

10/23**

Financial Services Authority

Decision Procedure
and Penalties manual
and Enforcement
Guide review 2010

October 2010

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The Financial Services Authority invites comments on this Consultation Paper. Comments should reach us by 14 December 2010. Comments may be sent by electronic submission using the form on the FSA's website at (www.fsa.gov.uk/Pages/Library/Policy/CP/2010/cp10_23_response.shtml). Alternatively, please send comments in writing to:

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It is the FSA's policy to make all responses to formal consultation available for public inspection unless the respondent requests otherwise. A standard confidentiality statement in an email message will not be regarded as a request for non-disclosure.

A confidential response maybe requested from us 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 Tribunal.

Copies of this Consultation Paper are available to download from our website – www.fsa.gov.uk. Alternatively, paper copies can be obtained by calling the FSA order line: 0845 608 2372.

List of acronyms used in this Consultation Paper

Cost benefit analysis	(CBA)
Consultation Paper	(CP)
Counter Terrorism Act 2008	(CTA)
Decision Procedure and Penalties manual	(DEPP)
Enforcement Guide	(EG)
Financial Services Act 2010	(the Act)
Financial Services and Markets Act 2000	(FSMA)
General Provisions module	(GEN)
Money Laundering Regulations 2007	(MLRs)
Payment Services Regulations 2009	(PSRs)
Regulatory Decisions Committee	(RDC)

1 Overview

Purpose

- 1.1 The aim of this Consultation Paper (CP) is to seek views on the amendments we are proposing to make to ensure that the Decision Procedure and Penalties manual (DEPP) and the Enforcement Guide (EG) continue to contain accurate and up-to-date statements of our approach to enforcement. In addition, the CP meets the public commitment we made in July 2007, when we first published DEPP and EG, to review those materials at least annually and to consult on all changes to EG even though, unlike DEPP, it does not form part of our Handbook and is not therefore subject to Handbook consultation requirements.¹
- 1.2 This CP also seeks views on our proposed imposition of a new rule in the General Provisions module (GEN) relating to the payment of financial penalties.

Key changes

- 1.3 We are proposing to impose a new rule in GEN that an authorised firm must not pay a financial penalty imposed on a present or former employee, director or partner of the firm or an affiliated company. This rule will not apply to sole traders.
- 1.4 We also propose to make the following changes to DEPP and EG:
 - Include in EG our policy for publishing decision notices.
 - Amend our policy for reviewing published notices and press releases.
 - Apply the settlement discount scheme to the length of periods of suspension.
 - Adopt a penalties policy and decision maker for using our enforcement powers under the Cross-Border Payments in Euro Regulations 2010 (the ‘Cross-Border Regulations’).

¹ Please note that our commitment to reviewing DEPP and EG at least once a year does not necessarily mean we will have an annual, dedicated DEPP and EG consultation. We explained this in paragraph 1.5 of the Decision Procedure and Penalties manual and Enforcement Guide Review 2008 CP. (CP08/10: www.fsa.gov.uk/pages/Library/Policy/CP/2008/08_10.shtml).

- Adopt a decision maker in relation to giving statutory notices under various parts of the Financial Services and Markets Act 2000 (FSMA).
- Describe the new enforcement powers we have been given under legislation other than FSMA.
- Update our existing policies to ensure they are consistent with recent amendments to FSMA or other legal developments.
- Make minor clarifications to ensure EG and DEPP give a clear statement of our enforcement policy.

Structure of this CP

1.5 The remainder of this CP is set out as follows:

- Chapter 2 sets out our main proposals.
- Chapter 3 sets out our other proposed amendments to DEPP and EG.
- Annex 1 contains a section on cost benefit analysis and the compatibility statement in relation to the proposed changes.
- Annex 2 lists the questions in this CP.
- Appendix 1 sets out our proposed amendments to the Glossary, GEN, DEPP and EG.

Equality and diversity

1.6 We have assessed the equality issues that arise in our proposals. We believe that our proposals do not give rise to discrimination and are of low relevance to the equality agenda. We would nevertheless welcome any comments respondents may have on any equality issues they believe arise.

Next steps

1.7 The consultation on this CP will close on 14 December 2010. We consider this two-month consultation period to be an appropriate amount of time, taking into account:

- the desirability of a sufficiently long consultation period; and
- the nature of the changes we are proposing, which should not materially affect the behaviour required of firms.

1.8 We plan to publish feedback on responses to this CP, along with the final amended text of the Glossary, GEN, DEPP and EG, in a Policy Statement in January 2011.

Who should read this CP?

- 1.9 This CP will be of general interest as it builds on our existing statements about our use of enforcement as a regulatory tool. It will be particularly relevant to both the regulated community and unregulated persons against whom we may use our enforcement powers.

CONSUMERS

This CP will not directly affect consumers, although its contents may be of interest to consumers and consumer groups to the extent that they benefit from, and so may wish to know about, our approach to enforcement.

2 Our main proposals

2.1 In this chapter we outline our main proposals for amending GEN, DEPP and EG. These are:

- Impose a new rule in GEN that an authorised firm, except a sole trader, must not pay a financial penalty imposed on a present or former employee, director or partner of the firm or an affiliated company.
- Include in EG our policy for publishing decision notices.
- Amend our policy for reviewing published notices and press releases.
- Apply the settlement discount scheme to suspension periods.
- Adopt a penalties policy and decision maker for using our enforcement powers under the Cross-Border Payments in Euro Regulations 2010 (the ‘Cross-Border Regulations’).

New rule preventing firms from paying employees’ fines

- 2.2 We propose to introduce a rule that an authorised firm, except a sole trader, must not pay a financial penalty imposed on a present or former employee, partner or director of the firm or an affiliated company. We do not know how frequently firms may have paid financial penalties imposed on their employees in the past, but concerns have been expressed to us about this practice. Such action could arguably be a breach of Principles 1 or 11 of our Principles for Businesses, but we consider that the introduction of such a rule would address a potential regulatory failure. The rule is also consistent with our policy of credible deterrence, as individuals would be less likely to be put off from breaching our rules if they expected their employer to pay any financial penalty imposed on them.
- 2.3 As this is a rule, it will not be introduced in DEPP or EG. Instead, we are intending to include it in Chapter 6 of GEN as a new GEN 6.1.8 R. There should be no costs

associated with this rule, other than the cost to individuals of having to pay a financial penalty imposed on them, which in a small number of cases may otherwise have been paid by the firm instead.²

Q1: Do you have any comments on our proposed new rule preventing firms (except sole traders) from paying financial penalties imposed on a present or former employee, partner or director of the firm or an affiliated company?

Publishing decision notices

- 2.4 Under FSMA, the usual procedure for taking action against a person in an enforcement case must culminate with us giving the person three notices: firstly, a warning notice; secondly, a decision notice; and thirdly, a final notice.
- 2.5 A warning notice must be given to a person if, following an investigation, we believe that enforcement action against the person is justified. The warning notice informs the person of the action we intend to take and the reasons for the proposed action, and it must specify a reasonable period within which the person to whom it is given may make representations to the FSA. A decision notice must be given if, following the person's representations, we decide to take action. The decision notice must give our reasons for the decision to take action, and inform the person that they have 28 days to make a referral to the Upper Tribunal (Tax and Chancery Chamber) (the 'Tribunal'). A final notice must be given if the person decides not to refer the matter to the Tribunal, or if the person refers the matter to the Tribunal and the Tribunal decides that we should take action against the person.
- 2.6 The Financial Services Act 2010 (the Act) amended section 391 of FSMA to provide that the FSA 'must publish such information about the matter to which a *decision notice* or final notice relates as it considers appropriate' (section 391(4)). The amendments made by the Act also prevent a recipient of a decision notice from publishing the notice or any details concerning it unless we have published the notice or those details (section 391(1A)). These amendments were commenced by Treasury Order on 11 October 2010 and apply from 12 October 2010 (except in cases where we had given the person a warning notice before 12 October 2010). Before these amendments, we were prohibited from publishing details of a decision notice and were only able to publish details of a final notice. This had the drawback that, if a person decided to refer a matter to the Tribunal, there was sometimes a long delay before consumers and the industry became aware of our reasons for taking action.
- 2.7 We propose to make a number of changes to EG as a result of the amendments to section 391. These are all consequential changes, except the proposed change to EG 6.8, which will explain our approach to publishing decision notices. We considered two alternative approaches.

2 This is not a cost of the policy because – in the small number of potential cases – the proposal would in effect be a cost transfer from firms to individuals.

- 2.8 First, we considered a policy of generally publishing a decision notice as soon as practicable after giving it to a person. In cases where the person does not refer the matter to the Tribunal, this would mean the final notice would be published about 28 days later. This approach would be consistent with our statutory objective of consumer protection, as it would mean consumers would be aware as early as possible of the action we have taken. However, this approach has drawbacks. It would mean publishing the decision notice and press release without knowing at that time whether or not the matter had been completely concluded, which could lessen the impact of the message we wish to send to markets and consumers. In addition, publishing two notices so close together may not be the best use of our resources.
- 2.9 The approach we therefore propose is that we will only publish a decision notice if a person decides to refer the matter to the Tribunal, unless we consider there is a compelling reason to publish before the person has decided whether to refer. For example, we may consider that early publication of the detail of our reasons for taking action would allow consumers to avoid any potential harm arising from a firm's actions. If a person decides not to refer, we will generally only publish a final notice. We consider that this approach addresses the drawbacks of the first option, while remaining consistent with our consumer protection objective, as the maximum delay in publication compared to the first option is less than a month and we could still publish at an earlier stage if there was an urgent reason for doing so. This approach is also consistent with the main benefit of the changes to section 391, which is that the action we have taken can become public knowledge in cases where the subject of the enforcement action refers the matter to the Tribunal. This approach will also impose no costs on firms.

Transitional matters

- 2.10 The amendments to section 391 allow us to publish decision notices from 12 October 2010 (except in cases where we had given the person a warning notice before 12 October 2010). We may therefore publish a decision notice before the changes to EG regarding our approach to publishing decision notices come into force.

Q2: Do you have any comments on our proposed approach to publishing decision notices?

Review of published notices

- 2.11 Our current policy for reviewing whether final notices and related press releases should remain published on our website is set out in EG 6.10, which states: 'The FSA will review final notices and related press releases that are published on the FSA's web site after a period of six years. The FSA will determine at that time whether continued publication is appropriate, or whether notices and publicity should be removed or amended.' EG 6.12 contains similar wording for reviewing supervisory notices and related press releases.
- 2.12 We are proposing to amend this policy so that we are no longer committed to automatically carrying out these reviews after six years. We are concerned that the

statement in EG 6.10 may give the misleading impression that a notice is likely to be removed after six years. When carrying out a review it is usually the case that, unless there is a good reason for removal, the reasons for continued publication (deterrence, precedent/educational value, maintaining market confidence in our ability to take effective action, as a matter of record) will normally outweigh any unfairness to the individual of continued publication. We therefore expect usually to conclude that a notice should remain published.

- 2.13 Our proposed new approach is to only carry out a review on request, with the expectation that we will usually conclude that notices and related press releases that have been published for less than six years should not be removed from our website. On review, we could decide to retain, remove or amend the notice. (If we remove a notice from our website, we would still take into account the action we have taken in future matters relating to the person – for example, in relation to an application for approval.)
- 2.14 This new approach should mean we will conduct far fewer reviews, which will save resources. There should be no cost to individuals as, if an individual wants us to review the continued publication of their notice, they will be able to ask us to do so.
- 2.15 We propose that this approach applies to all notices, including decision notices. We also propose to include a new EG 6.10A, which will explain that in cases where we publish a decision notice relating to a person, but the person successfully refers the matter to the Tribunal, we will make it clear on our website that the decision notice no longer applies. We will normally do this by publishing a notice of discontinuance.

Q3: Do you have any comments on our proposed amendments to our approach to reviewing published notices and related press releases?

Suspensions and the settlement discount scheme

- 2.16 We operate a settlement discount scheme in cases involving financial penalties. This scheme aims to encourage and reward early settlement, as the early resolution of an enforcement case through settlement has many advantages, including: the saving of FSA and industry resources, getting messages out to the market sooner, a public perception of timely and effective action and, in appropriate cases, consumers obtaining compensation earlier than would otherwise be the case.
- 2.17 The settlement discount scheme for financial penalties is set out in DEPP 6.7. A person will receive a discount of up to 30% for settling, with the applicable percentage discount dependant on the stage at which they settle.
- 2.18 The Act gave us a new power to impose suspensions or restrictions on authorised persons, under section 206A of FSMA, and on approved persons, under section 66 of FSMA (the ‘suspension power’). We can impose a suspension³ on an authorised person for a period not exceeding 12 months and on an approved person for a period not exceeding two years.

3 For the purposes of this CP, unless otherwise stated we will use the terms ‘suspension/suspend’ to cover both the power to suspend and the power to impose limitations or restrictions.

- 2.19 The suspension power is a punitive power: we can use it to stop firms or individuals from engaging in certain activity as a disciplinary sanction. We recently published⁴ our new policy for using the suspension power (set out in DEPP 6A) and can use the suspension power for misconduct that took place on or after 6 August 2010.
- 2.20 We consider that the reasons for providing a discount for early settlement of cases involving financial penalty also apply to the early settlement of cases involving a suspension. We therefore propose to apply the settlement discount scheme to the length of suspension periods. For example, if we consider it appropriate to suspend a firm for ten months, and the firm agrees to our proposed action at the earliest possible stage for settlement (Stage 1), the firm would receive a 30% discount for early settlement and we would reduce the suspension period to seven months.
- 2.21 We consider that this proposal should not result in higher direct costs for firms or individuals involved in the enforcement process, nor a reduction in the degree of deterrence.

Transitional matters

- 2.22 As mentioned above, we can use the suspension power for misconduct that took place on or after 6 August 2010. If we proceed with these proposals, the settlement discount scheme will apply whenever we use the suspension power, including where the misconduct took place before the changes to DEPP to apply the settlement discount scheme to the length of suspension periods come into force.

Q4: Do you have any comments on our proposal to apply the settlement discount scheme to the period of suspension?

Cross-Border Payments in Euro Regulations 2010

- 2.23 The Cross-Border Regulations implement, in part, Regulation (EC) No. 924/2009 of the European Parliament and of the Council on cross-border payments in the European Community (the 'Community Regulation'). The main aim of the Community Regulation is to ensure that the charges for cross-border payments in euro are the same as the charges for identical national payments in euro within a member state. The Cross-Border Regulations lay down rules on cross-border payments in euro to ensure that compliance with the Community Regulation is guaranteed by effective, proportionate and deterrent sanctions. Under the Cross-Border Regulations we have investigation and sanctioning powers in relation to breaches of the Community Regulation, including powers to require information, impose a public censure and impose a financial penalty.
- 2.24 Paragraphs 1 and 3 of the Schedule to the Cross-Border Regulations apply sections 69(1) and 210(1) of FSMA, and so require us to prepare and issue a statement of policy regarding the imposition and amount of penalties under the Cross-Border Regulations. Paragraph 5 of the Schedule to the Cross-Border Regulations applies

⁴ See CP10/18: Implementing aspects of the Financial Services Act 2010: www.fsa.gov.uk/pages/Library/Policy/CP/2010/10_18.shtml

section 395(5) of FSMA, and so requires us to issue a statement of our policy for the procedure for giving warning notices and decision notices under the Cross-Border Regulations. Paragraphs 1, 3 and 5 of the Schedule also provide that, until we issue these required statements of policy, the equivalent statement of policy issued in respect of the Payment Services Regulations 2009 (PSRs) automatically applies. Therefore, in effect, we already have a policy in place for the Cross-Border Regulations. However, we are consulting now as we think it is appropriate to set out clearly in DEPP and EG what our policy is for our powers under the Cross-Border Regulations.

- 2.25 The penalty powers given to us by the Cross-Border Regulations replicate those given to us by the PSRs. We therefore propose to adopt the same decision maker (which will be the Regulatory Decisions Committee (RDC)) and penalties policy for the Cross-Border Regulations as we have adopted for the PSRs. As our penalties policy for the PSRs is the same as our penalties policy for breaches of FSMA, we will apply our penalties policy set out in DEPP Chapter 6 when imposing a penalty under the Cross-Border Regulations.
- 2.26 These proposals will ensure we have a single, consistent approach to penalties, and so will extend the benefits of clarity, transparency and deterrence associated with our existing penalties regime. As the policies we have adopted for the PSRs currently apply to the Cross-Border Regulations, and as our proposed policies for the Cross-Border Regulations are consistent with these policies, our proposals will impose no additional costs.
- 2.27 These proposals require no changes to DEPP. However, we propose to amend DEPP 2 Annex 1 to set out who the decision maker is for sanctions imposed under the Cross-Border Regulations. We also propose to include new paragraphs in EG chapter 19 to explain the powers we have under the Cross-Border Regulations and our approach to using them, which we propose should mirror our approach to using our enforcement powers given to us by FSMA.

Q5: Do you have any comments on our proposed approach for our powers under the Cross-Border Regulations?

3 Other proposed amendments to DEPP and EG

3.1 In this chapter we outline our other proposals for amending DEPP, EG and the Glossary. These fall into the following categories:

- The adoption of a decision maker in relation to the giving of statutory notices under various parts of FSMA.
- The description of the new enforcement powers we have been given under legislation other than FSMA.
- Other proposed amendments to DEPP, EG and the Glossary.

Decision maker for giving statutory notices

3.2 We propose to amend DEPP 2 Annex 1 to set out who will make the decisions to issue warning notices and decision notices under parts of FSMA that have recently been amended or that were previously mistakenly omitted from the Annex. The decision makers we propose are as follows:

- The RDC will make decisions for giving a warning notice and a decision notice under section 89K(2)/(3) of FSMA. This relates to the public censure of an issuer of securities admitted to trading on a regulated market who fails to comply with an applicable transparency obligation. This was previously mistakenly omitted. This is consistent with the fact that decisions to issue other public censures are usually made by the RDC.
- The RDC will make decisions for giving a warning notice and a decision notice under section 256(4)/(5) of FSMA. This relates to our refusal of a request for the revocation of the authorisation order of an authorised unit trust scheme. This was previously mistakenly omitted. We propose these decisions should be made by the RDC, as this is consistent with giving warning notices and decisions notices under section 255(1)/(2), relating to our making an order revoking the authorisation order of an authorised unit trust scheme.
- FSA staff under executive procedures will make decisions for the giving of warning notices and decision notices under Part 18A of FSMA

(sections 313A – 313D of FSMA). This relates to the suspension and removal of financial instruments from trading. The amendments to DEPP 2 Annex 1 are needed following amendments to Part 18A by the Financial Services and Markets Act 2000 (amendments to Part 18A etc) Regulations 2010/1193. We propose that these decisions should be made by executive procedures as this was the case under the repealed sections of Part 18A.

- 3.3 We are also proposing to make amendments to clarify the table of decision makers in respect of the Payment Services Regulations 2009, also set out in DEPP 2 Annex 1.
- 3.4 We also propose to amend DEPP 2 Annex 2 to set out who will make the decisions to give supervisory notices under parts of FSMA that have recently been amended. The decision makers we propose are as follows:
- FSA staff under executive procedures will make decisions for the giving of supervisory notices under section 78A(2)/(8)(b) of FSMA. This relates to the discontinuance or suspension of the listing of securities at the request of the issuer. This change is needed following the addition of this section by the Regulatory Reform (Financial Services and Markets Act 2000) Order 2007/1973. We propose these decisions should be made by executive procedures as this is consistent with the giving of supervisory notices under section 78(2)/(5) of FSMA, relating to the discontinuance or suspension of the listing of securities on our own initiative.
 - FSA staff under executive procedures will make decisions for the giving of supervisory notices under sections 191B(1) and 301J(1) of FSMA. These relate to control over authorised persons and over recognised investment exchanges respectively. These changes are needed following amendments to these sections by the Financial Services and Markets Act 2000 (Controllers) Regulations 2009/534. We propose these decisions should be made by executive procedures as this is consistent with the giving of other supervisory notices relating to these Parts of FSMA.
- 3.5 We also propose to include a new paragraph in DEPP, DEPP 2.5.7A G, to explain that FSA staff under executive procedures, rather than the RDC, will take decisions to give a supervisory notice for a firm that agrees not to contest our exercise of our own initiative power. We are proposing this change because we believe that, as the firm would not be contesting our proposed action, requiring the decision to be made by FSA staff under executive procedures would save time and cost.

Q6: Do you have any comments on the decision makers we are proposing for the giving of these statutory notices?

Our enforcement powers under legislation other than FSMA

- 3.6 Chapter 19 of EG describes many of the powers we have to enforce requirements imposed under legislation other than FSMA. As well as the amendments we propose to make to EG 19 to describe our approach to enforcing the Cross-Border

Regulations, outlined in Chapter 2 above, we propose to include in EG 19 a description of our powers, and our approach to using those powers, under the following legislation:

- The Counter Terrorism Act 2008 (CTA). We have investigation and sanctioning powers in relation to both civil and criminal breaches of the CTA. These powers are similar to those given to us by the Money Laundering Regulations 2007 (MLRs), and so we propose to use our powers under the CTA in a manner consistent with our approach to using our powers under the MLRs.
- The Insurance Accounts Directive (Lloyd's Syndicate and Aggregate Accounts) Regulations 2008 (the 'Lloyd's Regulations'). The Lloyd's Regulations give us the power to institute criminal proceedings for an offence committed under them. Our policy in relation to the prosecution of criminal offences and the circumstances in which we would expect to commence criminal proceedings is set out in EG chapter 12.

Q7: Do you have any comments on our proposed descriptions of our powers under the CTA and the Lloyd's Regulations?

Other proposed amendments to DEPP, EG and the Glossary

- 3.7 We also propose to make amendments to DEPP, EG and the Glossary, which are intended either to update our existing policies to ensure they are consistent with recent amendments to FSMA or other legal developments, or to clarify our enforcement policy. We will also make minor changes such as correcting typos and updating references. We consider that none of these proposed changes will impose material costs on firms or individuals.

Proposed amendments to DEPP

- 3.8 We propose to make the following additional changes to DEPP:
- We propose to include a new paragraph, DEPP 1.2.6A G, to clarify that statutory notice associated decisions do not include decisions relating to the publication of a statutory notice.
 - We propose to amend DEPP 4.2.1 G and 5.1.1 G(3) to clarify that decisions made by directors can also be made by 'acting directors'. This applies to decisions to give an urgent statutory notice and to give a statutory notice in cases that settle. This also requires an amendment to the definition of 'settlement decision maker' in the Glossary.
 - We propose to include a new paragraph, DEPP 6.5D.4A G, which amends our serious financial hardship policy regarding firms to make it clear that, where we are also withdrawing a firm's authorisation, we will have regard to the effect this will have on the firm's ability to pay the financial penalty. This amendment is pursuant to the deletion of section 206(2) of FSMA by the Financial Services

Act 2010 (the Act), which had provided that we could not both impose a financial penalty on an authorised person and withdraw their authorisation. The proposed amendment is consistent with DEPP 6.5D.3 G, which sets out the approach we will follow when we are both imposing a financial penalty on an individual and either prohibiting them or withdrawing their approval.

Proposed amendments to EG

3.9 We propose to make the following additional changes to EG:

- We propose to amend paragraphs 2.1, 6.20, 7.1, 11.3(10) of EG and paragraph 1.1 of the Appendix to EG to reflect the following amendments to our regulatory objectives: the addition of ‘financial stability’ and the deletion of ‘public awareness’. These changes to our regulatory objectives were made by the Act.
- We propose to amend EG 7.4, which describes our statements of policy in relation to the imposition of financial penalties, to include a reference to our statement of policy in relation to financial penalties for late submission of reports, set out in DEPP 6.6. This reference was previously mistakenly omitted.
- We propose to amend EG 8.1 to state that we can use our powers under section 45 of FSMA to vary or cancel an authorised person’s Part IV permission if it is desirable to do so to meet any of our statutory objectives. This change reflects the amendment to section 45(1)(c) made by the Act.
- We propose to delete the last sentence of EG 8.17, which provides that an example of a situation where we may decide not to cancel a firm’s Part IV permission (which would consequently require us to withdraw their authorisation) is where we propose to impose a financial penalty on the firm under section 206 of FSMA. This is to reflect the fact that, following the deletion of section 206(2) by the Act, we are now able to both impose a financial penalty on a firm and withdraw their authorisation.
- We propose to amend the explanation in EG 12.1 regarding our ability to prosecute criminal offences. We now propose to state that we may prosecute criminal offences where to do so would be consistent with meeting any of our statutory objectives. This is consistent with the Supreme Court’s judgment in the case *R (Respondent) v Rollins (Appellant) [2010] UKSC 39*. This also requires an amendment to paragraph 1.4 of the Appendix to EG.
- We propose to include a sentence in EG 12.11, which explains how we liaise with other prosecuting authorities in relation to prosecuting criminal offences, mentioning that we are a signatory to the Prosecutors’ Convention and the Investigators’ Convention.
- We propose to amend EG 19.73 to include a reference to SYSC 6.1.1, so the financial crime requirements under SYSC for common platform firms are mentioned. EG 19.73 already includes a reference to SYSC 3.2.6, which sets out the financial crime requirements for firms that are not common platform firms.

- We propose to amend paragraph 1.4 of the Appendix to EG to mention that we have the power to impose penalties on persons that perform controlled functions without approval under section 63 of FSMA. This is required following changes to FSMA made by the Act.

Proposed amendment to the Glossary

- 3.10 We are also proposing to amend the definition of ‘Tribunal’ in the Glossary of definitions, and to delete the definition of ‘Financial Services and Markets Tribunal’, to reflect the fact that, from 6 April 2010, the Upper Tribunal replaced the Financial Services and Markets Tribunal.

Q8: Do you have any comments on the other amendments we are proposing to make to DEPP, EG and the Glossary?

Cost benefit analysis and compatibility statement

Cost benefit analysis (CBA)

1. A CBA assesses the economic costs and benefits of a proposed policy. When proposing new rules, we are obliged under section 155 of FSMA to publish a CBA, unless we consider that they will give rise to no costs or an increase in costs of minimal significance.
2. The amendment to GEN removes a potential source of regulatory failure while safeguarding the deterrent effect of financial penalties imposed on individuals at minimal cost.
3. The proposals for amending DEPP and EG do not relate to rule changes or to guidance on rules. They are instead concerned with statements of procedure or policy that we are required to publish under FSMA and with the description of our approach to enforcement.
4. In previous CPs concerning our approach to enforcement, we have conducted a CBA to ensure we are aware of the possible impact of the proposed changes on firms and consumers.⁵ However, the proposals outlined in this CP are not expected to impose any costs or costs of greater than minimal significance and are expected to yield modest net benefits, so we have not conducted a separate CBA. However, we have integrated some CBA considerations – such as the likely impact on firms and consumers – into the main CP text, where we believe it might prove helpful.

Compatibility with our statutory objectives

5. This section explains our reasons for concluding that the proposals set out in this CP are compatible with our general duties under section 2 of FSMA and our regulatory objectives set out in sections 3 to 6.
6. Our statutory objectives are set out in section 2(2) of FSMA. We believe that our proposals will further these objectives, including in the following ways.

5 For example, CP08/10: Decision Procedure and Penalties manual and Enforcement Guide Review 2008: www.fsa.gov.uk/pages/Library/Policy/CP/2008/08_10.shtml

Securing the appropriate degree of protection for consumers

7. Our effective and appropriate use of investigation and enforcement powers plays an important part in the pursuit of our regulatory objectives, including the consumer protection objective. For example, the publication of decision notices when the subject of enforcement action appeals to the Tribunal should make consumers aware at an earlier stage of the action we have taken. In addition, applying the settlement discount scheme to suspension periods should result in more cases concluding earlier, which should make consumers aware at an earlier stage of the action we have taken.

Maintaining market confidence

8. Ensuring that DEPP and EG continue to contain accurate and up-to-date statements of our approach to enforcement should help consumers and industry understand how we will take action against persons who breach our rules and other regulatory requirements, which in turn should enhance confidence in financial markets.

Compatibility with the Principles of Good Regulation

9. Section 2(3) of FSMA requires that, in carrying out our general functions, we must have regard to a number of specific matters. Of these, the following matters are particularly relevant to our proposals.

The need to use our resources in the most efficient and economic way

10. Our proposed amendment to our policy for reviewing published notices and press releases, so that we will no longer be required to review every notice that has been published for six years, should save our resources. Our proposal to apply the settlement discount scheme to suspension periods should result in more cases settling earlier, which should mean our staff can investigate other cases at an earlier stage.

The principle that a burden or restriction should be proportionate to the benefits

11. Our proposals do not impose any additional burdens or restrictions.

The need to minimise the adverse effects on competition that may arise from anything done in the discharge of those functions

12. Our proposed changes are largely procedural and will therefore not have material effects on competition.
13. In line with section 2(1) of FSMA, we also believe our proposals to be the most appropriate way of meeting our regulatory objectives.

List of questions

- Q1: Do you have any comments on our proposed new rule preventing firms (except sole traders) from paying financial penalties imposed on a present or former employee, partner or director of the firm or an affiliated company?
- Q2: Do you have any comments on our proposed approach to publishing decision notices?
- Q3: Do you have any comments on our proposed amendments to our approach to reviewing published notices and related press releases?
- Q4: Do you have any comments on our proposal to apply the settlement discount scheme to the period of suspension?
- Q5: Do you have any comments on our proposed approach for our powers under the Cross-Border Regulations?
- Q6: Do you have any comments on the decision makers we are proposing for the giving of these statutory notices?
- Q7: Do you have any comments on our proposed descriptions of our powers under the CTA and the Lloyd's Regulations?
- Q8: Do you have any comments on the other amendments we are proposing to make to DEPP, EG and the Glossary?

Draft legal instrument
setting out the proposed
amendments to the
Glossary, GEN, DEPP
and EG

**DECISION PROCEDURE AND PENALTIES MANUAL AND ENFORCEMENT GUIDE
(REVIEW) INSTRUMENT 2010**

Powers exercised

- A. The Financial Services Authority makes this instrument in the exercise of the following powers and related provisions in or under:
- (1) the following sections of the Financial Services and Markets Act 2000 (“the Act”):
 - (a) section 69(1) (Statement of policy) as applied by paragraph 1 of the Schedule to the Cross-Border Payment in Euro Regulations 2010 (SI 2010/89) (“the Regulations”);
 - (b) section 138 (General rule-making power);
 - (c) section 157(1) (Guidance);
 - (d) section 210(1) (Statement of policy) as applied by paragraph 3 of the Schedule to the Regulations;
 - (e) section 395(5) as applied by paragraph 5 of the Schedule to the Regulations, and by paragraph 7 of Schedule 5 to the Payment Services Regulations 2009 (SI 2009/209);
 - (2) regulation 14 (Guidance) of the Regulations.
- B. The rule-making power listed above is specified for the purpose of section 153(2) (Rule-making instruments) of the Act.

Commencement

- C. This instrument comes into force on [6 February 2011].

Amendments to the Handbook

- D. The Glossary is amended in accordance with Annex A to this instrument.
- E. The General Provisions module (GEN) is amended in accordance with Annex B to this instrument.
- F. The Decision Procedure and Penalties manual (DEPP) is amended in accordance with Annex C to this instrument.

Amendments to the Enforcement Guide

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

Citation

- H. This instrument may be cited as the Decision Procedure and Penalties Manual and Enforcement Guide (Review) Instrument 2010.

By order of the Board

[27 January 2011]

Annex A

Amendments to the Glossary of definitions

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

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

...

Cross-Border Payments in Euro Regulations the Cross-Border Payments in Euro Regulations 2010 (SI 2010/89).

...

EU Cross-Border Regulation Regulation (EC) No. 924/2009 of the European Parliament and of the Council on cross-border payments in the European Community

Amend the following as shown.

...

employee ...
(2) (for the purposes of:
(aa) GEN 4 (Statutory status disclosure);
(ab) GEN 6.1 (Payment of financial penalties);

...

...

restriction notice a notice served under ~~section~~ sections 191B or 301J of the *Act*.

...

settlement decision makers (in *DEPP* and *EG*) two members of the *FSA's* executive of at least director of division level (which may include an acting director) with responsibility for deciding whether to give *statutory notices* in the circumstances described in *DEPP* 5.

...

*settlement
discount
scheme*

(in *DEPP* and *EG*) the scheme described in *DEPP* 6.7 by which the financial penalty that might otherwise be payable, or the length of the period of suspension or restriction that might otherwise be imposed, in respect of a *person*'s misconduct or contravention may be reduced to reflect the timing of any settlement agreement.

...

Tribunal

the ~~*Financial Services and Markets Tribunal*~~ Upper Tribunal.

...

Delete the following definition. The deleted text is not shown.

Financial Services and Markets Tribunal

Annex B

Amendments to the General Provisions sourcebook (GEN)

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

6.1 ~~Insurance against~~ Payment of financial penalties

...

- 6.1.7 G GEN 6.1.5 R and GEN 6.1.6 R do not prevent a *firm* or *member* from entering into, arranging, claiming on or making any payment under a *contract of insurance* which indemnifies any *person* against all or part of the costs of defending *FSA* enforcement action or any costs they may be ordered to pay to the *FSA*.

Payment of a penalty imposed on an employee

- 6.1.8 R No *firm*, except a *sole trader*, may pay a financial penalty imposed by the *FSA* on a present or former *employee*, *director* or *partner* of the *firm* or an *affiliated company*.

Annex C

Amendments to the Decision Procedure and Penalties manual (DEPP)

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

...

- 1.1.2 G The purpose of *DEPP* is to satisfy the requirements of sections 63C(1), 69(1), 93(1), 124(1), 131J(1), 169~~(7)~~ (9), 210(1) and 395 of the *Act* that the *FSA* publish the statements of procedure or policy referred to in DEPP 1.1.1 G.

1.2 Introduction to statutory notices

Statutory and related notices

...

- 1.2.6A G *Statutory notice associated decisions* do not include decisions relating to the publication of a *statutory notice*.

...

- 2.5.7 G The *RDC* will take the decision to give a *supervisory notice* exercising the *FSA's* own initiative power (by removing a regulated activity, by imposing a limitation or requirement or by specifying a narrower description of regulated activity) if the action involves a fundamental change (see DEPP 2.5.8 G) to the nature of a *permission*. Otherwise, the decision to give the *decision notice* will be taken by *FSA* staff under *executive procedures*.

- 2.5.7A G Notwithstanding *DEPP* 2.5.7G, *FSA* staff under *executive procedures* will be the decision maker whenever a *firm* agrees not to contest the *FSA's* exercise of its own initiative power, including where the *FSA's* action involves a fundamental change to the nature of a *permission*.

...

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

...

Section of the Act	Description	Handbook reference	Decision maker
...			

<u>89K(2)/(3)</u>	<u>when the FSA is proposing or deciding to publish a statement that an issuer of securities admitted to trading on a regulated market is failing or has failed to comply with an applicable transparency obligation</u>		<u>RDC</u>
...			
<u>256(4)/(5)</u>	<u>when the FSA is proposing or deciding to refuse a request for the revocation of the authorisation order of an AUT</u>		<u>RDC</u>
...			
313B(9)	<u>when the FSA has required an institution to suspend a financial instrument from trading and it is proposing or deciding to refuse an application by the institution or the issuer for the cancellation of the suspension. [deleted]</u>	<u>REC 4.2D</u>	<u>Executive procedures</u>
313B(10)/(11)	<u>when the FSA has required an institution to suspend a financial instrument from trading and it is proposing or deciding to refuse an application by the institution or the issuer for the cancellation of the suspension [deleted]</u>	<u>REC 4.2D</u>	<u>Executive procedures</u>
<u>313BB(5)/313BC(5)</u>	<u>when, upon the application of an institution, the FSA is proposing or deciding not to revoke a requirement imposed on an institution under section 313A or is proposing or deciding that a requirement imposed on a class of institutions under section 313A will continue to apply to the applicant</u>	<u>REC 4.2D</u>	<u>Executive procedures</u>
<u>313BD(5)/313BE(4)</u>	<u>when, upon the application of an issuer, the FSA is proposing or deciding not to revoke a requirement imposed on an institution or a class of institutions under section 313A or to revoke a</u>	<u>REC 4.2D</u>	<u>Executive procedures</u>

	<u>requirement imposed on a class of institutions under section 313A in relation to the class apart from one or more specified members of it, or one or more specified members of the class only</u>		
...			
Payment Services Regulations	Description	Handbook reference	Decision maker
Regulations 9(7) and 14	when the <i>FSA</i> is proposing to refuse an application for authorisation as an <i>authorised payment institution</i> , or for registration as a <i>small payment institution</i> , or <u>to impose a requirement, or to refuse an application to vary an authorisation</u>		<i>Executive procedures</i>
Regulations 9(8)(a) and 14	when the <i>FSA</i> is deciding to refuse an application for authorisation as an <i>authorised payment institution</i> , or for registration of a <i>small payment institution</i> , or <u>to impose a requirement, or to refuse an application to vary an authorisation</u>		<i>Executive procedures</i> where no representations are made in response to a warning notice, otherwise by the <i>RDC</i>
...			
Regulated Covered Bonds Regulations 2008	Description	Handbook reference	Decision maker
...			
Regulation 35(1)/(3)	when the <i>FSA</i> is proposing or deciding to impose a penalty on a person under regulation 34*	RCB 6	<i>RDC</i>
<u>Cross-Border Payments in Euro</u>	<u>Description</u>	<u>Handbook reference</u>	<u>Decision maker</u>

<u>Regulations 2010</u>			
<u>Regulations 7(1) and 7(3)</u>	<u>when the FSA is proposing or deciding to impose a financial penalty*</u>		<u>RDC</u>
<u>Regulations 7(1) and 7(3)</u>	<u>when the FSA is proposing or deciding to publish a statement that a <i>payment service provider</i> has contravened the <i>EU Cross-Border Regulation</i>*</u>		<u>RDC</u>
<u>Regulations 10(1) and 10(3)</u>	<u>when the FSA is proposing or deciding to exercise its powers to require restitution*</u>		<u>RDC</u>
<u>Schedule paragraph 1</u>	<u>when the FSA is proposing or deciding to publish a statement that a relevant person has been knowingly concerned with a contravention of the <i>EU Cross-Border Regulation</i> (Note 1)</u>		<u>RDC</u>
<u>Schedule paragraph 1</u>	<u>when the FSA is proposing or deciding to impose a financial penalty against a relevant person (Note 1)</u>		<u>RDC</u>
<p>Note: <u>(1) The <i>Cross-Border Payments in Euro Regulations</i> do not require third party rights and access to FSA material when the FSA exercises this power. However, the FSA generally intends to allow for third party rights and access to material when exercising this power.</u></p>			

2 Annex 2G Supervisory notices

...

Section of the Act	Description	Handbook reference	Decision maker
...			
<u>78A(2)/(8) (b)</u>	<u>when the FSA discontinues or suspends the <i>listing</i> of a <i>security</i> on the application of the <i>issuer</i> of the</u>	<u>LR 5</u>	<u><i>Executive procedures</i></u>

	<u>security</u>		
...			
<u>191B(1)</u>	<u>when the FSA gives a restriction notice under section 191B</u>		<u>Executive procedures</u>
197(3)/(6)/(7)(b)	when the FSA is exercising its power of intervention in respect of an incoming firm	SUP 14	RDC or executive procedures See DEPP 2.5.7 G and <u>2.5.7A G</u>
...			
<u>301J(1)</u>	<u>when the FSA gives a restriction notice under section 301J</u>		<u>Executive procedures</u>
...			

...

- 4.2.1 G If FSA staff recommend that action be taken and they consider that the decision falls within the responsibility of a *senior staff committee*:

...

the decision may be taken by a member of the FSA's executive of at least director of division level (which may include an acting director) or, in the case of a *senior staff committee* which reports directly to the FSA's senior executive committee, by a member of that committee.

...

- 5.1.1 G (3) The decision will be taken jointly by two members of the FSA's executive of at least director of division level (which may include an acting director) (the "*settlement decision makers*").

...

Withdrawal of authorisation

- 6.5D.4A G The FSA may withdraw a firm's authorisation under section 33 of the Act, as well as impose a financial penalty. Such action by the FSA does not affect the FSA's assessment of the appropriate financial penalty in relation to a breach. However, the fact that the FSA has withdrawn a firm's authorisation, as a result of which the firm may have less earning potential, may be relevant in assessing whether the penalty will cause the firm serious

financial hardship.

...

- 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, and other conditions which the *FSA* seeks to impose by way of such action. Such conditions might include, for example, the amount or mechanism for the payment of compensation to consumers. The *FSA* recognises the benefits of such agreements, in that they offer the potential for securing earlier redress or protection for consumers and the saving of cost to the *person* concerned and the *FSA* itself in contesting the financial penalty, suspension or restriction. The penalty that might otherwise be payable, or the length of the period of suspension or restriction that might otherwise be imposed, in respect of a *breach* by the *person* concerned will therefore be reduced to reflect the timing of any settlement agreement.

The settlement discount scheme applied to financial penalties

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

...

The settlement discount scheme applied to suspensions and restrictions

- 6.7.6 G The *settlement discount scheme* which applies to the amount of a financial penalty, described in DEPP 6.7.2 G to DEPP 6.7.5 G, also applies to the length of the period of a suspension or restriction, having regard to the *FSA*'s statement of policy as set out in DEPP 6A.3.

...

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

Schedule 3

Fees and other required payments

...

The FSA's power to impose financial penalties is contained in:

...

the *Payment Services Regulations*

the *Cross-Border Payments in Euro Regulations*

Schedule 4 Powers Exercised

Sch 4.1 G The following powers and related provisions in or under the *Act* have been exercised by the *FSA* to make the statements of policy in *DEPP*:

...

Section 69 (Statement of policy) (including as applied by paragraph 1 of Schedule 5 to the *Payment Services Regulations* and by paragraph 1 of the Schedule to the *Cross-Border Payments in Euro Regulations*)

...

Section 210(1) (Statements of policy) (including as applied by regulation 86(6) of the *Payment Services Regulations* and by paragraph 3 of the Schedule to the *Cross-Border Payments in Euro Regulations*)

Section 395 (The Authority's procedures) (including as applied by paragraph 7 of Schedule 5 to the *Payment Services Regulations* and by paragraph 5 of the Schedule to the *Cross-Border Payments in Euro Regulations*)

...

Sch 4.2 G The following additional powers and related provisions have been exercised by the *FSA* to make the statements of policy in *DEPP*:

...

Regulation 93 (Guidance) of the *Payment Services Regulations*

Regulation 14 (Guidance) of the *Cross-Border Payments in Euro Regulations*

Annex D

Amendments to the Enforcement Guide (EG)

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

...

2.1 The FSA's effective and proportionate use of its enforcement powers plays an important role in the pursuit of its *regulatory objectives* of protecting *consumers*, maintaining confidence in the *financial system*, financial stability ~~promoting public awareness~~ and reducing *financial crime*. For example, using enforcement helps to contribute to the protection of *consumers* and to deter future contraventions of FSA and other applicable requirements and *financial crime*. It can also be a particularly effective way, through publication of enforcement outcomes, of raising awareness of regulatory standards.

...

5.14 The *settlement discount scheme* allows a reduction in a financial penalty, period of suspension or period of restriction 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.

...

5.19A 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.

...

6.7 For ~~both~~ *supervisory notices* (as defined in section 395(13)) which have taken effect, *decision notices* and *final notices*, section 391 of the Act requires the FSA to publish, in such manner as it considers appropriate, such information about the matter to which the notice relates as it considers appropriate. However, section 391 provides that the FSA cannot publish information if publication of it would, in its opinion, be unfair to the *person* with respect to whom the action was taken or prejudicial to *consumers*.

Decision notices and ~~Final~~ final notices

6.8 The FSA will consider the circumstances of each case, but will ordinarily publicise enforcement action where this has led to the issue of a *final notice*. The FSA may also publicise enforcement action where this has led to the issue of a *decision notice*. The FSA will generally only publish a *decision notice* if the subject of enforcement action decides to refer a matter to the *Tribunal*, unless the FSA considers there is a compelling reason to publish a *decision notice* before the *person* has decided whether to refer. For example, the FSA may consider that early publication of the detail of its reasons for taking action would allow *consumers* to

avoid any potential harm arising from a firm's actions. If a person decides not to refer, the FSA will generally only publish a final notice. Publication will generally include placing the notice on the FSA web-site and this will often be accompanied by a press release. The FSA will also consider what information about the matter should be included on the *FSA Register*. Additional guidance on the FSA's approach to the publication of information on the *FSA Register* in certain specific types of cases is set out at the end of this chapter.

...

6.10 Publishing ~~final~~ notices is important to ensure the transparency of FSA decision-making; it informs the public and helps to maximise the deterrent effect of enforcement action. The FSA will review *decision notices*, *final notices* and related press releases that are published on the FSA's web site upon request after a period of six years. The FSA will determine at that time whether continued publication is appropriate, or whether notices and publicity should be removed or amended. The FSA expects usually to conclude that notices and related press releases that have been published for less than six years should not be removed from the website.

6.10A In cases where the FSA publishes a decision notice and the subject of enforcement action successfully refers the matter to the Tribunal, the FSA will make it clear on its website that the decision notice no longer applies. The FSA will normally do this by publishing a notice of discontinuance.

...

6.12 Publishing the reasons for variations of *Part IV permission* (and interventions), and maintaining an accurate public record, are important elements of the FSA's approach to its *consumer* protection objective. The FSA will always aim to balance both the interests of *consumers* and the possibility of unfairness to the *person* subject to the FSA's action. The FSA will publish relevant details of both fundamental and non-fundamental variations of *Part IV permission* and interventions which it imposes on *firms*. But it will use its discretion not to do so if it considers this be unfair to the person on whom the variation is imposed or prejudicial to the interests of consumers. Publication will generally include placing the notice on the FSA web site and this may be accompanied by a press release. As with *decision notices* and *final notices*, *supervisory notices* and related press releases that are published on the FSA's web site will be reviewed upon request after a period of six years. The FSA will determine at that time whether continued publication is appropriate, or whether notices and related press releases should be removed or amended. The FSA expects usually to conclude that notices and related press releases that have been published for less than six years should not be removed from the web site.

...

6.18 Where the behaviour to which a *decision notice*, *final notice*, civil action, or criminal action relates has occurred in the context of a *takeover bid*, the FSA will consult the *Takeover Panel* over the timing of publication if the FSA believes that publication may affect the timetable or outcome of that bid, and will give due weight to the *Takeover Panel's* views.

...

6.20 To help it fulfil its *regulatory objectives* of protecting *consumers* and ~~promoting public awareness~~, the FSA will keep on the *FSA Register* a record of *firms* or individual auditors or actuaries who have been the subject of disqualification orders.

...

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

...

7.4 The FSA'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 FSA's statement of policy in relation to the amount of a financial penalty is set out in *DEPP* 6.5 to *DEPP* 6.5D. The FSA's statement of policy in relation to financial penalties for late submission of reports is set out in *DEPP* 6.6.

Apportionment of financial penalties

7.5 In a case where the FSA is proposing to impose a financial penalty on a *person* for two or more separate and distinct areas of misconduct, the FSA will consider whether it is appropriate to identify in the *decision notice and final notice* how the penalty is apportioned between those separate and distinct areas. Apportionment will not however generally be appropriate in other cases.

...

7.8A Chapter 6 of the General Provisions module of the FSA Handbook also contains a rule prohibiting a *firm* from paying a financial penalty imposed on an *employee* or former *employee*.

...

8.1 The FSA has powers under section 45 of the *Act* to vary or cancel an *authorised person's Part IV permission*. The FSA may use these powers where:

- (1) the person is failing or is likely to fail to satisfy the threshold conditions;
- (2) the person has not carried on any *regulated activity* for a period of at least 12

months; or

- (3) it is desirable to exercise the power vary or cancel the person's *Part IV permission* in order to meet any of its regulatory objectives protect the interests of consumers or potential consumers.

...

8.17 However, where the FSA has cancelled a *firm's Part IV permission*, it is required by section 33 of the *Act* to go on to give a direction withdrawing the *firm's authorisation*. Accordingly, the FSA may decide to keep a *firm's Part IV permission* in force to maintain the *firm's* status as an *authorised person* and enable it (the FSA) to monitor the *firm's* activities. An example is where the FSA needs to supervise an orderly winding down of the *firm's* regulated business (see *SUP* 6.4.22 (When will the FSA grant an application for cancellation of *permission*)). Alternatively, the FSA may decide to keep a *firm's Part IV permission* in force to maintain the *firm's* status as an *authorised person* to use administrative enforcement powers against the *firm*. ~~This may be, for example, where the FSA proposes to impose a financial penalty on the *firm* under section 206 of the *Act*.~~

...

9.6 Where the FSA issues a *prohibition order*, it may indicate in the *decision notice or final notice* that it would be minded to revoke the order on the application of the individual in the future, in the absence of new evidence that the individual is not fit and proper. If the FSA gives such an indication, it will specify the number of years after which it would be minded to revoke or vary the prohibition on an application. However, the FSA will only adopt this approach in cases where it considers it appropriate in all the circumstances. In deciding whether to adopt this approach, the factors the FSA may take into account include, but are not limited to, where appropriate, the factors at paragraphs 9.9 and at 9.17. The FSA would not be obliged to revoke an order after the specified period even where it gave such an indication. Further, if an individual's *prohibition order* is revoked, he would still have to satisfy the FSA as to his fitness for a particular role in relation to any future application for approval to perform a *controlled function*.

...

9.10 The FSA may have regard to the cumulative effect of a number of factors which, when considered in isolation, may not be sufficient to show that the individual is not fit and proper to continue to perform a *controlled function* or other function in relation to *regulated activities*. It may also take account of the particular *controlled function* which an *approved person* is performing for a *firm*, the nature and activities of the *firm* concerned and the markets within which it operates.

...

11.3 (10) The behaviour of the persons suffering loss

The FSA will consider the conduct of the persons who have suffered loss. As part of its *regulatory objectives* objective of ~~increasing consumer~~

awareness of the *financial system* and protecting *consumers*, the FSA is required to publicise information about the *authorised* status of *persons* and is empowered to give information and guidance about the regulation of financial services. This information should help *consumers* avoid suffering losses. When the FSA considers whether to obtain restitution on behalf of *persons*, it will consider the extent to which those *persons* may have contributed to their own loss or failed to take reasonable steps to protect their own interests.

...

12.1 The FSA has powers under sections 401 and 402 of the *Act* to prosecute a range of criminal offences in England, Wales and Northern Ireland. The FSA may also prosecute criminal offences where to do so would be consistent with meeting any of its statutory objectives for which it is not the statutory prosecutor, but where the offences form part of the same criminality as the offences it is prosecuting under the *Act*.

...

12.5 In some cases, the FSA may decide to issue a formal caution rather than to prosecute an offender. In these cases the FSA will follow the Home Office Guidance on the cautioning of offenders, currently contained in the Home Office Circular 48/1994 16/2008.

...

12.11 The FSA has agreed guidelines that establish a framework for liaison and cooperation in cases where one or more other authority (such as the Crown Prosecution Service or Serious Fraud Office) has an interest in prosecuting any aspect of a matter that the FSA is considering for investigation, investigating or considering prosecuting. These guidelines are set out in annex 2 to this guide. The FSA is also a signatory to the Prosecutors' Convention and the Investigators' Convention.

...

19.73 The *Money Laundering Regulations* add to the range of options available to the FSA for dealing with anti-money laundering failures. These options are:

...

- to take regulatory action against authorised firms for failures which breach the FSA's rules and requirements (for example, under Principle 3 or SYSC 3.2.6R or SYSC 6.1.1R); and

...

Counter Terrorism Act 2008

19.89A The FSA has investigation and sanctioning powers in relation to both criminal and civil breaches of the Counter Terrorism Act 2008 ("the Counter Terrorism Act").

The Counter Terrorism Act allows the Treasury to issue directions imposing requirements on relevant persons in relation to transactions or business relationships with designated persons of a particular country. Relevant persons may be required to take the following action:

- apply enhanced customer due diligence measures;
- apply enhanced ongoing monitoring of any business relationship with a designated person;
- systematically report details of transactions and business relationships with designated persons; or
- limit or cease business with a designated person.

19.89B The FSA is responsible for monitoring and enforcing compliance with requirements imposed by the Treasury under the Counter Terrorism Act by ‘credit institutions’ that are authorised persons and by ‘financial institutions’ (except money service businesses that are not authorised persons and consumer credit financial institutions). ‘Credit institutions’ and ‘financial institutions’ are defined in Part 2 of Schedule 7 to the Counter Terrorism Act.

19.89C The investigation and sanctioning powers given to the FSA by the Counter Terrorism Act are similar to those given to the FSA by the *Money Laundering Regulations*. The FSA’s approach to using its powers under the Counter Terrorism Act will be consistent with its approach to using its powers under the *Money Laundering Regulations*, described in paragraphs 19.78 to 19.84 above.

Insurance Accounts Directive (Lloyd’s Syndicate and Aggregate Accounts) Regulations 2008

19.89D The Lloyd’s Accounting Regulations implement the Audit and Accounts Directives in relation to the Lloyd’s insurance market. They aim to increase the transparency of the accounts published by Lloyd’s syndicates by imposing requirements in relation to the preparation and disclosure of the accounts. The Regulations give the FSA the power to institute criminal proceedings for an offence committed under the Regulations.

19.89E Our policy in relation to the prosecution of criminal offences and the circumstances in which we would expect to commence criminal proceedings is set out in *EG 12*.

...

Imposition of penalties under the Payment Services Regulations

19.101 When imposing a financial penalty the FSA’s policy includes having regard to the relevant factors in *DEPP 6.2*, ~~*DEPP 6.3*~~ and *DEPP 6.4*. The FSA’s policy in relation to determining the level of a financial penalty includes having regard, where relevant, to *DEPP 6.5* to *DEPP 6.5D*.

...

19.103 The *Payment Services Regulations* apply section 169 of the *Act* which requires the *FSA* to publish a statement of policy on the conduct of certain interviews in response to requests from overseas regulators. For the purposes of the *Payment Services Regulations* the *FSA* will follow the procedures described in *DEPP 7*.

Cross-Border Payments in Euro Regulations 2010

19.104 The *Cross-Border Payments in Euro Regulations* lay down rules on cross-border payments in euro, to ensure that compliance with the *EU Cross-Border Regulation* is guaranteed by effective, proportionate and deterrent sanctions. The main aim of the *EU Cross-Border Regulation* is to ensure that the charges for cross-border payments in euro are equal to the charges for identical national payments in euro within a Member State. The *Cross-Border Payments in Euro Regulations* give the *FSA* investigation and sanctioning powers in relation to breaches of the *EU Cross-Border Regulation*, including:

- the power to require information
- the power of public censure; and
- the power to impose financial penalties.

19.105 The *FSA*'s policy for using the powers given to it by the *Cross-Border Payments in Euro Regulations* is the same as its policy for using the equivalent powers given to it by the *Payment Services Regulations*, set out in EG 19.90 to 19.103, as, for the most part, these powers are very similar. As the *Payment Services Regulations*, for the most part, mirror the *FSA*'s investigative, sanctioning and regulatory powers under the *Act*, the *FSA* will therefore adopt enforcement procedures akin to those used under the *Act*.

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

Purpose, status and application of the guidelines

1. These guidelines have been agreed by the following bodies (the agencies):

...

- the Department for Business, ~~Enterprise and Regulatory Reform (BERR)~~ Innovation and Skills (BIS);

...

9. The following are indicators of whether action by the *FSA* 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 FSA

...

- Where the suspected conduct in question would be best dealt with by:

...

- regulatory action which can be referred to the ~~Financial Services and Markets Tribunal~~ Tribunal (including proceedings for market abuse); and

...

(b) Tending towards action by one of the other agencies

...

- Where the suspected conduct in question would be best dealt with by:

- criminal proceedings for which the *FSA* is not the statutory prosecutor;
- proceedings for disqualification of directors under the Company Directors Disqualification Act 1986 (normally appropriate for ~~BERR~~ BIS action);
- winding up proceedings which the *FSA* does not have statutory powers to bring (normally appropriate for ~~BERR~~ BIS action); or
- criminal proceedings in Scotland.

...

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

1. The FSA

1.1 The FSA is the single statutory regulator for all financial business in the UK. Its regulatory objectives under the Financial Services and Markets Act 2000 (the 2000 Act) are:

- market confidence;
- financial stability;
- ~~public awareness~~;

- the protection of consumers; and
- the reduction of financial crime.

...

1.4 The FSA has the power to take the following enforcement action:

- discipline authorised firms under Part XIV of the 2000 Act and approved persons under s66 of the 2000 Act;
- impose penalties on persons that perform controlled functions without approval under s.63A of the 2000 Act;

...

- (except in Scotland) prosecute certain offences, including under the Money Laundering Regulations 2007, the Transfer of Funds (Information on the Payer) Regulations 2007, Part V Criminal Justice Act 1993 (insider dealing) and various offences under the 2000 Act including:

(**Note:** The FSA may also prosecute any other offences where to do so would be consistent with meeting any of its statutory objectives ~~which are incidental to those which it has express statutory power to prosecute~~)

...

2. **BERR BIS**

2.1 The Secretary of State for Business, ~~Enterprise and Regulatory Reform~~ Innovation and Skills exercises concurrently with the FSA those powers and functions marked with an asterisk in paragraphs 1.3 above. The investigation functions are undertaken by Companies Investigation Branch (CIB) and the prosecution functions by the Legal Services Directorate.

...

2.3 The Solicitors Office advises on investigation work carried out by CIB and undertakes criminal investigations and prosecutions in respect of matters referred to it by CIB, the Insolvency Service or other directorates of ~~BERR~~ BIS or its agencies.

...

PUB REF: 002348

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