

# Chapter 6

## Penalties

## 6.1 Introduction

- 6.1.1** **G** ■ DEPP 6 includes the *FCA's* statement of policy with respect to the imposition and amount of penalties under the *Act*, as required by sections 63C(1), 69(1), 88C, 89S, 93(1), 124(1), 131J(1), 192N, 210(1), 312J and 345D of the *Act*.
- 6.1.2** **G** The principal purpose of imposing a financial penalty or issuing a *public censure* 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. Financial penalties and *public censures* are therefore tools that the *FCA* may employ to help it to achieve its *statutory objectives*.

## 6.2 Deciding whether to take action

### 6.2.1

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The FCA will consider the full circumstances of each case when determining whether or not to take action for a financial penalty or *public censure*. 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.

- (1) The nature, seriousness and impact of the suspected *breach*, including:
  - (a) whether the *breach* was deliberate or reckless;
  - (b) the duration and frequency of the *breach*;
  - (c) the amount of any benefit gained or loss avoided as a result of the *breach*;
  - (d) whether the *breach* reveals serious or systemic weaknesses of the management systems or *internal controls* relating to all or part of a *person's* business;
  - (e) the impact or potential impact of the *breach* on the orderliness of markets including whether confidence in those markets has been damaged or put at risk;
  - (f) the loss or risk of loss caused to *consumers* or other market users;
  - (g) the nature and extent of any *financial crime* facilitated, occasioned or otherwise attributable to the *breach*; and
  - (h) whether there are a number of smaller issues, which individually may not justify disciplinary action, but which do so when taken collectively.
- (2) The conduct of the *person* after the *breach*, including the following:
  - (a) how quickly, effectively and completely the *person* brought the *breach* to the attention of the FCA or another relevant regulatory authority;
  - (b) the degree of co-operation the *person* showed during the investigation of the *breach*;
  - (c) any remedial steps the *person* has taken in respect of the *breach*;
  - (d) the likelihood that the same type of *breach* (whether on the part of the *person* under investigation or others) will recur if no action is taken;
  - (e) whether the *person* concerned has complied with any requirements or rulings of another regulatory authority relating to his *behaviour* (for example, where relevant, those of the *Takeover Panel* or an *RIE*); and

- (f) the nature and extent of any false or inaccurate information given by the person and whether the information appears to have been given in an attempt to knowingly mislead the *FCA*.
- (3) The previous disciplinary record and compliance history of the *person* including:
  - (a) whether the *FCA* (or any *previous regulator*) has taken any previous disciplinary action resulting in adverse findings against the *person*;
  - (b) whether the *person* has previously undertaken not to do a particular act or engage in particular *behaviour*;
  - (c) whether the *FCA* (or any *previous regulator*) has previously taken protective action in respect of a *firm*, using its own initiative powers, by means of a variation of a *Part 4A permission* or otherwise, or has previously requested the *firm* to take remedial action, and the extent to which such action has been taken; and
  - (d) the general compliance history of the *person*, including whether the *FCA* (or any *previous regulator*) has previously issued the *person* with a private warning.

(4) *FCA guidance* and other published materials:

The *FCA* will not take action against a person for *behaviour* that it considers to be in line with *guidance*, other materials published by the *FCA* in support of the *Handbook* or *FCA*-confirmed Industry Guidance which were current at the time of the *behaviour* in question. (The manner in which *guidance* and other published materials may otherwise be relevant to an enforcement case is described in ■ EG 2.)

(4A) *FCA-recognised industry codes*:

Behaviour that is in line with a *FCA-recognised industry code* will tend to indicate compliance, in carrying out *unregulated activities*, with applicable *FCA rules* that reference 'proper standards of market conduct'. In such cases, the *FCA* will usually not take action against a person for behaviour, in relation to *unregulated activities*, that it considers to be in line with the relevant *FCA-recognised industry code*.

- (5) Action taken by the *FSA* or *FCA* in previous similar cases.
- (6) Action taken by other domestic or international regulatory authorities:

Where other regulatory authorities propose to take action in respect of the *breach* which is under consideration by the *FCA*, or one similar to it, the *FCA* will consider whether the other authority's action would be adequate to address the *FCA*'s concerns, or whether it would be appropriate for the *FCA* to take its own action.

## 6.2.2

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

- (1) The degree of sophistication of the users of the market in question, the size and liquidity of the market, and the susceptibility of the market to *market abuse*.
- (2) The impact, having regard to the nature of the *behaviour*, that any financial penalty or *public censure* may have on the financial markets or on the interests of *consumers*:

- (a) a penalty may show that high standards of market conduct are being enforced in the financial markets, and may bolster market confidence;
- (b) a penalty may protect the interests of *consumers* by deterring future *market abuse* and improving standards of conduct in a market;
- (c) in the context of a *takeover bid*, the *FCA* may consider that the impact of the use of its powers is likely to have an adverse effect on the timing or outcome of that bid, and therefore it would not be in the interests of financial markets or *consumers* to take action for *market abuse* during the *takeover bid*. If the *FCA* considers that the proposed use of its powers may have that effect, it will consult the *Takeover Panel* and give due weight to its views.

6.2.2A **G** The factors to which the *FCA* will have regard when deciding whether to impose a penalty under regulation 34 of the *RCB Regulations* are set out in **■ RCB 4.2.3 G**.

### Discipline for breaches of *FCA* rules on systems and controls against money laundering

6.2.3 **G** The *FCA*'s rules on systems and controls against *money laundering* are set out in **■ SYSC 3.2** and **■ SYSC 6.3**. The *FCA*, when considering whether to take action for a financial penalty or censure in respect of a breach of those rules, will have regard to whether a *firm* has followed relevant provisions in the Guidance for the UK financial sector issued by the Joint Money Laundering Steering Group.

### Action against individuals under section 66 of the Act

6.2.4 **G** 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 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 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 3.1.1 R** or **■ SYSC 4.1.10R** or article 21(5) of the *MiFID Org Regulation* (as applied in accordance with **■ SYSC 1 Annex 1 2.8AR**, **■ SYSC 1 Annex 1 3.2-AR**, **■ SYSC 1 Annex 1 3.2-BR**, **■ SYSC 1 Annex 1 3.2CR** and **■ SYSC 1 Annex 1 3.3R**), and an 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 6.2.1 G**, there are some additional considerations that may be relevant when deciding whether to take action against an 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 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 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 individual.
- (2) Whether the most appropriate regulatory response would be disciplinary action against the *firm*, the individual or both.
- (3) Whether disciplinary action would be a proportionate response to the nature and seriousness of the misconduct by the 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*, except for action taken by virtue of section 66A(5). ■ DEPP 6.2.9-AG to ■ DEPP 6.2.9-FG apply only to action taken by virtue of section 66A(5).

**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 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, ■ 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 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 to SC4* in ■ COCON 2.2, only if 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, as applicable).

**6.2.8** **G** An individual will not be in breach if they have exercised due and reasonable care when assessing the information available to them, have reached a reasonable conclusion and have acted on it.

**6.2.9** **G** Where disciplinary action is taken against an individual the onus will be on the *FCA* to show that the individual has been guilty of misconduct.

### Action against an SMF manager under section 66A(5) of the Act

- 6.2.9-A **G** The FCA is able to take action against an *SMF manager* under section 66A(5) of the Act where:
- (1) there has been (or continues to be) a contravention of a relevant requirement by the *SMF manager's firm*;
  - (2) at the time of the contravention, the *SMF manager* was responsible for the management of any of the *firm's* activities in relation to which the contravention occurred; and
  - (3) the *SMF manager* did not take such steps as a person in their position could reasonably be expected to take to avoid the contravention by the *firm* occurring (or continuing).
- In such an action, an *SMF manager* is not bound by a finding of the RDC, a court or a tribunal, which he or she was not privy nor party to.
- 6.2.9-B **G** When deciding whether to take action further to section 66A(5) of the Act, the FCA will follow the approach in ■ DEPP 6.2.1G and ■ DEPP 6.2.6G.
- 6.2.9-C **G** When determining, for the purposes of section 66A(5) of the Act, whether an *SMF manager* was responsible for the management of any of the *firm's* activities in relation to which a contravention of a relevant requirement by the *firm* occurred, the FCA will consider the full circumstances of each case. A list of considerations that may be relevant for this purpose is set out below. This list is not exhaustive.
- (1) The *SMF manager's statement of responsibilities*, including whether the *SMF manager* was performing an executive or non-executive role.
  - (2) The *firm's management responsibilities map*.
  - (3) How the *firm* operated, and how responsibilities were allocated in the *firm* in practice.
  - (4) The *SMF manager's* actual role and responsibilities in the *firm*, to be determined by reference to, among other things, minutes of meetings, emails, regulatory interviews, telephone recordings and organisational charts.
  - (5) The relationship between the *SMF manager's* responsibilities and the responsibilities of other *SMF managers* in the *firm* (including any joint responsibilities or matrix management structures).
- 6.2.9-D **G** Under section 66A(5)(d) of the Act, such steps as a person in the position of the *SMF manager* could reasonably be expected to take to avoid the *firm's* contravention of a relevant requirement occurring (or continuing) are:
- (1) such steps as a competent *SMF manager* would have taken:
    - (a) at that time;
    - (b) in that specific individual's position;

- (c) with that individual's role and responsibilities; and
- (d) in all the circumstances.

## 6.2.9-E

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When determining under section 66A(5)(d) of the *Act* whether or not an *SMF manager* has taken such steps as a person in their position could reasonably be expected to take to avoid the contravention of a relevant requirement by the *firm* occurring (or continuing), additional considerations to which the *FCA* would expect to have regard include, but are not limited to:

- (1) the role and responsibilities of the *SMF manager* (for example, such steps as an *SMF manager* in a non-executive role could reasonably be expected to take may differ, depending on the circumstances, from those reasonably expected of an *SMF manager* in an executive role: see, for example, the *guidance* on the role and responsibilities of *non-executive directors* for *SMCR firms* in ■ COCON 1 Annex 1G);
- (2) whether the *SMF manager* exercised reasonable care when considering the information available to them;
- (3) whether the *SMF manager* reached a reasonable conclusion on which to act;
- (4) the nature, scale and complexity of the *firm's* business;
- (5) the knowledge the *SMF manager* had, or should have had, of regulatory concerns, if any, relating to their role and responsibilities;
- (6) whether the *SMF manager* (where they were aware of, or should have been aware of, actual or suspected issues that involved possible breaches by their *firm* of relevant requirements relating to their role and responsibilities) took reasonable steps to ensure that the issues were dealt with in a timely and appropriate manner;
- (7) whether the *SMF manager* acted in accordance with their statutory, common law and other legal obligations, including, but not limited to, those set out in the Companies Act 2006, the *Handbook* (including COCON), and, if the *firm* had a *premium listing*, the *UK Corporate Governance Code* and related guidance;
- (8) whether the *SMF manager* took reasonable steps to ensure that any delegation of their responsibilities, where this was itself reasonable, was to an appropriate person with the necessary capacity, competence, knowledge, seniority and skill, and whether the *SMF manager* took reasonable steps to oversee the discharge of the delegated responsibility effectively;
- (9) whether the *SMF manager* took reasonable steps to ensure that the reporting lines, whether in the *UK* or *overseas*, in relation to the *firm's* activities for which they were responsible, were clear to staff and operated effectively;
- (10) whether the *SMF manager* took reasonable steps to satisfy themselves, on reasonable grounds, that, for the activities for which they were responsible, the *firm* had appropriate policies and procedures for reviewing the competence, knowledge, skills and



performance of each individual member of staff to assess their suitability to fulfil their duties;

- (11) whether the *SMF manager* took reasonable steps (including in relation to ■ SYSC 4.9) to assess, on taking up each of their responsibilities, and monitor, where reasonable, the governance, operational and risk management arrangements in place for the *firm's* activities for which they were responsible (including, where appropriate, corroborating, challenging and considering the wider implications of the information available to them), and whether they took reasonable steps to deal with any actual or suspected issues identified as a result in a timely and appropriate manner;
- (12) whether the *SMF manager* took reasonable steps to ensure an orderly transition when another *SMF manager* under their oversight or responsibility was replaced in the performance of that function by someone else;
- (13) whether the *SMF manager* took reasonable steps to ensure an orderly transition when they were replaced in the performance of their function by someone else;
- (14) whether the *SMF manager* failed to take reasonable steps to understand and inform themselves about the *firm's* activities for which they were responsible, including, but not limited to, whether they:
  - (a) failed to ensure adequate reporting or seek an adequate explanation of issues within a business area, whether from people within that business area, or elsewhere within or outside the *firm*, if they were not an expert in that area; or
  - (b) failed to maintain an appropriate level of understanding about an issue or a responsibility that they delegated to an individual or individuals; or
  - (c) failed to obtain independent, expert opinion where appropriate from within or outside the *firm* as appropriate; or
  - (d) permitted the expansion or restructuring of the business without reasonably assessing the potential risks; or
  - (e) inadequately monitored highly profitable *transactions*, business practices, unusual *transactions*, or individuals who contributed significantly to the profitability of a business area or who had significant influence over the operation of a business area;
- (15) whether the *SMF manager* took reasonable steps to ensure that, where they were involved in a collective decision affecting the *firm's* activities for which they were responsible, and it was reasonable for the decision to be taken collectively, they informed themselves of the relevant matters before taking part in the decision, and exercised reasonable care, skill and diligence in contributing to it;
- (16) whether the *SMF manager* took reasonable steps to follow the *firm's* procedures, where this was itself appropriate;
- (17) how long the *SMF manager* had been in role with their responsibilities and whether there was an orderly transition and handover when they took up the role and responsibilities;

- (18) whether the *SMF manager* took reasonable steps to implement (either personally or through a compliance department or other departments) adequate and appropriate systems and controls to comply with the relevant requirements and standards of the regulatory system for the activities of the *firm*.

6.2.9-F **G** Where action is taken against an *SMF manager* under section 66A(5) of the *Act* the onus will be on the *FCA* to show that the *SMF manager* 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** In addition to the general factors outlined in ■ DEPP 6.2.1 G, there are some additional considerations that the *FCA* will have regard to when deciding whether to take action against a *person* that performs a *controlled function* without approval contrary to section 63A of the *Act*.

- (1) The conduct of the *person*. The *FCA* will take into consideration whether, while performing *controlled functions* without approval, the *person* committed misconduct in respect of which, if he had been approved, the *FCA* could have taken action pursuant to section 66 of the *Act* and, if so, the seriousness of that misconduct.
- (2) The extent to which the *person* could reasonably be expected to have known that 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 they were performing a *controlled function* without approval include:
  - (a) the *person* had previously performed a similar role at the same or another *firm* for which he had been approved;
  - (b) the *person's firm* or another *firm* had previously applied for approval for the *person* to perform the same or a similar *controlled function*;
  - (c) the *person's* seniority or experience was such that he could reasonably be expected to have known that he was performing a *controlled function* without approval; and
  - (d) the *person's firm* had clearly apportioned responsibilities so that the *person's* role, and the responsibilities associated with it, were clear;
  - (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.
- (3) The length of the period during which the *person* performed a *controlled function* without approval.
- (4) Whether the *person* is an individual.
- (5) The appropriateness of taking action against the *person* instead of, or in addition to, taking action against an *authorised person*. In assessing this, the *FCA* will take into consideration the extent of the culpability of an *authorised person* for the *person* performing a

*controlled function* without approval. For example, a relevant factor may be that an *authorised person* decided that the *person* did not need to obtain approval and it was reasonable for the *person* to rely on the *authorised person's* judgment.

- (6) The *person's* position and responsibilities. The more senior the *person* that performs a *controlled function* without approval, the more seriously the *FCA* is likely to view his behaviour, and therefore the more likely it is to take action against the *person*.

### Action against directors, former directors and persons discharging managerial responsibilities for breaches under Part VI of the Act

**6.2.10** **G** The primary responsibility for ensuring compliance with Part VI of the *Act*, the *Part 6 rules*, the *prospectus rules* or a provision of the *Prospectus Regulation* or a requirement imposed under such provision rests with the persons identified in section 91(1) and section 91(1A) (Penalties for breach of Part 6 rules) of the *Act* respectively. Normally therefore, any disciplinary action taken by the *FCA* for contraventions of these obligations will in the first instance be against those persons.

**6.2.11** **G** However, in the case of a contravention by a *person* referred to in section 91(1)(a) or section 91(1)(b) or section 91(1A) of the *Act* ("P"), where the *FCA* considers that another *person* who was at the material time a *director* of P was knowingly concerned in the contravention, the *FCA* may take disciplinary action against that *person*. In circumstances where the *FCA* does not consider it appropriate to seek a disciplinary sanction against P (notwithstanding a breach of relevant requirements by such person), the *FCA* may nonetheless seek a disciplinary sanction against any other person who was at the material time a *director* of P and was knowingly concerned in the contravention.

**6.2.12** **G** [deleted]

**6.2.13** **G** In deciding whether to take action, the *FCA* will consider the full circumstances of each case. Factors that may be relevant for this purpose include, but are not limited to, the factors at ■ DEPP 6.2.1 G.

### Discipline for breaches of the Principles for Businesses

**6.2.14** **G** The *Principles* are set out in ■ PRIN 2.1.1 R. The *Principles* are a general statement of the fundamental obligations of *firms* under the *regulatory system*. The *Principles* derive their authority from the *FCA's* rule-making powers set out in section 137A(General rule-making power) of the *Act*. A breach of a *Principle* will make a *firm* liable to disciplinary action. Where the *FCA* considers this is appropriate, it will discipline a *firm* on the basis of the *Principles* alone.

**6.2.15** **G** In determining whether a *Principle* has been breached, it is necessary to look to the standard of conduct required by the *Principle* in question at the time. Under each of the *Principles*, the onus will be on the *FCA* to show that a *firm* has been at fault in some way.

### Discipline for breaches of the Listing Principles and Premium Listing Principles

**6.2.16** **G** The Listing Principles and Premium Listing Principles are set out in ■ LR 7. The Listing Principles set out in ■ LR 7.2.1 R are a general statement of the fundamental obligations of all *listed companies*. In addition to the Listing Principles, the Premium Listing Principles set out in ■ LR 7.2.1A R are a general statement of the fundamental obligations of all *listed companies* with a *premium listing*. The Listing Principles and Premium Listing Principles derive their authority from the FCA's rule making powers set out in section 73A(1) (Part 6 Rules) of the Act. A breach of a Listing Principle or, if applicable, a Premium Listing Principle, will make a *listed company* liable to disciplinary action by the FCA.

**6.2.17** **G** In determining whether a Listing Principle or Premium Listing Principle has been broken, it is necessary to look to the standard of conduct required by the Listing Principle or Premium Listing Principle in question. Under each of the Listing Principles and Premium Listing Principles, the onus will be on the FCA to show that a *listed company* has been at fault in some way. This requirement will differ depending upon the relevant Listing Principle or Premium Listing Principle.

**6.2.18** **G** In certain cases, it may be appropriate to discipline a *listed company* on the basis of the a Listing Principle or, if applicable, a Premium Listing Principle, alone. Examples include the following:

- (1) where there is no detailed *listing rule* which prohibits the *behaviour* in question, but the *behaviour* clearly contravenes a Listing Principle or, if applicable, a Premium Listing Principle;
- (2) where a *listed company* has committed a number of breaches of detailed *rules* which individually may not merit disciplinary action, but the cumulative effect of which indicates the breach of a Listing Principle or, if applicable, a Premium Listing Principle.

### Action involving other regulatory authorities or enforcement agencies

**6.2.19** **G** Some types of *breach* may potentially result not only in action by the FCA, but also action by other domestic or overseas regulatory authorities or enforcement agencies.

**6.2.20** **G** When deciding how to proceed in such cases, the FCA will examine the circumstances of the case, and consider, in the light of the relevant investigation, disciplinary and enforcement powers, whether it is appropriate for the FCA or another authority to take action to address the *breach*. The FCA will have regard to all the circumstances of the case including whether the other authority has adequate powers to address the *breach* in question.

**6.2.21** **G** In some cases, it may be appropriate for both the FCA and another authority to be involved, and for both to take action in a particular case arising from the same facts. For example, a breach of *RIE* rules may be so serious as to justify the FCA varying or cancelling the *firm's Part IV permission*, or withdrawing approval from *approved persons*, as well as action taken by the

*RIE*. In such cases, the *FCA* will work with the relevant authority to ensure that cases are dealt with efficiently and fairly, under operating arrangements in place (if any) between the *FCA* and the relevant authority.

- 6.2.22** **G** In relation to behaviour which may have happened or be happening in the context of a *takeover bid*, the *FCA* will refer to the *Takeover Panel* and give due weight to its views. Where the *Takeover Code* has procedures for complaint about any behaviour, the *FCA* expects parties to exhaust those procedures. The *FCA* will not, save in exceptional circumstances, take action under any of section 123 (*FCA's* power to impose penalties), section 123A (Power to prohibit individuals from managing or dealing), section 123B (Suspending permission to carry on regulated activities etc.), section 129 (Power of court to impose penalties), section 381 (Injunctions), sections 383 or 384 (Restitution) in respect of behaviour to which the *Takeover Code* is relevant before the conclusion of the procedures available under the *Takeover Code*.
- 6.2.23** **G** The *FCA* will not take action against a *person* over behaviour which does not amount to *market abuse*. Behaviour is less likely to amount to *market abuse* where it (a) conforms with the *Takeover Code* or rules of an *RIE* and (b) falls within the terms of ■ MAR 1.10.4G to ■ 1.10.6G which state that behaviour so conforming is unlikely to, of itself, amount to *market abuse*. The *FCA* will seek the *Takeover Panel's* or relevant *RIE's* views on whether behaviour complies with the *Takeover Code* or *RIE* rules and will attach considerable weight to its views.
- 6.2.24** **G** If any of the circumstances in ■ DEPP 6.2.26 G apply, and the *FCA* considers that the use of its disciplinary powers under section 123 or section 129, or of its injunctive powers under section 381 or of its powers relating to restitution under section 383 or 384 is appropriate, it will not take action during an offer to which the *Takeover Code* applies except in the circumstances set out in ■ DEPP 6.2.27 G.
- 6.2.25** **G** In any case where the *FCA* considers that the use of its powers under any of sections 123, 123A, 123B, 129, 381, 383 or 384 of the *Act* may be appropriate, if that use may affect the timetable or outcome of a *takeover bid* or where it is appropriate in the context of any exercise by the *Takeover Panel* of its powers and authority, the *FCA* will consult the *Takeover Panel* before using any of those powers.
- 6.2.26** **G** Where the behaviour of a *person* which amounts to *market abuse* is behaviour to which the *Takeover Code* is relevant, the use of the *Takeover Panel's* powers will often be sufficient to address the relevant concerns. In cases where this is not so, the *FCA* will need to consider whether it is appropriate to use any of its own powers under the *market abuse regime*. The principal circumstances in which the *FCA* is likely to consider such exercise are:
- (1) where the behaviour falls within the prohibition in article 14 of the *Market Abuse Regulation*;

- (2) where the *FCA's* approach in previous similar cases (which may have happened otherwise than in the context of a *takeover bid*) suggests that a sanction should be imposed;
- (3) where the behaviour extends to *securities* or a class of *securities* which may be outside the *Takeover Panel's* jurisdiction;
- (4) where the behaviour threatens or has threatened the stability of the *financial system*; and
- (5) where for any other reason the *Takeover Panel* asks the *FCA* to consider the use of any of its powers referred to in ■ DEPP 6.2.22 G.

[Note: In this section, 'securities' has the same meaning given in subsection (1) of the definition of 'security' in the Handbook *Glossary*]

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- 6.2.27 G The exceptional circumstances in which the *FCA* will consider the use of powers during a *takeover bid* are listed in ■ DEPP 6.2.26G (1), ■ DEPP 6.2.26G (3) and ■ DEPP 6.2.26G (4), and, depending on the circumstances, ■ DEPP 6.2.26G (5).
- 6.2.28 G [deleted]



**6.3 Penalties for market abuse**

6.3.1 **G** [deleted]

6.3.2 **G** [deleted]

## 6.4 Financial penalty or public censure

- 6.4.1** **G** The *FCA* will consider all the relevant circumstances of the case when deciding whether to impose a penalty or issue a *public censure*. As such, the factors set out in **■ DEPP 6.4.2 G** are not exhaustive. Not all of the factors may be relevant in a particular case and there may be other factors, not listed, that are relevant.
- 6.4.2** **G** The criteria for determining whether it is appropriate to issue a *public censure* rather than impose a financial penalty include those factors that the *FCA* will consider in determining the amount of penalty set out in **■ DEPP 6.5 A** to **■ DEPP 6.5 D**. Some particular considerations that may be relevant when the *FCA* determines whether to issue a *public censure* rather than impose a financial penalty are:
- (1) whether or not deterrence may be effectively achieved by issuing a *public censure*;
  - (2) if the *person* has made a profit or avoided a loss as a result of the *breach*, this may be a factor in favour of a financial penalty, on the basis that a *person* should not be permitted to benefit from its *breach*;
  - (3) if the *breach* is more serious in nature or degree, this may be a factor in favour of a financial penalty, on the basis that the sanction should reflect the seriousness of the *breach*; other things being equal, the more serious the *breach*, the more likely the *FCA* is to impose a financial penalty;
  - (4) if the *person* has brought the *breach* to the attention of the *FCA*, this may be a factor in favour of a *public censure*, depending upon the nature and seriousness of the *breach*;
  - (5) if the *person* has admitted the *breach* and provides full and immediate co-operation to the *FCA*, and takes steps to ensure that those who have suffered loss due to the *breach* are fully compensated for those losses, this may be a factor in favour of a *public censure*, rather than a financial penalty, depending upon the nature and seriousness of the *breach*;
  - (6) if the *person* has a poor disciplinary record or compliance history (for example, where the *FSA* or *FCA* has previously brought disciplinary action resulting in adverse findings in relation to the same or similar *behaviour*), this may be a factor in favour of a financial penalty, on the basis that it may be particularly important to deter future cases;



- (7) the *FSA's* or *FCA's* approach in similar previous cases: the *FCA* will seek to achieve a consistent approach to its decisions on whether to impose a financial penalty or issue a *public censure*; and
- (8) the impact on the *person* concerned. It would only be in an exceptional case that the *FCA* would be prepared to agree to issue a *public censure* rather than impose a financial penalty if a financial penalty would otherwise be the appropriate sanction. Examples of such exceptional cases could include:
  - (a) where the application of the *FCA's* policy on serious financial hardship (set out in ■ DEPP 6.5D) results in a financial penalty being reduced to zero;
  - (b) where there is verifiable evidence that the *person* would be unable to meet other regulatory requirements, particularly financial resource requirements, if the *FCA* imposed a financial penalty at an appropriate level; or
  - (c) in Part VI cases in which the *FCA* may impose a financial penalty, where there is the likelihood of a severe adverse impact on a *person's* shareholders or a consequential impact on market confidence or market stability if a financial penalty was imposed. However, this does not exclude the imposition of a financial penalty even though this may have an impact on a *person's* shareholders.

## 6.5 Determining the appropriate level of financial penalty

- 6.5.1** **G** For the purpose of ■ DEPP 6.5 to ■ DEPP 6.5D and ■ DEPP 6.6.2 G, the term “firm” means *firms, sponsors, primary information providers, recognised investment exchanges, qualifying parent undertakings, actuaries, auditors* and those *unauthorised persons* who are not individuals.
- 6.5.2** **G** The FCA's penalty-setting regime is based on the following principles:
- (1) Disgorgement - a firm or individual should not benefit from any *breach*;
  - (2) Discipline - a firm or individual should be penalised for wrongdoing; and
  - (3) Deterrence - any penalty imposed should deter the firm or individual who committed the *breach*, and others, from committing further or similar *breaches*.
- 6.5.3** **G**
- (1) The total amount payable by a person subject to enforcement action may be made up of two elements: (i) disgorgement of the benefit received as a result of the *breach*; and (ii) a financial penalty reflecting the seriousness of the *breach*. These elements are incorporated in a five-step framework, which can be summarised as follows:
    - (a) Step 1: the removal of any financial benefit derived directly from the *breach*;
    - (b) Step 2: the determination of a figure which reflects the seriousness of the *breach*;
    - (c) Step 3: an adjustment made to the Step 2 figure to take account of any aggravating and mitigating circumstances;
    - (d) Step 4: an upwards adjustment made to the amount arrived at after Steps 2 and 3, where appropriate, to ensure that the penalty has an appropriate deterrent effect; and
    - (e) Step 5: if applicable, a settlement discount will be applied. This discount does not apply to disgorgement of any financial benefit derived directly from the *breach*.
  - (2) These steps will apply in all cases, although the details of Steps 1 to 4 will differ for cases against firms (■ DEPP 6.5A), cases against

individuals (■ DEPP 6.5B) and *market abuse* cases against individuals (■ DEPP 6.5C).

- (3) The *FCA* recognises that a penalty must be proportionate to the *breach*. The *FCA* may decrease the level of the penalty arrived at after applying Step 2 of the framework if it considers that the penalty is disproportionately high for the *breach* concerned. For cases against firms, the *FCA* will have regard to whether the *firm* is also an individual (for example, a sole trader) in determining whether the figure arrived at after applying Step 2 is disproportionate.
- (4) The lists of factors and circumstances in ■ DEPP 6.5A to ■ DEPP 6.5D are not exhaustive. Not all of the factors or circumstances listed will necessarily be relevant in a particular case and there may be other factors or circumstances not listed which are relevant.
- (5) The *FCA* may decide to impose a financial penalty on a mutual (such as a *building society*), even though this may have a direct impact on that mutual's *customers*. This reflects the fact that a significant proportion of a mutual's *customers* are shareholder-members; to that extent, their position involves an assumption of risk that is not assumed by *customers* of a firm that is not a mutual. Whether a firm is a mutual will not, by itself, increase or decrease the level of a financial penalty.
- (6) Part III (Penalties and Fees) of Schedule 1ZA to the *Act* specifically provides that the *FCA* may not, in determining its policy with respect to the amount of penalties, take account of expenses which it incurs, or expects to incur, in discharging its functions.

## 6.5A The five steps for penalties imposed on firms

### Step 1 - disgorgement

6.5A.1

G

- (1) The *FCA* will seek to deprive a firm of the financial benefit derived directly from the *breach* (which may include the profit made or loss avoided) where it is practicable to quantify this. The *FCA* will ordinarily also charge interest on the benefit.
- (2) Where the success of a firm's entire business model is dependent on breaching *FCA rules* or other requirements of the *regulatory system* and the *breach* is at the core of the firm's *regulated activities*, the *FCA* will seek to deprive the firm of all the financial benefit derived from such activities. Where a firm agrees to carry out a redress programme to compensate those who have suffered loss as a result of the *breach*, or where the *FCA* decides to impose a redress programme, the *FCA* will take this into consideration. In such cases the final penalty might not include a disgorgement element, or the disgorgement element might be reduced.

[Note: For the purposes of ■ DEPP 6.5A, "firm" has the special meaning given to it in ■ DEPP 6.5.1 G]

### Step 2 - the seriousness of the breach

6.5A.2

G

- (1) The *FCA* will determine a figure that reflects the seriousness of the *breach*. In many cases, the amount of revenue generated by a firm from a particular product line or business area is indicative of the harm or potential harm that its *breach* may cause, and in such cases the *FCA* will determine a figure which will be based on a percentage of the firm's revenue from the relevant products or business areas. The *FCA* also believes that the amount of revenue generated by a firm from a particular product or business area is relevant in terms of the size of the financial penalty necessary to act as a credible deterrent. However, the *FCA* recognises that there may be cases where revenue is not an appropriate indicator of the harm or potential harm that a firm's *breach* may cause, and in those cases the *FCA* will use an appropriate alternative.
- (2) In those cases where the *FCA* considers that revenue is an appropriate indicator of the harm or potential harm that a firm's *breach* may cause, the *FCA* will determine a figure which will be based on a percentage of the firm's "relevant revenue". "Relevant revenue" will be the revenue derived by the firm during the period of the *breach* from the products or business areas to which the *breach* relates.

Where the *breach* lasted less than 12 *months*, or was a one-off event, the relevant revenue will be that derived by the firm in the 12 months preceding the end of the *breach*. Where the firm was in existence for less than 12 *months*, its relevant revenue will be calculated on a pro rata basis to the equivalent of 12 *months'* relevant revenue.

- (3) Having determined the relevant revenue, the *FCA* will then decide on the percentage of that revenue which will form the basis of the penalty. In making this determination the *FCA* will consider the seriousness of the *breach* and choose a percentage between 0% and 20%. This range is divided into five fixed levels which represent, on a sliding scale, the seriousness of the *breach*. The more serious the *breach*, the higher the level. For penalties imposed on firms there are the following five levels:
  - (a) level 1 - 0%;
  - (b) level 2 - 5%;
  - (c) level 3 - 10%;
  - (d) level 4 - 15%; and
  - (e) level 5 - 20%.
- (4) The *FCA* will assess the seriousness of a *breach* to determine which level is most appropriate to the case.
- (5) In deciding which level is most appropriate to a case involving a firm, the *FCA* will take into account various factors, which will usually fall into the following four categories:
  - (a) factors relating to the impact of the *breach*;
  - (b) factors relating to the nature of the *breach*;
  - (c) factors tending to show whether the *breach* was deliberate; and
  - (d) factors tending to show whether the *breach* was reckless.
- (6) Factors relating to the impact of a *breach* committed by a firm include:
  - (a) the level of benefit gained or loss avoided, or intended to be gained or avoided, by the firm from the *breach*, either directly or indirectly;
  - (b) the loss or risk of loss, as a whole, caused to *consumers*, investors or other market users in general;
  - (c) the loss or risk of loss caused to individual *consumers*, investors or other market users;
  - (d) whether the *breach* had an effect on particularly vulnerable people, whether intentionally or otherwise;
  - (e) the inconvenience or distress caused to *consumers*; and
  - (f) whether the *breach* had an adverse effect on markets and, if so, how serious that effect was. This may include having regard to whether the orderliness of, or confidence in, the markets in question has been damaged or put at risk.
- (7) Factors relating to the nature of a *breach* by a firm include:

- (a) the nature of the *rules*, requirements or provisions breached;
  - (b) the frequency of the *breach*;
  - (c) whether the *breach* revealed serious or systemic weaknesses in the firm's procedures or in the management systems or internal controls relating to all or part of the firm's business;
  - (d) whether the firm's senior management were aware of the *breach*;
  - (e) the nature and extent of any *financial crime* facilitated, occasioned or otherwise attributable to the *breach*;
  - (f) the scope for any potential *financial crime* to be facilitated, occasioned or otherwise occur as a result of the *breach*;
  - (g) whether the firm failed to conduct its business with integrity;
  - (h) whether the firm, in committing the *breach*, took any steps to comply with *FSA rules*, and the adequacy of those steps; and
  - (i) in the context of contraventions of Part VI of the *Act*, the extent to which the *behaviour* which constitutes the contravention departs from current market practice.
- (8) Factors tending to show the *breach* was deliberate include:
- (a) the *breach* was intentional, in that the firm's senior management, or a responsible individual, intended or foresaw that the likely or actual consequences of their actions or inaction would result in a *breach*;
  - (b) the firm's senior management, or a responsible individual, knew that their actions were not in accordance with the firm's internal procedures;
  - (c) the firm's senior management, or a responsible individual, sought to conceal their misconduct;
  - (d) the firm's senior management, or a responsible individual, committed the *breach* in such a way as to avoid or reduce the risk that the *breach* would be discovered;
  - (e) the firm's senior management, or a responsible individual, were influenced to commit the *breach* by the belief that it would be difficult to detect;
  - (f) the *breach* was repeated; and
  - (g) in the context of a contravention of any *rule* or requirement imposed by or under Part VI of the *Act*, the firm obtained reasonable professional advice before the contravention occurred and failed to follow that advice. Obtaining professional advice does not remove a *person's* responsibility for compliance with applicable *rules* and requirements.
- (9) Factors tending to show the *breach* was reckless include:
- (a) the firm's senior management, or a responsible individual, appreciated there was a risk that their actions or inaction could result in a *breach* and failed adequately to mitigate that risk; and
  - (b) the firm's senior management, or a responsible individual, were aware there was a risk that their actions or inaction could result

in a *breach* but failed to check if they were acting in accordance with the firm's internal procedures.

- (10) Additional factors to which the *FCA* will have regard when determining the appropriate level of financial penalty to be imposed under regulation 34 of the *RCB Regulations* are set out in ■ RCB 4.2.5 G.
- (11) In following this approach factors which are likely to be considered 'level 4 factors' or 'level 5 factors' include:
- (a) the *breach* caused a significant loss or risk of loss to individual *consumers*, investors or other market users;
  - (b) the *breach* revealed serious or systemic weaknesses in the firm's procedures or in the management systems or internal controls relating to all or part of the firm's business;
  - (c) *financial crime* was facilitated, occasioned or otherwise attributable to the *breach*;
  - (d) the *breach* created a significant risk that *financial crime* would be facilitated, occasioned or otherwise occur;
  - (e) the firm failed to conduct its business with integrity; and
  - (f) the *breach* was committed deliberately or recklessly.
- (12) Factors which are likely to be considered 'level 1 factors', 'level 2 factors' or 'level 3 factors' include:
- (a) little, or no, profits were made or losses avoided as a result of the *breach*, either directly or indirectly;
  - (b) there was no or little loss or risk of loss to *consumers*, investors or other market users individually and in general;
  - (c) there was no, or limited, actual or potential effect on the orderliness of, or confidence in, markets as a result of the *breach*;
  - (d) there is no evidence that the *breach* indicates a widespread problem or weakness at the firm; and
  - (e) the *breach* was committed negligently or inadvertently.
- (13) In those cases where revenue is not an appropriate indicator of the harm or potential harm that a firm's *breach* may cause, the *FCA* will adopt a similar approach, and so will determine the appropriate Step 2 amount for a particular *breach* by taking into account relevant factors, including those listed above. In these cases the *FCA* may not use the percentage levels that are applied in those cases in which revenue is an appropriate indicator of the harm or potential harm that a firm's *breach* may cause.

### Step 3 - mitigating and aggravating factors

6.5A.3

G

- (1) The *FCA* may increase or decrease the amount of the financial penalty arrived at after Step 2, but not including any amount to be disgorged as set out in Step 1, to take into account factors which aggravate or mitigate the *breach*. Any such adjustments will be made by way of a percentage adjustment to the figure determined at Step 2.

- (2) The following list of factors may have the effect of aggravating or mitigating the *breach*:
- (a) the conduct of the firm in bringing (or failing to bring) quickly, effectively and completely the *breach* to the *FCA*'s attention (or the attention of other regulatory authorities, where relevant);
  - (b) the degree of cooperation the firm showed during the investigation of the *breach* by the *FCA*, or any other regulatory authority allowed to share information with the *FCA*;
  - (c) where the firm's senior management were aware of the *breach* or of the potential for a *breach*, whether they took any steps to stop the *breach*, and when these steps were taken;
  - (d) any remedial steps taken since the *breach* was identified, including whether these were taken on the firm's own initiative or that of the *FCA* or another regulatory authority; for example, identifying whether *consumers* or investors or other market users suffered loss and compensating them where they have; correcting any misleading statement or impression; taking disciplinary action against staff involved (if appropriate); and taking steps to ensure that similar problems cannot arise in the future. The size and resources of the firm may be relevant to assessing the reasonableness of the steps taken;
  - (e) whether the firm has arranged its resources in such a way as to allow or avoid disgorgement and/or payment of a financial penalty;
  - (f) whether the firm had previously been told about the *FCA*'s concerns in relation to the issue, either by means of a private warning or in supervisory correspondence;
  - (g) whether the firm had previously undertaken not to perform a particular act or engage in particular behaviour;
  - (h) whether the firm concerned has complied with any requirements or rulings of another regulatory authority relating to the *breach*;
  - (i) the previous disciplinary record and general compliance history of the firm;
  - (j) action taken against the firm by other domestic or international regulatory authorities that is relevant to the *breach* in question;
  - (k) whether *FCA guidance* or other published materials had already raised relevant concerns, and the nature and accessibility of such materials; and
  - (l) whether the *FCA* publicly called for an improvement in standards in relation to the behaviour constituting the *breach* or similar behaviour before or during the occurrence of the *breach*.

#### Step 4 - adjustment for deterrence

6.5A.4

G

- (1) If the *FCA* considers the figure arrived at after Step 3 is insufficient to deter the firm who committed the *breach*, or others, from committing further or similar breaches then the *FCA* may increase the penalty. Circumstances where the *FCA* may do this include:
- (a) where the *FCA* considers the absolute value of the penalty too small in relation to the *breach* to meet its objective of credible deterrence;



- (b) where previous *FCA* action in respect of similar *breaches* has failed to improve industry standards. This may include similar *breaches* relating to different products (for example, action for mis-selling or claims handling failures in respect of 'x' product may be relevant to a case for mis-selling or claims handling failures in respect of 'y' product);
- (c) where the *FCA* considers it is likely that similar *breaches* will be committed by the firm or by other firms in the future in the absence of such an increase to the penalty; and
- (d) where the *FCA* considers that the likelihood of the detection of such a *breach* is low.

#### Step 5 - settlement discount

6.5A.5

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The *FCA* and the firm on whom a penalty is to be imposed may seek to agree the amount of any financial penalty and other terms. In recognition of the benefits of such agreements, ■ DEPP 6.7 provides that the amount of the financial penalty which might otherwise have been payable will be reduced to reflect the stage at which the *FCA* and the firm concerned reached an agreement. The settlement discount does not apply to the disgorgement of any benefit calculated at Step 1.

6

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

### 6.5B.1

G

#### Step 1 - disgorgement

The *FCA* will seek to deprive an individual of the financial benefit derived directly from the *breach* (which may include the profit made or loss avoided) where it is practicable to quantify this. The *FCA* will ordinarily also charge interest on the benefit. Where the success of a firm's entire business model is dependent on breaching *FCA rules* or other requirements of the *regulatory system* and the individual's *breach* is at the core of the firm's *regulated activities*, the *FCA* will seek to deprive the individual of all the financial benefit he has derived from such activities.

[**Note:** For the purposes of ■ DEPP 6.5B, "firm" has the special meaning given to it in ■ DEPP 6.5.1 G.]

### 6.5B.2

G

#### Step 2 - the seriousness of the breach

- (1) The *FCA* will determine a figure which will be based on a percentage of an individual's "relevant income". "Relevant income" will be the gross amount of all benefits received by the individual from the employment in connection with which the *breach* occurred (the "relevant employment"), and for the period of the *breach*. In determining an individual's relevant income, "benefits" includes, but is not limited to, salary, bonus, pension contributions, *share* options and *share* schemes; and "employment" includes, but is not limited to, employment as an adviser, *director*, partner or contractor.
- (2) Where the *breach* lasted less than 12 *months*, or was a one-off event, the relevant income will be that earned by the individual in the 12 *months* preceding the end of the *breach*. Where the individual was in the relevant employment for less than 12 months, his relevant income will be calculated on a pro rata basis to the equivalent of 12 *months'* relevant income.
- (3) This approach reflects the *FCA's* view that an individual receives remuneration commensurate with his responsibilities, and so it is reasonable to base the amount of penalty for failure to discharge his duties properly on his remuneration. The *FCA* also believes that the extent of the financial benefit earned by an individual is relevant in terms of the size of the financial penalty necessary to act as a credible deterrent. The *FCA* recognises that in some cases an individual may be approved for only a small part of the work he carries out on a day-to-day basis. However, in these circumstances the *FCA* still considers it

appropriate to base the relevant income figure on all of the benefit that an individual gains from the relevant employment, even if their employment is not totally related to a *controlled function*.

- (4) Having determined the relevant income the *FCA* will then decide on the percentage of that income which will form the basis of the penalty. In making this determination the *FCA* will consider the seriousness of the *breach* and choose a percentage between 0% and 40%.
- (5) This range is divided into five fixed levels which reflect, on a sliding scale, the seriousness of the *breach*. The more serious the *breach*, the higher the level. For penalties imposed on individuals there are the following five levels:
  - (a) level 1 - 0%;
  - (b) level 2 - 10%;
  - (c) level 3 - 20%;
  - (d) level 4 - 30%; and
  - (e) level 5 - 40%.
- (6) The *FCA* will assess the seriousness of a *breach* to determine which level is most appropriate to the case.
- (7) In deciding which level is most appropriate to a case against an individual, the *FCA* will take into account various factors which will usually fall into the following four categories:
  - (a) factors relating to the impact of the *breach*;
  - (b) factors relating to the nature of the *breach*;
  - (c) factors tending to show whether the *breach* was deliberate; and
  - (d) factors tending to show whether the *breach* was reckless.
- (8) Factors relating to the impact of a *breach* committed by an individual include:
  - (a) the level of benefit gained or loss avoided, or intended to be gained or avoided, by the individual from the *breach*, either directly or indirectly;
  - (b) the loss or risk of loss, as a whole, caused to *consumers*, investors or other market users in general;
  - (c) the loss or risk of loss caused to individual *consumers*, investors or other market users;
  - (d) whether the *breach* had an effect on particularly vulnerable people, whether intentionally or otherwise;
  - (e) the inconvenience or distress caused to *consumers*; and
  - (f) whether the *breach* had an adverse effect on markets and, if so, how serious that effect was. This may include having regard to whether the orderliness of, or confidence in, the markets in question has been damaged or put at risk.
- (9) Factors relating to the nature of a *breach* by an individual include:
  - (a) the nature of the *rules*, requirements or provisions breached;

- (b) the frequency of the *breach*;
- (c) the nature and extent of any *financial crime* facilitated, occasioned or otherwise attributable to the *breach*;
- (d) the scope for any potential *financial crime* to be facilitated, occasioned or otherwise occur as a result of the *breach*;
- (e) whether the individual failed to act with integrity;
- (f) whether the individual abused a position of trust;
- (g) whether the individual committed a breach of any professional code of conduct;
- (h) whether the individual caused or encouraged other individuals to commit *breaches*;
- (i) whether the individual held a prominent position within the industry;
- (j) whether the individual is an experienced industry professional;
- (k) whether the individual held a senior position with the firm;
- (l) the extent of the responsibility of the individual for the product or business areas affected by the *breach*, and for the particular matter that was the subject of the *breach*;
- (m) whether the individual acted under duress;
- (n) whether the individual took any steps to comply with *FCA rules*, and the adequacy of those steps;
- (o) in the context of contraventions of Part VI of the *Act*, the extent to which the *behaviour* which constitutes the contravention departs from current market practice;
- (p) in relation to a contravention of section 63A of the *Act*, whether the individual's only misconduct was to perform a *controlled function* without approval;
- (q) in relation to a contravention of section 63A of the *Act*, whether the individual performed *controlled functions* without approval and, while doing so, committed misconduct in respect of which, if the individual had been an *approved person*, the *FCA* would have been empowered to take action pursuant to section 66 of the *Act*; and
- (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 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 they were performing a *controlled function* without approval include:
  - (i) the *person* had previously performed a similar role at the same or another *firm* for which he had been approved;
  - (ii) the *person's firm* or another *firm* had previously applied for approval for the *person* to perform the same or a similar *controlled function*;
  - (iii) the *person's* seniority or experience was such that he could reasonably be expected to have known that he was performing a *controlled function* without approval; and

- (iv) the *person's* firm had clearly apportioned responsibilities so the *person's* role, and the responsibilities associated with it, were clear.
  - (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.
- (10) Factors tending to show the *breach* was deliberate include:
- (a) the *breach* was intentional, in that the individual intended or foresaw that the likely or actual consequences of his actions or inaction would result in a *breach*;
  - (b) the individual intended to benefit financially from the *breach*, either directly or indirectly;
  - (c) the individual knew that his actions were not in accordance with his firm's internal procedures;
  - (d) the individual sought to conceal his misconduct;
  - (e) the individual committed the *breach* in such a way as to avoid or reduce the risk that the *breach* would be discovered;
  - (f) the individual was influenced to commit the *breach* by the belief that it would be difficult to detect;
  - (g) the individual knowingly took decisions relating to the *breach* beyond his field of competence; and
  - (h) the individual's actions were repeated.
- (11) Factors tending to show the *breach* was reckless include:
- (a) the individual appreciated there was a risk that his actions or inaction could result in a *breach* and failed adequately to mitigate that risk; and
  - (b) the individual was aware there was a risk that his actions or inaction could result in a *breach* but failed to check if he was acting in accordance with internal procedures.
- (12) In following this approach factors which are likely to be considered 'level 4 factors' or 'level 5 factors' include:
- (a) the *breach* caused a significant loss or risk of loss to individual *consumers*, investors or other market users;
  - (b) *financial crime* was facilitated, occasioned or otherwise attributable to the *breach*;
  - (c) the *breach* created a significant risk that *financial crime* would be facilitated, occasioned or otherwise occur;
  - (d) the individual failed to act with integrity;
  - (e) the individual abused a position of trust;
  - (f) the individual held a prominent position within the industry; and
  - (g) the *breach* was committed deliberately or recklessly.
- (13) Factors which are likely to be considered 'level 1 factors', 'level 2 factors' or 'level 3 factors' include:

- (a) little, or no, profits were made or losses avoided as a result of the *breach*, either directly or indirectly;
- (b) there was no or little loss or risk of loss to *consumers*, investors or other market users individually and in general;
- (c) there was no, or limited, actual or potential effect on the orderliness of, or confidence in, markets as a result of the *breach*;
- (d) the *breach* was committed negligently or inadvertently; and
- (e) in relation to a contravention of section 63A of the *Act*, the individual's only misconduct was to perform a *controlled function* without approval.

### Step 3 - mitigating and aggravating factors

- (1) The *FCA* may increase or decrease the amount of the financial penalty arrived at after Step 2, but not including any amount to be disgorged as set out in Step 1, to take into account factors which aggravate or mitigate the *breach*. Any such adjustments will be made by way of a percentage adjustment to the figure determined at Step 2.
- (2) The following list of factors may have the effect of aggravating or mitigating the *breach*:
  - (a) the conduct of the individual in bringing (or failing to bring) quickly, effectively and completely the *breach* to the *FCA's* attention (or the attention of other regulatory authorities, where relevant);
  - (b) the degree of cooperation the individual showed during the investigation of the *breach* by the *FCA*, or any other regulatory authority allowed to share information with the *FCA*;
  - (c) whether the individual took any steps to stop the *breach*, and when these steps were taken;
  - (d) any remedial steps taken since the *breach* was identified, including whether these were taken on the individual's own initiative or that of the *FCA* or another regulatory authority;
  - (e) whether the individual has arranged his resources in such a way as to allow or avoid disgorgement and/or payment of a financial penalty;
  - (f) whether the individual had previously been told about the *FCA's* concerns in relation to the issue, either by means of a private warning or in supervisory correspondence;
  - (g) whether the individual had previously undertaken not to perform a particular act or engage in particular behaviour;
  - (h) whether the individual has complied with any requirements or rulings of another regulatory authority relating to the *breach*;
  - (i) the previous disciplinary record and general compliance history of the individual;
  - (j) action taken against the individual by other domestic or international regulatory authorities that is relevant to the *breach* in question;

- (k) whether *FCA guidance* or other published materials had already raised relevant concerns, and the nature and accessibility of such materials;
- (l) whether the *FCA* publicly called for an improvement in standards in relation to the behaviour constituting the *breach* or similar behaviour before or during the occurrence of the *breach*;
- (m) whether the individual agreed to undertake training subsequent to the *breach*; and
- (n) in relation to a contravention of section 63A of the *Act*, whether the *person's* firm or another firm has previously withdrawn an application for the *person* to perform the same or a similar *controlled function* or has had such an application rejected by the *FCA*.

#### Step 4 - adjustment for deterrence

6.5B.4

G

- (1) If the *FCA* considers the figure arrived at after Step 3 is insufficient to deter the individual who committed the *breach*, or others, from committing further or similar *breaches* then the *FCA* may increase the penalty. Circumstances where the *FCA* may do this include:
- (a) where the *FCA* considers the absolute value of the penalty too small in relation to the *breach* to meet its objective of credible deterrence;
  - (b) where previous *FCA* action in respect of similar *breaches* has failed to improve industry standards. This may include similar *breaches* relating to different products (for example, action for mis-selling or claims handling failures in respect of 'x' product may be relevant to a case for mis-selling or claims handling failures in respect of 'y' product);
  - (c) where the *FCA* considers it is likely that similar *breaches* will be committed by the individual or by other individuals in the future;
  - (d) where the *FCA* considers that the likelihood of the detection of such a *breach* is low; and
  - (e) where a penalty based on an individual's income may not act as a deterrent, for example, if an individual has a small or zero income but owns assets of high value.

#### Step 5 - settlement discount

6.5B.5

G

The *FCA* and the individual on whom a penalty is to be imposed may seek to agree the amount of any financial penalty and other terms. In recognition of the benefits of such agreements, ■ DEPP 6.7 provides that the amount of the financial penalty which might otherwise have been payable will be reduced to reflect the stage at which the *FCA* and the individual concerned reached an agreement. The settlement discount does not apply to the disgorgement of any benefit calculated at Step 1.

## 6.5C The five steps for penalties imposed on individuals in market abuse cases

### Step 1 - disgorgement

- 6.5C.1 **G** The *FCA* will seek to deprive an individual of the financial benefit derived as a direct result of the *market abuse* (which may include the profit made or loss avoided) where it is practicable to quantify this. The *FCA* will ordinarily also charge interest on the benefit.

### Step 2 - the seriousness of the market abuse

- 6.5C.2 **G**
- (1) The *FCA* will determine a figure dependent on the seriousness of the *market abuse* and whether or not it was referable to the individual's employment. This reflects the *FCA*'s view that where an individual has been put into a position where he can commit *market abuse* because of his employment the fine imposed should reflect this by reference to the gross amount of all benefits derived from that employment.
  - (2) In cases where the *market abuse* was referable to the individual's employment, the figure for the purpose of Step 2 will be the greater of:
    - (a) a figure based on a percentage of the individual's "relevant income". The percentage of relevant income which will apply is explained in paragraphs (6) and (8) to (16) below;
    - (b) a multiple of the profit made or loss avoided by the individual for his own benefit, or for the benefit of other individuals where the individual has been instrumental in achieving that benefit, as a direct result of the *market abuse* (the "profit multiple"). The profit multiple which will apply is explained in paragraphs (6) and (8) to (16) below; and
    - (c) for *market abuse* cases which the *FCA* assesses to be seriousness level 4 or 5, £100,000. How the *FCA* will assess the seriousness level of the *market abuse* is explained in paragraphs (9) to (16) below. The *FCA* usually expects to assess *market abuse* committed deliberately as seriousness level 4 or 5.
  - (3) In cases where the *market abuse* was not referable to the individual's employment, the figure for the purpose of Step 2 will be the greater of:
    - (a) a multiple of the profit made or loss avoided by the individual for his own benefit, or for the benefit of other individuals where the individual has been instrumental in achieving that benefit, as a



direct result of the *market abuse* (the “profit multiple”). The profit multiple which will apply is explained in paragraphs (7) to (16) below; and

- (b) for *market abuse* cases which the *FCA* assesses to be seriousness level 4 or 5, £100,000. How the *FCA* will assess the seriousness level of the *market abuse* is explained in paragraphs (9) to (16) below. The *FCA* usually expects to assess *market abuse* committed deliberately as seriousness level 4 or 5.
- (4) An individual’s “relevant income” will be the gross amount of all benefits received by the individual from the employment in connection with which the *market abuse* occurred (the “relevant employment”) for the period of the *market abuse*. In determining an individual’s relevant income, “benefits” includes, but is not limited to, salary, bonus, pension contributions, *share* options and *share* schemes; and “employment” includes, but is not limited to, employment as an adviser, *director*, partner or contractor.
  - (5) Where the *market abuse* lasted less than 12 *months*, or was a one-off event, the relevant income will be that earned by the individual in the 12 *months* preceding the final *market abuse*. Where the individual was in the relevant employment for less than 12 *months*, his relevant income will be calculated on a pro rata basis to the equivalent of 12 *months*’ relevant income.
  - (6) In cases where the *market abuse* was referable to the individual’s employment:
    - (a) the *FCA* will determine the percentage of relevant income which will apply by considering the seriousness of the *market abuse* and choosing a percentage between 0% and 40%; and
    - (b) the *FCA* will determine the profit multiple which will apply by considering the seriousness of the *market abuse* and choosing a multiple between 0 and 4.
  - (7) In cases where the *market abuse* was not referable to the individual’s employment the *FCA* will determine the profit multiple which will apply by considering the seriousness of the *market abuse* and choosing a multiple between 0 and 4.
  - (8) The percentage range (where the *market abuse* was referable to the individual’s employment) and profit multiple range (in all cases) are divided into five fixed levels which reflect, on a sliding scale, the seriousness of the *market abuse*. The more serious the *market abuse*, the higher the level. For penalties imposed on individuals for *market abuse* there are the following five levels (the percentage figures only apply where the *market abuse* was referable to the individual’s employment):
    - (a) level 1 - 0%, profit multiple of 0;
    - (b) level 2 - 10%, profit multiple of 1;
    - (c) level 3 - 20%, profit multiple of 2;
    - (d) level 4 - 30%, profit multiple of 3; and
    - (e) level 5 - 40%, profit multiple of 4.

- (9) The *FCA* will assess the seriousness of the *market abuse* to determine which level is most appropriate to the case.
- (10) In deciding which level is most appropriate to a *market abuse* case, the *FCA* will take into account various factors which will usually fall into the following four categories:
- (a) factors relating to the impact of the *market abuse*;
  - (b) factors relating to the nature of the *market abuse*;
  - (c) factors tending to show whether the *market abuse* was deliberate; and
  - (d) factors tending to show whether the *market abuse* was reckless.
- (11) Factors relating to the impact of the *market abuse* include:
- (a) the level of benefit gained or loss avoided, or intended to be gained or avoided, by the individual from the *market abuse*, either directly or indirectly;
  - (b) whether the *market abuse* had an adverse effect on markets and, if so, how serious that effect was. This may include having regard to whether the orderliness of, or confidence in, the markets in question has been damaged or put at risk; and
  - (c) whether the *market abuse* had a significant impact on the price of *shares* or other *investments*.
- (12) Factors relating to the nature of the *market abuse* include:
- (a) the frequency of the *market abuse*;
  - (b) whether the individual abused a position of trust;
  - (c) whether the individual caused or encouraged other individuals to commit *market abuse*;
  - (d) whether the individual has a prominent position in the market;
  - (e) whether the individual is an experienced industry professional;
  - (f) whether the individual held a senior position with the firm; and
  - (g) whether the individual acted under duress.
- (13) Factors tending to show the *market abuse* was deliberate include:
- (a) the *market abuse* was intentional, in that the individual intended or foresaw that the likely or actual consequences of his actions would result in *market abuse*;
  - (b) the individual intended to benefit financially from the *market abuse*, either directly or indirectly;
  - (c) the individual knew that his actions were not in accordance with exchange rules, *share* dealing rules and/or the firm's internal procedures;
  - (d) the individual sought to conceal his misconduct;
  - (e) the individual committed the *market abuse* in such a way as to avoid or reduce the risk that the *market abuse* would be discovered;
  - (f) the individual was influenced to commit the *market abuse* by the belief that it would be difficult to detect;

- (g) the individual's actions were repeated; and
  - (h) for *market abuse* falling within the prohibition in article 14(a) of the *Market Abuse Regulation*, the individual knew or recognised that the information on which the *dealing* was based was *inside information*.
- (14) Factors tending to show the *market abuse* was reckless include:
- (a) the individual appreciated there was a risk that his actions could result in *market abuse* and failed adequately to mitigate that risk; and
  - (b) the individual was aware there was a risk that his actions could result in *market abuse* but failed to check if he was acting in accordance with internal procedures.
- (15) In following this approach factors which are likely to be considered 'level 4 factors' or 'level 5 factors' include:
- (a) the level of benefit gained or loss avoided, or intended to be gained or avoided, directly by the individual from the *market abuse* was significant;
  - (b) the *market abuse* had a serious adverse effect on the orderliness of, or confidence in, markets;
  - (c) the *market abuse* was committed on multiple occasions;
  - (d) the individual breached a position of trust;
  - (e) the individual has a prominent position in the market; and
  - (f) the *market abuse* was committed deliberately or recklessly.
- (16) In following this approach factors which are likely to be considered 'level 1 factors', 'level 2 factors' or 'level 3 factors' include:
- (a) little, or no, profits were made or losses avoided as a result of the *market abuse*, either directly or indirectly;
  - (b) there was no, or limited, actual or potential effect on the orderliness of, or confidence in, markets as a result of the *market abuse*; and
  - (c) the *market abuse* was committed negligently or inadvertently.

[Note: For the purposes of ■ DEPP 6.5C, "firm" has the special meaning given to it in ■ DEPP 6.5.1 G.]

### Step 3 - mitigating and aggravating factors

6.5C.3

G

- (1) The *FCA* may increase or decrease the amount of the financial penalty arrived at after Step 2, but not including any amount to be disgorged as set out in Step 1, to take into account factors which aggravate or mitigate the *market abuse*. Any such adjustments will be made by way of a percentage adjustment to the figure determined at Step 2.
- (2) The following list of factors may have the effect of aggravating or mitigating the *market abuse*:
  - (a) the conduct of the individual in bringing (or failing to bring) quickly, effectively and completely the *market abuse* to the *FCA's*

attention (or the attention of other regulatory authorities, where relevant);

- (b) the degree of cooperation the individual showed during the investigation of the *market abuse* by the *FCA*, or any other regulatory authority allowed to share information with the *FCA*;
- (c) whether the individual assists the *FCA* in action taken against other individuals for *market abuse* and/or in criminal proceedings;
- (d) whether the individual has arranged his resources in such a way as to allow or avoid disgorgement and/or payment of a financial penalty;
- (e) whether the individual had previously been told about the *FCA*'s concerns in relation to the issue, either by means of a private warning or in supervisory correspondence;
- (f) the previous disciplinary record and general compliance history of the individual;
- (g) action taken against the individual by other domestic or international regulatory authorities that is relevant to the *market abuse* in question;
- (h) whether *FCA guidance* or other published materials had already raised relevant concerns, and the nature and accessibility of such materials; and
- (i) whether the individual agreed to undertake training subsequent to the *market abuse*.

#### Step 4 - adjustment for deterrence

6.5C.4

G

- (1) If the *FCA* considers the figure arrived at after Step 3 is insufficient to deter the individual who committed the *market abuse*, or others, from committing further or similar abuse then the *FCA* may increase the penalty. Circumstances where the *FCA* may do this include:
  - (a) where the *FCA* considers the absolute value of the penalty too small in relation to the *market abuse* to meet its objective of credible deterrence;
  - (b) where previous *FCA* action in respect of similar *market abuse* has failed to improve industry standards; and
  - (c) where the penalty may not act as a deterrent in light of the size of the individual's income or net assets.

#### Step 5 - settlement discount

6.5C.5

G

The *FCA* and the individual on whom a penalty is to be imposed may seek to agree the amount of any financial penalty and other terms. In recognition of the benefits of such agreements, ■ DEPP 6.7 provides that the amount of the financial penalty which might otherwise have been payable will be reduced to reflect the stage at which the *FCA* and the individual concerned reached an agreement. The settlement discount does not apply to the disgorgement of any benefit calculated at Step 1.

## 6.5D Serious financial hardship

### 6.5D.1

G

- (1) The *FCA's* approach to determining penalties described in ■ DEPP 6.5 to ■ DEPP 6.5C is intended to ensure that financial penalties are proportionate to the *breach*. The *FCA* recognises that penalties may affect persons differently, and that the *FCA* should consider whether a reduction in the proposed penalty is appropriate if the penalty would cause the subject of enforcement action serious financial hardship.
- (2) Where an individual or firm claims that payment of the penalty proposed by the *FCA* will cause them serious financial hardship, the *FCA* will consider whether to reduce the proposed penalty only if:
  - (a) the individual or firm provides verifiable evidence that payment of the penalty will cause them serious financial hardship; and
  - (b) the individual or firm provides full, frank and timely disclosure of the verifiable evidence, and cooperates fully in answering any questions asked by the *FCA* about their financial position.
- (3) The onus is on the individual or firm to satisfy the *FCA* that payment of the penalty will cause them serious financial hardship.

[**Note:** For the purposes of ■ DEPP 6.5D, “firm” has the special meaning given to it in ■ DEPP 6.5.1 G.]

### Individuals

### 6.5D.2

G

- (1) In assessing whether a penalty would cause an individual serious financial hardship, the *FCA* will consider the individual’s ability to pay the penalty over a reasonable period (normally no greater than three years). The *FCA's* starting point is that an individual will suffer serious financial hardship only if during that period his net annual income will fall below £14,000 and his capital will fall below £16,000 as a result of payment of the penalty. Unless the *FCA* believes that both the individual’s income and capital will fall below these respective thresholds as a result of payment of the penalty, the *FCA* is unlikely to be satisfied that the penalty will result in serious financial hardship.
- (2) The *FCA* will consider all relevant circumstances in determining whether the income and capital threshold levels should be increased in a particular case.

- (3) The *FCA* will consider agreeing to payment of the penalty by instalments where the individual requires time to realise his assets, for example by waiting for payment of a salary or by selling property.
- (4) For the purposes of considering whether an individual will suffer serious financial hardship, the *FCA* will consider as capital anything that could provide the individual with a source of income, including savings, property (including personal possessions), *investments* and land. The *FCA* will normally consider as capital the equity that an individual has in the home in which he lives, but will consider any representations by the individual about this; for example, as to the exceptionally severe impact a sale of the property might have upon other occupants of the property or the impracticability of re-mortgaging or selling the property within a reasonable period.
- (5) The *FCA* may also consider the extent to which the individual has access to other means of financial support in determining whether he is able to pay the penalty without being caused serious financial hardship.
- (6) Where a penalty is reduced it will be reduced to an amount which the individual can pay without going below the threshold levels that apply in that case. If an individual has no income, any reduction in the penalty will be to an amount that the individual can pay without going below the capital threshold.
- (7) There may be cases where, even though the individual has satisfied the *FCA* that payment of the financial penalty would cause him serious financial hardship, the *FCA* considers the *breach* to be so serious that it is not appropriate to reduce the penalty. The *FCA* will consider all the circumstances of the case in determining whether this course of action is appropriate, including whether:
  - (a) the individual directly derived a financial benefit from the *breach* and, if so, the extent of that financial benefit;
  - (b) the individual acted fraudulently or dishonestly with a view to personal gain;
  - (c) previous *FCA* action in respect of similar *breaches* has failed to improve industry standards; or
  - (d) the individual has spent money or dissipated assets in anticipation of *FCA* or other enforcement action with a view to frustrating or limiting the impact of action taken by the *FCA* or other authorities.

#### Prohibition orders and withdrawal of approval

##### 6.5D.3

G

In cases against individuals, including *market abuse* cases, the *FCA* may make a *prohibition order* under section 56 of the *Act* or withdraw an individual's approval under section 63 of the *Act*, as well as impose a financial penalty. Such action by the *FCA* reflects the *FCA*'s assessment of the individual's fitness to perform *regulated activity* or suitability for a particular role, and does not affect the *FCA*'s assessment of the appropriate financial penalty in relation to a *breach*. However, the fact that the *FCA* has made a *prohibition order* against an individual or withdrawn his approval, as a result of which the individual may have less earning potential, may be relevant in assessing whether the penalty will cause the individual serious financial hardship.

### Firms

6.5D.4

G

- (1) The *FCA* will consider reducing the amount of a penalty if a firm will suffer serious financial hardship as a result of having to pay the entire penalty. In deciding whether it is appropriate to reduce the penalty, the *FCA* will take into consideration the firm's financial circumstances, including whether the penalty would render the firm insolvent or threaten the firm's solvency. The *FCA* will also take into account its statutory objectives, for example in situations where *consumers* would be harmed or market confidence would suffer, the *FCA* may consider it appropriate to reduce a penalty in order to allow a firm to continue in business and/or pay redress.
- (2) There may be cases where, even though the firm has satisfied the *FCA* that payment of the financial penalty would cause it serious financial hardship, the *FCA* considers the *breach* to be so serious that it is not appropriate to reduce the penalty. The *FCA* will consider all the circumstances of the case in determining whether this course of action is appropriate, including whether:
  - (a) the firm directly derived a financial benefit from the *breach* and, if so, the extent of that financial benefit;
  - (b) the firm acted fraudulently or dishonestly in order to benefit financially;
  - (c) previous *FCA* action in respect of similar *breaches* has failed to improve industry standards; or
  - (d) the firm has spent money or dissipated assets in anticipation of *FCA* or other enforcement action with a view to frustrating or limiting the impact of action taken by the *FCA* or other authorities.

### Withdrawal of authorisation

6.5D.4A

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The *FCA* may withdraw a firm's *authorisation* under section 33 of the *Act*, as well as impose a financial penalty. Such action by the *FCA* does not affect the *FCA*'s assessment of the appropriate financial penalty in relation to a *breach*. However, the fact that the *FCA* 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.

### Transfers of assets

6.5D.5

G

Where the *FCA* considers that, following commencement of an *FCA* investigation, an individual or firm has reduced their solvency in order to reduce the amount of any disgorgement or financial penalty payable, for example by transferring assets to third parties, the *FCA* will normally take account of those assets when determining whether the individual or firm would suffer serious financial hardship as a result of the disgorgement and financial penalty.

## 6.6 Financial penalties for late and incomplete submission of reports

### 6.6.1

G

- (1) The *FCA* attaches considerable importance to the timely submission by *firms* of reports. This is because the information that they contain is essential to the *FCA*'s assessment of whether a *firm* is complying with the requirements and standards of the *regulatory system* and to the *FCA* understanding of that *firm*'s business.
- (2) ■ DEPP 6.6.1 G to ■ DEPP 6.6.5 G set out the *FCA*'s policy in relation to financial penalties for late submission of reports and is in addition to the *FCA*'s policy relating to financial penalties as set out in ■ DEPP 6.5 to ■ DEPP 6.5D.

### 6.6.2

G

In addition to the factors considered in Step 2 for cases against firms (■ DEPP 6.5A) and cases against individuals (■ DEPP 6.5B), the following considerations are relevant.

- (1) In general, the *FCA*'s approach to disciplinary action arising from the late submission of a report will depend upon the length of time after the due date that the report in question is submitted.
- (2) If the *person* concerned is an individual, it is open to him to make representations to the *FCA* as to why he should not be the subject of a financial penalty, or why a lower penalty should be imposed. If he does so, the matters to which the *FCA* will have regard will include the matters set out in ■ DEPP 6.5B. It should be noted that an administrative difficulty such as pressure of work does not, in itself, constitute a relevant circumstance for this purpose.
- (3) The *FCA* will have regard to repeated failures to submit reports on time. In the majority of cases involving such repeated failure, the *FCA* considers that it will be appropriate to seek more serious disciplinary sanctions or other enforcement action, including seeking to apply for the cancellation of the *firm*'s permission.
- (4) The *FCA* will also have regard to the submission frequency of the late report when assessing the seriousness of the contravention. For example, a short delay in submitting a weekly or monthly report can have serious implications for the supervision of the *firm* in question. Such a delay may therefore be subject to a higher penalty than might otherwise be the case.

[**Note:** For the purposes of ■ DEPP 6.6.2 G, “*firm*” has the special meaning given to it in ■ DEPP 6.5.1.]



- 6.6.3** **G** In addition, in appropriate cases, the *FCA* may bring disciplinary action against the individuals within the *firm's* management who are ultimately responsible for ensuring that the *firm's* reports are completed and returned to the *FCA*.
- 6.6.4** **G** In applying the *guidance* in this section, the *FCA* may treat a report which is materially incomplete or inaccurate as not received until it has been submitted in a form which is materially complete and accurate. For the purposes of the *guidance*, the *FCA* may also treat a report as not received where the method by which it is submitted to the *FCA* does not comply with the prescribed method of submission.
- 6.6.5** **G** In most late reporting cases, it will not be necessary for the *FCA* to appoint an investigator since the fact of the breach will be clear. It follows that the *FCA* will not usually send the *firm* concerned a preliminary findings letter for late-reporting disciplinary action.

## 6.7 Discount for early settlement

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

### **The settlement discount scheme applied to financial penalties**

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

**6.7.3** **G**

- (1) Subject to ■ DEPP 6.7.3G(4) a settlement discount is available only in cases where a *settlement agreement* (which may be a *focused resolution agreement*) is reached during the period from commencement of an investigation until the *FCA* has:
  - (a) a sufficient understanding of the nature and gravity of the *breach* to make a reasonable assessment of the appropriate penalty; and
  - (b) communicated that assessment to the *person* concerned and given them reasonable opportunity to reach agreement as to the amount of the penalty ("stage 1").
- (2) The communication of the *FCA*'s assessment of the appropriate penalty for the purposes of ■ DEPP 6.7.3G(1)(b) need not be in a

prescribed form but will include an indication of the *breaches* alleged by the *FCA*. It may include the provision of a draft *warning notice*.

- (3) Subject to ■ DEPP 6.7.3.G(4), in relation to any *settlement agreement* other than a *focused resolution agreement* the reduction in penalty will be as follows:
  - (a) 30% if the agreement is concluded during stage 1; and
  - (b) 0% in any other case.
- (4) Where stage 1 has been started but no *settlement agreement* has been agreed before 1 March 2017:
  - (a) if any agreement is reached to settle the case between the period from the end of stage 1 until the expiry of the period for making representations, or, if sooner, the date on which the representations are sent in response to the giving of a warning notice, there will be a reduction of 20% in the penalty; and
  - (b) if any agreement is reached to settle the case between the expiry of the period of making representations, or, if sooner, the date on which representations are sent in response to the giving of a warning notice and the giving of a decision notice, there will be a reduction of 10% in the penalty.

## 6.7.3A

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

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

- 6.7.3B** **G** The decision maker responsible for applying **DEPP 6.7.3AG** is:
- (1) The *settlement decision makers* in cases in which the *focused resolution agreement* is followed, after stage 1 has ended, by a complete *settlement agreement*.
  - (2) The *RDC* in all other cases.
- 6.7.3C** **G** Where **DEPP 6.7.3AG** specifies that the reduction will be within a range, the decision maker identified by **DEPP 6.7.3BG** will determine the appropriate figure within the range. Factors relevant to this determination may include:
- (1) the extent to which the position taken by the *person* subject to enforcement action on the disputed issues at the time the *focused resolution agreement* is entered into is reflected in the terms of the *decision notice*.
  - (2) any saving of time or public resources as a result of the *focused resolution agreement*.
- 6.7.4** **G**
- (1) Any *settlement agreement* between the *FCA* and the *person* concerned will therefore need to include a statement as to the appropriate penalty discount in accordance with this procedure.
  - (2) In certain circumstances the *person* concerned may consider that it would have been possible to reach a settlement at an earlier stage in the action, and argue that it should be entitled to a greater percentage reduction in penalty than is suggested by the table at **DEPP 6.7.3G** (3). It may be, for example, that the *FCA* no longer wishes to pursue its action in respect of all of the acts or omissions previously alleged to give rise to the *breach*. In such cases, the *person* concerned might argue that it would have been prepared to agree an appropriate penalty at an earlier stage and should therefore benefit from the discount which would have been available at that time. Equally, *FCA* staff may consider that greater openness from the *person* concerned could have resulted in an earlier settlement.
  - (3) Arguments of this nature risk compromising the goals of greater clarity and transparency in respect of the benefits of early settlement, and invite dispute in each case as to when an agreement might have been possible. It will not usually be appropriate therefore to argue for a greater reduction in the amount of penalty on the basis that settlement could have been achieved earlier.
  - (4) However, in exceptional cases the *FCA* may accept that there has been a substantial change in the nature or seriousness of the action being taken against the *person* concerned, and that an agreement would have been possible at an earlier stage if the action had commenced on a different footing. In such cases the *FCA* and *person* concerned may agree that the amount of the reduction in penalty should reflect the stage at which a settlement might otherwise have been possible or, where the *settlement agreement* is a *focused resolution agreement*, the decision maker identified by **DEPP 6.7.3BG** may take this into account when determining the appropriate figure within the applicable range.

- 6.7.5 **G** In cases in which the *settlement discount scheme* is applied, the fact of settlement and the level of the discount to the financial penalty imposed by the *FCA* will be set out in the *final notice*.

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

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- 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, restriction, condition or disciplinary prohibition (other than a permanent disciplinary prohibition), having regard to the *FCA*'s statement of policy as set out in ■ DEPP 6A.3. No settlement discount is available with respect to a permanent disciplinary prohibition. The *settlement discount scheme* does not apply to the length of the period for which approvals under section 59 of the *Act* have effect as a result of a limitation, as different considerations apply to determining the appropriate length of this period: see ■ DEPP 6A.1.5G and ■ DEPP 6A.3AG. However, the *FCA* will take into account that the *approved person* is willing to enter into a settlement agreement when determining the appropriate period.

