

Chapter 7

Financial penalties and other disciplinary sanctions

7.1 The FCA's use of sanctions

7.1.1

Financial penalties, suspensions, restrictions, conditions, limitations, disciplinary prohibitions, and *public censures* are important regulatory tools. However, they are not the only tools available to the *FCA*, and there will be many instances of non-compliance which the *FCA* considers it appropriate to address without the use of formal disciplinary sanctions. Still, the effective and proportionate use of the *FCA's* powers to enforce the requirements of the *Act*, the *rules*, *COCON* and the Statements of Principle for Approved Persons (APER) will play an important role in the *FCA's* pursuit of its *statutory objectives*. Imposing disciplinary sanctions shows that the *FCA* is upholding regulatory standards and helps to maintain market confidence and deter *financial crime*. An increased public awareness of regulatory standards also contributes to the protection of *consumers*.

7.1.2

The *FCA* has the following powers to impose sanctions.

- (1) It may publish a statement:
 - (a) against an *approved person* or *conduct rules staff* under section 66 of the *Act*;
 - (b) against an *issuer* under section 87M of the *Act*;
 - (c) against a *sponsor* under section 88A of the *Act*;
 - (ca) against a *primary information provider* under section 89Q of the *Act*;
 - (d) where there has been a contravention of the *Part 6 rules*, under section 91 of the *Act*;
 - (e) against a *person* under section 123 of the *Act*;
 - (ea) if a natural or legal person has contravened any provision of the *short selling regulation*, or any requirement imposed on that person under section 131E or 131F, under section 131G of the *Act*;
 - (eb) against a qualifying parent undertaking under section 192K of the *Act*;
 - (ec) against an auditor under section 249 of the *Act*;
 - (ed) against a *recognised investment exchange* under section 312E of the *Act*;
 - (ee) against an auditor and/or an *actuary* under section 345 of the *Act*; and

- (f) against a *firm*, or an *unauthorised person* to whom section 404C applies, under section 205 of the *Act*.
- (2) It may impose a financial penalty:
 - (a) on a *person* that performs a *controlled function* without approval, under section 63A of the *Act*;
 - (aa) on an *approved person* or *conduct rules staff*, under section 66 of the *Act*;
 - (ab) on a *sponsor* under section 88A of the *Act*;
 - (ac) on a *primary information provider* under section 89Q of the *Act*;
 - (b) where there has been a contravention of the *Part 6 rules*, under section 91 of the *Act*;
 - (c) on a *person*, under section 123 of the *Act*;
 - (ca) on a natural or legal person who has contravened any provision of the *short selling regulation*, or any requirement imposed on that person under section 131E or 131F, or any natural or legal person who was knowingly concerned in the contravention, under section 131G of the *Act*;
 - (cb) on a qualifying parent undertaking under section 192K of the *Act*;
 - (d) on a *firm*, or an *unauthorised person* to whom section 404C applies, under section 206 of the *Act*;
 - (da) on an auditor under section 249 of the *Act*;
 - (db) on a *recognised investment exchange* under section 312F of the *Act*; and
 - (dc) on an auditor and/or *actuary* under section 345 of the *Act*.
- (3) It may impose a suspension, *limitation* or other restriction:
 - (a) [deleted]
 - (b) on a *sponsor* under section 88A of the *Act*;
 - (c) on a *primary information provider* under section 89Q of the *Act*; and
 - (d) on an *authorised person* under sections 123B or 206A of the *Act*.
- (4) It may impose a suspension, condition or limitation on an *approved person* under section 66 of the *Act*.
- (5) It may impose a disciplinary prohibition on an individual under section 123A of the *Act*.

7.1.3

Section 415B of the *Act* requires the *FCA* to consult with the *PRA* before it takes certain enforcement action in relation to a *PRA-authorised person* or someone who has a qualifying relationship (as defined in section 415B(4) of the *Act*) with a *PRA-authorised person*. Further detail on when the *FCA* is required to consult the *PRA*, and when it has agreed to notify the *PRA* of certain matters, is set out in the Memorandum of Understanding between the *PRA* and the *FCA*.

7.2 Alternatives to sanctions

7.2.1

The *FCA* also has measures available to it where it considers it is appropriate to take protective or remedial action. These include:

- (1) where a *firm's* continuing ability to meet the *threshold conditions* or where an *approved person's* or other individual's fitness and propriety are called into question:
 - (a) varying and/or cancelling of *permission* and the withdrawal of a *firm's* authorisation (see ■ chapter 8); and
 - (b) the withdrawal of an individual's status as an *approved person* and/or the prohibition of an individual from performing a specified function in relation to a *regulated activity* (see ■ chapter 9).
- (1A) where it is desirable to do so in order to advance one or more of its *operational objectives*, the *FCA* may vary the approval of an *SMF manager* (see ■ DEPP 8);
- (2) where the smooth operation of the market is, or may be, temporarily jeopardised or where protecting investors so requires, the *FCA* may suspend, with effect from such time as it may determine, the *listing* of any *securities* at any time and in such circumstances as it thinks fit (whether or not at the request of the *issuer* or its *sponsor* on its behalf);
- (3) when the *FCA* is satisfied there are special circumstances which preclude normal regular dealings in any *listed securities*, it may cancel the listing of any *security*;
- (4) where the *FCA* considers it necessary for the purpose of the exercise by it of functions under the *Market Abuse Regulation* or any directly applicable *EU* regulation made under the *Market Abuse Regulation*, the *FCA* may suspend trading in a *financial instrument* under section 122I of the *Act*;
- (4a) where the *FCA* considers it necessary for the purpose of the exercise by it of functions under the *auction regulation* the *FCA* may suspend trading in *emission auction products* under section 122I of the *Act*;
[Note: see Regulation 6 and Schedule 1 to the *RAP Regulations* for power in relation to *emission auction products*]
- (5) where there are reasonable grounds for suspecting that a provision of Part VI of the *Act*, a provision contained in the *prospectus rules*, or

any other provision made in accordance with the *Prospectus Directive* has been infringed, the *FCA* may:

- (a) suspend or prohibit the offer to the public of transferable securities as set out in section 87K of the *Act*; or
 - (b) suspend or prohibit admission of transferable securities to trading on a regulated market as set out in section 87L of the *Act*;
- (6) where the *FCA* considers it necessary for the purposes set out in section 122G of the *Act* the *FCA* may, by notice in writing, require an issuer to publish specified information or a specified statement as set out under section 122G of the *Act*; and
- (7) where the *FCA* considers it necessary for the purposes set out in section 122H of the *Act* the *FCA* may, by notice in writing, require a person to publish corrective information or a corrective statement as set out under section 122H of the *Act*.

7.2.2

Where a *person* who is a *shareholder* has contravened one or more relevant transparency provisions (as defined in section 89NA(11) of the *Act*) in respect of shares in a company admitted to trading on a *regulated market* and the *FCA* considers the breach to be serious, the *FCA* may apply to the Court for an order suspending that person's voting rights as set out in section 89NA of the *Act*.



7.3 FCA's statements of policy

7.3.1

The *FCA's* statement of policy on the imposition of financial penalties is set out in ■ DEPP 6.2 (Deciding whether to take action) and ■ DEPP 6.4 (Financial penalty or public censure). The *FCA's* statement of policy on the amount of a financial penalty is set out in ■ DEPP 6.5 to ■ DEPP 6.5D. The *FCA's* statement of policy on financial penalties for late submission of reports is set out in ■ DEPP 6.6. The *FCA's* statement of policy on the imposition of suspensions, restrictions, conditions, limitations and disciplinary prohibitions is set out in ■ DEPP 6A (The power to impose a suspension, restriction, condition, limitation or disciplinary prohibition). The *FCA's* statement of policy on the variation of an *SMF manager's* approval on its own initiative is set out in ■ DEPP 8.



7.4 Apportionment of financial penalties

7.4.1

In a case where the *FCA* is proposing to impose a financial penalty on a *person* for two or more separate and distinct areas of misconduct, the *FCA* will consider whether it is appropriate to identify in the *decision notice* and *final notice* how the penalty is apportioned between those separate and distinct areas. Apportionment will not however generally be appropriate in other cases.



7.5 Payment of financial penalties

- 7.5.1 Financial penalties must be paid within the period (usually 14 days) that is stated on the *FCA's final notice*. The *FCA's* policy in relation to reducing a penalty because its payment may cause a *person* serious financial hardship is set out in ■ DEPP 6.5D.
- 7.5.2 [deleted]
- 7.5.3 Chapter 6 of the General Provisions module of the *FCA Handbook (GEN)* contains *rules* prohibiting a *firm* or *member* from entering into, arranging, claiming on or making a payment under a *contract of insurance* that is intended to have, or has, the effect of indemnifying any *person* against a financial penalty.
- 7.5.4 Chapter 6 of the General Provisions of the *FCA Handbook (GEN)* also contains a *rule* prohibiting a *firm*, except a *sole trader*, from paying a financial penalty imposed by the *FCA* on a present or former *employee*, *director* or *partner* of the *firm* or of an *affiliated company*.
- 7.5.5 *Rule* ■ 1.5.33 in the *FCA's Prudential Sourcebook for Insurers (INSPRU)* prohibits a *long- term insurer* (including a *firm* qualifying for *authorisation* under *Schedule 3* or *4* to the *Act*), which is not a mutual, from paying a financial penalty from a long-term insurance fund.



7.6 Private warnings

- 7.6.1** In certain cases, despite concerns about a *person's* behaviour or evidence of a *rule* breach, the *FCA* may decide that it is not appropriate, having regard to all the circumstances of the case, to bring formal action for a financial penalty or *public censure*. This is consistent with the *FCA's* risk-based approach to enforcement. In such cases, the *FCA* may give a private warning to make the *person* aware that they came close to being subject to formal action.
- 7.6.2** Private warnings are a non-statutory tool. Fundamentally they are no different to any other *FCA* communication which criticises or expresses concern about a *person's* conduct. But private warnings are a more serious form of reprimand than would usually be made in the course of ongoing supervisory correspondence. A private warning requires that the *FCA* identifies and explains its concerns about a *person's* conduct and/or procedures, and tells the subject of the warning that the *FCA* has seriously considered formal steps to impose a penalty or censure. They are primarily used by the *FCA* as an enforcement tool, but they may also be used by other parts of the *FCA*.
- 7.6.3** Typically, the *FCA* might give a private warning rather than take formal action where the matter giving cause for concern is minor in nature or degree, or where the *person* has taken full and immediate remedial action. But there can be no exhaustive list of the conduct or the circumstances which are likely to lead to a private warning rather than more serious action. The *FCA* will take into account all the circumstances of the case before deciding whether a private warning is appropriate. Many of the criteria identified in ■ DEPP 6 for determining whether the *FCA* should take formal action for a financial penalty or *public censure* will also be relevant to a decision about whether to give a private warning.
- 7.6.4** Generally, the *FCA* would expect to use private warnings in the context of *firms, approved persons* and *conduct rules staff*. However, the *FCA* may also issue private warnings in circumstances where the persons involved may not necessarily be authorised or approved. For example, private warnings may be issued in potential cases of *market abuse*; cases where the *FCA* has considered making a *prohibition order* or a disapplication order; or cases involving breaches of provisions imposed by or under Part VI of the *Act* (Official Listing).
- 7.6.5** In each case, the *FCA* will consider the likely impact of a private warning on the recipient and whether any risk that *person* poses to the *statutory*

objectives requires the *FCA* to take more serious action. Equally, where the *FCA* gives a private warning to an *approved person* or *conduct rules staff*, the *FCA* will consider whether it would be desirable and appropriate to inform the *person's firm* (or *employer*, if different) of the conduct giving rise to the warning and the *FCA's* response.

7.6.6

A private warning is not intended to be a determination by the *FCA* as to whether the *recipient* has breached the *FCA's rules*. However, private warnings, together with any comments received in response, will form part of the *person's* compliance history. In this sense they are no different to other *FCA* correspondence, but the weight the *FCA* attaches to a private warning is likely to be greater. They may therefore influence the *FCA's* decision whether to commence action for a penalty or censure in relation to future breaches. Where action is commenced in those circumstances, earlier private warnings will not be relied upon in determining whether a breach has taken place. However, if a *person* has previously been told about the *FCA's* concerns in relation to an issue, either by means of a private warning or in supervisory correspondence, then this can be an aggravating factor for the level of a penalty imposed in respect of a similar issue that is the subject of later *FCA* action.

7.6.7

Where the *FCA* is assessing the relevance of private warnings in determining whether to commence action for a financial penalty or a *public censure*, the age of a private warning will be taken into consideration. However, a long-standing private warning may still be relevant.

7.6.8

Private warnings may be considered cumulatively, although they relate to separate areas of a *firm's* or other *person's* business, where the concerns which gave rise to those warnings are considered to be indicative of a *person's* compliance culture. Similarly, private warnings issued to different subsidiaries of the same parent *company* may be considered cumulatively where the concerns which gave rise to those warnings relate to a common management team.



7.7 How a person will know they are receiving a private warning

7.7.1

It will be obvious from the terms of any letter written by the *FCA* whether it is intended to constitute a private warning. In particular, a warning letter will describe itself as a private warning and will refer to this chapter to explain the consequences of receiving it for the person.



7.8 The procedure for giving a private warning

7.8.1

The *FCA's* normal practice is to follow a "minded-to" procedure before deciding whether to give a private warning. This means that it will notify in writing the intended recipient of the warning that it has concerns about their conduct and inform them that the *FCA* proposes to give a private warning. The recipient will then have an opportunity to comment on our understanding of the circumstances giving rise to the *FCA's* concerns and whether a private warning is appropriate. The *FCA* will carefully consider any response to its initial letter before it decides whether to give the private warning. The decision will be taken by an *FCA* head of department or a more senior member of *FCA* staff.



7.9 Suspensions of voting rights

- 7.9.1** **R** Where a *person* who is a *shareholder* has contravened one or more relevant transparency provisions (as defined in section 89NA(11) of the *Act*) in respect of shares in a company admitted to trading on a *regulated market* and the *FCA* considers the breach to be serious, the *FCA* may apply to the Court for an order suspending that person's voting rights as set out in section 89NA of the *Act*.
- 7.9.2** Decisions about whether to apply to the Court for a voting rights suspension order under the *Act* will be made by the *RDC* Chairman or, if the Chairman is not available, by an *RDC* Deputy Chairman.
- 7.9.3** In deciding whether to apply for a voting rights suspension order, the *FCA* will consider all the relevant circumstances of the case, and in particular will have regard to the factors listed in 89NA(4) of the *Act*.

