

INDIVIDUAL ACCOUNTABILITY (ENFORCEMENT) INSTRUMENT 2015

Powers exercised

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

Commencement

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

Amendments to the Handbook

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

Amendments to the material outside the Handbook

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

Notes

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

Citation

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

By order of the Board
3 December 2015

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

In this Annex, underlining indicates new text.

Amend the following definition as shown.

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

Annex B

Amendments to the Decision Procedure and Penalties manual (DEPP)

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

1.1 Application and Purpose

Application

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

...

(3) ... ;

(4) the *FCA*'s policy regarding the variation of an *SMF manager*'s approval on the *FCA*'s initiative under section 63ZB of the *Act* (see *DEPP* 8).

Purpose

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

...

1.2 Introduction to statutory notices

...

- 1.2.4A G Section 395 of the *Act* also requires the *FCA* to publish a statement of its procedure for decisions which ~~gives~~ give rise to an obligation for the *PRA* to include a statement under section 387(1A) in a *warning notice* or a statement under section 388(1A) in a *decision notice* as follows:

(1) Section 387(1A) provides that where the *FCA* proposes to refuse consent for the purposes of section 55F, 55I or 59 of the *Act*, or to give conditional consent as mentioned in section 55F(5), ~~or 55I(8) or 61(2D)~~, the *warning notice* given by the *PRA* must (a) state that fact, and (b) give the reasons for the *FCA*'s proposal.

(2) Section 388(1A) provides that where the *FCA* has decided to refuse consent for the purposes of section 55F, 55I or 59 of the *Act*, or to

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

...

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

...

2 Statutory notices and the allocation of decision making

...

2.5 Provision for certain categories of decision

...

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

...

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

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

...

...

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

...

Decisions relating to applications for *PRA* authorisation or approval

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

...

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

...

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

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

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

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

...

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

...

Section of the Act	Description	Handbook reference	Decision maker
...			
62(2)	when the <i>FCA</i> is proposing to refuse an application for approval of a <i>person</i> performing a <i>controlled function</i> <u>or to grant the application subject to conditions or for a limited period (or both)</u>	SUP 40 <u>SUP 10A</u> and <u>SUP 10C</u>	<i>Executive procedures</i>
62(3)	when the <i>FCA</i> is deciding to refuse an application for approval of a <i>person</i> performing a <i>controlled function</i> <u>or to grant the application subject to conditions or for a limited period (or both)</u>	SUP 40 <u>SUP 10A</u> and <u>SUP 10C</u>	<i>RDC or executive procedures</i> See <i>DEPP 2.5.5G</i>
...			

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

2 Annex Supervisory notices
2G

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

...

6 Penalties

...

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

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

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

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

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

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

...

(d) ... ;

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

...

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

...

6.5B.2 G ...

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

...

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

...

(iv) ... ;

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

...

6.6 Financial penalties for late and incomplete submission of reports

...

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

...

6.7 Discount for early settlement

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

...

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

- 6.7.6 G The *settlement discount scheme* which applies to the amount of a financial penalty, described in *DEPP 6.7.2G* to *DEPP 6.7.5G*, also applies to the length of the period of a suspension, ~~or restriction or condition~~, having regard to the *FCA's* statement of policy as set out in *DEPP 6A.3*. The settlement discount scheme does not apply to the length of the period for which approvals under section 59 of the Act have effect as a result of a limitation, as different considerations apply to determining the appropriate length of this period: see DEPP 6A.1.5G and DEPP 6A.3AG. However, the FCA will take into account that the approved person is willing to enter into a settlement agreement when determining the appropriate period.

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

6A.1 Introduction

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

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

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

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

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

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

6A.2 Deciding whether to take action

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

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

...

(6) ... ;

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

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

...

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

- 6A.3.1 G The *FCA* will consider all the relevant circumstances of a case when it determines the length of the period of suspension, ~~or~~ restriction or condition (if any) that is appropriate for the *breach* concerned, and is also a sufficient deterrent. Set out below is a list of factors that may be relevant for this purpose. The list is not exhaustive: not all of these factors may be applicable in a particular case, and there may be other factors, not listed, that are relevant.
- 6A.3.2 G The following factors may be relevant to determining the appropriate length of the period of suspension, ~~or~~ restriction or condition to be imposed on a *person* under the *Act*:

(1) Deterrence

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

...

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

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

...

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

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

...

...

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

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

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

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

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

Amend the following as shown.

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

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

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

...

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

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

8.1 Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8.5 Effects of a breach of condition or time limitation

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

Amend the following as shown

Sch 4 Powers Exercised

- Sch 4.1 G

The following powers and related provisions in or under the <i>Act</i> have been exercised by the <i>FCA</i> to make the statements of policy in <i>DEPP</i> :
--

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

Annex C

Amendments to the Enforcement Guide

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

1 Introduction

...

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

(1) ...

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

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

2 The *FCA*'s approach to enforcement

...

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

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

...

...

Senior management responsibility

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

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

...

4 Conduct of investigations

...

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

Scoping discussions

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

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

...

5 Settlement

...

The settlement discount scheme

5.14 The *settlement discount scheme* allows a reduction in a financial penalty; or period of suspension, ~~or period of restriction~~ or condition that would otherwise be imposed on a *person* according to the stage at which the agreement is reached. Full details of the scheme are set out in *DEPP* 6.7.

...

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

...

5.19A The procedure for the *settlement discount scheme* where the outcome is potentially a financial penalty, described in paragraphs 5.14 to 5.19, will also apply where the outcome is potentially a suspension, ~~or restriction~~ or condition.

...

6 Publicity

...

Warning notice statements

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

individual or cancel the permission of a *firm*.

...

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

...

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

...

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

...

6.12 ~~Publishing~~ It is important that the *FCA* maintains an accurate public record. One of the ways the *FCA* does this is by publishing the reasons for variations of *Part 4A permission*, the imposition of requirements, and variations of the approval of *SMF managers*. ~~and maintaining an accurate public record, are important elements of the *FCA*'s approach to its statutory objectives.~~ The *FCA* will always aim to balance both the interests of *consumers* and the possibility of unfairness to the *person* subject to the *FCA*'s action. The *FCA* will publish relevant details of both fundamental and non-fundamental variations of *Part 4A permission* and requirements which it imposes on *firms*, and variations of approval of *SMF managers*. But it will use its discretion not to do so if it considers this to be unfair to the *person* on whom the variation is imposed, prejudicial to the interests of *consumers*, or detrimental to the stability of the *UK financial system*. Publication will generally include placing the notice on the *FCA* website and this may be accompanied by a press release. As with warning notice statements, *decision notices* and *final notices*, *supervisory notices* and related press releases that are published on the *FCA*'s website will be reviewed upon request. The *FCA* will determine at that time whether continued publication is appropriate, or whether notices and related press releases should be removed or amended. The *FCA* expects usually to conclude that *supervisory notices* and related press releases that have been published for less than six years should not be removed from the website.

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

...

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

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

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

(1) It may publish a statement:

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

...

(2) It may impose a financial penalty:

...

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

...

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

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

...

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

...

Alternatives to financial penalties and public censures

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

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

...

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

...

***FCA's* statements of policy**

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

...

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

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

...

9 Prohibition Orders and withdrawal of approval

...

Prohibition orders and withdrawal of approval – approved persons

...

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

...

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

...

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

...

Applications for variation or revocation of prohibition orders

...

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

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

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

...

12 Prosecution of Criminal Offences

...

FCA cautions

...

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

...

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

...

Indicators for deciding which agency should take action

- 9 The following are indicators of whether action by the *FCA* or one of the other agencies is more appropriate. They are not listed in any particular order or ranked according to priority. No single feature of the case should be considered in isolation, but rather the whole case should be considered in the round.
- (a) Tending towards action by the *FCA*
- ...
- Where the likely defendants are *authorised persons*, ~~or approved persons~~ or conduct rules staff.

...

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

...

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

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

...