

Proxy Advisors (Shareholders' Rights) Regulations Implementation (DEPP and EG) – Feedback and final rules for CP19/21

Policy Statement

PS19/28

November 2019

This relates to

Consultation Paper 19/21
which is available on our website at
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1 Summary

Introduction

- 1.1** This Policy Statement (PS) sets out our response to the feedback we received to Consultation Paper 19/21 (CP19/21), Proxy Advisors (Shareholders' Rights) Regulations Implementation (DEPP and EG).
- 1.2** The Proxy Advisors (Shareholders' Rights) Regulations 2019 (PA Regulations) came into force on 10 June 2019, giving the FCA powers to discipline and investigate proxy advisors. In CP19/21 we consulted on our proposal to amend the Decision Procedure and Penalties manual (DEPP) and the Enforcement Guide (EG) to reflect the changes the PA Regulations introduced.
- 1.3** This PS sets out our response to the feedback to CP19/21. The instrument in Appendix 1 sets out the Handbook changes.

Who this affects

- 1.4** This PS will be of interest to anyone who may fall within the scope of the PA Regulations, or anyone who uses the services of proxy advisors. This will include proxy advisors, listed companies, their shareholders and intermediaries.

The wider context of this policy statement

Our consultation

- 1.5** The revised Shareholder Rights Directive (SRD II) set out new obligations on proxy advisors. They aim to encourage proxy advisors to be more transparent in the way they carry out their work and provide proxy advisor services. To give effect to those parts of SRD II which apply to proxy advisors, the Treasury laid an implementing Statutory Instrument – the PA Regulations. These confirmed the FCA as the competent authority and gave us powers to discipline and investigate proxy advisors.

What we are changing

- 1.6** We are making amendments to the Handbook's DEPP and EG regulatory guides and processes to reflect the changes that the PA Regulations introduced. The legal instrument accompanying this PS contains the final Handbook changes.

Summary of feedback and our response

- 1.7** We received 3 responses to the CP, all of which broadly supported our proposals. One respondent felt our focus should be on incentivising proxy advisors to meet their obligations, rather than on public enforcement sanctions. This respondent supported an enforcement approach that was specific and focused on compliance with disclosure obligations, rather than the content of these disclosures. One respondent noted that not all proxy advisors provide recommendations. Another said that the proposed changes were appropriate and reasonable.
- 1.8** Overall, the respondents either agreed with or did not comment on our proposed decision-making procedure, approach to sanctions and proposal to add a new EG19.37A to broadly mirror our existing approach to investigations, sanctions and use of regulatory powers under FSMA.

Equality and diversity considerations

- 1.9** We have considered the equality and diversity issues that may arise from this PS.
- 1.10** We do not consider that the proposal in this PS negatively affect any of the groups with protected characteristics i.e. age, disability, sex, marriage or civil partnership, pregnancy and maternity, race, religion and belief, sexual orientation and gender reassignment. We received no comments from respondents on our equality impact assessment.

2 Changes to DEPP and EG

- 2.1** We consulted on our proposals to amend DEPP and EG to reflect the changes introduced by the PA Regulations. We have considered the formal responses to the CP and are making the following amendments.

Changes to DEPP

- 2.2** We have made the following amendments to DEPP 2 Annex 1 to set out the decision-making procedures for:
- **Deciding when to publish a statement about a proxy advisor who has breached a relevant requirement.** We will decide to impose a public censure under the RDC procedure in contested cases. In settled cases, the settlement decision makers will decide using executive procedures.
 - **Deciding when to impose a financial penalty on a proxy advisor.** In contested cases, we will decide to impose a financial penalty under the RDC procedure. In settled cases, the settlement decision makers will decide using executive procedures.
 - **Deciding when to impose a restitution requirement.** We will use the RDC procedure when taking the decision to require someone to pay restitution.

We will also make it clear that we will use our executive procedures when deciding whether to remove a proxy advisor from the public list of proxy advisors and we will amend DEPP accordingly.

Applying the penalty policy

- 2.3** We will apply our existing penalty policy in DEPP 6 as it currently applies. This means we will consider all the relevant circumstances of the case including the factors set out in the PA Regulations.

Proposed changes to EG

- 2.4** We have added a new section to Chapter 19 of EG (Non-FSMA powers). This explains how we will use our powers under the PA Regulations (EG19.37A). Our approach will broadly mirror our approach to conducting investigations, sanctioning and using our regulatory powers under FSMA.

Annex 1

List of non-confidential respondents

Georgina Marshall, Institutional Shareholder Services, Inc.

Professor Konstantinos Sergakis, University of Glasgow

Sarah Wilson, Minerva Analytics Ltd

Annex 2

Abbreviations used in this paper

CP	Consultation Paper
DEPP	Decision Procedure and Penalties manual
EG	Enforcement Guide
EU	European Union
FCA	Financial Conduct Authority
FSMA	Financial Services and Markets Act 2000
Handbook	The FCA's Handbook of rules and guidance
PA Regulations	Proxy Advisors (Shareholders' Rights) Regulations 2019
RDC	Regulatory Decisions Committee
SRD II	Revised Shareholder Rights Directive
the Treasury	Her Majesty's Treasury



We have developed the policy in this Policy Statement in the context of the existing UK and EU regulatory framework. The Government has made clear that it will continue to implement and apply EU law until the UK has left the EU. We will keep the proposals under review to assess whether any amendments may be required in the event of changes in the UK regulatory framework in the future.

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Appendix 1

Made rules (legal instrument)

PROXY ADVISORS (DEPP AND EG) INSTRUMENT 2019

Powers exercised

- A. The Financial Conduct Authority (“the FCA”) makes this instrument in the exercise of:
- (1) the following powers and related provisions in the Financial Services and Markets Act 2000 (“the Act”):
 - (a) section 139A (Power of the FCA to give guidance);
 - (b) section 395 (The Authority’s procedures); and
 - (2) the powers of direction, guidance and related provisions in or under the following provisions of the Proxy Advisors (Shareholders’ Rights) Regulations 2019:
 - (a) regulation 16 (Statements of policy);
 - (b) regulation 22 (Application of Part 11 of the Act (information gathering and investigations)); and
 - (c) regulation 26 (Application of Part 26 of the Act (notices)).
- B. The rule-making provisions listed above are specified for the purposes of section 138G(2) (Rule-making instruments) of the Act.

Commencement

- C. This instrument comes into force on 25 November 2019.

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.

Material outside the Handbook

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

Citation

- G. This instrument may be cited as the Proxy Advisors (DEPP and EG) Instrument 2019.

By order of the Board
21 November 2019

Annex A

Amendments to the Glossary of definitions

In this Annex, all the text is new and is not underlined.

Insert the following new definition in the appropriate alphabetical position.

*Proxy Advisors
(Shareholders’
Rights)
Regulations* the Financial Services and Markets Act 2000 (Proxy Advisors) Regulations
2019 (SI 2019/926).

Annex B

Amendments to the Decision Procedure and Penalties manual (DEPP)

In this Annex, underlining indicates new text.

2 Statutory notices and the allocation of decision making

...

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

...

UK Securitisation Regulations	Description	Handbook reference	Decision maker
...			
<u>Proxy Advisors (Shareholders' Rights) Regulations</u>	<u>Description</u>	<u>Handbook reference</u>	<u>Decision maker</u>
<u>Regulation 11</u>	<u>when the FCA is proposing or deciding to publish a statement under regulation 11</u>		<u>RDC or executive procedures</u>
<u>Regulation 12</u>	<u>when the FCA is proposing or deciding to impose a financial penalty under regulation 12</u>		<u>RDC or executive procedures</u>
<u>Regulation 25</u>	<u>when the FCA is proposing or deciding to require restitution under regulation 25</u>		<u>RDC</u>
<u>Regulation 32</u>	<u>when the FCA is proposing or deciding to remove a proxy</u>		<u>Executive procedures</u>

	<u>advisor from the public list.</u>		
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...

Sch 3 Fees and other required payments

...

3.2G

The *FCA*'s power to impose financial penalties are contained in:

...

the *Small and Medium Sized Business (Finance Platforms) Regulations*

the *Proxy Advisors (Shareholders' Rights) Regulations*

Sch 4 Powers Exercised

...

4.2G

The following additional powers and related provisions have been exercised by the *FCA* to make the statements of policy in *DEPP*.

...

Application of Part 26 of the Act (notices) of the *UK Securitisation Regulations*

Regulation 16 (Statement of policy on imposition of penalties) of the *Proxy Advisors (Shareholders' Rights) Regulations*

Regulation 22 (Application of Part 11 of the Act (information gathering and investigations)) of the *Proxy Advisors (Shareholders' Rights) Regulations*

Regulation 26 (Application of Part 26 of the Act (notices)) of the *Proxy Advisors (Shareholders' Rights) Regulations*

Annex C

Amendments to the Enforcement Guide (EG)

Insert the following new section, EG 19.37A, after EG 19.37 (UK Benchmarks Regulations). The text is not underlined.

19.37A Proxy Advisors (Shareholders' Rights) Regulations 2019

19.37A. The *Proxy Advisors (Shareholders' Rights) Regulations* in part implement the revised *Shareholders Rights Directive (SRD)*. The *FCA* has investigative and sanctioning powers in relation to breaches of the *Proxy Advisors (Shareholders' Rights) Regulations*.

19.37A. The *Proxy Advisors (Shareholders' Rights) Regulations* establish a new regulatory framework for *proxy advisors*. This framework imposes requirements on *proxy advisors* that are subject to the *Proxy Advisors (Shareholders' Rights) Regulations*, including, amongst other things, to provide a range of information to *proxy advisors'* clients and the public with the aim of providing greater transparency. The Regulations will ensure that where proxy advisor services are provided in accordance with or by reference to a Code of Conduct it is made public together with a report on the way it has been applied. They will also ensure that information is made public by which the quality and reliability of the *proxy advisor's* services and recommendations can be assessed and the *proxy advisor* will ensure that conflicts of interests and the management thereof are identified and disclosed appropriately. This framework will help to increase transparency in *proxy advisor* services and reduce the harm from investors relying on their services including their voting recommendations, without having the necessary information to assess the approach taken.

19.37A. The *FCA's* approach to enforcement under the *Proxy Advisors (Shareholders' Rights) Regulations* will mirror its general approach to enforcing the *Act*, as set out in *EG 2*. The *FCA* will seek to exercise its enforcement powers in a manner that is transparent, proportionate, responsive to the issue and consistent with its publicly stated policies. It will also seek to ensure fair treatment when exercising its enforcement powers. Finally, it will aim to change the behaviour of the *person* who is the subject of its action, to deter future non-compliance by others, to eliminate any financial gain or benefit from non-compliance, and where appropriate, to remedy the harm caused by the non-compliance.

19.37A. The regulatory powers which the *Proxy Advisors (Shareholders' Rights) Regulations* provide to the *FCA* include:

- the power to require information and appoint investigators;
- powers of entry and inspection;
- power of public censure;
- the power to impose financial penalties;
- the power to apply for an injunction or restitution order;
- the power to require restitution;
- the power to remove a proxy advisor from the public list; and
- the power to prosecute relevant offences.

19.37A. The *Proxy Advisors (Shareholders' Rights) Regulations*, for the most part, mirror
5 the *FCA's* investigative, sanctioning and regulatory powers under the *Act*. The *FCA* has decided to adopt procedures and policies in relation to the use of those powers akin to those it has under the *Act*. Key features of the *FCA's* approach are described below.

The conduct of investigations under the Proxy Advisors (Shareholders' Rights) Regulations

19.37A. The *Proxy Advisors (Shareholders' Rights) Regulations* apply much of Part 11 of
6 the *Act*. The effect of this is to apply the same procedures under the *Act* for appointing investigators and requiring information when investigating breaches of the *Proxy Advisors (Shareholders' Rights) Regulations*.

19.37A. The *FCA* will notify the subject of the investigation that it has appointed
7 investigators to carry out an investigation unless notification is likely to prejudice the investigation or otherwise result in it being frustrated. The *FCA* expects to carry out a scoping visit early on in the enforcement process in most cases. The *FCA's* policy when investigating under the *Proxy Advisors (Shareholders' Rights) Regulations* is to use powers to compel information in the same way as it would in the course of an investigation under the *Act*.

Decision making under the Proxy Advisors (Shareholders' Rights) Regulations

19.37A. The *RDC* is the *FCA's* decision maker for most of the decisions under the *Proxy
8 Advisors (Shareholders' Rights) Regulations* as set out in *DEPP 2 Annex 1G*. This includes the decision to publish a censure and the decision to impose a financial penalty. For the purposes of the *Proxy Advisors (Shareholders' Rights) Regulations*, the *FCA* will follow the procedure for issuing a *warning notice* and *decision notice* as set out in *DEPP 2*.

19.37A. For decisions made by *executive procedures* i.e. settlement decisions under
9 Regulation 11 and 12 or proposals or decisions under Regulation 32, the procedures to be followed will be those described in *DEPP 4*.

19.37A. The *Proxy Advisors (Shareholders' Rights) Regulations* do not require the *FCA* to
10 have published procedures for commencing criminal prosecutions. However, in

these situations the *FCA* expects that we will normally follow our decision-making procedures for the equivalent decisions under the *Act*, as set out in *EG 12*.

19.37A. The *Proxy Advisors (Shareholders' Rights) Regulations* do not require the *FCA* to
11 have published procedures to apply to the court for an injunction or restitution order. However, the *FCA* will normally follow its decision-making procedures for the equivalent decisions under the *Act*, as set out in *EG 10* and *EG 11*.

19.37A. The *Proxy Advisors (Shareholders' Rights) Regulations* require the *FCA* to give
12 third party rights as set out in section 393 of the *Act* and to give access to certain material as set out in section 394 of the *Act*.

19.37A. Certain *FCA* decisions (for example the imposition of a financial penalty) may be
13 referred to the *Tribunal* by an aggrieved party.

Imposition of penalties under the Proxy Advisors (Shareholders' Rights) Regulations

19.37A. The *Proxy Advisors (Shareholders' Rights) Regulations* do not require the *FCA* to
14 issue a statement of policy with respect to the imposition and amount of penalties under the *Proxy Advisors (Shareholders' Rights) Regulations*. However, the *FCA* has decided to issue a statement of policy for the imposition of a financial penalty under the Regulations. The *FCA's* policy includes having regard to the relevant factors in *DEPP 6.2* and *DEPP 6.4* in addition to those set out in the *Proxy Advisors (Shareholders' Rights) Regulations*, where appropriate. The *FCA's* policy in relation to determining the level of a financial penalty includes having regard, where relevant, to *DEPP 6.5* to *DEPP 6.5D* in addition to the factors set out in the *Proxy Advisors (Shareholders' Rights) Regulations*, where appropriate.

19.37A. As with cases under the *Act*, the *FCA* may settle or mediate appropriate cases
15 involving breaches of the *Proxy Advisors (Shareholders' Rights) Regulations* to assist it to exercise its functions under the Regulations in the most efficient and economical way. See *DEPP 5*, *DEPP 6.7* and *EG 5* for further information on the settlement process and the *settlement discount scheme*.

Statement of policy in section 169(7) interviews (as applied by the Proxy Advisors (Shareholders' Rights) Regulations)

19.37A. The *Proxy Advisors (Shareholders' Rights) Regulations* apply section 169 of the
16 *Act* which requires the *FCA* to publish a statement of policy on the conduct of certain interviews in response to requests from *overseas regulators*. For the purposes of the *Proxy Advisors (Shareholders' Rights) Regulations* the *FCA* will follow the procedures described in *DEPP 7*.

