

Chapter 6

Penalties

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.