Chapter 6

Penalties

6

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.

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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 G

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.