

Chapter 6

Penalties



6.5 Determining the appropriate level of financial penalty

- 6.5.1

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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

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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

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(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
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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.