 1 until the expiry of the period for making written representations or, if sooner, the date on which the written representations are sent in response to the giving of a *warning notice* ("stage 2"); communicated that assessment to the person concerned and given them reasonable opportunity to reach agreement as to the amount of the penalty ("stage 1").~~
  - (c) ~~the period from the end of stage 2 until the giving of a *decision notice* ("stage 3");~~
  - (d) ~~the period after the end of stage 3, including proceedings before the *Tribunal* and any subsequent appeals ("stage 4").~~
- (2) The communication of the *FCA's* assessment of the appropriate penalty for the purposes of *DEPP* 6.7.3G(1)(b)(a) need not be in a prescribed form but will include an indication of the *breaches* alleged by the *FCA*. It may include the provision of a draft *warning notice*.
- (3) The reductions in penalty will be as follows:

<b>Stage at which agreement reached</b>	<b>Percentage reduction</b>
Stage 1	30
Stage 2	20
Stage 3	10
Stage 4	0

Subject to *DEPP* 6.7.3.G(4), in relation to any *settlement agreement* other than a *focused resolution agreement* the reduction in penalty will be as follows:

- (a) 30% if the agreement is concluded during stage 1; and
  - (b) 0% in any other case.
- (4) Where stage 1 has been started but no *settlement agreement* has been agreed before 1 March 2017:

- (a) if any agreement is reached to settle the case between the period from the end of stage 1 until the expiry of the period for making representations, or, if sooner, the date on which the representations are sent in response to the giving of a warning notice, there will be a reduction of 20% in the penalty; and
- (b) if any agreement is reached to settle the case between the expiry of the period of making representations, or, if sooner, the date on which representations are sent in response to the giving of a warning notice and the giving of a decision notice, there will be a reduction of 10% in the penalty.

6.7.3A G The reductions in penalty in cases involving a *focused resolution agreement* will be as follows.

- (1) Where agreement is reached in relation to all relevant facts and all issues as to whether those facts constitute a *breach* (or more than one *breach*):
  - (a) 30% if the agreement is concluded during stage 1; and
  - (b) 0% in any other case.
- (2) Where agreement is reached in relation to all relevant facts:
  - (a) 15 to 30% if the agreement is concluded during stage 1; and
  - (b) 0% in any other case.
- (3) Where the agreement reached does not fall within either *DEPP 6.7.3AG(1)* or *DEPP 6.7.3AG(2)*:
  - (a) 0 to 30% if the agreement is concluded during stage 1; and
  - (b) 0% in any other case.
- (4) Where a *focused resolution agreement* is followed:
  - (a) before the end of stage 1, by a complete *settlement agreement*, the reduction is determined under *DEPP 6.7.3G* and not *DEPP 6.7.3AG*.
  - (b) after the end of stage 1, by a complete *settlement agreement*, the reduction is determined under *DEPP 6.7.3AG* and not *DEPP 6.7.3G*.

6.7.3B G The decision maker responsible for applying *DEPP 6.7.3AG* is:

- (1) The *settlement decision makers* in cases in which the *focused resolution agreement* is followed, after stage 1 has ended, by a complete *settlement*

agreement.

(2) The RDC in all other cases.

6.7.3C G Where DEPP 6.7.3AG specifies that the reduction will be within a range, the decision maker identified by DEPP 6.7.3BG will determine the appropriate figure within the range. Factors relevant to this determination may include:

(1) the extent to which the position taken by the person subject to enforcement action on the disputed issues at the time the focused resolution agreement is entered into is reflected in the terms of the decision notice.

(2) any saving of time or public resources as a result of the focused resolution agreement.

6.7.4 G (1) Any ~~settlement agreement~~ settlement agreement between the FCA and the person concerned will therefore need to include a statement as to the appropriate penalty discount in accordance with this procedure.

(2) In certain circumstances the person concerned may consider that it would have been possible to reach a settlement at an earlier stage in the action, and argue that it should be entitled to a greater percentage reduction in penalty than is suggested by DEPP 6.7.3G (3)(b). It may be, for example, that the FCA no longer wishes to pursue its action in respect of all the acts or omissions previously alleged to give rise to the breach. In such cases, the person concerned might argue that it would have been prepared to agree an appropriate penalty at an earlier stage and should therefore benefit from the discount which would have been available at that time. Equally, FCA staff may consider that greater openness from the person concerned could have resulted in an earlier settlement.

(3) Arguments of this nature risk compromising the goals of greater clarity and transparency in respect of the benefits of early settlement and invite dispute in each case as to when an agreement might have been possible. It will not usually be appropriate therefore to argue for a greater reduction in the amount of penalty on the basis that settlement could have been achieved earlier.

(4) However, in exceptional circumstances the FCA may accept that there has been a substantial change in the nature or seriousness of the action being taken against the person concerned, and that an agreement would have been possible at an earlier stage if the action had commenced on a different footing. In such cases the FCA and ~~person~~ person concerned may agree that the amount of the reduction in penalty should reflect the stage at which a settlement might otherwise have been possible or, where the settlement agreement is a focused resolution agreement, the decision maker identified by DEPP 6.7.3BG may take this into account when determining the appropriate figure within the applicable range.

...

## Annex C

## Amendments to the Enforcement Guide (EG)

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

**Part 1: Comes into force 31 January 2017**

**2 The FCA's approach to enforcement**

...

**2.2 Case selection: and referral criteria ~~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 *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 *rules*) occurs at two main levels:~~

- ~~(1) strategic planning; and~~
- ~~(2) decisions on individual cases. [deleted]~~

...

2.2.6 ~~Before~~ In all cases, before it proceeds with an investigation, the *FCA* will satisfy itself that there are grounds to investigate under the statutory provisions that give the *FCA* powers to appoint investigators. ~~If the statutory test is met, it will decide whether to carry out an investigation after considering all the relevant circumstances. To assist its consideration of cases, the *FCA* has developed a set of assessment criteria. The current criteria (which are published on the Enforcement section of the *FCA* web site) are framed as a set of questions. They take account of the *FCA's* statutory objectives, its strategic/supervision priorities (see above) and other issues such as the response of the *firm* or individual to the issues being referred. Not all of the criteria will be relevant to every case and there may be other considerations which are not mentioned in the list but which are relevant to a particular case. The *FCA's* assessment will include considering whether using alternative tools is more appropriate taking into account the overall circumstances of the *person* or *firm* concerned and the wider context. Another consideration will be whether the *FCA* is under a Community obligation to take action on behalf of, or otherwise to provide assistance to, an authority from another *EU* member state. Paragraph *EG 2.5.1* discusses the position where other authorities may have an interest in a case. If the statutory test is met, the *FCA* will consider what is the most efficient and effective way of achieving its statutory objectives of protecting consumers, enhancing market integrity and promoting competition. A referral to~~

Enforcement for an investigation will be made if the FCA considers that an investigation, rather than an alternative regulatory response, is the right course of action given all the circumstances. Enforcement action and other regulatory tools can be used together and are not mutually exclusive. To assist in making the decision to refer a matter for investigation, the FCA has developed referral criteria that set out a range of factors it may consider when deciding whether to appoint enforcement investigators. The criteria are not exhaustive, and all the circumstances of a particular case are taken into account. Not all the criteria will be relevant to every case, and additional considerations may apply in certain cases. Any one of the factors alone may warrant the appointment of investigators and in some cases, including cases where *breaches* are self-reported, the misconduct may be so serious that there is no credible alternative to referral.

2.2.7 If a decision to refer an *individual* or *firm* to Enforcement is made, the FCA will explain and set out the criteria applied in coming to the decision to refer, and will give a summary of the circumstances and the reason(s) for the referral at the start of the investigation.

Case selection: disciplinary regulatory cases

2.2.8 The FCA's referral criteria are published on the Enforcement section of the FCA's website: <http://www.fca.org.uk/about/enforcement/referral-criteria>. In considering whether an enforcement investigation is likely to further the FCA's aims and objectives, the FCA will consider factors that address the following issues:

- (1) any available supporting evidence and the proportionality and impact of opening an investigation;
- (2) what purpose or goal would be served if the FCA were to end up taking enforcement action in the case; and
- (3) relevant factors to assess whether the purposes of enforcement action are likely to be met.

Case selection: markets cases

2.2.9 In relation to non-criminal *market abuse* investigations, the revised referral criteria will be similarly applied in deciding whether to open such an investigation. However, given the often limited alternatives to enforcement action available to address *market abuse* (with many of the subjects typically unauthorised), greater emphasis will be given to the egregiousness and deterrence value of a particular case when making such decisions.

Case selection: listing cases

2.2.10 As with *market abuse* cases, many of the non-enforcement tools are not available for use in cases involving listing regime *breaches*. This is because in many cases (aside from certain areas such as *sponsors* and *primary information providers*), there will be no on-going supervisory relationship with the listed companies in question, and no similar authorisation regime as there is with *authorised persons, firms* and *individuals*. As a result, the ability to use many of the early intervention tools or

restricting or limiting certain activities is not available and enforcement is likely to be the most effective (and sometimes only) regulatory tool available to address the misconduct.

...

## 2.12 Co-operation

...

- 2.12.2 On its web site, the *FCA* ~~has given~~ gives anonymous examples of where it has decided not to investigate or take enforcement action in relation to a possible *rule* breach because of the way in which the *firm* has conducted itself when putting the matter right. This is part of an article entitled ‘The benefits to firms and individuals of co-operating with the *FCA* *FCA*’. However, in those cases where enforcement action is not taken and/or a formal investigation is not commenced, the *FCA* will expect the *firm* to act promptly to take the necessary remedial action agreed with its supervisors to deal with the *FCA*'s concerns. If the *firm* does not do this, the *FCA* may take disciplinary or other enforcement action in respect of the original contravention.

...

## 3 Use of information gathering and investigation powers

...

### 3.10 Liaison where other authorities have an interest

...

Information requests in joint investigations with the PRA

- 3.10.2 In certain circumstances, it will be appropriate and expedient for the *FCA* and *PRA* to issue a joint information request where there is a joint investigation. Where a joint information request is issued to a *firm* or *individual*, the request will make it clear to which investigation(s) it relates.

...

## 4 Conduct of investigations

...

### 4.8 Scoping discussions

- 4.8.1 For cases involving *firms*, *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 and an indication of the likely timing of the key milestones and next steps in the investigation; the individuals and documents the team will need access to initially and so on. There is may be 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 relationship-managed firm.

- 4.8.2 In addition to the initial scoping discussions, there will be an ongoing dialogue with the *firm* or individuals throughout the investigative process. We will aim to give periodic updates at least on a quarterly basis covering the steps taken in the investigation to date as well as the next steps in the investigation and indicative timelines. Where the nature of the *FCA's* concerns changes significantly from that notified to the *person* under investigation and the *FCA*, having reconsidered the case, is satisfied that it is appropriate in the circumstances to continue the investigation, the *FCA* will notify the *person* of the change in scope.

#### 4.9 Involvement of FCA supervisors during the investigation phase

- 4.9.1 A clear division between the conduct of the investigation ~~on the one hand and the need to continue with the ongoing supervision of the firm on the other may mean that the investigation does not~~ means that clarity as to who is carrying out what work in important, so that the focus on the various needs of the investigation and supervisory function are not lost. It is also important that the investigation can benefit as much as it might otherwise do from the knowledge of the firm or individuals that the supervisors will have built up, or from their general understanding of the firm's business or sector. In most (if not all) cases, assistance from a referring area in informing the investigation team of certain matters (e.g. the firm's business model and market practice issues) will be helpful. ~~Before matters are referred to the Enforcement Division for investigation, FCA staff from its Enforcement Division will often work closely together with staff from the Supervision Division in order to determine the proper course of action to take.~~ Following a referral, the *FCA* takes the following general considerations into account in relation to the potential role of a supervisor in an investigation.

...

- (2) Such assistance will include: making the case team aware of the *firm's* business, history and compliance track record; the current supervisory approach to the area concerned; current issues with the firm; and acting as a sounding board on questions that emerge from the investigation about industry practices and standards and any market practice issues. Depending on the issues that arise, it may be appropriate for a supervisor to attend a progress meeting with the firm.

...

- (5) Where a firm's supervisor does not become part of the investigation team, the investigation will keep the firm's supervisor (or referring area) updated on the progress of the investigation.

...

## 4.13 Preliminary findings letters and preliminary investigation reports

...

- 4.13.3 In cases where it is sent, the preliminary findings letter will set out the facts which the investigators consider relevant to the matters under investigation (normally, as indicated above, by means of an annexed preliminary investigation report). And it will invite the *person* concerned to confirm that those facts are complete and accurate, or to provide further comment. *FCA* staff will allow a reasonable period (normally 28 days) for a response to this letter, and will take into account any response received within the period stated in the letter. They are not obliged to take into account any response received outside that period. If a *firm* or individual requests an extension to the period for responding to the preliminary findings report, the *FCA* will take into account all relevant factors, including the legal and factual complexity of the case, and whether there are any factors outside the control of the *firm* or individual that would materially impact on their ability to respond within the period set out in the preliminary findings letter.

...

## 4.14 Joint investigations with the PRA

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- 4.14.2 In such cases, the guidance contained in this chapter will apply to the *FCA*'s investigation and the *FCA* will attempt to ensure that the subject of the investigation is not prejudiced or unduly inconvenienced by the fact that there are two investigating authorities. The *FCA* and *PRA* investigation teams will keep each other and their respective supervisory teams informed about the progress of the investigation. Discussions with the *firm* or individual under investigation should normally occur with the representatives of both regulators present.
- 4.14.3 Both the *FCA* and the *PRA* will seek to ensure that, as far as possible, their respective processes (whether for contested or settlement decision-making) occur in a coordinated and timely manner in a joint investigation. For example, the regulators will, where appropriate, endeavour to settle a joint investigation into a relevant *firm* or individual simultaneously.

...

## 5 Settlement

...

### 5.2 When settlement decisions may take place

...

- 5.2.4 The *FCA* will engage senior management in discussions (either heads of department or directors), liaising where appropriate with the *settlement decision makers*, attending a without prejudice meeting during discussions or arranging for the

attendance of an appropriately senior FCA representative.

...

## **Part 2: Comes into force on 1 March 2017**

Amend the following as shown.

### **5.1 Settlement and the FCA – an overview**

...

5.1.2 The possibility of settlement does not, however, change the fact that enforcement action is one of the tools available to the *FCA* to secure our *statutory objectives*. The *FCA* seeks to change the behaviour not only of those subject to the immediate action, but also of others who will be alerted to our concerns in a particular area. There is no distinction here between action taken following agreement with the subject of the enforcement action and action resisted by a firm before the *RDC* (including action taken following a *focused resolution agreement*). In each case, the *FCA* must be satisfied that its decision is the right one, both in terms of the immediate impact on the subject of the enforcement action but also in respect of any broader message conveyed by the action taken.

...

5.1.4 In recognition of the value of early settlement, the *FCA* operates a scheme to award ~~explicit discounts~~ a discount for early settlement of cases involving financial penalties, suspensions, restrictions and disciplinary prohibitions. Details of the scheme, which applies only to settlement of cases where investigators were appointed on or after 20 October 2005, are set out in *DEPP* 6.7. This chapter provides some commentary on certain practical aspects of the operation of the scheme.

5.1.5 ~~Decisions~~ Some decisions on settlements and *statutory notices* arising from them are taken by two members of the *FCA's* senior management, rather than by the *RDC* (*DEPP* refers to these individuals as the '*settlement decision makers*'). Full details of the special decision making arrangements for settlements are set out in *DEPP* 5.

...

### **5.3 The basis of settlement discussions**

5.3.1 ~~As described above, the *FCA* operates special decision making arrangements under which members of *FCA* senior management take decisions on *FCA* settlements. This means that settlement discussions will take place without involving the *RDC*.~~

As set out in DEPP 5, special decision-making arrangements apply in relation to settlement. The person concerned may agree all relevant issues with the FCA (in which case the settlement decision makers will give all relevant statutory notices). Alternatively, a focused resolution agreement may be agreed (in which case the settlement decision makers are responsible for giving the warning notice and the RDC for giving any decision notice). The FCA would expect to hold any settlement discussions on the basis that neither FCA staff nor the person concerned would seek to rely against the other on any admissions or statements made if the matter is considered subsequently by the RDC or the Tribunal unless those admissions or statements are recorded in a focused resolution agreement. This will not, however, prevent the FCA from following up, through other means, on any new issues of regulatory concern which come to light during settlement discussions. The RDC may be made aware of the fact negotiations are taking place if this is relevant, for example, to an application for an extension of the period for making representations.

- 5.3.2 If the settlement negotiations result in a proposed settlement of the dispute, FCA staff will put the terms of the proposed settlement in writing and agree them with the person concerned. The settlement decision makers (and, as the case may be, the RDC) will then consider the settlement matter under the procedures set out in DEPP 5. A settlement is also likely to result in the giving of statutory notices (see paragraphs EG 2.15.1 to EG 2.15.3).

...

## 5.5 The settlement discount scheme

...

- 5.5.2 Normally, where the outcome is potentially a financial penalty, suspension, restriction, condition or disciplinary prohibition, the FCA will send a letter at an early point in the enforcement process to the subject of the investigation. This is what the FCA refers to as a stage 1 letter. The FCA will aim to give 28 days' notice of the beginning of stage 1 to allow the parties involved to make administrative arrangements, e.g. ensuring that key staff can be available to participate where necessary in any settlement discussions. Where appropriate, the FCA will offer a preliminary without prejudice meeting to explain the FCA's view of the misconduct (including the key factual and legal bases for our view), and to give the firm or individual an opportunity to identify where they believe there are errors in the factual basis and to indicate the extent to which they agree with the outline findings.

[Note: stage 1 is the period from commencement of an investigation until the FCA has a sufficient understanding of the nature and gravity of the breach to make a reasonable assessment of the appropriate penalty (or suspension, restriction, condition or disciplinary prohibition, or combination thereof). The FCA, at stage 1, also needs to have communicated that assessment to the person concerned and allowed a reasonable opportunity to reach agreement as to the amount of penalty or the length of any suspension, restriction, condition or temporary disciplinary prohibition.]

- 5.5.3 The settlement discount scheme does not apply to civil or criminal proceedings brought in the courts, or to public ~~ensure~~ censures, 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.

- 5.5.4 There is no set form for a stage 1 letter though it will always explain the nature of the misconduct, the *FCA's* view on ~~penalty~~ the sanction, and the period within which the *FCA* expects any settlement discussions to be concluded. In some cases, a draft *statutory notice* setting out the alleged *rule* breaches and the proposed ~~penalty~~ sanction may form part of the letter, to convey the substance of the case team's concerns and reasons for arriving at a particular ~~penalty figure~~ level of sanction. The *FCA* will identify the key evidence on which its case relies at the commencement of stage 1. While the *FCA* will identify the key evidence that underpins our outline findings, the *FCA* will not generally provide evidence where that evidence is already in the possession of the *firm* or individual.

...

- 5.5.6 The *FCA* considers that 28 days following a stage 1 letter will normally be the 'reasonable opportunity to reach agreement as to the amount of penalty' before the expiry of stage 1 contemplated by *DEPP* 6.7.3G. Extensions to this period will be granted in exceptional circumstances only, and factors that will be taken into account in considering an application will include the extent to which factors outside the *firm's* or individual's control will have a material impact on their ability to engage in settlement negotiations within the period set out in the stage 1 letter.

...

## 6 Publicity

...

### 6.2 Publicity during, or upon the conclusion of regulatory action

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Warning notice statements

...

- 6.2.4 The decisions on whether to exercise the power to publish information about a *warning notice*, and if so what information to publish, will (subject to *EG* 6.2.4AG) be taken by the *RDC* after it has consulted with the *persons* to whom the *warning notice* has been given or copied. The procedure the *FCA* will follow when making these decisions is set out in *DEPP* 3.

- 6.2.4A Where the *settlement decision makers* decide to issue a *warning notice*, they shall also take the decision on whether to exercise the power to publish information about a *warning notice* and if so what information to publish. The *settlement decision makers* will consult with the *persons* to whom the *warning notice* has been given or copied. The *FCA* expects that the *settlement decision makers* are unlikely to decide it is appropriate to publish information about a *warning notice* where a *focused resolution agreement* has been entered into and where it is likely that a *final notice* will shortly follow, save in exceptional circumstances. The procedure the *FCA* will

follow when making these decisions is set out in *DEPP 5*.



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