

TRADE REPOSITORIES (GUIDANCE) INSTRUMENT 2019

Powers exercised

- A. The Financial Conduct Authority (“the FCA”) makes this instrument in the exercise of:
- (1) section 139A (Power of the FCA to give guidance) in the Financial Services and Markets Act 2000 (“the Act”);
 - (2) the powers of direction, guidance and related provisions in or under the following provisions of the Over the Counter Derivatives, Central Counterparties and Trade Repositories (Amendments etc. and Transitional Provision) (EU Exit) Regulations 2019 (SI 2019/335):
 - (a) regulation 69 (Statement of policy);
 - (b) regulation 71 (Powers to issue guidance);
 - (c) regulation 75 (Application of Part 11 of the Act (information gathering and investigations)); and
 - (d) regulation 76 (Application of Part 26 of the Act (notices)).

Commencement

- B. This instrument comes into force on exit day as defined in the European Union (Withdrawal) Act 2018, immediately after the changes made by the Credit Rating Agencies (Guidance) Instrument 2019 come into force.

Amendments to the Handbook

- C. The Decision Procedure and Penalties manual (DEPP) is amended in accordance with Annex A to this instrument.

Amendments to material outside the Handbook

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

Citation

- E. This instrument may be cited as the Trade Repositories (Guidance) Instrument 2019.

By order of the Board
28 March 2019

Annex A

Amendments to the Decision Procedure and Penalties manual (DEPP)

In this Annex, underlining indicates new text.

2 Statutory notices and the allocation of decision making

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2.5 Provision for certain categories of decision

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- 2.5.18 G Some of the distinguishing features of notices given under enactments other than the *Act* are as follows:

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(7) *Trade Repositories (EU Exit) Regulations*: Where the FCA is exercising its powers to refuse an application for registration of a trade repository under article 58 of EMIR or to refuse an application made by a trade repository to withdraw its registration under article 71(3) of EMIR, it must give a written notice in accordance with article 71a(6) of EMIR. In these circumstances the decision to give a written notice under article 71a(6) will be taken by FCA staff under executive procedures.

Where the FCA is exercising its powers to withdraw the registration of a trade repository on the FCA's own initiative under article 71(1) or (2), it must give a written notice in accordance with article 71a(6). In these circumstances the decision to give a written notice under article 71a(6) will be taken by the RDC.

Upon receipt of a written notice under article 71a(6) the credit rating agency may decide to seek a review or to refer the matter directly to the Tribunal under article 71b.

If the trade repository decides to seek a review of the decision set out in the article 71a(6) notice, they can make representations to the RDC. If the RDC decides to maintain the original decision, the trade repository may refer the RDC's decision to do so to the Tribunal.

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

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| CRA (EU Exit) Regulations | Description | Handbook reference | Decision maker |
|--|--|----------------------------------|------------------------------|
| ... | | | |
| <u>Trade Repositories (EU Exit) Regulations</u> | <u>Description</u> | <u>Handbook reference</u> | <u>Decision maker</u> |
| <u>Regulations 65(a) and 66(a)</u> | <u>when the FCA is proposing or deciding to publish a statement under regulation 67</u> | | <u>RDC</u> |
| <u>Regulations 65(b) and 66(b)</u> | <u>when the FCA is proposing or deciding to impose a financial penalty under regulation 68</u> | | <u>RDC</u> |

2 Annex 2G Supervisory notices

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| CRA Regulation | Description | Handbook reference | Decision maker |
|--|--|----------------------------------|--|
| ... | | | |
| <u>Trade Repositories (EU Exit) Regulations</u> | <u>Description</u> | <u>Handbook reference</u> | <u>Decision maker</u> |
| <u>Article 71a(6) and 71a(10)</u> | <u>when the FCA is exercising its power under article 58 to refuse an application for registration of a trade repository</u> | | <u>RDC or executive procedures (see DEPP 2.5.18G(7))</u> |
| <u>Article 71a(6) and 71a(10)</u> | <u>when the FCA is exercising its power under article 71(1) or 71(2) to withdraw the registration of a trade</u> | | <u>RDC (see DEPP 2.5.18G(7))</u> |

| | | | |
|-----------------------------------|--|--|--|
| | <u>repository on its own initiative</u> | | |
| <u>Article 71a(6) and 71a(10)</u> | <u>when the FCA is exercising its power under article 71(3) to refuse an application made by a trade repository to withdraw its registration</u> | | <u>RDC or executive procedures</u> <u>(see DEPP 2.5.18G(7))</u> |

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Sch 4 Powers Exercised

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

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Regulation 19 (Notices) of the *CRA (EU Exit) Regulations*

Regulation 69 (Statement of policy) of the *Trade Repositories (EU Exit) Regulations*

Regulation 71 (Powers to issue guidance) of the *Trade Repositories (EU Exit) Regulations*

Regulation 75 (Application of Part 11 of the Act (information gathering and investigations) of the *Trade Repositories (EU Exit) Regulations*

Regulation 76 (Application of Part 26 of the Act (notices) of the *Trade Repositories (EU Exit) Regulations*

Annex B

Amendments to the Enforcement Guide (EG)

Insert the following new section after EG 19.39 (Credit Rating Agencies (CRA) Regulation).
The text is not underlined.

19.40 Trade Repositories (EU Exit) Regulations

19.40.1 Supervisory and enforcement functions in respect of *trade repositories* under *EU EMIR* were transferred from *ESMA* to the *FCA* through the *Trade Repositories (EU Exit) Regulations* on exit day.

19.40.2 The *FCA*'s approach to enforcing under the *Trade Repositories (EU Exit) Regulations* will mirror our general approach to enforcing the *Act*, as set out in *EG 2*. We will seek to exercise our enforcement powers in a manner that is transparent, proportionate, responsive to the issue and consistent with our publicly stated policies. We will also seek to ensure fair treatment when exercising our enforcement powers. Finally, we will aim to change the behaviour of the *person* who is the subject of our action, to deter future non-compliance by others, to eliminate any financial gain or benefit from non-compliance and, where appropriate, to remedy the harm caused by the non-compliance.

Conduct of investigations under the Trade Repositories (EU Exit) Regulations

19.40.3 The *Trade Repositories (EU Exit) Regulations* apply much of Part 11 of the *Act*. The effect of this is to apply the same procedures under the *Act* for appointing investigators and requiring information when investigating breaches of the *Trade Repositories (EU Exit) Regulations*, *EMIR* and the Trade Repositories (Amendment and Transitional Provision) (EU Exit) Regulations 2018.

19.40.4 The *FCA* will notify the subject of the investigation that we have appointed investigators to carry out an investigation under the *Trade Repositories (EU Exit) Regulations* and the reasons for the appointment, unless notification is likely to prejudice the investigation or otherwise result in it being frustrated. The *FCA* expects to carry out a scoping visit early on in the enforcement process in most cases. The *FCA*'s policy in non-criminal investigations under the *Trade Repositories (EU Exit) Regulations* is to use powers to compel the provision of information in the same way as we would during an investigation under the *Act*.

Decision making under the Trade Repositories (EU Exit) Regulations

19.40.5 The decision-making procedures for those decisions under the *Trade Repositories (EU Exit) Regulations* requiring the giving of a *warning notice*,

decision notice or *supervisory notice* are dealt with within *DEPP*.

- 19.40.6 The *Trade Repositories (EU Exit) Regulations* require the *FCA* to give third party rights as set out in section 393 of the *Act* and to give access to certain material as set out in section 394 of the *Act* as applied by the *Trade Repositories (EU Exit) Regulations*.

Imposition of penalties under the *Trade Repositories (EU Exit) Regulations*

- 19.40.7 When determining whether to take action to impose a penalty or to issue a public censure under the *Trade Repositories (EU Exit) Regulations*. The *FCA*'s policy includes having regard to the relevant factors in *DEPP* 6.2 and *DEPP* 6.4. The *FCA*'s policy in relation to determining the level of a financial penalty includes having regard, where relevant, to *DEPP* 6.5, *DEPP* 6.5A, *DEPP* 6.5B and *DEPP* 6.5D.

- 19.40.8 As with cases under the *Act*, the *FCA* may settle or mediate appropriate cases involving non-criminal breaches of the *Trade Repositories (EU Exit) Regulations* to assist us to exercise our functions under the *Trade Repositories (EU Exit) Regulations* in the most efficient and economical way. See *DEPP* 5, *DEPP* 6.7 and *EG* 5 for further information on the settlement process and the *settlement discount scheme*.

- 19.40.9 The *FCA* will apply the approach to publicity that is outlined in *EG* 6, read in the light of regulation 76 of the *Trade Repositories (EU Exit) Regulations*.

Statement of policy in section 169(7) interviews (as implemented by the *Trade Repositories (EU Exit) Regulations*)

- 19.40.10 The *Trade Repositories (EU Exit) Regulations* apply section 169 of the *Act* which requires the *FCA* to publish a statement of policy on the conduct of certain interviews in response to requests from overseas regulators. For the purposes of the *Trade Repositories (EU Exit) Regulations* the *FCA* will follow the procedures described in *DEPP* 7.