

Consultation Paper

CP16/13**

Changes to the Decision Procedure and Penalties Manual and the Enforcement Guide for the implementation of the Market Abuse Regulation (2014/596/EU)



April 2016

Contents

Abbreviations used in this paper	3
1 Overview	5
2 Proposed changes to DEPP and the Glossary	9
3 Proposed changes to EG	15
Annexes	
1 List of questions	18
2 Cost benefit analysis	19
3 Compatibility statement	20
Appendix	
1 Draft Handbook text	21

We are asking for comments on this Consultation Paper by 22 May 2016.

You can send them to us using the form on our website at:
www.the-fca.org.uk/cp16-13-response-form.

Or in writing to:

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We make all responses to formal consultation available for public inspection unless the respondent requests otherwise. We will not regard a standard confidentiality statement in an email message as a request for non-disclosure.

Despite this, we may be asked to disclose a confidential response under the Freedom of Information Act 2000. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by the Information Commissioner and the Information Rights Tribunal.

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Abbreviations used in this paper

COBS	Conduct of Business Sourcebook
DEPP	Decision Procedure and Penalties Manual
DTR	Disclosure and Transparency Rules
EG	Enforcement Guide
EU MAR	EU Market Abuse Regulation (2014/596/EU)
FCA	Financial Conduct Authority
FI	Financial Instrument
FSMA	Financial Services and Markets Act 2000
LR	Listing Rules
MAR	The MAR sourcebook
MTF	Multilateral Trading Facilities
RAP Regulations	Recognised Auctioning Platforms Regulations 2011
SUP	Supervision Sourcebook
SYSC	Senior Management Arrangements, Systems & Controls Sourcebook
the Treasury	Her Majesty's Treasury

1. Overview

Introduction

- 1.1** In CP15/35 in November 2015, we consulted on our proposed approach to the implementation of the Market Abuse Regulation (EU MAR) and changes to MAR 1, MAR 2, MAR 8, COBS 12.4, SUP 15.10, DTR 1-3, LR 9 and SYSC 18. We also invited comments on the different options for implementation offered by the regime to Member States in two areas. The consultation period for CP15/35 has now closed and we will shortly publish our feedback in a Policy Statement.
- 1.2** In November 2015, we also published CP15/38 to consult on changes to the Disclosure and Transparency Rules relating to delaying disclosure of inside information. This consultation has also closed and we will publish the Policy Statement shortly.
- 1.3** CP15/35 and CP15/38 did not include proposed changes to the Decision Procedures and Penalties Manual (DEPP) or the Enforcement Guide (EG). As explained in CP15/35, this would be covered by a further consultation. This is because these changes are highly dependent on the details to be set out in the Treasury's Statutory Instrument to be made under section 2(2) of the European Communities Act 1972 which was still under discussion. The Treasury intends to lay the Statutory Instrument before Parliament in the coming weeks so we now intend to proceed with this consultation on proposed amendments to DEPP and EG to set out how we will enforce EU MAR.
- 1.4** Our proposed changes to the Handbook are set out in Appendix 1 and should be considered alongside the proposals in this Consultation Paper.

Who does this consultation affect?

- 1.5** This Consultation Paper will be of interest to, among others, any firm or individual who directly or indirectly deals in, or any firm who issues, any financial instruments (FIs):
 - admitted to trading on a regulated market or for which a request for admission to trading on such a market has been made
 - traded on a Multilateral Trading Facility (MTF), admitted to trading on an MTF or for which a request for admission to trading on an MTF has been made
 - traded on an Organised Trading Facility
 - not admitted to trading on one of those facilities, but the price or value of which depends on or has an effect on the price or value of an FI

- 1.6** This includes any transaction, order or behaviour concerning any FIs referred to above, whether or not the transaction, order, or behaviour takes place on a trading facility.
- 1.7** This Consultation Paper will also be of interest to emission allowance market participants, and any person discharging managerial responsibilities within issuers or emission allowance market participants or any person closely associated with them.
- Is this of interest to consumers?**
- 1.8** This Consultation Paper will be of interest to consumers who directly or indirectly deal and invest in any of the FIs indicated above.

Context

- 1.9** In October 2011, the European Commission published proposals for a Regulation on insider dealing, market manipulation and the improper disclosure of inside information. The resulting EU MAR was adopted by the European Parliament and the Council of the European Union and published in its final form in the Official Journal of the European Union in June 2014. EU MAR updates the civil market abuse framework formerly established by the EU Market Abuse Directive (EU MAD) and will apply from 3 July 2016.
- 1.10** In November 2015, we published our CP15/35, setting out our policy proposals and Handbook changes relating to the implementation of EU MAR. That Consultation Paper noted that the Treasury was preparing a Statutory Instrument to modify domestic law to meet the UK's obligation to implement EU MAR (the preliminary draft). The webpage for CP15/35 directed readers to the appropriate contact at the Treasury to request a copy of the preliminary draft.
- 1.11** The preliminary draft amends FSMA and gives us a range of enforcement powers to investigate breaches of EU MAR or any 'directly applicable EU regulation made under the market abuse regulation'¹ and impose sanctions. We are required to prepare and issue a statement of policy about the imposition and the amount or duration of any such sanction.
- 1.12** This Consultation Paper and proposed changes to the Handbook in Appendix 1 have been drafted on the basis of the preliminary draft and the amendments proposed in CP15/35. Where we think that changes in the preliminary draft may impact our consultation, this has been indicated in the Consultation Paper and its effect on our proposals noted.

Summary of our proposals

- 1.13** We propose to:
- Update the list of 'Warning notices and decision notices' and 'Supervisory notices' in DEPP 2 Annex 1 and DEPP 2 Annex 2 to make reference to our new powers.
 - Delete DEPP 6.3, as it relates to defunct 'reasonableness' defences.

¹ We note that the Treasury is currently considering amending this to 'any supplementary EU Regulation', which is defined as 'a directly applicable EU regulation made under the market abuse regulation'. This also applies to other references in the preliminary draft and this Consultation Paper and the annexed Handbook instrument. In the event that these amendments are made, we propose that the policy that is the subject of this consultation will apply, and the reference in the Handbook instrument change, accordingly.

- Apply our current penalty policy to all breaches of EU MAR by a firm. We also propose to apply our current penalty policy for individuals in non-market abuse cases to all breaches of EU MAR by individuals other than in breaches of Articles 14 and 15 EU MAR (market abuse), and apply our current penalty policy for individuals in market abuse cases to breaches of Articles 14 and 15 EU MAR.
- Apply our current policy on suspensions and restrictions to breaches of MAR, and extend it to include the new powers of disciplinary prohibition.
- Apply the current settlement discount scheme for suspensions and restrictions to disciplinary prohibitions, with the exception that no settlement discount will be available for a permanent disciplinary prohibition.
- Amend the definition of 'breach' in the Glossary to refer to behaviour that the FCA can impose sanctions for under Part VIII FSMA.
- Make necessary consequential amendments to DEPP and EG to:
 - reflect the fact that market abuse is now governed by EU MAR
 - refer to our new powers to impose disciplinary prohibitions, suspend permission or impose conditions or restrictions for a breach of EU MAR, suspend trading in financial instruments, require publication of a statement or information, and require publication of a corrective statement or information
 - refer to our new information gathering and investigation powers
 - remove references to the now-superseded disclosure rules and the defence to market abuse, and
 - reflect the deletion of the specific market abuse injunctions and restitution powers in FSMA and the incorporation of these into our general powers.

Equality and diversity considerations

- 1.14** We have assessed the likely equality and diversity impacts of the proposals and do not think they give rise to any concerns, but would welcome any comments.

Next steps

What do you need to do next?

- 1.15** We want to know what you think of our proposals. Please send us your comments by 22 May 2016. We are consulting for one month to enable us to consider consultation responses and publish our Policy Statement in readiness for the EU MAR coming into effect on 3 July 2016. We also consider that a short consultation period is appropriate as the changes we propose are either consequential in nature or extend our current approach and policy to the enforcement of EU MAR.

How?

1.16 Use the online response form on our website or write to us at the address on page 2.

What will we do?

1.17 We will consider your feedback and publish our rules and guidance in a Policy Statement in June 2016.

2. Proposed changes to DEPP and the Glossary

Introduction

- 2.1** Section 395 FSMA requires us to set out the procedure we will follow when deciding to give a warning notice, decision notice or supervisory notice. Our decision-making procedures for these notices are set out in DEPP 1-5. The changes to FSMA introduced by the preliminary draft makes it necessary for us to amend DEPP 2.
- 2.2** In addition, under section 66 and 124 FSMA, we are required to prepare and issue a statement of policy with respect to imposing sanctions, and the amount or duration of a sanction. Our statement of policy is contained in DEPP 6 and 6A. The changes introduced by EU MAR and the preliminary draft make it necessary for us to make amendments to our statement of policy.
- 2.3** These are dealt with in turn below, and should be considered alongside the draft Handbook text set out in Appendix 1.

Decision-making process for new and existing powers

- 2.4** The preliminary draft amends FSMA. It changes the scope of our powers to impose financial penalties and public censures under Part VIII FSMA, and gives us a number of additional powers to impose sanctions for contraventions of EU MAR, any directly applicable EU regulation made under EU MAR or requirements imposed under Part VIII FSMA. Our new powers under Part VIII FSMA include the power to prohibit an individual from carrying out a management function or dealing in FIs on their own account.
- 2.5** We propose to follow our current decision-making process when proposing, or deciding, to exercise our amended Part 8 FSMA sanctioning powers. We propose to:
- amend DEPP 2 Annex 1 by updating the entry for sections 126(1)/127(1) to refer to our new sanctioning powers
- 2.6** A new section in FSMA (127A), introduced by the preliminary draft, requires us to give a warning notice when proposing, and a decision notice when deciding, to refuse an application to vary or revoke a prohibition imposed under section 123A.² We propose that the decision to give a warning notice or decision notice should be made by the RDC in accordance with our current decision making process in DEPP. We therefore propose to:
- insert a new entry for sections 127A(3)/127A(4) in DEPP 2 Annex 1 providing that these decisions will be made by the RDC
- 2.7** The preliminary draft deletes section 96C FSMA and reinserts our power to suspend trading in FIs as section 122I FSMA. We propose to follow the same decision making procedure for the section 122I FSMA power as we have used for our section 96C FSMA power. The preliminary draft also removes our ability to make the disclosure rules under Part VI FSMA.

² We note that the Treasury is currently considering deleting section 127A. If the deletion is made, the above proposed amendment to DEPP 2 Annex 1 will not be made. In that case we will follow our current decision making process for considering requests to vary or revoke suspensions, restrictions or conditions imposed under section 66 or 206A, when considering a request to vary or revoke a prohibition imposed under section 123A.

2.8 As a result, we propose to:

- amend DEPP 2 Annex 2 by changing the reference to section 96C FSMA to a reference to section 122I FSMA and deleting the reference to the Disclosure and Transparency Rules (DTR)

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

Contraventions of EU MAR: The application of the penalty policy and other consequential changes

2.9 The preliminary draft deletes the definition of market abuse in section 118 FSMA. As noted above, the preliminary draft removes our ability to make and enforce the disclosure rules. We will instead have the power to impose sanctions for contraventions of EU MAR, directly applicable EU regulation made under EU MAR or requirements imposed under Part VIII FSMA³. These include the prohibitions against market abuse, as well as provisions on the disclosure of inside information, insider lists, manager transactions and investment recommendations and statistics.

2.10 We propose to apply our current approach to imposing sanctions for market abuse, and other contraventions of FSMA, to contraventions of EU MAR. This means that:

- the current penalty policy for firms set out in DEPP 6.5A will apply to breaches of any provision of EU MAR by a firm
- the current market abuse penalty policy for individuals set out in DEPP 6.5C will apply to breaches of the market abuse provisions of EU MAR (i.e. Articles 14 and 15 EU MAR) by individuals, and
- the current penalty policy for non-market abuse breaches by individuals set out in DEPP 6.5B will apply to breaches of other provisions of EU MAR by individuals

2.11 The above approach will apply to firms or individuals who have contravened a provision of EU MAR directly, as well as those who have participated or otherwise been involved in such a contravention. For example, where an approved individual is found to have been knowingly concerned in a contravention of Articles 14 and 15 EU MAR, the penalty imposed on that individual under section 66 FSMA will be determined in accordance with DEPP 6.5C, while the penalty on a person discharging managerial responsibility who fails to comply with his or her notification obligation under Article 19 EU MAR will be determined in accordance with DEPP 6.5B.

2.12 No amendments to DEPP are necessary to give effect to the above policy proposal (see below regarding suspensions and restrictions, and the new disciplinary prohibition powers).

2.13 Further, we consider that the following consequential amendments are necessary:

- deleting the reference in DEPP 6.2.2 to the 'requiring or encouraging' offence

³ We note that the Treasury is currently considering providing the FCA with the power to impose sanctions, under sections 123, 123A and 123B, on persons who have been knowingly concerned in a contravention of MAR (other than Articles 14 and 15 MAR) and any supplementary EU regulation. In addition, the Treasury is considering amending the scope of the power to impose sanctions for contraventions of Articles 14 and 15 MAR so that persons who 'acting alone or jointly or in concert' contravene these Articles can be subject to sanctions. In the event that these amendments are made, we propose that the policy that is the subject of this consultation, including the distinctions between individuals and firms, and between market abuse and other breaches of MAR, will apply, and that the references in the Handbook instrument will change accordingly to give effect to this.

- deleting DEPP 6.2.12, which refers to the now defunct disclosure rules in DTR 3
- amending the references in DEPP 6.2.22 - 6.2.26 to 'behaviour' so that it no longer refers to the term as defined in the glossary
- changing the references in DEPP 6.2.22, 6.2.24 and 6.2.25 that refer to sections 381 and 383 to instead refer to sections 380 and 382 (see paragraph 3.13 for detail of the proposed legislative change these sections refer to)
- referring in DEPP 6.2.26 to the prohibition in Article 14 EU MAR, instead of sections 118(2), 118(3) or 118(4) FSMA, and
- referring in DEPP 6.5C.2 to the prohibition in Article 14(a) EU MAR, instead of section 118(2) FSMA

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

Suspensions, restrictions, conditions or limitations

2.14 The preliminary draft introduces new section 123B FSMA, which gives us the power to suspend, or impose limitations or restrictions on, the permission of authorised persons for a contravention of EU MAR. Amendments to the Financial Services and Markets Act 2000 (Qualifying EU Provisions) Order 2013 made by the preliminary draft also give us the power to impose sanctions, under Part V FSMA, on approved persons or employees of relevant authorised persons (as defined in section 71A FSMA) who have been knowingly concerned in a contravention of EU MAR, any directly applicable EU regulation made under the EU MAR or a requirement imposed under Part VIII FSMA.

2.15 We propose to apply our current penalty policy for suspensions, restrictions, conditions or limitations, as set out in DEPP 6A, when imposing a suspension, restriction, condition or limitation for a contravention of EU MAR. We also propose to mirror the distinction (see paragraph 2.10) between penalties imposed on individuals for market abuse and those imposed on them for other breaches of EU MAR.

2.16 We therefore propose to:

- include a reference to the above powers in DEPP 6.2.22, 6.2.25, 6A.1.1, 6A.1.2(1) and 6A.1.2(2), as appropriate
- amend DEPP 6A.3.2(2) and 6A.3.2(3) to reflect that suspensions, restrictions, conditions or limitations can be imposed for market abuse. These amendments will also reflect that when assessing the seriousness of a breach, and any aggravating and mitigating factors, to determine the period of any suspension or condition to be imposed on an individual for market abuse, those factors can include those used to determine financial penalties in market abuse cases against individuals

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

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

2.17 The preliminary draft introduces new section 123A FSMA, which gives us the power to impose a range of disciplinary prohibitions for contraventions of EU MAR, any directly applicable EU regulation made under EU MAR or a requirement imposed under Part VIII. These are:

- a temporary prohibition on an individual holding an office or position with responsibility for taking decisions about the management of an investment firm
- a permanent prohibition on an individual holding an office or position involving responsibility for taking decisions about the management of an investment firm - this is only for a breach of Articles 14 or 15 EU MAR, and
- a temporary prohibition on an individual dealing in FIs on his or her own account

2.18 We propose to apply our current penalty policy for suspensions, restrictions, conditions or limitations, as set out in DEPP 6A, when deciding whether to impose a disciplinary prohibition and the duration of any such prohibition. In our view, the factors set out in DEPP 6A are equally appropriate when determining whether a disciplinary prohibition should be imposed and to its duration. We also propose to mirror the distinction (see paragraph 2.10) between penalties imposed on individuals for market abuse and those imposed on them for other breaches of EU MAR, directly applicable EU regulations made under EU MAR or requirements imposed under Part VIII.

2.19 We therefore propose to:

- amend DEPP 1.1.1 and 6A.1.1 to state that DEPP also sets out our policy on the imposition of disciplinary prohibitions and the period in which they will have effect
- include a reference to our new disciplinary prohibition powers in DEPP 6.2.22 and 6.2.25
- define 'disciplinary prohibition' in DEPP 6A.1.2 to mean the prohibitions imposed under section 123A FSMA
- state in DEPP 6A.1.3 and 6A.1.4 that disciplinary prohibitions are disciplinary measures that can be imposed in addition to or instead of other disciplinary measures, and alongside other non-disciplinary measures such as variations or cancellations of permission, withdrawal of approval or prohibitions
- amend DEPP 6A.2, which sets out how we decide whether to impose a suspension or restriction, to also refer to disciplinary prohibitions
- amend DEPP 6A.3, which sets out how we determine the length and commencement of a period of suspension, to also refer to disciplinary prohibitions, and to make appropriate cross-references to factors we would consider when imposing penalties on individuals in market abuse and non-market abuse cases, and
- include a reference in DEPP 6A.4, which sets out the interaction between the various sanctions that we can impose, to disciplinary prohibitions

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

prohibition?

2.20 We propose that the early settlement discount policy set out in DEPP 6.7 should also apply to disciplinary prohibitions. However, no settlement discount will be available for permanent prohibitions imposed for contravention of Articles 14 or 15 EU MAR.

2.21 We therefore propose to:

- amend DEPP 6.7.1, 6.7.6 and 6A.3.4, to provide that our early settlement discount policy applies to disciplinary prohibitions other than permanent prohibitions

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

The defence to market abuse

2.22 The preliminary draft amends section 123 FSMA by deleting the ‘reasonableness’ defence to market abuse previously set out in section 123(2). Our policy on the reasonableness defence is found in DEPP 6.3, and is no longer applicable.

2.23 We therefore propose to:

- delete DEPP 6.3 in its entirety, and make other related consequential amendments to DEPP

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

Behaviour conforming with the Takeover Code

2.24 In CP15/35 we consulted on changes to the Market Conduct Sourcebook. To comply with EU MAR we proposed amending sections 1.10.4 – 1.10.6 of the sourcebook to reflect that behaviour conforming with specified provisions of the Takeover Code will be unlikely to amount to market abuse. DEPP 6.2.23 refers to the content of the sourcebook sections and we propose to:

2.25 amend 6.2.23 to make clear the sections to which it refers and to reflect the proposed changes to these sections

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

Behaviour in contravention of Articles 38 to 42 of regulation (EU) No 1031/2010

2.26 In CP15/35 we proposed amending the definition of ‘market abuse’ to include behaviour prohibited by ‘articles 38 to 42 of regulation (EU) No 1031/2010 and as referred to in the RAP Regulations’ in addition to that prohibited by articles 14 and 15 of EU MAR. As already noted, we will shortly be publishing our Policy Statement in light of responses to CP15/35. The Treasury is separately considering how to provide us with the power to impose sanctions for market abuse in relation to auctioning platforms.

2.27 While the mechanism for sanctioning this market abuse will depend on the Treasury’s Statutory Instrument, we are proposing to apply our penalty policy when imposing sanctions for behaviour that is prohibited by articles 38 to 42 of regulation (EU) No.1031/2010, and as referred to in the

RAP Regulations in the same way as we would apply it to behaviour prohibited by articles 14 and 15 of EU MAR.

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

Glossary changes

2.28 We propose to amend the definition of 'breach' in the glossary to include contraventions in respect of which the FCA takes action pursuant to its powers under sections 123, 123A or 123B FSMA.

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

3. Proposed changes to EG

Market abuse governed by EU MAR

- 3.1** The preliminary draft deletes the definition of market abuse in section 118 FSMA. Where market abuse is defined in those terms, we propose to amend EG to reflect that market abuse will be governed by EU MAR and that sanctions will be imposed under different sections of FSMA. In our CP15/35 we consulted on changes to the Handbook Glossary arising from the implementation of EU MAR. We proposed changing the definition of market abuse in the Handbook Glossary to refer to contravention of Articles 14 and 15 EU MAR. We now propose to amend EG to replace references to market abuse which are not consistent with this definition.
- 3.2** We therefore propose to amend the following provisions to reflect the above change:
- EG 7.1.1, 7.1.2(1)(e), 7.1.2(2)(c), 8.6.2, and 12.3.1, and EG Appendix 3 at 3.1.3

New investigation powers

- 3.3** The preliminary draft introduces into Part VIII new sections 122A, 122B and 122C FSMA, which give us specific powers to require information and documents to support both our supervisory and enforcement functions under EU MAR.
- 3.4** We therefore propose to:
- amend and add EG 2.6.1, 3.1.1, 3.2A, 3.2B and 3.8A to include reference to these powers and an explanation of when they can be used to assist an EEA regulator
- 3.5** The preliminary draft also gives us a specific power under section 122D FSMA to enter premises under warrant, for use where our information requirements imposed under Part VIII FSMA are not complied with.
- 3.6** We therefore propose to:
- amend EG 4.12.1 and 4.12.2 to include reference to the above power, and
 - explain in EG 3.8A.4 when this power can be used to assist an EEA regulator

New powers

- 3.7** The preliminary draft gives us new powers to impose sanctions for contraventions of EU MAR, any directly applicable EU regulation made under EU MAR or requirements imposed under Part VIII. We therefore propose to:
- add a reference in EG 7.1.2(5) to our power to impose a disciplinary prohibition on an individual
 - amend EG 7.1.2(3)(d) to refer to our power to suspend an authorised person's permission or impose a limitation or other restriction on their permission
 - include both of the above powers in EG Appendix 3 at 3.1.4, and
 - reflect in EG 7.3.14 that we have a statement of policy on the use of these powers
- 3.8** Our broader regulatory tools will include specific powers to suspend trading in a FI and to require information and statements including corrective information and statements. Although these powers are not strictly enforcement tools we propose to include them in EG for completeness.
- 3.9** We therefore propose to:
- amend EG 7.2.1(4) to refer to our power to suspend trading in FI under section 122I FSMA
 - amend EG 7.2.1(6) to refer to our power to require an issuer or emissions allowance market participant to publish information or statements under section 122G FSMA, and
 - amend EG 7.2.1(7) to refer to our power to require a person to publish a corrective statement or information under section 122H FSMA

Removing references to disclosure rules and defences

- 3.10** The preliminary draft removes our ability to make and enforce the disclosure rules under Part VI FSMA.
- 3.11** The preliminary draft also removes the defences to market abuse in section 123 FSMA. As detailed in paragraphs 2.22-2.23 of this Consultation Paper, we are proposing to reflect this by deleting DEPP 6.3.
- 3.12** We therefore propose to:
- remove reference to the disclosure rules in EG 2.2.1 and 7.2.1(4), and
 - delete the reference to DEPP 6.3 in EG 7.3.1 and 11.3(11)

Reflecting deletion of specific market abuse injunctions and restitution orders

- 3.13** The preliminary draft includes EU MAR and any directly applicable EU regulation made under EU MAR in the Financial Services and Markets Act 2000 (Qualifying EU Provisions) Order 2013,

making it a relevant requirement for section 380 FSMA (injunctions) and section 382 FSMA (restitution orders). The preliminary draft deletes the specific sections of FSMA dealing with injunctions for market abuse (section 381 FSMA) and restitution orders for market abuse (section 383 FSMA).

3.14 We therefore propose to:

- delete references to sections 381 and 383 FSMA in EG 10.2.2, 10.3.1, 10.4.1, 10.4.4, 10.4.5, 11.1.3, 11.2.1, 11.3.2, 11.5.1 and 11.5.2

Q10: Do you agree with our proposed amendments to EG?

Annex 1

List of questions

- Q1:** Do you agree with the proposed changes to our decision making process in DEPP?
- Q2:** Do you agree with the proposal regarding how we will apply our penalty policy to different breaches of EU MAR and the proposed consequential amendments?
- Q3:** Do you agree with the application of our current policy on suspensions, restrictions, conditions or limitation when imposing these sanctions for market abuse and the proposed distinction between market abuse and other contraventions in cases against individuals?
- Q4:** Do you agree with the proposal regarding our policy on how we decide whether to impose a disciplinary prohibition and the duration of the prohibition?
- Q5:** Do you agree with our proposal regarding the application of the early settlement discount policy to disciplinary prohibitions, other than permanent disciplinary prohibitions?
- Q6:** Do you agree with the deletion of our policy regarding the 'reasonableness' defence, as set out in DEPP 6.3?
- Q7:** Do you agree with our proposed amendment to DEPP 6.2.23?
- Q8:** Do you agree with the proposed approach to the application of our penalty policy when imposing sanctions for market abuse in relation to auctioning platforms?
- Q9:** Do you agree with the proposed amendments to the Glossary?
- Q10:** Do you agree with our proposed amendments to EG?

Annex 2

Cost benefit analysis

Competition and economic implications

1. This Consultation Paper recommends removing Handbook provisions that are no longer sustainable because of changes to primary legislation implementing EU MAR. This Consultation Paper also recommends applying our current policy and procedures to breaches of requirements under EU MAR and new sanctions that may be imposed on the basis of EU MAR.
2. Depending on the provision in question, we either have no discretion in implementation or the proposed approach will not be substantially different from the status quo.
3. Our view is that the costs of the proposals will be of minimal significance if compared with any reasonable counterfactual and that no cost benefit analysis is required. Similarly, we do not see any implication for our competition objective.

Annex 3

Compatibility statement

Compatibility with the FCA's general duties

1. Section 1B of FSMA requires the FCA to explain why it considers that the proposed rules are compatible with its strategic objective, advance one or more of its operational objectives, and promote effective competition in the interests of consumers.
2. The FCA believes the proposals set out above are compatible with its duties under section 1B of FSMA. The effective and appropriate use of enforcement powers plays an important part in pursuing the FCA's statutory objectives, as it increases compliance with rules by making market participants more aware of conduct that may breach these rules, and the potential for sanctions for such conduct.
3. The FCA has had regard to the regulatory principles set out in section 3B of FSMA. In particular, the proposals are consistent with the need to use resources in the most efficient and economic way, and the principle that the regulators should exercise their functions as transparently as possible.

Appendix 1

Draft Handbook text

ENFORCEMENT (MARKET ABUSE REGULATION) INSTRUMENT 2016

Powers exercised by the Financial Conduct Authority

- A. The Financial Conduct Authority makes this instrument in the exercise of:
- (1) the following powers and related provisions of the Financial Services and Markets Act 2000 (“the Act”):
 - (a) section 69 (Statement of Policy);
 - (b) section 124 (Statement of Policy);
 - (c) section 139A (Power of the FCA to give guidance);
 - (d) section 210 (Statement of Policy); and
 - (e) section 395 (The FCA’s and PRA’s procedures); and
 - (2) the other rule and guidance making powers listed in Schedule 4 (Powers exercised) to the General Provisions of the FCA’s Handbook.
- B. The rule-making powers listed above are specified for the purpose of section 138G(2) (Rule-making instruments) of the Act.

Commencement

- C. This instrument comes into force on [*date*].

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 Enforcement (Market Abuse Regulation) Instrument 2016.

By order of the Board
[*date*]

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

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

Amend the following definition as shown.

breach

in DEPP:

...

- (4) ~~behaviour amounting to *market abuse*, or to *requiring or encouraging market abuse*, in respect of which the *FCA* takes action pursuant to section 123 (Power to impose penalties in cases of market abuse)~~ a contravention in respect of which the *FCA* takes action pursuant to section 123, 123A or 123B of the *Act*,

...

Annex B

Amendments to the Decision Procedure and Penalties Manual (DEPP)

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

1.1 Application and Purpose

Application

1.1.1 G This manual (*DEPP*) is relevant to *firms, approved persons* and other *persons*, whether or not they are regulated by the *FCA*. It sets out:

...

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

...

...

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

...

Section of the Act	Description	Handbook reference	Decision maker
...
126(1)/ 127(1)	when the <i>FCA</i> is proposing or deciding to impose a sanction for market abuse <u>penalty or public censure under section 123 of the Act, a disciplinary prohibition under section 123A of the Act, or a suspension or restriction under section 123B of the Act.*</u>		<i>RDC</i>
<u>127A(3)/ 127A(4)</u>	<u>when the <i>FCA</i> is proposing or deciding to refuse an application for variation or revocation of a prohibition imposed under section 123A of the Act.</u>		<i>RDC</i>

...
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...

2 Annex Supervisory notices

2

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

...

6 Penalties

...

6.2 Deciding whether to take action

...

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

...

...

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

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

...

- 6.2.22 G In relation to ~~behaviour~~ behaviour which may have happened or be happening in the context of a *takeover bid*, the *FCA* will refer to the *Takeover Panel* and give due weight to its views. Where the *Takeover Code* has procedures for complaint about any ~~behaviour~~ behaviour, the *FCA* expects parties to exhaust those procedures. The *FCA* will not, save in exceptional circumstances, take action under any of section 123 (*FCA's* power to impose penalties), section 123A (power to prohibit individuals from managing or dealing), section 123B (suspending permission to carry on regulated activities etc.), section 129 (Power of court to impose penalties), section ~~381~~ 380 (Injunctions), sections ~~383~~ 382 or 384 (Restitution) in respect of ~~behaviour~~ behaviour to which the *Takeover Code* is relevant before the conclusion of the procedures available under the *Takeover Code*.
- 6.2.23 G The *FCA* will not take action against a *person* over ~~behaviour~~ behaviour which does not amount to market abuse. Behaviour is less likely to amount to market abuse where it (a) conforms with the *Takeover Code* or rules of an *RIE* and (b) falls within the terms of ~~any provision of the Code of Market Conduct~~ MAR 1.10.14 to 1.10.6 which states that ~~behaviour~~ behaviour so conforming is unlikely to, of itself, does not amount to *market abuse*. The *FCA* will seek the *Takeover Panel's* or relevant *RIE's* views on whether ~~behaviour~~ behaviour complies with the *Takeover Code* or *RIE* rules and will attach considerable weight to its views.
- 6.2.24 G If any of the circumstances in *DEPP* 6.2.26G apply, and the *FCA* considers that the use of its disciplinary powers under section 123 or section 129, or of its injunctive powers under section ~~381~~ 380 or of its powers relating to restitution under section ~~383~~ 382 or 384 is appropriate, it will not take action during an offer to which the *Takeover Code* applies except in the circumstances set out in *DEPP* 6.2.27G.
- 6.2.25 G In any case where the *FCA* considers that the use of its powers under any of sections 123, 123A, 123B, 129, ~~381~~ 380, ~~383~~ 382 or 384 of the *Act* may be appropriate, if that use may affect the timetable or outcome of a *takeover bid* or where it is appropriate in the context of any exercise by the *Takeover Panel* of its powers and authority, the *FCA* will consult the *Takeover Panel* before using any of those powers.
- 6.2.26 G Where the ~~behaviour~~ behaviour of a person which amounts to *market abuse* is ~~behaviour~~ behaviour to which the *Takeover Code* is relevant, the use of the *Takeover Panel's* powers will often be sufficient to address the relevant concerns. In cases where this is not so, the *FCA* will need to consider whether it is appropriate to use any of its own powers under the *market abuse regime*. The principal circumstances in which the *FCA* is likely to consider such exercise are:
- (1) where the ~~behaviour~~ behaviour falls within ~~sections 118(2), 118(3) or 118(4) of the Act~~ the prohibition in article 14 of the *Market Abuse Regulation*;

- (2) where the *FCA's* approach in previous similar cases (which may have happened otherwise than in the context of a *takeover bid*) suggests that a financial penalty sanction should be imposed;

...

...

6.3 Penalties for market abuse

6.3.1 G ~~Section 123(2) of the Act states that the FCA may not impose a penalty on a person if there are reasonable grounds to be satisfied that:~~

- (1) ~~the person concerned believed, on reasonable grounds, that his behaviour did not amount to market abuse or requiring or encouraging; or~~
- (2) ~~the person concerned took all reasonable precautions and exercised all due diligence to avoid engaging in market abuse or requiring or encouraging. [deleted]~~

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

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

(for example, did the *person* discuss the *behaviour* with internal line management and/or internal legal or compliance departments);

- (7) whether, and if so the extent to which, the *person* sought any appropriate expert legal or other expert professional advice and followed that advice; and
- (8) whether, and if so to what extent, the *person* sought advice from the market authorities of any relevant *prescribed market* or, where relevant, consulted the *Takeover Panel*, and followed the advice received. [deleted]

...

6.5C.2 Step 2 – the seriousness of the market abuse

...

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

...

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

...

6.7 Discount for early settlement

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

...

- 6.7.6 G The *settlement discount scheme* which applies to the amount of a financial penalty, described in DEPP 6.7.2G to DEPP 6.7.5G, also applies to the length of the period of a suspension, restriction ~~or~~ condition or disciplinary prohibition (other than a permanent disciplinary prohibition), having regard to the *FCA's* statement of policy as set out in DEPP 6A.3. No settlement

discount is available with respect to a permanent disciplinary prohibition.
 The *settlement discount scheme* does not apply to the length of the period for which approvals under section 59 of the *Act* have effect as a result of a limitation, as different considerations apply to determining the appropriate length of this period: see *DEPP* 6A.1.5G and *DEPP* 6A.3AG. However, the *FCA* will take into account that the *approved person* is willing to enter into a settlement agreement when determining the appropriate period.

...

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

6A.1 **Introduction**

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

- (1) the imposition of suspensions or restrictions under sections 88A, 89Q and 206A of the *Act*, and the period for which those suspensions or restrictions are to have effect, as required by sections 88C(1), 89S(1) and 210(1) of the *Act*;
- (2) ~~It also sets out the *FCA's* statement of policy on~~ the imposition of suspensions, conditions or limitations under section 66 of the *Act*, the period for which suspensions or conditions are to have effect, and the period for which approvals under section 59 have effect as a result of a limitation, as required by section 69(1); and
- (3) the imposition of disciplinary prohibitions, suspensions or restrictions under sections 123A and 123B of the *Act*, as required by section 124(1).

DEPP 6A does not concern limitations or conditions imposed under section 61(2B), 63ZA or 63ZB of the *Act*.

6A.1.2 G (1) For the purposes of *DEPP* 6A, "suspension" refers to the suspension of:

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

...

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

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

...

(3) "condition" refers to a condition imposed in relation to any approval of the performance by an *approved person* of any function to which

the approval relates (under section 66 of the *Act*); ~~and~~

- (4) “limitation” refers, apart from in *DEPP* 6A.1.2G(2), to a limitation of the period for which any approval of the performance by an *approved person* of any function to which the approval relates is to have effect (under section 66 of the *Act*); and
- (5) “disciplinary prohibition” refers to a temporary or permanent prohibition on an individual holding an office or position involving responsibility for taking decisions about the management of a *MiFID investment firm* (under section 123A(1)(a) and (2) of the *Act*) or a temporary prohibition on an individual dealing in financial instruments on their own account (under section 123A(1)(b) of the *Act*).

6A.1.3 G The power to impose a suspension, restriction, condition, ~~or~~ limitation or disciplinary prohibition is a disciplinary measure which the *FCA* may use in addition to, or instead of, imposing a financial penalty or issuing a *public censure*. The principal purpose of imposing such a measure is to promote high standards of regulatory and/or market conduct by deterring *persons* who have committed *breaches* from committing further *breaches*, helping to deter other *persons* from committing similar *breaches*, and demonstrating generally the benefits of compliant behaviour. These measures are tools that the *FCA* may employ to help it to achieve its *statutory objectives*. Examples of measures that we may impose include:

...

6A.1.4 G The powers to impose a suspension, restriction, condition or limitation in relation to *authorised persons* and *approved persons*, and to impose a disciplinary prohibition in relation to individuals, are disciplinary measures; where the *FCA* considers it necessary to take action, for example, to protect *consumers* from an *authorised person*, the *FCA* will seek to cancel or vary the *authorised person's permissions*. If the *FCA* has concerns with a *person's* fitness to be approved, and considers it necessary to take action, the *FCA* will seek to prohibit the *approved person* or withdraw their approval. For an *SMF manager*, the *FCA* may instead vary their approval by imposing one or more conditions, if the *FCA* is satisfied that they would be a fit and proper person to perform functions in relation to *regulated activities* if the conditions are imposed, and that it is appropriate to do so. While the powers to impose a suspension or a restriction in relation to *sponsors* and *primary information providers* under sections 88A(2)(b)/(c) and 89Q(2)(b)/(c) of the *Act* are disciplinary measures, the *FCA* can impose suspensions, limitations or other restrictions in relation to *sponsors* and *primary information providers* in other circumstances.

...

6A.2 Deciding whether to take action

6A.2.1 G The *FCA* will consider the full circumstances of each case and determine

whether it is appropriate to impose a suspension, restriction, condition, ~~or~~ limitation, ~~or~~ disciplinary prohibition. The *FCA* will usually make this decision at the same time as it determines whether or not to impose a financial penalty or a *public censure*.

6A.2.2 G The *FCA* will take into account relevant factors in deciding whether it is appropriate to impose a suspension, restriction, condition, ~~or~~ limitation ~~or~~ disciplinary prohibition. These may include factors listed in *DEPP* 6.2. There may also be other factors, not listed in *DEPP* 6.2, that are relevant.

6A.2.3 G The *FCA* will consider it appropriate to impose a suspension, restriction, condition, ~~or~~ limitation ~~or~~ disciplinary prohibition where it believes that such action will be a more effective and persuasive deterrent than the imposition of a financial penalty alone. This is likely to be the case where the *FCA* considers that direct and visible action in relation to a particular *breach* is necessary. Examples of circumstances where the *FCA* may consider it appropriate to take such action include:

...

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

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

...

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

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

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

(1) Deterrence

When determining the appropriate length of the period of suspension, restriction, ~~or~~ condition ~~or~~ disciplinary prohibition the *FCA* will have regard to the principal purpose for which it imposes sanctions, namely to promote high standards of regulatory and/or

market conduct by deterring *persons* who have committed *breaches* from committing further *breaches* and helping to deter other *persons* from committing similar *breaches*, as well as demonstrating generally the benefits of compliant business.

(2) The seriousness of the breach

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

(3) Aggravating and mitigating factors

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

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

...

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

- (f) the ~~*approved person's*~~ expected lost earnings from not being able to carry out the suspended, ~~or~~ restricted or prohibited activity; and
- (g) whether the suspension, ~~or~~ restriction or disciplinary prohibition would cause the ~~*approved person*~~ serious financial hardship.

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

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

...

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

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

...

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

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

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

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

...

- (3) If the *FCA*, following the approach set out in *DEPP* 6A.2, considers it appropriate to impose a suspension, restriction, condition, ~~or~~ limitation or disciplinary prohibition (or some combination of these), it will calculate the appropriate length of the period (or periods) of sanction ~~this measure~~, following the approach set out in *DEPP* 6A.3 or *DEPP* 6A.3A, as appropriate.

- (4) Where the *FCA* considers it appropriate to impose ~~both a financial penalty and a suspension, restriction, condition or limitation~~ a combination of sanctions, it will decide whether the combined impact on the *person* is likely to be disproportionate in respect to the *breach* and the deterrent effect of the sanctions.
- (5) If the *FCA* considers the combined impact on the *person* is likely to be disproportionate, it will decide whether to reduce the period of suspension, restriction, ~~or condition,~~ or disciplinary prohibition, the amount of ~~the any~~ financial penalty or both, so that the combined impact of the sanctions is proportionate in relation to the *breach* and the deterrent effect of the sanctions. The *FCA* will decide which sanction or sanctions to reduce after considering all the circumstances of the case.
- (6) In deciding the final level of ~~the any~~ financial penalty and the length of ~~the any~~ period of suspension, restriction, condition, ~~or limitation~~ or disciplinary prohibition, the *FCA* will also take into account any representations by the *person* that the combined impact will cause them serious financial hardship. The *FCA* will take the approach set out in *DEPP* 6.5D in assessing this.

...

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

...

- 6A.4.3 G The *FCA* may depart from the approach set out in *DEPP* 6A.4.2 G. For example, the *FCA* may at the outset consider that a financial penalty is the only appropriate sanction for a *breach* but, having determined the appropriate level of financial penalty, may consider it appropriate to reduce the amount of the financial penalty for serious financial hardship reasons. In such a situation, the *FCA* may consider it appropriate to impose a suspension, restriction, condition, ~~or limitation~~ or disciplinary prohibition even if the *FCA* at the outset did not consider such a sanction to be appropriate. The *FCA* will take into account whether the *person* would suffer serious financial hardship in deciding the length of the period of suspension, restriction, condition, ~~or limitation~~ or disciplinary prohibition and may decide not to impose such a measure if it considers such action would result in serious financial hardship.

Annex C

Amendments to the Enforcement Guide (EG)

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

1 Introduction

...

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

...

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

...

2 The FCA's approach to enforcement

...

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

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

...

2.6.1 The *FCA* views co-operation with its overseas counterparts as an essential part of its regulatory functions. Section 354A of the *Act* imposes a duty on the *FCA* to take such steps as it considers appropriate to co-operate with others who exercise functions similar to its own. This duty extends to authorities in the UK and overseas. In fulfilling this duty the *FCA* may share information which it is not prevented from disclosing, including information obtained in the course of the *FCA's* own investigations, or exercise certain of its powers under Part XI of the *Act*. Further details of the *FCA's* powers to assist overseas regulators are provided at EG 3.7.1 – 3.7.4 (Investigations to assist overseas authorities), EG 3.8.1 – 3.8.4 (Information requests and investigations to assist EEA regulators in relation to short selling), EG 3.8A (Information requests and entry of premises under warrant

to assist EEA regulators in relation to the Market Abuse Regulation), EG 4.7.1 (Use of statutory powers to require the production of documents, the provision of information or the answering of questions), EG 4.11.9 – 4.11.11 (Interviews in response to a request from an overseas regulator or EEA regulator), and EG 3.11.2 – 3.11.9 (Exercising the power under section 55Q to vary or cancel a firm’s Part 4A permission, or to impose requirements on a firm in support of an overseas regulator: the FCA’s policy). The FCA’s statement of policy in relation to interviews which representatives of overseas regulators or *EEA regulators* attend and participate in is set out in DEPP 7.

...

3 Use of information gathering and investigation powers

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

...

3.2A Information requests (section 122A)

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

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

3.2B Information requests (section 122B)

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

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

...

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

- 3.8A.1 The FCA may use its section 122B power to require information and documents from natural or legal persons to support both its supervisory and its enforcement functions.
- 3.8A.2 The FCA's power to require information to assist EEA regulators in respect of the Market Abuse Regulation or any directly applicable EU regulation made under the Market Abuse Regulation is contained in section 122B(6) of the Act. The section provides that at the request of an EEA regulator, the FCA may use its power under section 122B to require the production of information.
- 3.8A.3 Section 122B(7) states that the FCA must, in deciding whether or not to exercise its power to require information, consider whether the exercise of that power is necessary to comply with the Market Abuse Regulation or any directly applicable EU regulation made under the Market Abuse Regulation.
- 3.8A.4 The FCA may give information under 122D(1) or 176(1) (Entry of premises under warrant) at the request of an EEA regulator where the regulator makes the request in the exercise of its functions under the Market Abuse Regulation. Section 122D(11) states that the FCA must, in deciding whether or not to exercise its powers of entry of premises under warrant, consider whether the exercise of that power is necessary for the purpose of the exercise by it of its functions under the Market Abuse Regulation or any directly applicable EU regulation made under the Market Abuse Regulation.

...

4 Conduct of investigations

...

4.12 Search and seizure powers

- 4.12.1 Under sections 176 and 122D of the Act, the FCA has the power to apply to a justice of the peace for a warrant to enter premises where documents or information is held. The circumstances under which the FCA may apply for a search warrant include:
- (1) where a *person* on whom an information requirement has been imposed fails (wholly or in part) to comply with it; or
 - (2) where there are reasonable grounds for believing that if an information requirement were to be imposed, it would not be complied with, or that the documents or information to which the information requirement relates, would be removed, tampered with or destroyed.
- 4.12.2 A warrant obtained pursuant to sections 176 and 122D of the Act authorises a police constable or an FCA investigator in the company, and under the supervision of, a police constable, to do the following, amongst other things: to

enter and search the premises specified in the warrant and take possession of any documents or information appearing to be documents or information of a kind in respect of which the warrant was issued or to take, in relation to any such documents or information, any other steps which may appear to be necessary for preserving them or preventing interference with them.

...

7 Financial penalties and other disciplinary sanctions

...

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

...

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

(1) It may publish a statement:

...

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

...

(2) It may impose a financial penalty:

...

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

...

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

...

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

Act;

...

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

...

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

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

...

- (4) ~~where there are reasonable grounds to suspect non-compliance with the disclosure rules, the *FCA* may require the suspension of trading of a financial instrument with effect from such time as it may determine; and where the *FCA* considers it necessary for the purpose of the exercise by it of functions under the *Market Abuse Regulation* or any directly applicable EU regulation made under the *Market Abuse Regulation*, the *FCA* may suspend trading in a financial instrument under section 122I of the Act;~~

...

- (6) where the *FCA* considers it necessary for the purposes set out in section 122G of the Act the *FCA* may, by notice in writing, require an issuer or emission allowance market participant to publish specified information or a specified statement as set out under section 122G of the Act; and

- (7) where the *FCA* considers it necessary for the purposes set out in section 122H of the Act the *FCA* may, by notice in writing, require a person to publish corrective information or a corrective statement as set out under section 122H of the Act.

7.3 *FCA's* statements of policy

- 7.3.1 The *FCA's* statement of policy in relation to the imposition of financial penalties is set out in *DEPP* 6.2 (Deciding whether to take action), ~~*DEPP* 6.3 (Penalties for market abuse)~~ and *DEPP* 6.4 (Financial penalty or public censure). The *FCA's* statement of policy on the amount of a financial penalty is set out in *DEPP* 6.5 to *DEPP* 6.5D. The *FCA's* statement of policy in relation to financial penalties for late submission of reports is set out in *DEPP* 6.6. The *FCA's* statement of policy in relation to the imposition of suspensions ~~or~~, restrictions, conditions, limitations or disciplinary prohibitions is set out in *DEPP* 6A (The power to impose a suspension, ~~or~~ restriction, condition, ~~or~~ limitation or disciplinary prohibition). The *FCA's* statement of policy on the variation of an SMF manager's approval on its own initiative is set out in *DEPP* 8.

...

...

8.6 Exercising the power under section 55Q to vary or cancel a firm's Part 4A permission or to impose requirements on a firm in support of an overseas regulator: the FCA's policy

...

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

...

10 Injunctions

...

10.2.2 The broad test the *FCA* will apply when it decides whether to seek an *injunction* is whether the application would be the most effective way to deal with the *FCA's* concerns. In deciding whether an application for an *injunction* is appropriate in a given case, the *FCA* will consider all relevant circumstances and may take into account a wide range of factors. The following list of factors is not exhaustive; not all the factors will be relevant in a particular case and there may be other factors that are relevant.

...

- (3) Whether the conduct in question has stopped or is likely to stop and whether steps have been taken or will be taken by the *person* concerned to ensure that the interests of *consumers* are adequately protected. For example, an application for an *injunction* may be appropriate where the *FCA* has grounds for believing that a contravention of a relevant requirement, ~~market abuse or both~~ may continue or be repeated. It is likely to have grounds to believe this where, for example, the *Takeover Panel* has requested that a person stop a particular course of conduct and that *person* has not done so.
- (4) Whether there are steps a *person* could take to remedy a contravention of a relevant requirement ~~or market abuse~~. The steps the *FCA* may require a *person* to take will vary according to the circumstances but may include the withdrawal of a misleading *financial promotion* or publishing a correction, writing to clients or investors to notify them of *FCA* action, providing financial redress and repatriating funds from an overseas jurisdiction. An application by the *FCA* to the court under section 380(2) ~~or 381(2)~~ for an order requiring a *person* to take such steps may not be appropriate if, for

example, that *person* has already taken or proposes to take appropriate remedial steps at his own initiative or under a ruling imposed by another regulatory authority (such as the *Takeover Panel* or a *recognised investment exchange*). If another authority has identified the relevant steps and the person concerned has failed to take them, the *FCA* will take this into account and (subject to all other relevant factors and circumstances) may consider it is appropriate to apply for an injunction. In those cases the *FCA* may consult with the relevant regulatory authority before applying for an *injunction*.

- (5) Whether there is a danger of assets being dissipated. The main purpose of an application under section 380(3), ~~sections 381(3) and (4)~~ or pursuant to the court's inherent jurisdiction, is likely to be to safeguard funds containing *client* assets (e.g. client accounts) and/or funds and other assets from which restitution may be made. The *FCA* may seek an *injunction* to secure assets while a suspected contravention is being investigated or where it has information suggesting that a contravention is about to take place.

...

- (11) In any case where the *FCA* is of the opinion that any potential exercise of its powers under section ~~381~~ 380 in relation to *market abuse* may affect the timetable or the outcome of a *takeover bid*, the *FCA* will consult the *Takeover Panel* before taking any steps to exercise these powers and will give due weight to its views.

10.3 Asset-freezing injunctions

- 10.3.1 Where the *FCA* applies to the court under section 380(3) ~~or sections 381(3) and (4) of the Act~~, the *FCA* may ask the court to exercise its inherent jurisdiction to make orders on an interim basis, restraining a *person* from disposing of, or otherwise dealing with, assets. To succeed in an application for such interim relief, the *FCA* will have to show a good arguable case for the granting of the *injunction*. The *FCA* will not have to show that a contravention has already occurred or may have already occurred.

...

10.4 Other relevant powers

- 10.4.1 The *FCA* has a range of powers it can use to take remedial, protective and disciplinary action against a *person* who has contravened a relevant requirement or engaged in *market abuse*, as well as its powers to seek *injunctions* under sections 380 ~~and 381~~ of the *Act* and under the courts' inherent jurisdiction. Where appropriate, the *FCA* may exercise these other powers before, at the same time as, or after it applies for an *injunction* against a *person*.

...

- 10.4.4 In certain cases, conduct that may be the subject of an *injunction* application will

also be an offence which the *FCA* has power to prosecute under the *Act*. In those cases, the *FCA* will consider whether it is appropriate to prosecute the offence in question, as well as applying for an injunctions under section 380, ~~section 381, or both.~~

- 10.4.5 Where the *FCA* exercises its powers under section 380, ~~section 381~~ and/or invokes the court's inherent jurisdiction to obtain an order restraining the disposal of assets, it may also apply to the court for a restitution order for the distribution of those assets.

...

11 Restitution and redress

11.1 Restitution orders under sections 382, ~~383~~ and 384 of the Act: the FCA's general approach

...

- 11.1.3 The *FCA* has power to apply to the court for a restitution order under section 382 of the *Act* ~~and (in the case of market abuse) under section 383 of the Act~~. It also has an administrative power to require restitution under section 384 of the *Act*. When deciding whether to exercise these powers, the *FCA* will consider whether this would be the best use of the *FCA*'s limited resources taking into account, for example, the likely amount of any recovery and the costs of achieving and distributing any sums. It will also consider, before exercising its powers: other ways that *persons* might obtain redress, and whether it would be more efficient or cost-effective for them to use these means instead; and any proposals by the *person* concerned to offer redress to any *consumers* or other *persons* who have suffered loss, and the adequacy of those proposals. The *FCA* expects, therefore, to exercise its formal restitution powers on rare occasions only.

...

11.2 Criteria for determining whether to exercise powers to obtain restitution

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

...

- (6) Is redress available through another regulator?

The *FCA* will consider the availability of redress through another regulatory authority. Where another regulatory authority, such as ~~the~~ the Takeover Panel, is in a position to require appropriate redress, the *FCA* will not generally exercise its own powers to do so. If the *FCA* does consider that action is appropriate and the matters in question have happened in the context of a *takeover bid*, the *FCA* will only take action during the bid in the circumstances set out in *DEPP* 6.2.256G if the *person* concerned has

responsibilities under the *Takeover Code*. If another *regulatory body* has required redress and a *person* has not met that requirement, the *FCA* will take this into account and (subject to all other relevant factors and circumstances) may consider it appropriate to take action to ensure that such redress is provided.

...

(11) Other factors which may be relevant

The *FCA* will consider the context of the conduct in question. In any case where the *FCA* believes that the exercise of its powers under section ~~383~~ 382 or 384 of the *Act* in relation to market abuse may affect the timetable or outcome of a *takeover bid*, it will consult the *Takeover Panel* before taking any steps to exercise such powers, and will give due weight to its views.

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

11.3 The FCA's choice of powers

...

11.3.2 However, there may be circumstances in which the *FCA* will choose to use the powers under section 382 ~~or section 383~~ of the *Act* to apply to the court for an order for restitution against a *firm*. Those circumstances may include, for example, where:

...

11.5 Other relevant powers

11.5.1 The *FCA* may apply to the court for an *injunction* if it appears that a *person*, whether *authorised* or not, is reasonably likely to breach a relevant requirement^{10B}

^{10B} Under section 380(6)(a) and (7)(a), a 'relevant requirement' in relation to an application by the appropriate regulator means a requirement: which is imposed by or under the *Act* or by a qualifying EU provision specified, or of a description specified, for the purpose of section 380(6) by the Treasury by order; or which is imposed by or under any other *Act* and whose contravention constitutes an offence mentioned in section 402(1) of the *Act*; or which is imposed by the AIFMD UK regulation. The definition of "appropriate regulator" is set out in section 380(8) to (12) of the *Act*.

^{10C} Under section 204A(2), a 'relevant requirement' in relation to an application by the appropriate regulator means a requirement: which is imposed by or under the *Act* or by a qualifying EU provision specified, or of a

of the Act or any directly applicable Community regulation or decision under MiFID or the UCITS Directive or the auction regulation, ~~or engage in market abuse~~. It can also apply for an *injunction* if a *person* has breached one of those requirements ~~or has engaged in market abuse~~ and is likely to continue doing so.

- 11.5.2 The *FCA* may consider taking action for a financial penalty or *public censure*, as well as seeking restitution, if a *person* has breached a relevant requirement,^{10C} of the Act or any directly applicable Community regulation or decision under MiFID or the UCITS Directive or the auction regulation, ~~or has engaged in, or required or encouraged others to engage in, market abuse~~.

...

12 Prosecution of Criminal Offences

...

12.3 Criminal prosecutions in cases of market abuse

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

...

Appendix 3 APPENDIX TO THE GUIDELINES ON INVESTIGATION OF CASES OF INTEREST OR CONCERN TO THE FINANCIAL CONDUCT AUTHORITY AND OTHER PROSECUTING AND INVESTIGATING AGENCIES

3.1 The FCA

...

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

...

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

...

description specified, for the purpose of section 204A(2) by the Treasury by order or which is imposed by the AIFMD UK regulation. The definition of “appropriate regulator” is set out in section 204A(3) of the Act.

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

...

- impose civil penalties ~~in cases of market abuse~~ under s.123 of the 2000 Act;
- temporarily prohibit on an individual from exercising management functions in *MiFID investment firms* or from dealing in financial instruments on their own account, under s.123A(2) of the 2000 Act;
- permanently prohibit an individual from exercising management functions in *MiFID investment firms* under s.123A(3) of the 2000 Act;
- suspend the permission of an *authorised person* or impose limitations or other restrictions in relation to the carrying on of a *regulated activity* by an *authorised person* under s.123B of the 2000 Act;

...

- apply to Court for *injunctions* (or interdicts) and other orders against persons contravening relevant requirements (under s.380 of the 2000 Act) ~~or engaging in *market abuse* (under s.381 of the 2000 Act);~~

...

- apply to the court under ss.382 ~~and 383~~ of the 2000 Act for restitution orders against persons contravening relevant requirements ~~or persons engaged in *market abuse*;~~
- require restitution under s.384 of the 2000 Act of profits which have accrued to authorised persons contravening relevant requirements ~~or persons engaged in *market abuse*~~, or of losses which have been suffered by others as a result of those *breaches*;

...

Financial Conduct Authority



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